The Case for the Philippine Competition Law

Joy Abrenica and Johannes Bernabe

Ayala-UPSE Economic Forum
Ayala Museum, Greenbelt Park
Makati City
20 April 2015
DRAFT COMPETITION LAW

• SB 2282, “Fair Competition Act of 2015”
  – Osmena III, Guingona III, Defensor-Santiago, Ejercito-Estrada, Trillanes and Aquino IV

• HB 5286, “Philippine Competition Act”
  – Ponce Enrile et al.
OUTLINE

• Scope and key provisions

• Precedents

• Per se versus Rule of Reason

• Block Exemptions

• Way Forward
SCOPE AND KEY FEATURES

• Anti-Competitive Agreements
• Abuse of Dominant Position
• Mergers and Acquisitions
• Competition Commission
• Remedies and Penalties
PRECEDEENTS

• Anti-competitive Agreements
  – Article 101(1) TFEU

• Abuse of Dominant Position
  – Article 102 TFEU

• Mergers and Acquisition
  – Section 7 Clayton Act; US DOJ Merger Guidelines

• Extraterritorial Jurisdiction
  – US case laws (Alcoa; Hartford Fire Insurance cases)
PRECEDENTS

• Leniency Program
  – US case laws (Foreign Trade Antitrust Amendment Act 1982)

• Private action
  – 9 of 10 US antitrust cases are privately initiated

• Single economic entity doctrine
  – 1984 US Copperweld case
Anti-Competitive Agreements: Common Provisions

PER SE VS RULE OF REASON

• **Scope**
  “any type or form of contract, arrangement, understanding, collective recommendation or **concerted action**, whether formal or informal, explicit or tacit, written or oral”

• **Article 101(1) of TFEU**
  – Fix prices (exchange of information; RPM)
  – Share markets
  – Limit production, sales
  – Collective exclusive dealing
  – Bid rigging

• **Horizontal agreements (between competitors) more pernicious than other agreements (between non-competitors)**
Anti-Competitive Agreements: Disagreement
PER SE VS RULE OF REASON

• HB 5286
  – Sec 5(a) : agreements between competitors
    PER SE PROHIBITED
  – Sec 5(b) : other agreements
    RULE OF REASON

• SB 2282
  RULE OF REASON
  – “object or effect of unreasonably and substantially preventing, restricting or lessening competition”
PER SE vs RULE OF REASON

• PER SE PROHIBITION
  – automatic rule of illegality
  – patently anti-competitive; no redeeming value
  – non-rebuttable

• RULE OF REASON
  – extensive analysis of market outcome
  – counter-factual simulation
  – Balance of positive and negative effects
  – Case-by-case determination
CASE FOR PER SE PROHIBITION

• Reduced administrative burden

• Market certainty

• Lower cost and time of enforcement

• Limited jurisprudence
CASE FOR RULE OF REASON

- Inconsistencies in Sec 5(a), HB 5286
- Flexibility
- US antitrust enforcement
Sec 5(a), HB 5286
CASE FOR RULE OF REASON

SEC 5. *Anti-Competitive Agreement*

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

except where reasonably necessary to create new product, share risk, integrate productive activity, set legitimate standards, or otherwise achieve efficiencies likely to enhance competition, productivity and consumer welfare.
Flexibility
CASE FOR RULE OF REASON

• Agreements to specialize or divide markets to improve productivity or enhance competitiveness may be permitted if competition is not restricted, prevented or lessened substantially

• DE MINIMIS Exception in EU
  – Combined market share of 10% or less (horizontal agreements); 15% or less (non-horizontal agreements)

• Crisis cartels
US antitrust enforcement
CASE FOR RULE OF REASON

• Limited application of per se prohibition to exceptional cases
• US court preference for rule of reason
• “Quick look” or truncated rule of reason
  – Where it is possible for someone with rudimentary knowledge of economics to discern the anticompetitive effects of a behavior, the burden to prove otherwise is shifted to the defendant
EU STANDARD
BLOCK EXEMPTION

Article 101 (3) : Conditions for exemptions

• MUST contribute to improving the production or distribution of goods or promoting technical or economic progress;

• MUST allow consumers a fair share of the resulting benefit;

• MUST NOT impose restrictions that are not indispensable to the attainment of the objectives of the conduct; and

• MUST NOT eliminate competition in a substantial part of the relevant market
US STANDARD
BLOCK EXEMPTION

• Not codified in any law or guideline

• Companies in “financial distress”
  – Nearly bankrupt
  – Unable to reorganize
  – No other buyer offering reasonable tender with less anti-competitive consequence

• If pro-competitive effects greater than and anticompetitive effects, then LEGAL
EU vs US STANDARD
BLOCK EXEMPTION

• EU exemptions:
  – Market efficiencies cannot trump harm to competition

• US exemptions:
  – Market efficiencies can trump harm to competition
• Sec 5(b) : Anti-competitive agreements
...Provided, That any agreement which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress shall not be considered an anti-competitive agreement.

• Sec 6 : Abuses of Dominant Position
...Provided, That any conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress shall not be considered an abuse of dominant position.
SB 2282
BLOCK EXEMPTION

• Sec 1, Chapter III: Anti-competitive agreements

...Provided, That the above agreements which contribute to improving the production or distribution of goods and services or promoting technical and economic progress, while allowing a fair share of the resulting benefits may not be deemed a violation of this Act
SB 2282 and HB 5286
BLOCK EXEMPTION

SEC. 5 (Sec 10). Prohibited Merger and Acquisition. –

Merger or acquisition agreements that will prevent or substantially lessen competition in the relevant market or in the market for substantially related goods or services as may be determined by the Commission shall be prohibited.
SB 2282 and HB 5286

BLOCK EXEMPTION

SEC. 6 (Sec 13). *Permissible Merger and Acquisition.* – Merger or acquisition agreements prohibited under Section 5 (10) 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;
SEC. 6 (Sec 13). *Permissible Merger and Acquisition.* – Merger or acquisition agreements prohibited under Section 5 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;
SEC. 13. Permissible Merger and Acquisition. – Merger or acquisition agreements prohibited under Section 10 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;

(c) any merger or acquisition which contributes to improving the production or distribution of goods and services or to promote technical or economic progress
(d) the acquisition of the stock or other share capital of one or more corporations is solely for investment and not using the same for voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition;

- Sec 802.9 US Code of Federal Regulations
- Exemptions from Notification

(e) the transaction is to cause the formation of subsidiary, or to own and hold all or part of the stock of such subsidiary corporations, for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof;
WAY FORWARD
BLOCK EXEMPTION

• EU vs US standard

• Prudencce in carving out transactions

• Consistent application of standard in the law