THE REGULATORY IMPACT OF THE PHILIPPINE COMPETITION ACT AND DERIVATIVE OBJECTIONS TO A NEW ENFORCEMENT REGIME*

NOTE

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> *"The most perfect creations of man [...], whether in the form of a constitution, a statute or an automobile, must still be administered by man; which is to say that they must inevitably reflect the frailties of their mortal creators."*
> —Jerrold Van Cise[1]

The term *antitrust* originated in the United States where it was coined to describe the State policy against *trusts* or monopolies.[2] As advocated by Senator John Sherman, the proponent of the seminal Sherman Act of 1890, "If we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade[.]"[3] Today, antitrusts refer not only to monopolies, but also to a wide array of acts constituting unfair competition.

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[1] Jerrold Van Cise, *The Modern Corporation and the Antitrust Laws: From Trust to Distrust*, 19 U. CHI. L. REV. 668, 668-69 (1951-1952).

[2] Animesh Ballabh, *Antitrust Law: An Overview*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 877, 885-86 (2006).

[3] 17 HOUS. L. REV. 775, 790 n. 89; 21 Cong. Rec. 2460 (1889).

Just recently, our Congress enacted a new antitrust law, the Philippine Competition Act[4] (hereinafter "PCA"). Hailed as a landmark legislation, the PCA has earned the present administration some bragging rights. But contrary to popular belief, it is not an entirely novel piece of legislation in this jurisdiction. A review of our existing laws reveals that monopolies and combinations have long been criminalized,[5] right to damages by victims of unfair competition long been recognized,[6] mergers and acquisitions long been regulated,[7] combinations in restraint of trade or unfair competition long been proscribed under the Constitution,[8] price-fixing long been penalized,[9] and unfair and unconscionable sales acts and practices long been abhorred.[10] Likewise, for more industry-specific laws, we already passed the Foreign Investments Act, the Intellectual Property Code, the Downstream Oil Industry Deregulation Act, and the Retail Trade Liberalization Act, all of which address antitrust concerns.

At this point, it may be asked whether the PCA is a mere surplusage. *It is not.* While admitting that it is not a totally new creature of law, it may be said that the PCA made doing business in the Philippines and abroad a brand new ballgame. In the language of sports and competition, it redefines the rules of the game—its salient features allow new players, level the playing field, and introduce a new referee, the Philippine Competition Commission (PCC). The PCA also penalizes new offenses, delineates these from the old, sets new penalties, and provides additional remedies. The PCA promises to be the real-deal.

Interestingly, it was processed in the legislative mill for the past two decades. Like a true buzzer beater, Congress passed it in 2015 just in time for the looming deadline of our commitment under the ASEAN Economic Community Blueprint. One of the requirements for participating in the ASEAN integration is the enactment of a competition law and, among the five founding members of ASEAN—Singapore, Malaysia, Indonesia, and Thailand are the other four—it is notable that we are the last one to pass such legislation.[11] *Better late than never.*

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[4] Rep. Act No. 10667, signed into law on July 21, 2015.

[5] REV. PEN. CODE, art. 186.

[6] CIVIL CODE, art. 28.

[7] Batas Pambansa Blg. 68, Title IX. The Corporation Code of the Philippines.

[8] CONST. art. XII, § 19.

[9] Rep. Act No. 7581 (1992), § 5. The Price Act.

[10] Rep. Act No. 7394 (1992), § 52. The Consumer Act of the Philippines.

[11] H. Congressional Record 41, 16th Cong., 2nd Sess. (Jan. 27, 2015); S. Rpt. 56, 16th Cong., 2nd Sess. (2015). Committees on Trade, Commerce and Entrepreneurship; Economic Affairs; Finance; and Justice and Human Rights: Indonesia and Thailand passed their competition laws in 1999, Singapore in 2004 and Malaysia in 2005.

The primary considerations for the enactment of the law are economic efficiency and free and fair competition in trade, industry, and all other commercial economic activities.[12] Despite these praiseworthy goals, however, the PCA is far from perfect. Twenty years of drafting and re-drafting is clearly not sufficient to polish it fully. Although many issues were clarified in the plenary floor, some still remain and have to be tested before the PCC or the courts of justice.

Foremost in the list of contentious areas brought by the enactment of the PCA is the effect of legal transplantation (or as Prof. Gunther Teubner prefers to call it, "legal irritation").[13] Most of the provisions of the PCA are lifted from the deemed best practices of US, UK, and ASEAN antitrust laws.[14] This procedure has several implications as regards our appreciation of the provisions of the PCA, *e.g.*, resort to foreign jurisprudence and other such sources to dispel ambiguity, wholesale adoption of alien concepts and common-law definitions, etc. Ultimately, one issue must be settled: whether or not the legal transplantation sufficiently considered the context where these provisions are transferred into.

As Prof. Teubner elucidated:

> Legal institutions cannot be easily moved from one context to the other, like the 'transfer' of a part from one machine into the other. They need careful implantation and cultivation in the environment. But 'transplant' creates the wrong impression that after a difficult surgical operation the transferred material will remain identical with itself playing its old role in the new organism. Accordingly, it comes down to the narrow alternative: repulsion or integration. However, *when a foreign rule is imposed on a domestic culture, I submit, something else is happening. It is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events.* It irritates, of course, the minds and emotions of tradition-bound lawyers; but in a deeper sense, — and this is the core of my thesis — it irritates law's 'binding arrangement'. It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. *'Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adopted to a new cultural context, rather they*

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[12] PCA, § 2.

