

COMPETITION AND GOVERNMENT RESPONSE TO THE COVID-19 PANDEMIC*

*Gwen Grecia-De Vera***
*Jolina Pauline Tuazon-Eraña****
*Raizza Dawn Angeli C. David*****
*Johanne Daniel M. Negre******

ABSTRACT

As the Philippine government continues to form the country's COVID-19 relief and recovery strategy, it is important to consider the shifting commercial landscape, the accompanying

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** Program Director, University of the Philippines Law Center Competition Law and Policy Program ("CLPP"); Senior Lecturer, University of the Philippines College of Law; Executive Director, Philippine Competition Commission ("PCC") (2018); LL.M., Northwestern University (2010); LL.B., *dean's medal*, University of the Philippines Diliman (1995); A.B., *magna cum laude*, University of the Philippines Diliman (1991).

Launched in December 2018, the CLPP is envisioned to support the legal and institutional framework established under the Philippine Competition Act and ensure the development of competition policy remains responsive to the needs of the country as a developing jurisdiction. The CLPP is intended to serve as: (i) a platform for developing multi-disciplinary academic and policy research in relation to competition law and economics and (ii) a forum on competition law and economics for academics, practitioners, enforcement officers, and members of the judiciary. It is currently one of four research and policy programs of the University of the Philippines College of Law. We wish to thank the interns under the Clinic on Competition Law Enforcement for Second Semester, A.Y. 2019-2020 for further research assistance. In particular, we acknowledge the submission of Pauline Angela D. Carillo and Roberto Rolando L. Geotina on various legislative initiatives to respond to the pandemic.

*** Resource Person, UP Law Center CLPP; Associate, Puyat Jacinto Santos Law (2019); Attorney III, PCC Adjudication Division (2018); Chief of Staff, Office of the Executive Director, PCC (2017); J.D., University of the Philippines Diliman (2015); B.A. Public Administration, University of the Philippines Diliman (2006).

**** Research Assistant, UP Law Center CLPP; Research Assistant, UP Law Center Technology, Law and Policy Program (2019); Legal Assistant, Balsam International Unlimited Company (2016-present); J.D., University of the Philippines Diliman (2021, expected); Dip. in Industrial Relations, University of the Philippines Diliman (2016); B.S.B.A., *cum laude*, University of the Philippines Diliman (2012).

***** Research Assistant, UP Law Center CLPP; Research Assistant, UP Law Center Technology, Law and Policy Program (2019); Legal Assistant, Balsam International Unlimited Company (2016-present); J.D., University of the Philippines Diliman (2021, expected); B.S. Marketing Management, De La Salle University–Manila (2011).

changes in business behaviors, and their impact on consumers. In this Essay, the authors explore the government's package of interventions designed to mitigate the effects of the pandemic and argue that these measures should be informed by competition policy. Competition policy and the enforcement of the Philippine Competition Act remain relevant during the pandemic and, more importantly, in shaping the course of the country's economic recovery. Competition policy is an integral part of the Philippine development plan, and the continued and consistent enforcement of competition law throughout the period of the public health emergency and into post-COVID-19 recovery will bring needed discipline in reconfiguring or creating business models, transactional strategies, and industry structures.

I. INTRODUCTION

As countries across the globe adopt policies to contain the transmission of the Coronavirus Disease 2019 ("COVID-19") and mitigate its effects on businesses and the economy, competition authorities have been quick to respond with the monitoring of and enforcement against anti-competitive conduct, as well as the expedited review of mergers and acquisitions. In the Philippines, despite continued competition law enforcement by the Philippine Competition Commission ("PCC") during the various levels of community quarantine, legislators have proposed granting regulatory relief to enterprises as part of recovery interventions as the country works its way towards the new normal.¹ Just days before the *sine die* adjournment of the 18th Congress' first session, the Lower House passed on third reading House Bill No. 6815, otherwise known as the Accelerated Recovery and Investments Stimulus for the Economy of the Philippines

¹ New normal pertains to "the emerging behaviors, situations, and minimum public health standards that will be institutionalized in common or routine practices and remain even after the pandemic while the disease is not totally eradicated through means such as widespread immunization. These include actions that will become second nature to the general public as well as policies such as bans on large gatherings that will continue to remain in force." The new normal is intended to prevail in areas where no community quarantine is in place. Inter-Agency Task Force for the Management of Emerging Infection Diseases (IATF-EID) Omnibus Guidelines on the Implementation of Community Quarantine in the Philippines (with Amendments as of July 2, 2020) [hereinafter "IATF Omnibus Guidelines"], § 1.4 in relation to § 6.

(“ARISE”).² This bill aims to set aside funds to support the country’s emergence from an economy adversely affected by COVID-19. Among its proposed regulatory relief measures are provisions enjoining the PCC from imposing fines and other monetary penalties upon businesses that failed to comply with compulsory notification and other reportorial requirements “relating to business activities and transactions that promote continuity and capacity-building in all sectors of the economy.”³ At the same time, the bill proposes to prevent the PCC from requiring parties to make any submission in proceedings before the Commission, including fact-finding or preliminary inquiries.⁴

This is a significant shift away from promoting competition law and policy as integral to aligning the country’s economic recovery and inclusive growth. In this Essay, the authors reflect on the necessity of preserving competition policy as part of the country’s recovery and development plan and enforcing the Philippine Competition Act⁵ (“PCA”) and other competition-related laws in ensuring that anti-competitive business conduct is not justified as a response to the pandemic and preventing such conduct from becoming institutionalized as models and practices in the new normal. We will begin by examining the impact of the current health crisis on enterprises and the expected shifts in business structures or activities. We will then briefly survey the government responses to COVID-19, with particular attention to ARISE, and conclude with recommendations on enhancing competition law enforcement as an integral component of maintaining the country’s socio-economic growth trajectory.

