

COMPETITION ENFORCEMENT PRIORITIES FOR SMALL AND MEDIUM ENTERPRISES

The Philippine Competition Commission (PCC) was created under the Philippine Competition Act (PCA). The PCA, or the Republic Act No. 10667, was enacted in July 2015 providing a basis for improving competition practice in the Philippines. The PCC is mandated to conduct inquiries, investigate cases involving anti-competitive agreements, abuse of dominant positions, and anti-competitive mergers and acquisitions. It is also within their remit to impose administrative sanctions for violation of the PCA and engage in competition advocacy.

This Policy Note is based on work completed under the *Capacity Building for Small and Medium Enterprises (SMEs) on Competition Policy and Law (CPL)* project sponsored by Asia-Pacific Economic Cooperation (APEC). The analysis is based on a literature review and focus group discussions (FGDs) conducted with government agencies and regulators, SME representative associations, and selected SME business owners. The opinions here are those of the authors and do not necessarily represent those of the PCC.

Enforcement under the Philippine Competition Act (PCA)

The PCC conducts administrative investigation and prosecution of violations of the PCA and other competition laws. Hardcore cartel conduct such as price fixing, bid rigging, market or customer allocation and output restrictions are considered violations of the PCA which may be subjected to administrative and criminal penalties. Investigation and prosecution of criminal offenses under the PCA are however under the jurisdiction of the DOJ. The PCA includes three principal prohibitions, as outlined in Table 1.

Enforcement and SMEs

The main threat to SMEs is the prohibition of anti-competitive agreements. Abuse of dominance and merger issues is unlikely be a concern to SMEs. It is improbable that most agreements between individual SMEs would be tracked. It would also be unlikely to substantially restrict competition. If a whole industry practice was coordinated by a trade association, such a situation might be detected. However, serious horizontal cartel practices, such as price fixing, bid-rigging, market or customer division or output restriction, may be a problem for some SME sectors where trade associations might coordinate such practices. In

Table 1 – Three principal prohibitions of the Philippine Competition Act

| Principal | Description |
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| Anti-competitive agreements | Horizontal or vertical anti-competitive agreements are unlawful if they can be proved to have been made with the object or effect substantially preventing, restricting or lessening competition shall also be prohibited. However, price fixing ² and bid-rigging ³ are presumed to substantially injure competition and are so per se illegal. |
| Abuse of dominance or Misuse of market power | Where one or more business abuses its dominant market position by engaging in conduct that would substantially prevent, restrict or lessen competition, the law is breached. |
| Anti-competitive mergers | Any agreement to affect a merger or acquisition that substantially prevents, restricts or lessens competition in the relevant market is prohibited. |

¹ A cartel is an association of manufacturers or suppliers with the purpose of maintaining prices at a high level and restricting competition

² Price fixing is the maintenance of prices at a certain level by agreement between competing sellers

³ Bid-rigging is a form of fraud in which a commercial contract is promised to one party, even though several other parties also present a bid for the sake of appearance

such cases both the association and individual SMEs could be subject to civil liability or criminal liability in price-fixing and bid-rigging cases.

Emergent issues

The FGDs identified a range of emerging issues which the PCC should be cognizant of in relation to SMEs and the enforcement of the PCA.

Unfamiliarity with the law and interpretation of the law

FGD participants confirmed that SME and SME associations are not familiar with the prohibitions in the PCA or their implications for the SME sector. The majority of FGD participants did not know there was a competition law or what it seeks to achieve; moreover, they also did not know of the existence of the PCC or its responsibilities. While this lack of awareness is an issue, highlighting the core relevance of competition related prohibitions to the SME sector is relatively simple. Specifically, targeted messaging in relation to avoiding involvement in cartel conduct is a core priority. This should be done concurrently with other basic awareness raising work for what is and is not legal, as this knowledge base appears to be almost entirely absent.

Uncompetitive practices by big business

FGD participants mentioned several instances of the imposition of unfair terms of trade by large suppliers or customers on SMEs in various sectors. However, they did not

identify uncompetitive practices by big businesses as a major concern. While SME owners and associations were not conscious of upstream or downstream anti-competitive practices, this does not necessarily mean that such conduct is absent. SME market participants consider such conduct 'normal' due to historical or structural circumstances, or are simply not aware of it. While the FGDs did not provide significant evidence of major anti-competitive behavior by 'big business', upstream cartels and oligopoly⁴ sellers and oligopolistic or monopolist purchasers are a potential, if an unacknowledged, issue.