[13] Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 11-12 (1998).

[14] H. Congressional Record 56, 16th Cong., 2nd Sess. (Mar. 3, 2015).

> *will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.*[15]

This Note endeavors to give a brief background of the salient points of the PCA as well as the potential legal issues that may arise once it is enforced. The following discussion, however, does not purport to exhaust the subject.

A. INTERPRETATION AND STATUTORY CONSTRUCTION

As mentioned, the PCA consolidates the best practices of the US, EU, and ASEAN models.[16] As such, in interpreting the provisions of the law, the researcher should identify the specific source, whether US, EU, or ASEAN, and look into the doctrines or congressional deliberations from US, EU, or ASEAN jurisprudence. The interpretations given by foreign courts on their laws are considered persuasive, if not binding, in our jurisdiction.[17] It must be considered, however, that these interpretations are made with respect to their foreign context. Also, even if the researcher can find an appropriate foreign case to cite, he or she must note that even foreign decisions flip-flop insofar as the critical areas of their antitrust laws are concerned.

Moreover, throughout the PCA, several provisions arguably overlap with those of other applicable statutes. For instance, consider an oil company selling oil products at a price below their average variable cost for the purpose of destroying competition. Under Section 11(b) of the Downstream Oil Industry Deregulation Act of 1998, this act is considered *predatory pricing*, a violation that imposes on the corporate officers a penalty of 3 years to 7 years of imprisonment and a fine ranging from 1 million to 2 million pesos.[18] Meanwhile,

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[15] Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 Mod. L. Rev. 11, 11-12 (1998). (Emphasis supplied.)

[16] H. Congressional Record 56, 16th Cong., 2nd Sess. (Mar. 3, 2015).

[17] In *Ang Giok Chip v. Springfield Fire and Insurance Company* (G.R. No. 33637, 1931), it was held that:

> As the Philippine law was taken verbatim from the law of California, in accordance with well settled canons of statutory construction, the court should follow in fundamental points, at least, the construction placed by California courts on a California law.

Similarly, in *Republic v. Del Monte Motors, Inc.* (G.R. No. 156956, 2006):

> Our Insurance Code is patterned after that of California. Thus, the ruling of the state's Supreme Court on a similar concept as that of the security deposit is instructive.

[18] "Section 11. Anti-Trust Safeguards.

under Section 15 of the PCA, this act may be considered an *abuse of dominant position*[19] and the corresponding administrative fine reaches up to 100 million for the first offense and between 100 million and 250 million for the second offense.[20]

It is submitted that since the State has the prerogative of choosing which law to base its complaint on, it rhymes with logic and reason to file it using the

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(b) Predatory pricing which means selling or offering to sell any oil product at a price below the seller's or offeror's average variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a potential competitor from entering the market: Provided, however, That pricing below average variable cost in order to match the lower price of the competitor and not for the purpose of destroying competition shall not be deemed predatory pricing. For purposes of this provision, "variable cost" as distinguished from "fixed cost", refers to costs such as utilities or raw materials, which vary as the output increases or decreases and "average variable cost" refers to the sum of all variable costs divided by the number of units of outputs.

Any person, including but not limited to the chief operating officer, chief executive officer or chief finance officer of the partnership, corporation or any entity involved, who is found guilty of any of the said prohibited acts shall suffer the penalty of three (3) to seven (7) years imprisonment, and a fine ranging from One million pesos (P 1,000,0000.00) to Two million pesos (P 2,000,000.00)." Rep. Act No. 8479 (1998), § 11. The Downstream Oil Industry Deregulation Act of 1998.

[19] Section 15. Abuse of Dominant Position. – It shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition:

(a) Selling goods or services below cost with the object of driving competition out of the relevant market: Provided, That in the Commission's evaluation of this fact, it shall consider whether the entity or entities have no such object and the price established was in good faith to meet or compete with the lower price of a competitor in the same market selling the same or comparable product or service of like quality;

[20] Section 29. Administrative Penalties. –

(a) Administrative Fines. – In any investigation under Chapter III, Sections 14 and 15, and Chapter IV, Sections 17 and 20 of this Act, after due notice and hearing, the Commission may impose the following schedule of administrative fines on any entity found to have violated the said Sections:

First offense: Fine of up to One Hundred Million Pesos (P100,000,000.00);

Second offense: Fine of not less than One Hundred Million Pesos (P100,000,000.00) but not more than Two Hundred Fifty Million Pesos (P250,000,000.00).

In fixing the amount of the fine, the Commission shall have regard to both the gravity and the duration of the violation.

PCA, which imposes a higher penalty. This conclusion finds support under the following legislative deliberation:

> REP. TINIO. [...] Now, Mr. Speaker, I would like to raise a clarificatory question.
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> If these penalties for certain anti-competitive acts will not be repealed and will remain in the books as it were, for instance, certain illegal acts under the Price Act, particularly cartel, cartel behavior, with certain prescribed penalties, where the Price Act, for instance, prescribes a penalty of five years to 15 years, Mr. Speaker, for cartel-like behavior, cartel-like price manipulation. How would the Sponsors reconcile the penal provisions in the Price Act with the penal provisions that are prescribed in this proposed law, Mr. Speaker?
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> * * *
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> REP. DEL ROSARIO (A.G.). Mr. Speaker, the complainant who will file the case will have to decide whether they will file the case against the proposed law or against the Price Act.
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> REP. TINIO. Okay.
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> REP. DEL ROSARIO (A.G.). Or both. *They could actually file two cases: one, under the Price Act, and the other one, under the proposed Anti-Competition Law in question.*[21]

In the test case, the only advantage of prosecuting under the Downstream Oil Industry Deregulation Act is the stigma that may damage the reputation of the defendant since the offense based on this law is criminal unlike in the PCA which is merely administrative.