II. COVID-19 AND ITS IMPACT ON COMMERCIAL ACTIVITIES

On March 8, 2020, Proclamation No. 922 was promulgated, declaring a State of Public Health Emergency throughout the country due to COVID-19.⁵ Through this proclamation, all government agencies and local government units were called upon to mobilize the necessary resources “to curtail and eliminate the threat of Covid-19.”⁶ Shortly after, on March 16, 2020, this was followed by a declaration of a State of Calamity throughout the

² H. No. 6815, 18th Cong., 1st Sess. (2020). ARISE Bill of 2020.

³ § 12.

⁴ § 12.

⁵ Rep. Act No. 10667 (2015). Philippine Competition Act.

⁶ The proclamation was issued pursuant to Rep. Act No. 11332 (2018). Mandatory Reporting of Notifiable Diseases and Health Events of Public Concern Act.

⁶ Proc. No. 929 (2020), declaring a State of Calamity throughout the Philippines due to Corona Virus Disease 2019.

Philippines for a period of six months⁷ and the implementation of the enhanced community quarantine (“ECQ”) in the island of Luzon.⁸ At the national and local levels, various measures were subsequently taken by the government to control the transmission of the disease and mitigate the pandemic’s impact on the country’s economy and the general public.

Predicated on the continued rise in the number of COVID-19 cases, the serious threat to health and safety posed by its transmission, and its adverse impact upon livelihood and economic activities, the Philippine Congress passed the Bayanihan to Heal As One Act⁹ (“Bayanihan Act”), declaring a state of national emergency and establishing a whole-of-government approach in addressing the health and economic menace brought on by the pandemic. In passing the Bayanihan Act, Congress set out the national policy, authorized the President to “exercise such powers that are necessary and proper to carry out the declared national policy,”¹⁰ and granted the President the power to adopt a set of “temporary emergency measures to respond to the crisis brought by the pandemic,”¹¹ all of which are in effect only for three months from the publication of the Act. The temporary measures applied to various activities, sectors, and industries: government budget and procurement, health, health care workers and supplies, social amelioration and safety nets, availability of adequate supply of goods and services, protection and preservation of human resources and employment, support for business and enterprises, and regulation of transport sector.¹² Among the enforcement measures under the Bayanihan Act is the proscription against certain acts that are also considered to be prohibited anti-competitive behavior under the Philippine Competition Act (“PCA”).¹³

The principle behind the imposition of a community quarantine is to reduce the likelihood of transmission of COVID-19 among persons within and outside the quarantine area.¹⁴ The most extreme form of community

⁷ Proc. No. 929 (2020).

⁸ Proc. No. 929 (2020); Memorandum from the Executive Secretary: Extension of the Enhanced Community Quarantine Over the Entire Luzon Until 30 Apr. 2020 (2020).

⁹ Rep. Act No. 11469 (2020). An Act Declaring the Existence of a National Emergency Arising from the Coronavirus Disease 2019 (COVID-19) Situation and a National Policy in Connection Therewith, and Authorizing the President of the Republic of the Philippines for a Limited Period and Subject to Restrictions, to Exercise Powers Necessary and Proper to Carry Out the Declared National Policy and for Other Purposes. The Bayanihan Act expired on June 25, 2020.

¹⁰ § 4.

¹¹ § 4.

¹² § 4.

¹³ § 4(i).

¹⁴ IATF Omnibus Guidelines, § 1(3).

quarantine, previously in place in Luzon and now prevailing in other parts of the country, is the enhanced community quarantine or the ECQ. An ECQ involves the “temporary implementation of stringent limitations on movement and transportation of people, strict regulation of operating industries, provision of food and essential services, and heightened presence of uniformed personnel to enforce community quarantine protocols.”¹⁵ The COVID-19 Government Response Stringency Index,¹⁶ which is a composite measure of nine response indicators including school closures, workplace closures, and travel bans, was rescaled to a value from zero to 100, with 100 being the strictest response.¹⁷ Based on this Index, the Philippines implemented what are considered the strictest response measures, determined by their impact on mobility.

The increasing number of COVID-19 confirmed cases necessitated the continued implementation of various levels of community quarantine in different parts of the country, resulting in limited mobility for businesses, workers, and consumers. Commercial activities have taken a slower pace, as enterprises scaled down. Even as companies and small businesses shifted to e-commerce and continued activities online, others have had to suspend operations altogether. While the Department of Trade and Industry (DTI) has yet to conclude its Impact Assessment Survey of COVID-19 on the Micro, Small, and Medium Enterprises (“MSMEs”),¹⁸ other indicators show the indelible impact of the public health emergency on our economy. The Philippine Statistics Authority (PSA) noted that from June 1 to 15, 2020, 57.8% of the total employment in the country are in areas still under general community quarantine¹⁹ (“GCQ”), such as the National Capital Region (“NCR”).²⁰ For the same period, the PSA reported that only 63.1% of employees or workers in the country were working, although this number

¹⁵ § 1(5).