In order for the PCC to be more fully aware of the actual situation it should consider conducting selected market studies in concentrated market sectors to ascertain what measures might be appropriate or necessary to open these markets to greater competition.

Other APEC member economies have developed target legal rules that address this important issue of unequal bargaining power of large enterprises which does not require proof of dominance.

For example, both Japan and the Republic of Korea have attempted to tackle the problem of unequal bargaining power between very large, but not necessarily dominant, firms and SME counterparts. In Japan, Article 2(9)(v) of the Antimonopoly Act prohibits the abuse of superior bargaining power.⁵ In Korea, Article 23 of the Monopoly Regulation and Fair Trade Act makes a similar provision. In both cases, there is no requirement to

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⁴ An oligopoly is a state of limited competition, in which a market is shared by a small number of producers or sellers

⁵ Government of Japan, Article 2, (9) (v) Japanese Antimonopoly Act; also see Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act. Available at: http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/101130GL.pdf 30 November 2010.

prove dominance and so the prohibited conduct applies to a wider range of 'large' firms that does the abuse of dominance provisions.

Judicial process

An indirect competition policy issue is a deficient dispute resolution processes in the Philippines. At a broader scale, the World Bank's Doing Business provides a broad assessment of the ease of doing business across 190 countries. The Philippines ranked 136th for Enforcing Contracts.⁶ FGD participants confirmed that while contract enforcement was a challenge within the Philippines, problems existed within the broader judicial process. Specifically, FGD participants from across government and SME associations noted that contract dispute resolution is an important SME issue as judicial processes are slow, expensive and, in some cases, problematic due to institutional corruption. This issue persists even after recent reforms, with these burdens falling disproportionately on SMEs given their limited resources.

As the PCA is fairly new and resolution of certain competition issues requires an understanding of economic concepts and analysis, there is a need for the courts and prosecutors to be educated in these concepts and have the skills required to resolve a competition-related civil or criminal case. Many other APEC member economies have benefitted from judicial and prosecutorial competition training programmes run by bodies such as the OECD and

through bilateral agreements with established competition agencies. The PCC should support the development of such programs in the Philippines.

Government participants noted that disputes between parties to a commercial contract can resolve their conflict through third-party arbitration (primarily through the non-government organization, the Philippine Dispute Resolution Center) and other alternative dispute resolution mechanisms, such as through small claims courts. This voluntary process, which bypasses the courts, was commended by SME exporters. The PCC might consider advocating the adoption of other SME focused arbitration and mediation mechanisms to avoid the problems associated with the judicial system.

Many other APEC members require first instance courts review of competition decisions to a special court or tribunal or to a panel of judges specially trained in competition issues. PCC might consider advocating such a course of action.

Conclusions and recommendations

There is limited awareness of the intent and possible impact of the recent PCA. While the PCA introduces three key prohibitions in relation to competition law, only one of these prohibitions is centrally relevant to SMEs – the prohibition of anti-competitive agreements. Raising awareness of this component of the PCA for SMEs should be the focus of relevant PCC advocacy activities.

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⁶ The World Bank, (2017). Doing Business – the Philippines. Available at: <http://www.doingbusiness.org/data/exploreeconomies/philippines>

There is a broad range of other activities which we recommend to improve the awareness on the PCA and its implications for businesses.

The PCC should consider undertaking market studies to monitor specific sectors where cartel activity is most likely to occur, due to the nature of the product and the structure of the market. The experience of other APEC economies could provide lessons in identifying sectoral targets that merit scrutiny.

The PCC should draw on decided cases in overseas jurisdictions which have identified anti-competitive contractual or trading conditions that exploit SMEs to identify targets for future action.

The PCC could also consider coordinating with the courts (particularly through the Philippine Judicial Academy) and the Office for Competition at the Department of Justice in training judges and prosecutors in the prosecution of violations of the PCA, whether through civil or criminal action.

The PCC could consider coordinating with the Supreme Court and other relevant government agencies, to assess the need for the creation of special courts authorized to hear and decide competition cases.

On an SME specific scale, we recommend the PCC to consider advocating for an SME focused arbitration and mediation mechanism. We also recommend PCC advocacy and clear guidance to SMEs and their associations to raise their awareness of factors that limit

market competition. SMEs may also be encouraged to report anti-competitive conduct that adversely affects market competition.

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