B. DICHOTOMY OF *PER SE* AND RULE OF REASON VIOLATION

These two concepts are foreign to Philippine soil and are transplanted for the first time through the PCA.[22] As such, we have to dig into these frameworks' US roots for a better understanding of how they work. "The per se analysis is applied when the conduct is 'manifestly anti-competitive.' In other words, conduct is per se illegal when the practice so rarely is beneficial that the

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[21] H. Congressional Record 46, 16th Cong., 2nd Sess. (Feb. 9, 2015).

[22] The term "per se violation" has been used only once in Philippine jurisprudence, albeit in the context of free exercise of religion; *See* Estrada v. Escritor, A.M. No. P-02-1651, 408 SCRA 1, 98, Aug. 4, 2003.

court need not make any further inquiries. Per se illegality is established upon a showing that the practice has a 'pernicious effect on competition' and lacks any redeeming value."[23] On the other hand, the rule of reason calls for a "case-by-case analysis" and "requires the factfinder to weigh 'all of the circumstances of a case in deciding whether a restrictive practice should be prohibited[.]' "[24] Notably, this distinction is akin to our *mala prohibita* and *mala in se* dichotomy.

Strictly speaking, only three prohibited acts under the PCA adhere to the *per se* framework. They are:

1. restricting competition as to price, or components thereof, or other terms of trade;[25]
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;[26] and
3. failure to comply with the compulsory notification requirement on mergers and acquisitions where the value of the transaction exceeds Php1 billion.[27]

Classified as anti-competitive agreements, the first two are deemed criminal offenses while the third is considered an administrative violation relative to mergers and acquisitions. Other than these three, all punishable acts under the PCA call for the application of the rule of reason. This categorization is vital because the use of *per se* or rule of reason is pregnant with implications; in fact, it could even spell out the difference between a conviction and acquittal. *First*, it determines the elements of the crime to be proved, *e.g.*, whether the effect of lessening competition will have to be established. *Second*, it dictates the defenses available to the accused. *Third*, it determines the speed, complexity, and cost in the disposition of cases. Proving economic efficiency as a matter of defense, for instance, entails the presentation of voluminous records, lengthy discussions of economists, and, at times, even expert testimony. Learning from the century-old experience of US, "[a]n antitrust defendant will almost always avoid liability under the rule of reason."[28]

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[23] 14 J. CORP. L. 495, 496 (1988-1989) *citing* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[24] *Id.*

[25] PCA, § 14 (a) (1).

[26] PCA, § 14 (a) (2).

[27] PCA, § 17.

[28] Peter Nealis, *Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason*, 61 OHIO ST. L. J. 347, 347 (2000).

In the US, the *per se* and rule of reason frameworks have caused chaos in their antitrust jurisprudence because of a 'schizophrenic' application. For instance, Section 1 of the Sherman Act which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal" has been enforced using both the *per se* and rule of reason. A strict construction of the cited provision calls for a *per se* application because the proscription appears to be unqualified and absolute, but the US Supreme Court in a number of cases managed to tweak it to justify a rule of reason application.[29] Worse, the application of this dichotomy flip-flops, sometimes in favor of *per se* and at other times of the rule of reason. Consequently, distrust on their antitrust laws has emerged and as one critique amply described: "[The US] Supreme Court at times seems to pattern its approach to old antitrust opinions much like Mark Twain's New England weather. If you don't like it, wait a minute."[30] Such displeasure is undeniably justified. Considering that antitrust laws impose criminal penalties, some degree of predictability is naturally expected so that corporations and their officers can avoid exposure to liability.

The rule of reason is highly subjective and rests primarily on the discretion of the deciding authority, which in the Philippines is the very powerful PCC.[31] Since many provisions are subject to the reasonable determination of the PCC, the Commissioners necessarily have to be the leading experts in different industries. However, if they *are* the leading experts, they will most likely also be the economic elites or big-shot executives in the field, so the following questions arise: *first*, how can they be incentivized to accept their appointment as Commissioners; and *second*, assuming that they do accept their appointments, how can it be ensured that they will act in the pursuit of public and not personal (or familial) interest?

While there is no legal issue that Congress, in the exercise of its plenary power on policy determination, can resolve that specific acts should be considered *per se* while others subject to the rule of reason, it is respectfully submitted that the implementing rules and regulations must provide crystal-clear standards to safeguard against the possible abuse of authority by the PCC as well

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[29] *See* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 Vand. L. Rev. 1753, 1753 n.3 (1994) *citing* Chicago Board of Trade v. United States, 246 U.S. 231, Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36.

[30] Van Cise, *supra* note 1, at 677.