¹⁶ Asian Development Bank, *Lockdown, Loosening, and Asia's Growth Prospects*, ASIAN DEVELOPMENT OUTLOOK SUPPLEMENT, June 2020, available at <https://www.adb.org/sites/default/files/publication/612261/ado-supplement-june-2020.pdf>

¹⁷ *Id.* at 3.

¹⁸ This includes information on the decline in average sales, percentage of workforce affected, and assistance needed by the sector.

¹⁹ General community quarantine pertains to the “implementation of temporary measures limiting movement and transportation, regulation of operating industries, and presence of uniformed personnel to enforce community quarantine protocols.” In areas under GCQ, movement remains limited to accessing goods and services and for work in offices and industries permitted to operate. IATF Omnibus Guidelines, § 1(5).

²⁰ Report to the Joint Congressional Oversight Committee, at 14 (June 20, 2020), available at <https://www.officialgazette.gov.ph/downloads/2020/06jun/20200622-Report-to-the-Joint-Congressional-Oversight-Committee.pdf>

presents a 10% increase from that noted from May 1 to 15, 2020.²¹ Towards the expiration of the Bayanihan Act, the Small Business Corporation (“SBC”) reported a projected release of loans in June 2020 amounting to 369.30 million pesos and pending loan applications in the total amount of 1.612 billion pesos.²²

III. GOVERNMENT INTERVENTIONS AND THE BUSINESS ENVIRONMENT UNDER COVID-19

It is not surprising then that, under these difficult circumstances, the government acted to protect consumers against deleterious business practices or strategies—whether these were intentionally adopted by entities to take advantage of the raging pandemic or resorted to out of sheer need to see their enterprises survive.²³ The dwindling demand for products and services may compel businesses to increase prices or explore means of coordination. Firms poised to survive may nevertheless see the situation as an opportunity to not only attain a position of dominance in the market, but to adopt exclusionary or exploitative measures. As COVID-19 related goods and services occupy the government’s priority for procurement, and exceptions to public procurement are put into effect,²⁴ the scramble for business from the government may motivate manipulation of bidding processes. These acts and practices are considered harmful to consumer welfare and inimical to the public interest. To be sure, Congress saw it fit to legislate further safeguards to curb or mitigate their impact. The Bayanihan Act, for example, penalizes the following acts:

engaging in hoarding, profiteering, injurious speculations, manipulation of prices, product deceptions, and cartels, monopolies or combinations in restraint of trade, or other pernicious practices affecting the supply, distribution and movement of food, clothing,

²¹ *Id.*

²² *Id.* at 6.

²³ See CNN Philippines Staff, *Three arrested for hoarding, selling overpriced alcohol*, CNN PHIL., Mar. 20, 2020, at <https://www.cnnphilippines.com/news/2020/3/20/alcohol-hoarding-overpricing-arrested.html>; Christopher Lloyd Caliwan, *17 nabbed for hoarding, sale of overpriced medical supplies*, PHIL. NEWS AGENCY, Mar. 25, 2020, at <https://www.pna.gov.ph/articles/1097760>; Darryl John Esguerra, *594 arrested for hoarding, profiteering amid COVID-19 crisis*, INQUIRER.NET, Apr. 7, 2020, available at <https://newsinfo.inquirer.net/1255032/594-arrested-for-hoarding-profiteering-amid-covid-19-crisis>

²⁴ Rep. Act No. 11469 (2020), § 4(k); Rep. Act No. 9184 (2002). Government Procurement Reform Act of 2002; GPPB Res. No. 03-2020, approving the Adoption of Efficient, Effective and Expedient Procurement Procedures during a State of Public Health Emergency.

hygiene and sanitation products, medicine and medical supplies, fuel, fertilizers, chemicals, building materials, implements, machinery equipment and spare parts required in agriculture, industry and other essential services, and other articles of prime necessity, whether imported or locally produced or manufactured.²⁵

Many, if not all of these acts, are already prohibited or criminalized under existing legislation.²⁶ Nonetheless, our legislators chose to emphasize that these activities are specifically enjoined and proscribed during the period of crisis. But neither the prevailing state of calamity nor the declaration of state of national emergency justifies for tolerating and condoning anti-competitive practices by suppressing the capability of established institutions to enforce competition laws.

Indeed, the PCC took swift steps to adapt to the community quarantine and comply with corresponding guidelines. A day after the effectivity of the community quarantine in the National Capital Region, the PCC issued a resolution, stating that it shall maintain a skeleton workforce and that the following merger review processes have been suspended: (a) acceptance of new Notification Forms and Letters of Non-Coverage; (b) evaluation of sufficiency of Notification Forms and Letters of Non-Coverage already submitted to the PCC; and (c) running of the 30-day Notification Period under Section 3.1 of the PCC Rules on Merger Procedure.²⁷ The next day, the PCC issued another resolution, this time on the interruption of the reglementary periods for all filings with the PCC, stating that, for the duration of the ECQ, the reglementary periods for the filing of pleadings, motions, affidavits and other submissions to the Commission, as well as those for the

²⁵ Rep. Act No. 11469 (2020), § 6(c).