[31] Under the PCA, administrative cases are within the jurisdiction of the PCC while criminal and civil cases are within the original and exclusive jurisdiction of Regional Trial Court where the subject entity conducts its principal place of business. PCA, § 12 (e) and § 44.

as encourage the courts to exercise judicial restraint and respect the decisions made by the PCC, except only in cases involving grave abuse of discretion.[32]

C. EXTRATERRITORIAL APPLICATION OF THE PCA

Apart from the potential problems arising from the local application of the PCA, its extraterritorial effect can also prove to be a problematic, keeping in mind what Justice Holmes described as "the comity of nations."[33] This issue finds particular significance in view of the Philippines' commitment to the ASEAN integration. Harmonizing the different antitrust policies will be difficult. The issue arises not so much because of an administration-cooperation conflict but because of the fact that this economic set-up involves different government protecting different interests.[34]

Today, only the US and the EU have successfully applied their laws extraterritorially.[35] The reason primarily lies in their respective sizes. This material fact poses a serious problem for a relatively small and developing country like the Philippines. Two reasons are provided why a small country has a weak antitrust policy. *First*, a small country must tolerate a greater degree of market power than a larger country to achieve the desired economies of scale. *Second*, if the country opens itself up to trade, it must inevitably accept firms with market power.[36]

Furthermore, the extraterritorial application is far from universal. For instance, consider a merger between a Philippine and a foreign conglomerate. Under Section 3 of the PCA, the law is "applicable to international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside the Republic of the Philippines," but there may be no equivalent provision on extraterritoriality under the laws of the foreign conglomerate. Japan's and US' situation is illustrative, *i.e.*, Japan laws do not provide for treble damages in antitrust claims, but the opposite is true under US laws. It is thus a concern for Japan if the applicability of treble damages will be

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[32] In the US, the decisions of the Supreme Court have been criticized: "Congress by its antitrust enactments merely proposes; it is the Supreme Court which disposes. Depending upon the personnel of our courts, the corporate virtues of yesterday may be business risks today and a criminal offense tomorrow." *See* Jerrold Van Cise, *The Modern Corporation and the Antitrust Laws: From Trust to Distrust*, 19 U. Chi. L. Rev. 668, (1951-1952).

[33] Damjan Kukovec, *International Antitrust – What Law In Action?*, 15 IND. INT'L & COMP. L. REV. 1, 3 (2004).

[34] *Id.* at 4.

[35] *Id.* at 5.

[36] Andrew Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. Rev. 1502, 1539 (1998).

extended to it by virtue of the US' extraterritorial application of its antitrust laws, thus interfering with "Japan's ability to regulate its own markets."[37]

Different levels of enforcement also necessarily result from different countries having different agencies implementing different antitrust policies. It is argued that "countries will be hesitant to enter into international agreements if those agreements can be circumvented simply by adjusting the levels and methods of enforcement."[38] Consider the case of Belgium, which pointed out areas that may conflict with the US' strict enforcement of extraterritoriality:

a. Belgium has adopted a leniency program as part of its enforcement regime that is affected by extraterritorial application of US antitrust laws. If US antitrust law is applied extraterritorially, it may undercut Belgium's enforcement efforts: if seeking leniency and acknowledging wrongdoing in Belgium expose the company to civil suits in the US, there is little incentive to apply for leniency in Belgium.
b. Belgium encourages settlements by offering a 10 percent reduction in the antitrust fines for companies that settle early. If companies that settle early in Belgium are later exposed to US antitrust penalties that may discourage early settlement.[39]

Although difficult, the possibility of creating a global antitrust regime is not entirely nil. International cooperation, however, is indispensable if such a regime is pursued. One of the options is an information-sharing agreement.[40] This model mandates that concerned countries "provide for notification of enforcement actions that may affect the interests of the other party and the sharing of non-confidential information."[41] Efforts in making this possible not only helps in developing extraterritorial effect but also in implementing domestic policies. Another possibility is a multilateral meeting of policymakers[42] in discussing a possible antitrust agreement. The challenge here is to find a common ground amid differing state interests. In the face of this reality, we must determine if it is really possible to develop a globally optimal regime regarding antitrust policies.

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[37] Melissa Ginsberg & Deirdre McEvoy, *Belgium, Japan to 7th Circuit: Don't interfere with our antitrust enforcement!* (2014), *available at* http://www.antitrustupdateblog.com/ blog/belgium-japan-do-not-interfere-with-our-antitrust-enforcement.

[38] Guzman, *supra* note 36, at 1541 n.122.

[39] Ginsberg & McEvoy, *supra* note 37.

[40] Guzman, *supra* note 36, at 1542.

[41] *Id.*

[42] *Id.* at 1545.

D. *NOLO CONTENDERE*

Section 36 of the PCA provides for *nolo contendere*, wherein the accused neither accepts nor denies responsibility for the charges but agrees to be punished as if he had pleaded guilty.[43] It is an unexplored territory in Philippine legislation and a fertile ground for legal research. *Nolo contendere* is a Latin legal term which means "I do not wish to contend" and is also called "a quasi-confession of guilt," "an implied confession," "a mild form of pleading guilty," "a compromise between the defendant and the state," or as one law school professor called it, "a gentleman's plea of guilty."[44] *Nolo contendere,* which has existed as early as the reign of King Henry IV, is "more in the nature of a petition to the sovereign's mercy":[45]

> An **implied confession** is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the King's mercy, and **desiring to submit to a small fine**: in which case, if the court think fit to accept of such admission, and make an entry that defendant *posuit se in gratiam regis,* without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the **defendant shall not be estopped to plead not guilty to an action for the same fact**, as he shall if the entry is *quod cognovits indictamentum.*

The *nolo contendere* plea is "viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency."[46] Congress intended it to be a user-friendly provision to make sure that erring companies, to protect their reputation or to end a

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[43] Section 36. *Nolo Contendere.* – An entity charged in a criminal proceeding pursuant to Section 14(a) and 14(b) of this Act may enter a plea of *Nolo Contendere,* in which *he does not accept nor deny responsibility for the charges but agrees to accept punishment as if he had pleaded guilty.* The plea cannot be used against the defendant entity to prove liability in a civil suit arising from the criminal action nor in another cause of action: *Provided,* That a plea of *Nolo Contendere* may be entered only up to arraignment and subsequently, only with the permission of the court which shall accept it only after weighing its effect on the parties, the public and the administration of justice. (Emphasis supplied.)

[44] Nathan Lenvin and Ernest Meyers, *Nolo Contendere: Its Nature and Implications,* 51 YALE L. J. 1255, 1255 (1941-1942). (Emphasis supplied.)

[45] *Id.* at 1255-256.

[46] Hugh Emory, *The Guilty Plea as a Waiver of Rights and as an Admission of Guilt,* 44 TEMP. L.Q. 540, 547 (1970-1971).

protracted litigation, can opt to use the *nolo contendere* plea to put a stop to the cases filed before the [PCC.][47] In other jurisdictions, it serves the purpose of saving expenses in prosecuting a case and rescues the defendant from the cost and annoyance of a criminal proceeding.[48] The plea, however, is criticized for disregarding important values such as reform education and expressive condemnation.[49]

Under the PCA, *nolo contendere* is available only to specific kinds of anti-competitive agreements under Section 14 (a) and (b),[50] which must be read in conjunction with Section 30 that imposes criminal penalties of imprisonment from 2 to 7 years, and a fine of Php 50 million to Php 250 million. The specific anti-competitive agreements covered are:

1. Restricting competition as to price, or components thereof, or other terms of trade;
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;
3. Setting, limiting, or controlling production, markets, technical development, or investment; and
4. 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.

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[47] H. Congressional Record 56, 16th Cong., 2nd Sess. (Mar. 3, 2015).

[48] Norman Oberstein, *Nolo Contendere – Its Use and Effect*, 52 CAL. L. REV. 408, 409 (1964).

[49] Stephanos Bibas, *Harmonizing Substantive Criminal Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1381 (2003).

[50] Section 14. Anti-Competitive Agreements. –

(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;

(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;

(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.

Notably, Section 36 only answers the effect of a plea of *nolo contendere* in the criminal and civil proceedings arising from the same prohibited acts, but is silent as to other ramifications, such as:

1. whether the plea of *nolo contendere* may be considered a mitigating circumstance;
2. whether the plea of *nolo contendere* by a conspirator may be used as evidence against an alleged co-conspirator;
3. whether the plea of *nolo contendere* dispenses with the prosecution's burden of proving guilt beyond reasonable doubt; and
4. whether the accused pleading *nolo contendere* may be imprisoned.

In understanding the consequences of the said plea, we should first characterize it. Is it a plea of guilt, conditional plea of guilt, part of plea bargaining, or, perhaps, just simply a *sui generis?*

One view is that it is a plea of guilt, which is anchored on the *En Banc* Decision in *People v. Sarip,* wherein the Court mentioned that the accused "interposed a plea of guilty or *nolo contendere*" in describing the plea of the accused in the trial court.[51] This seems to imply that a plea of guilty is the same as a plea of *nolo contendere.* However, *nolo contendere* and entering a plea of guilt differ in at least one significant way—if one pleads *nolo contendere,* the conviction in that criminal case cannot be used against him in a future non-criminal case.[52]

Another view is that it is a conditional plea of guilt; however, in our law, a conditional plea of guilt is tantamount to a non-guilty plea.[53] This interpretation cannot be given weight because of the express proviso in Section 36 that the defendant making the plea does not accept responsibility but becomes liable "as if he had pleaded guilty."

The third view is that it is a part of plea bargaining which finds support in US jurisprudence. In a long line of US cases, *nolo contendere* is considered a part of plea bargaining, and along with the Alford plea, is referred to as "guilty-but-not-guilty pleas."[54] Plea bargaining is recognized under Rule 116 Section 2 of the Rules of Court, which allows the accused to plead guilty to a lesser offense.[55]

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[51] People v. Sarip, G.R. No. 31481, 88 SCRA 666, Feb. 28, 1979.

[52] RULES OF COURT, Rule 116.

[53] RULES OF COURT, Rule 116, § 1.

[54] Bibas, *supra* note 49, at 1361.

[55] "Section 2. *Plea of guilty to a lesser offense.* At arraignment, the accused, with the consent of the offended party and the prosecutor, may be allowed by the trial court to plead guilty to a

Plea bargaining, however, is also different from *nolo contendere*. In the Philippines, the concept of plea bargaining is limited to pleading guilty to a lesser offense while in *nolo contendere*, the accused is pleading guilty to the original offense and accepting punishment without being proven guilty.

This brings us to the conclusion that *nolo contendere* is *sui generis* as it does not fit perfectly with any of the known pleas in Philippine statutes, rules, or jurisprudence. Based on the express provision of the PCA and the common law acceptance of the term, the following summarizes the effects of a *nolo contendere* plea:

1. the plea admits all the material facts pleaded in the complaint;[56]
2. as a general rule, it may be entered only up to arraignment; as an exception, after arraignment but only with the permission of the court which shall accept it only after weighing its effect on the parties, the public and the administration of justice;[57]
3. it is not exactly the same as a plea of guilt;[58] and
4. it may not be used against the defendant entity to prove liability in a civil suit arising from the criminal action.[59]

To answer the previously posed questions, it is respectfully submitted that:

5. it may not be used to mitigate the punishment;
6. it may not be used as evidence against a co-conspirator;
7. it dispenses with the prosecution's burden of proving the guilt of the accused; and
8. the penalty of imprisonment shall be imposed upon the responsible officers and directors of the entity.