²⁶ *See* Rep. Act No. 10667 (2014), §§ 14-15; Rep. Act No. 7581 (1992). Price Act of 1992, *amended by* Rep. Act No. 10623 (2012). Price Act of 2012; Rep. Act No. 9502 (2008). Universally Accessible Cheaper and Quality Medicines Act of 2008; OP Mem. Circ. No. 77 (2020), directing all government agencies and instrumentalities, including LGUs, to implement and ensure compliance with issuances (of DOH and DA) on prices of essential emergency medicines and supplies, agricultural and fishery commodities; Dep't of Health (DOH) Pub. Adv. No. 19 (2020), prohibiting hoarding of drugs and medicines, profiteering, illegal combination, and all other acts committed in restraint of trade; Dep't of Trade and Industry (DTI) Mem. Circ. No. 20-07 (2020), on anti-hoarding and anti-panic buying. DTI refers to the Price Act of 1992, but there is mistake in calling it the "Consumer Act of the Philippines"; DOH Dep't. Circ. No. 2020-0133 (2020), reiterating price freeze of essential emergency medicines and medical devices due to COVID-19; DTI Mem. Circ. No. 20-08 (2020), on unhampered movement of cargo and transit of personnel of exempt business establishments; measures to prevent unreasonable increase in the prices of all basic necessities.

²⁷ PCC Res. No. 007-2020 (2020).

payment of fines or penalties, are deemed interrupted.²⁸ While the PCC offices were closed to the public during the community quarantine, the PCC remained accessible online, with queries and requests for consultation done by email.

As the economy gradually reopens with minimum health safety standards in place, in a bid to mitigate the effects of the pandemic and regain the country's growth trajectory, government efforts have shifted to relief and recovery. Tanja Goodwin and Georgina Pop of the World Bank Group put the question in this way:

[r]ising mark-ups, superstar firms, 'killer acquisitions' and competition among digital platforms—for the past few years, academia and policymakers have been increasingly concerned about lack of competition. But in the face of a major economic recession caused by the coronavirus disease, does competition still matter?²⁹

IV. ARISE: A VIEW OF GOVERNMENT STRATEGIES FOR RECOVERY

It is our view that competition remains relevant during the pandemic and, more importantly, in shaping the course of the country's economic recovery, for *three* reasons: (i) competition policy is an integral part of our development plan, its significance in achieving inclusive growth having been demonstrated; (ii) continued and consistent competition law enforcement throughout the period of emergency and into post-COVID-19 and recovery will bring needed discipline in reconfiguring, choosing, and creating business models, transactional strategies, and industry structures; and (iii) the existence of safeguards in the PCA and competition-related laws ensures regulatory responsiveness and reduces the risk of agency delay and processual inefficiency.

The value of viewing the national policy on relief and recovery with a competition lens is evident when considered in light of the economic and financial interventions proposed under ARISE. House Bill No. 6815 is a

²⁸ PCC Res. No. 008-2020. Interruption of the Reglementary Periods for the Filing of Pleadings, Motions and Submissions to the Commission and the Payment of Fines or Penalties in View of the Enhanced Community Quarantine to Manage the COVID-19 Situation.

²⁹ Tanja Goodwin & Georgiana Pop, *Flatten the coronavirus curve, but don't flatline competition*, WORLD BANK BLOGS, Apr. 21, 2020, at <https://blogs.worldbank.org/psd/flatten-coronavirus-curve-dont-flatline-competition>

consolidation of various bills and was previously known as the Philippine Economic Stimulus Act or PESA. Upon its passage on third reading, it came to be referred to as ARISE. It is based on the policy of the State to protect Filipino families, workers, and businesses facing difficulties brought about by the COVID-19 pandemic. It further provides that it is the State's policy to "preserve the country's path to economic prosperity."³⁰ The proposed measure places emphasis on mass testing for COVID-19 as a general intervention, allocating the amount of 10 billion pesos for Fiscal Year 2020 and the same amount for Fiscal Year 2021.³¹ It also classifies the economic interventions under four categories: (i) transitional, (ii) financial, (iii) sectoral, and (iv) structural.³²

Transitional interventions refer to economic reliefs that are intended to "mitigate the permanent damage by the Covid-19 crisis to the economy and maintain employment levels of the corresponding sector or industry,"³³ and are envisioned to offer immediate relief up to a specific period. Among the transitional interventions are: (i) wage subsidies for non-essential businesses,³⁴ free-lancers, the self-employed, and repatriated overseas Filipino workers ("OFWs"),³⁵ (ii) assistance to displaced workers by expanding the Tulong Panghanapbuhay Program sa Ating Displaced/Disadvantaged Workers ("TUPAD"), and technical and vocational learners,³⁶ (iii) educational subsidy to students,³⁷ (iv) economic relief to OFWs,³⁸ (v) extension of principal loan payments,³⁹ (vi) regulatory relief for business entities,⁴⁰ and (vii) regularization of MSME+.⁴¹

ARISE also proposes various *financial* interventions: (i) credit mediation and restructuring service ("CMRS") for MSME+, (ii) loans to MSME+, (iii) interest-free loan programs to be introduced by the Land Bank of the Philippines ("LBP") and Development Bank of the Philippines

³⁰ H. No. 6815, 18th Cong., 1st Sess., §§ 1 & 6 (2020).