Under Section 1 of Rule 111 of the Rules of Court, a civil action is deemed instituted with the criminal action, unless the offended party waives the civil action, reserves the right to institute it separately, or institutes the civil action prior to the criminal action. Moreover, under Section 45 of the PCA, an injured party may institute an independent civil action after the PCC has completed the preliminary inquiry. In case the accused pleaded *nolo contendere* in

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lesser offense which is necessarily included in the offense charged. After arraignment but before trial, the accused may still be allowed to plead guilty to said lesser offense after withdrawing his plea of not guilty. No amendment of the complaint or information is necessary." RULES OF COURT, Rule 116, § 2.

[56] Thomas C. Hayden, Jr., *The Plea of Nolo Contendere*, 25 MD. L. REV. 227, 233 (1965).

[57] PCA, § 36.

[58] *Id.*

[59] *Id.*

the criminal case, this plea may not be used to prove liability in a separately instituted civil action or in an independent civil action. From the perspective of the accused, this is the benefit of a *nolo contendere* over a guilty plea.

The *nolo contendere* plea may not be used as a mitigating circumstance. *First*, Article 13 of the Revised Penal Code lists down the exclusive list of mitigating circumstances and while it includes a plea of guilt, it does not include those short of a plea of guilty to the offense charged, like a conditional plea of guilt[60] or plea guilt to a lesser offense.[61] *Second*, the rationale behind Article 13 of the Revised Penal Code is that the plea of guilt "is an act of repentance and respect for the law, it indicates a moral disposition in the accused favorable to his reform"[62] is lacking in a plea of *nolo contendere*. In effect, the accused is only saying that he will not contest the charge against him, but he neither admits having committed the offense nor repents for committing the same.

It may not also be used as evidence against a co-conspirator since there is no admission of guilt in a *nolo contendere* plea. In *State v. Batchelor*, it was held that "[t]he 'clear rule' is that evidence of convictions, guilty pleas, and pleas of *nolo contendere* of non-testifying co-defendants is inadmissible unless introduced for a legitimate purpose, i.e., used for a purpose other than evidence of guilt of the defendant on trial."[63]

Upon a plea of *nolo contendere* by the accused, the prosecution's burden of proving guilt beyond reasonable doubt is dispensed with. Under Section 4 of Rule 116 of the Rules of Court, "[w]hen the accused pleads guilty to a non-capital offense, the court may receive evidence from the parties to determine the penalty to be imposed."[64] While it has been said that a *nolo contendere* plea is not the same as a guilty plea, it is submitted that this provision should apply by analogy. Following this rule, the court may dispense with the requirement of proving the guilt beyond reasonable doubt and, based on its discretion, may receive evidence but only for the purpose of determining the penalty. This is also the rule observed in the US where a *nolo contendere* plea is common in

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[60] People v. Moro Sabilul, G.R. No. L-3765, 89 Phil. 283, 285, June 21, 1951.

[61] People v. Noble, G.R. No. 288, 77 Phil. 93, Aug. 29, 1946.

[62] People v. De la Cruz, G.R. No. L-45284, 63 Phil. 874, 876, Dec. 29, 1936.

[63] Catherine Eagles, *Co-Defendants, Accomplices, and Co-Conspirators: Common Evidence Issues and Selected Cases* 15 (2005), *available at* http://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/200510Eagles-CoD.pdf.

[64] The rule would be different if the plea of guilt is to a capital offense. Under Section 3 of Rule 116 of the Rules of Court, "When the accused pleads guilty to a capital offense, the court shall conduct a searching inquiry into the voluntariness and full comprehension of the consequences of his plea and shall require the prosecution to prove his guilt and the precise degree of culpability. The accused may present evidence in his behalf." Notably, none of the criminal acts under the PCA is considered capital offense.

antitrust cases—the white-collar accused tries to dodge the embarrassment of a guilty plea or being proven guilty in the course of trial, the corporation-accused wants to protect its unblemished reputation, and the prosecution saves effort, time, and money.[65]

In the early understanding of *nolo contendere* in Medieval England, the accused who makes such plea avoids imprisonment by offering to pay a sum of money to the king.[66] In the present acceptance of the plea, however, courts may impose jail time following a plea of *nolo contendere*, as in the case of *Hudson v. US*.[67] Since the *nolo contendere* plea means exposure to punishment, Section 30 of the PCA then applies. Under this provision, the accused has to serve jail time, pay the fine, and "[w]hen the entities involved are juridical persons, the penalty of imprisonment shall be imposed on its officers, directors, or employees holding managerial positions, who are knowingly and willfully responsible for such violation."

E. APPLICABILITY OF THE *IN PARI DELICTO* RULE

Under Section 31, a complaint may be initiated by the PCC or by any interested party. According to Rule 3, Section 2 of the Rules of Court, a party in interest is any person "who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit." This includes persons who are privy to the contract, even a co-conspirator. Therefore, it is possible for a conspirator to file a verified complaint to the Commission against his own co-conspirators. The issue therefore arises of whether the *in pari delicto* rule enshrined in Art 1411[68] and 1412[69] of the New Civil Code may be used as a defense by the defendant.

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[65] Bibas, *supra* note 49, at 1362-88.

[66] Colin Miller, *The Best Offense is a Good Defense: Why Criminal Defendants' Nolo Contendere Pleas should be Inadmissible against them when they become Civil Plaintiffs*, 75 U. Cin. L. Rev. 725, 729 (2006-2007) citing *North Carolina v. Alford*.

[67] 272 U.S. 451, 453-54 (1926).

[68] "Art. 1411. When the nullity proceeds from the illegality of the cause or object of the contract, and the act constitutes a criminal offense, both parties being in pari delicto, they shall have no action against each other, and both shall be prosecuted. Moreover, the provisions of the Penal Code relative to the disposal of effects or instruments of a crime shall be applicable to the things or the price of the contract.

This rule shall be applicable when only one of the parties is guilty; but the innocent one may claim what he has given, and shall not be bound to comply with his promise. (1305)." CIVIL CODE, art. 1411.

[69] "Art. 1412. If the act in which the unlawful or forbidden cause consists does not constitute a criminal offense, the following rules shall be observed:

There is a legal basis to say that the *in pari delicto* rule should apply because our Civil Code bars the parties in equal fault from recovering from each other and provides that both of the guilty parties should be prosecuted; and an antitrust agreement is not among the exceptions to the *in pari delicto* rule under the New Civil Code.[70] Also, as a practical matter, creating a new exception to the *in pari delicto* rule offers a " 'heads-I-win, tails-you-lose' protection,"[71] such that if Company X, a conspirator, profits from an antitrust agreement, Company X will definitely shy away from the courts and just keep the illegal agreement among its co-conspirators; on the other hand, if Company X suffers losses from an antitrust agreement, it will try to recoup the said losses by instituting a case against its co-conspirators.

This view, however, has a practical drawback particularly with respect to the enforcement of regulatory policies. The US Supreme Court in *Permalife Mufflers, Inc. v. International Parts Corp*[72] rejected the *in pari delicto* as a defense based on public policy considerations, such that it "frustrates the effectuation of regulatory policies."[73] The ruling in *Permalife* was reiterated in the case of *Bateman Eichler v. Berner,*[74] a case on insider trading where the Court held that "denying the *in pari delicto* defense in such circumstances will best promote protection of the investing public and the national economy."[75] Moreover, in *Gonzalo v. Tarnate,* our Supreme Court considered public policy as an exception to the *in pari delicto* rule.[76] Public policy is defined as "that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."[77]

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(1) When the fault is on the part of both contracting parties, neither may recover what he has given by virtue of the contract, or demand the performance of the other's undertaking;

(2) When only one of the contracting parties is at fault, he cannot recover what he has given by reason of the contract, or ask for the fulfillment of what has been promised him. The other, who is not at fault, may demand the return of what he has given without any obligation to comply his promise. (1306)." CIVIL CODE, art. 1412.

[70] The exceptions under Articles 1414 to 1419 are contracts involving money paid or property delivered for an illegal purpose, one of the contracting parties is incapacitated to give consent, prohibited but not illegal contracts where the prohibition is for the protection of the plaintiff, payment in excess of the price fixed by law or authority of law, worked rendered in excess of maximum number of hours, and agreed lower wage for laborers.

[71] Milton Handler, *Reforming the Antitrust Laws,* 82 COLUM. L. REV. 1287, 1362 (1982).

[72] 392 U.S. 134 (1968).

[73] *Id.*

[74] 472 U.S. 299 (1985).

[75] *Id.*

[76] Gonzalo v. Tarnate, G.R. No. 160600, 713 SCRA 224, Jan. 15, 2014.

[77] *Id.*

This issue, perhaps, is better appreciated within the context of executory contracts. It must be remembered that the mere execution of an anti-competitive agreement is punishable under the PCA.[78] At this stage, the State is not likely to be privy to the terms of an illegal agreement and only the conspirators have access to the pertinent documents and communications. The State, therefore, has no means of knowing the same[79] until such time that the agreement has already been executed and the anti-competitive effects are already apparent or, as they say, the damage is already done.

Moreover, Section 35 of the PCA sheds light on the non-application of the *in pari delicto* rule. Section 35 provides for a leniency program in the form of immunity from suit or reduction of any fine in exchange for voluntary disclosure of information in relation to violations of Section 14 (a) and (b), subject to the following conditions:

a. At the time the entity comes forward, PCC has not received information about the activity from any other source;
b. Upon the entity's discovery of illegal activity, it took prompt and effective action to terminate its participation therein;
c. The entity reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation throughout the investigation; and
d. The entity did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

Even if the PCC has already received information about the illegal activity, the reporting entity may still be allowed leniency under the following conditions:

a. Upon the entity's discovery of illegal activity, it took prompt and effective action to terminate its participation therein;
b. The entity reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation throughout the investigation;
c. The entity is the first to come forward and qualify for leniency;
d. At the time the entity comes forward, PCC does not have evidence against the entity that is likely to result in a sustainable conviction; and

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[78] PCA, § 14.

[79] Unless, perhaps, the State employs advance intelligence facilities or a whistle-blower squeals the confidential information.

e. PCC determines that granting leniency would not be unfair to others.

Based on the foregoing, the apparent overriding intention is to punish anti-competitive agreements. If the State is willing to go as far as incentivizing a co-conspirator through immunity from suit to aid the prosecution of the offense, it appears that the State does not mind even if the co-conspirator has "unclean hands" or is equally at fault as the other co-conspirator before going to the PCC. While the PCA is not crystal clear about the inapplicability of the *in pari delicto* rule, it is respectfully submitted that the public policy considerations in antitrust offenses necessitates its non-application or disuse.