³¹ § 3(f).

³² § 5.

³³ § 5(b).

³⁴ § 3(i). "Non-essential businesses" pertains to "business entities engaged in activities which are not allowed to operate during the CQ, whether under applicable law, presidential proclamations, or executive orders issued or promulgated for the purposes of containing the spread of COVID-19."

³⁵ § 7.

³⁶ § 8.

³⁷ § 9.

³⁸ § 10.

³⁹ § 11.

⁴⁰ § 12.

⁴¹ § 13.

(“DBP”), and (iv) loan guarantee by the Philippine Guarantee Corporation (“PGC”). Financial interventions are economic relief programs “intended to accelerate recovery and improve economic performance of business entities[.]”⁴²

Sectoral interventions refer to economic relief targeted at specific sectors or industries: (i) MSME+ sector, with preference for MSME+ that supports the Balik Probinsya, Bagong Pag-asa Program,⁴³ (ii) tourism industry, (iii) transportation industry, (iv) industry and service sectors, (v) agri-fishery sector, with preference to establishments requiring assistance to any activity that supports the Balik Probinsya, Bagong Pag-asa Program, and (vi) condonation of loans of agrarian reform beneficiaries for land acquisition under the government land redistribution programs. These interventions may or may not be limited to a specific period.⁴⁴ It is significant to note that the creation of a National Emergency Investment Vehicle (“NEIV”) is proposed under ARISE, with a NEIV Board led by the Secretary of Finance.⁴⁵ Its mandate is to identify critically impacted businesses⁴⁶ and extend financial accommodations, such as loans and equity investments, to such businesses.⁴⁷ The NEIV may also absorb the financial obligations of critically impacted businesses, in exchange for equity of the same value.⁴⁸ Similarly, upon consultation with relevant regulators, the NEIV may also merge or consolidate the identified critically-impacted businesses.⁴⁹

To establish the NEIV, ARISE sets the authorized capital stock at 100 billion pesos and proposes to appropriate 25 billion pesos as equity of the

⁴² § 5(c).

⁴³ Exec. Order No. 114 (2020), institutionalizing the Balik Probinsya, Bagong Pag-asa Program as a pillar of balanced regional development, creating a council therefor, and for other purposes.

⁴⁴ H. No. 6815, 18th Cong., 1st Sess., § 5(c) (2020).

⁴⁵ § 25.

⁴⁶ § 3(c). “Critically impacted businesses” pertains to “non-essential businesses that have been directly and adversely impacted by the COVID-19 outbreak such that (i) their liabilities have become more than their assets, or (ii) they have experienced at least a fifty percent (50%) decline in gross receipts for at least one calendar quarter, and in either instance, are generally unable to pay or perform their obligations as they fall due in the ordinary course of business, as a result of the COVID-19 outbreak. For purposes of ARISE, critically impacted business shall include the transport industry, tourism industry, and globally-oriented manufacturing and services firms that sell to the export market, local market, or both, but shall exclude banks and other financial institutions under the supervision of the *Bangko Sentral ng Pilipinas* (BSP).”

⁴⁷ § 25(b)-(d).

⁴⁸ § 25 (c).

⁴⁹ § 25 (e).

National Government in NEIV.⁵⁰ An equivalent amount is proposed to be appropriated as additional National Government equity under the 2021 General Appropriations Act.⁵¹ Enhancements to the programmed infrastructure spending are also provided for under ARISE, with specific focus on Build, Build, Build projects in universal health care, housing, education, agri-fishery, transportation, security, and information communication technology.⁵²

Included as part of the proposed *structural* interventions is the coordination between the BSP and the Securities and Exchange Commission (“SEC”) for purposes of adopting measures, which includes

the relaxation of regulatory and statutory restrictions and requirements for a period of not more than ten (10) years from their respective dates of effectivity, to encourage the banking industry and other financial institutions to extend loans and other forms of financial accommodation to help businesses recover from the economic effects of the COVID-19 crisis and to enable the banking industry to manage appropriate risks and potential losses.⁵³

These are considered structural interventions “designed to accommodate, close gaps in, or improve any sector or industry through an institutionalized program or entity.”⁵⁴

ARISE supports socio-economic policies aimed at “encourag[ing] businesses, communities, and individuals to positively respond to the economic effects of COVID-19.”⁵⁵ In relation to social amelioration affecting trade, the ARISE provides that

- i. All sector regulators with a price and fee regulation mandate shall review existing pricing and payment policies, including tariff rates, and issue temporary suspensions or revisions as needed, including export percentage requirements for purposes of aiding regulated businesses cope with economic losses arising from the COVID-19 pandemic.⁵⁶

⁵⁰ § 25.

⁵¹ § 25.

⁵² § 26.

⁵³ § 27.

⁵⁴ § 5(d).

⁵⁵ § 28.

⁵⁶ § 28(b)(i).

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- iii. All relevant departments and agencies shall make it a policy to give preference to all local suppliers and contractors for all Public-Private Partnership projects, infrastructure projects, and all purchases for relevant provisions and suppliers from their respective MOOE. [maintenance and other operating expenses]⁵⁷

V. THE ROLE OF COMPETITION POLICY IN FRAMING THE COUNTRY'S STRATEGIES FOR RECOVERY AND GROWTH

In brief, among the significant components of the economic and financial recovery mechanisms in ARISE are: (a) wage and other subsidies, (b) financial relief, including loans to MSME+, (c) sectoral assistance, and (d) the creation of the NEIV with the mandate to extend loan accommodations or place equity investments in critically impacted businesses. In other jurisdictions, to prevent the distortion of competition in affected markets and the resulting anti-competitive behavior, competition policy has informed decisions on government interventions. For example, in the matter of subsidies, the European Commission's guidance with regard to state aid ensures that such subsidies flow to companies that need them, without favoring certain firms.⁵⁸ The United Kingdom is partly considering nationalizing its flag carrier British Airways, while in Italy, it has been decreed that a government entity will be established to take control over Alitalia.⁵⁹ For these strategies to succeed, they must be designed from a competition policy perspective. This ensures that rescue or bailout packages do not sustain what are already failing companies or favor dominant enterprises. Bailout measures that are narrowly drawn may later prove to be exclusionary, thereby inducing dominance by incumbent players.⁶⁰ At a recent International Bar Association

⁵⁷ § 28(b)(iii).

⁵⁸ See European Commission, Communication from the Commission: Temporary Framework for State Aid Measures to Support the Economy in the Current Covid-19 Outbreak (Consolidated Version) (2020), available at https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_and_29_june_2020_en.pdf. As explained in the document itself, "[t]his text is meant purely as a documentation tool and has no legal effect."

⁵⁹ See José Varela Rodrigues, *British government studies nationalization of British Airways*, JORNAL ECONOMICO, Mar. 23, 2020, available at <https://jornaleconomico.sapo.pt/en/news/british-government-studies-nationalization-of-british-airways-564228>; Giuseppe Fonte, *UPDATE 1-Italy to inject 3 bln euros in new Alitalia - minister*, REUTERS, May 7, 2020, at <https://www.reuters.com/article/italy-alitalia-minister/update-1-italy-to-inject-3-bln-euros-in-new-alitalia-minister-idUSL8N2CP4B6>

⁶⁰ See *id.*

panel discussion on the proposed European Commission's White Paper on Leveling the Playing Field as Regards Foreign Subsidies,⁶¹ concerns were raised on state subsidies, particularly foreign state aid being utilized by grantees to seek out opportunities in the grantee state's public procurement market.⁶² Dr. Graciela Murciega, Senior Economist at the World Bank Group, offered a useful overview of pro-competitive solutions to support various government responses to the pandemic:

Policy Response	Associated Risks	Pro-Competitive Solutions
(a) Subsidies	Selective and ad hoc aid can distort the level playing field	Time-bound, limited and transparent aid schemes
(b) Bailouts and nationalizations	Unduly sustaining failing (private or public-owned) firms	Temporary measures, particularly for failing firms
(c) Leveraging private sector	Risk of calling upon only incumbent/large firms exclusively	Allow smaller firms to participate in service/good delivery
(d) Expedited public procurement	Risk of foregoing benefits of competitive mechanisms; risk of bid-rigging	Include measures that allow more players to compete
(e) Price controls	Risk of reducing supply, discouraging pro-competitive behavior	Time-bound, monitoring and transparency measures
(f) Coordination among competitors	Enforcement activities may be on hold in practice	Communicate plans to be vigilant to deter behavior, virtual evidence gathering

⁶¹ EUROPEAN COMMISSION, WHITE PAPER ON LEVELLING THE PLAYING FIELD AS REGARDS FOREIGN SUBSIDIES (2020), available at https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf

⁶² See International Bar Association (IBA), *The European Commission's White Paper on Levelling the Playing Field as Regards Foreign Subsidies*, IBA WEBSITE, July 3, 2020, at <https://www.ibanet.org/European-Commission-White-Paper-Webinar.aspx>

(g) Mergers	Pressure to approve all mergers quickly	Expedite M&A/JVs for medical solutions, tailored remedies, review “failing firm” defense case-by-case
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TABLE 1. Overview of policy responses to Covid-19 and pro-competitive solutions to support policy objective⁶³

Indeed, competition policy has been firmly established as an integral part of the country’s development plan and a critical component of achieving more inclusive and sustainable growth and development for the Philippine economy. A unique feature of the PCA is a provision for the articulation of the national competition policy, which was recognized by the inclusion of a competition chapter in the Philippine Development Plan 2017-2022.⁶⁴ The necessity of ensuring a resilient economy post-COVID-19 underscores the pervasive role of competition policy not only in the design of recovery responses, but in ensuring that these are monitored and evaluated from a competition perspective in their implementation.

Despite the far-reaching effects of the proposed interventions under ARISE, these measures suppress regulatory action, including the enforcement of the PCA and competition-related laws. Prominent among these proposed provisions is the regulatory relief for business entities, which states:

The [Bureau of Internal Revenue] BIR, Bureau of Customs (BOC), Department of Transportation (DOTR), [Securities and Exchange Commission] SEC, Philippine Competition Commission (PCC), and other relevant regulatory agencies shall suspend deadlines for all the filings and payments due during the Community Quarantine (CQ) period and extend the due dates accordingly without interests, fines, or penalties.