F. AUTOMATIC APPROVAL DUE TO INACTION

Section 17 of the PCA provides for an automatic approval of the merger or acquisition upon the lapse of 30, 60, or 90 days, as the case may be.[80] Based on this provision, the effect of inaction is automatic approval. This must be contrasted with Section 79 of the Corporation Code, which provides that a certificate of merger is issued by the SEC only upon being satisfied that the merger is not inconsistent with the provisions of the Corporation Code and other existing laws. In the old regime, no presumption of approval is created by the lapse of time or inaction. Curiously, in our other existing laws, such as the National Internal Revenue Code and the Local Government Code, the effect of inaction is also deemed a denial.

For instance, the Commissioner of Internal Revenue is given 120 days to act on a value-added tax refund or tax credit claim and in the event of inaction

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[80] Section 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.*

* * *

Should the Commission deem it necessary, it may request further information that are reasonably necessary and directly relevant to the prohibition under Section 20 hereof from the parties to the agreement before the expiration of the thirty (30)-day period referred. The issuance of such a request has the effect of extending the period within which the agreement may not be consummated for an additional sixty (60) days, beginning on the day after the request for information is received by the parties: *Provided,* That, *in no case shall the total period for review by the Commission of the subject agreement exceed ninety (90) days from initial notification by the parties.*

When the above periods have expired and no decision has been promulgated for whatever reason, the merger or acquisition shall be deemed approved and the parties may proceed to implement or consummate it. (Emphasis supplied.)

within 120 days, the taxpayer is given 30 days from the lapse of 120 days to appeal the unacted claim with the Court of Tax Appeals.[81] The remedy of appeal is available to the taxpayer since the inaction is deemed denial. Moreover, the local treasurer has 60 days from the time of filing of protest on a local tax assessment with which to act. In case of inaction, the taxpayer has 30 days from the lapse of 60 days to appeal the deemed denial to the regional trial court.[82]

The Congressional deliberations of the PCA reveal that the intent is to discourage laziness on the part of the PCC in acting on a merger or acquisition notification so much so that it is constrained to act within the time limit prescribed by the law, such as 30, 60, and 90 days.[83] This is understandable considering the fast-paced decision-making needed in running a business. It opens, however, the floodgates of corruption.[84] In the "inaction is deemed denial" framework, Mr. X, a bribed government official, can execute papers, affix his signature therein, and perhaps even falsify documents to approve a merger, for instance. This must be contrasted with an "inaction is deemed approval" framework wherein Mr. X just has to sit, relax, and wait for the period to lapse. Considering our government's track record for corruption, this is one

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[81] "Section 112. Refunds or Tax Credits of Input Tax. – [...] (D) Period within which Refund or Tax Credit of Input Taxes shall be Made. – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of compete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals. x x x" TAX CODE, § 112 (D).

[82] "Section 195. *Protest of Assessment.* – When the local treasurer or his duly authorized representative finds that correct taxes, fees, or charges have not been paid, he shall issue a notice of assessment stating the nature of the tax, fee, or charge, the amount of deficiency, the surcharges, interests and penalties. Within sixty (60) days from the receipt of the notice of assessment, the taxpayer may file a written protest with the local treasurer contesting the assessment; otherwise, the assessment shall become final and executory. The local treasurer shall decide the protest within sixty (60) days from the time of its filing. If the local treasurer finds the protest to be wholly or partly meritorious, he shall issue a notice cancelling wholly or partially the assessment. However, if the local treasurer finds the assessment to be wholly or partly correct, he shall deny the protest wholly or partly with notice to the taxpayer. The taxpayer shall have thirty (30) days from the receipt of the denial of the protest or from the lapse of the sixty (60) day period prescribed herein within which to appeal with the court of competent jurisdiction otherwise the assessment becomes conclusive and unappealable." LOCAL GOV'T CODE, § 195.

[83] *See* H. Congressional Record 44, 16th Cong., 2nd Sess. (Feb. 3, 2015).

[84] *Id.*

provision that leaves much to be desired because it makes under-the-table negotiations easier to execute and more difficult to detect in a subsequent audit.

CONCLUSION

In the final analysis, the PCA incontestably offers new solutions to old antitrust problems. Nevertheless, it also creates new sources of conflict and leaves certain issues in several areas of the law unsettled.

Prior to the PCA, our existing antitrust laws proved incapable of deterring anti-competitive acts. Various reasons are offered as explanation, namely the regulators' lack of industry expertise, ambiguities in pertinent laws, dearth in the budget of regulatory agencies, and, of course, corruption.[85] Notwithstanding the PCA, these concerns are likely to subsist; based on the preceding discussion, the crux of the critique revolved around them.[86]

Borrowing laws from foreign jurisdictions has legal ramifications. While it offers the borrowing country the option of choosing only the best practices that have withstood the test of time, such might not be a universal best practice or a one-size-fits-all solution. Case-by-case analysis must still be done to come up with laws that are tailor-fitted to the unique cultural, social, economic, and legal profile of any given State. Several provisions of the PCA, such as the dichotomy of the *per se* rule and the rule of reason and the *nolo contendere* plea, are fertile ground for confusion since these are US- or UK-based concepts with which we are unfamiliar. Perhaps, years after the promulgation of the PCA, we might see and confirm the impact of the "legal irritants" which Teubner warned us about.

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[85] *See* H. Congressional Record 56, 16th Cong., 2nd Sess. (Mar. 3, 2015).

[86] With regard to the scarcity in budget allotment, the PCA provided for Php 300 million budget under Section 51; Initially, the proposed budget was Php 100 million for the PCC, but it was later increased to Php 300 million; *See* H. Congressional Record 56, 16th Cong., 2nd Sess. (Mar. 3, 2015).