The BIR, PCC, SEC and other relevant regulatory agencies are likewise directed to desist from imposing fines and other monetary penalties for non-filing, late filing, failure to comply with compulsory

⁶³ Arsenio Balisacan, Economic Recovery Challenges and Competition Policy Enforcement, delivered at the webinar entitled UP School of Economics Alumni Association Zoom Forum (July 3, 2020), *citing* Graciela Murciega, Competition and the Covid-19 Crisis, delivered at the webinar entitled Capacity Improvement on Competition Advocacy for Legislative Staff (“CICALS”) (May 28, 2020).

⁶⁴ National Economic and Development Authority, *Levelling the Playing Field through a National Competition Policy*, in PHILIPPINE DEVELOPMENT PLAN 2017-2022 (2017) 243.

notification and other reportorial requirements relating to business activities and transactions that promote continuity and capacity-building in all sectors of the economy.

For a period of six (6) months from the lifting of Community Quarantine, the PCC, SEC and other relevant regulatory agencies shall review all pending matters before them or those subject on any ongoing review, fact-finding or preliminary inquiry or investigation, in order that business activities and transactions that promote continuity and capacity-building in all sectors of the economy shall be promptly resolved or otherwise allowed to proceed unimpeded.

The PCC, during the same period which may be extended for an additional period of six (6) months thereafter, shall desist from requiring any submission by parties to any proceedings before it, including fact-finding or preliminary inquiries, and from issuing any show cause order, cease and desist order, subpoena, statement of concern or similar statement and other similar issuances; *Provided*, That nothing herein shall prohibit the PCC from using decisions approving any transaction or transactions, confirmation of non-coverage, commitment decisions and similar orders relating to business activities and transactions that it shall have determined to promote continuity and capacity-building as well as orders and decisions relating to the enforcement of Chapter III of the Philippine Competition Act (PCA): *Provided, further*, That all mergers and acquisitions involving enterprises engaged in essential businesses entered into thirty (30) days prior or during the Community Quarantine and for a period of one year thereafter shall be deemed to promote continuity and capacity-building, and are hereby declared exempt from the compulsory notification and related requirements under PCA.⁶⁵

As pointed out by Dr. Murciega, there are two risks embedded in these regulatory relief measures that heavily impact competition: (i) putting on hold enforcement activities and (ii) pressure to approve mergers quickly (or exempt them altogether).⁶⁶ But pro-competitive solutions demonstrate that it is unnecessary to suppress regulatory action while the crisis prevails and much less during the period of recovery. To be sure, preserving and nurturing competition in our markets are founded upon a two-pronged approach under

⁶⁵ H. No. 6815, 18th Cong., 1st Sess., § 12 (2020). It is worth noting that, under the counterpart Senate measure, S. No. 1564, 18th Cong., 1st Sess. (2020), or the Bayanihan to Recover As One Act, there is no similar restriction on the enforcement activities of the PCC, save for a general directive for all agencies to resolve pending and new applications or matters within an inextendible period of five working days (§ 3xx).

⁶⁶ Balisacan, *supra* note 63.

the PCA. The PCA ensures that government policy and actions are pro-competition, adhering to the principle of competitive neutrality. It also looks at business behavior and market structure to create an opportunity for competition to be introduced or enhanced for the benefit of consumers and public interest. The PCA is designed to successfully implement its underlying policies with the adoption of competition enforcement approaches through administrative action and criminal prosecution of anti-competitive conduct, proscription of abuse of market dominance, prevention of anti-competitive mergers or acquisitions under a compulsory review regime, and the execution of timely and relevant advocacy activities.

While other countries were constrained to suspend enforcement, such suspensions have specific durations, and they only cover goods and services related to the health crisis. For example, collaboration agreements for the supply and distribution of essential medicines have been allowed.⁶⁷ More importantly, it is unnecessary to suppress the PCC's enforcement activities since there are adequate safeguards under the PCA and competition-related laws to prevent agency inaction, delay, or abuse—whether it be in the conduct of investigations⁶⁸ or in the exercise of the PCC's authority to review mergers and acquisitions.⁶⁹

With regard to investigations and enforcement activities involving anti-competitive behavior or abuse of dominance, there is a non-extendible 90-day period within which a preliminary inquiry must be concluded, at the end of which the PCC may decide to take no further action.⁷⁰ With the standard of reasonable grounds⁷¹ for the matter to become a full administrative investigation, entities are assured that transactions will not haphazardly or routinely come under further scrutiny. To enjoin even the conduct of preliminary inquiry will distort the legal and institutional framework for the suppression of activities that harm competition and consumers. Under the PCA, criminal prosecution for egregious acts, such as price fixing, bid manipulation, market allocation, and output restriction, may not be commenced except through a complaint brought by the PCC following its conduct of a preliminary inquiry.⁷² To be sure, withholding this authority

⁶⁷ Organisation for Economic Co-operation and Development, *Cooperation between competitors in the time of COVID-19*, OECD TACKLING CORONAVIRUS (COVID-19): CONTRIBUTING TO A GLOBAL EFFORT, May 26, 2020, available at <https://www.oecd.org/competition/Co-operation-between-competitors-in-the-time-of-COVID-19.pdf>

⁶⁸ Rep. Act No. 10667 (2014), §§ 14-15.

⁶⁹ § 16.

⁷⁰ § 31.

⁷¹ See § 31. See also PCC PROC. RULE, Rule II, art. I, § 2.1.

⁷² Rep. Act No. 10667 (2014), § 31.

from the PCC is a significant blow to enforcement, as the PCA expressly states that, except as provided elsewhere in the law, “no law enforcement agency shall conduct any kind of fact-finding, inquiry or investigation into any competition-related matters.”⁷³ Moreover, private litigants are effectively deprived of a statutorily-granted remedy to sue a party for damages arising from the latter’s violation of the PCA, because the prerogative arises only after a preliminary inquiry by the PCC is concluded, regardless of the outcome.⁷⁴ Enjoining the PCC from exercising its investigative and adjudicative functions—even if only for a period of six months, but at a time when there is heightened risk of businesses knowingly or inadvertently engaging in anti-competitive behavior—will induce aberrant and abusive business behavior and, in that condonation, likely make them permanent and irreversible.

With the expected rise in rescue acquisitions, it is not unusual to ask government agencies to offer expedited approval processes. However, putting the PCC’s merger review functions on hold or, worse, extending a statutory grant of approval, increases the risk of making permanent what are, only in the short term, tolerable anti-competitive behavioral or structural shifts. Competition authorities have instead pledged to remain rigorous in their review, while offering to support transacting parties or simplify review procedures so that the review of these transactions is concluded efficiently.⁷⁵ In addition, there are safety mechanisms embedded in the PCA to ensure that the review of mergers and acquisitions is undertaken pragmatically and, as the crisis demands, expeditiously. As noted by PCC Commissioner Johannes R. Bernabe:

⁷³ § 31.

⁷⁴ § 47.

⁷⁵ Jan Conner, *Antitrust review at the FTC: staying the course during uncertain times*, FEDERAL TRADE COMMISSION, Apr. 6, 2020, at <https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain>. The U.S. Federal Trade Commission (“FTC”) issued a statement on antitrust review at the FTC, saying – “The manner in which we conduct our investigations has adapted to the constraints of physical distancing, but make no mistake about it: the substance of our work remains the same. [...] The antitrust laws are flexible enough to account for changing market conditions, even during uncertain times. As we saw during the 2008 financial downturn and countless other difficult periods in our nation’s history, “emergency” exceptions to the antitrust laws are not needed. Now more than ever, FTC staff must continue to analyze carefully the potential effects of proposed transactions and business conduct. [...] We will not suspend our usual rigorous approach to ferreting out anticompetitive harm and seeking appropriate relief, even in the face of uncertainty. It might be tempting, for example, for parties to urge us to relax the rules in a time of crisis. But we know what the likely long-term negative consequences of such a reactionary policy would be: fewer competitors, reduced innovation, and higher prices. Therefore, we must stay the course. We will continue to follow the facts, adjust to changing market conditions, and master the many details that comprise a thorough antitrust review.”

The call for suspending PCC's authority to review mergers and acquisitions is made in the belief that given the difficulties businesses have had to endure during this pandemic, many are unlikely to continue operating unless they consolidate or are acquired by larger companies. This is meant to complement the loans and subsidies that these failing firms are intended to receive as 'bailout' from the government. It should be noted however that the Philippine Competition Act anticipated these kinds of difficulties that firms may encounter and provided for a 'failing firm defense' when troubled firms merge. Section 21 of the PCA states that mergers of acquisitions which would otherwise be prohibited may be exempted from such prohibition by the Commission when a merging or acquired party is 'faced with actual or imminent financial failure' and the transaction 'represents the least anti-competitive arrangement among the known alternative uses for the failing entity's assets.'⁷⁶

Apart from the availability of the failing firm defense, the PCA also grants PCC adequate powers to promulgate rules, clarificatory notes, and guidance. It is worth noting that since the PCC commenced exercising its compulsory merger review function, only one transaction has been blocked, highlighting how assiduous the PCC has been in its review.⁷⁷ In addition, even during the quarantine period, the PCC was able to release decisions approving transactions⁷⁸ and circulars providing for exemptions from compulsory notification of unsolicited public-private projects⁷⁹ and public-private joint ventures.⁸⁰

⁷⁶ Johannes Benjamin Bernabe, *Competition law in the time of Covid and beyond*, BUSINESS MIRROR, June 24, 2020, available at <https://businessmirror.com.ph/2020/06/24/competition-law-in-the-time-of-covid-and-beyond>

⁷⁷ *In re* Proposed Acquisition by Universal Robina Corp. (URC) of Assets of Central Azucarera Don Pedro Inc. (CADPI) & Roxas Holdings Inc. (RHI), PCC Decision No. 03-M-021/2019 (PCC Feb. 12, 2019).

⁷⁸ *In re* the Proposed Acquisition by Synergy Grid & Development Phils., Inc of Shares in OneTaipan Holdings Inc., & Pacifica21 Holdings, Inc., PCC Decision No. 08-M-005/2020 (PCC Mar. 30, 2020); *In re* Proposed Acquisition by Lotte Chilsung Beverage Co. Ltd. of Shares in Pepsi-Cola Products Phil. Inc., PCC Decision No. 09-M-006/2020 (PCC Mar. 26, 2020).

⁷⁹ PCC Mem. Circ. No. 20-002 (2020), Process for Exemption from Compulsory Notification of Unsolicited Public-Private Partnership Projects.

⁸⁰ PCC Mem Circ. No. 20-001 (2020), Process for Exemption from Compulsory Notification of Joint Venture Agreements Entered into Pursuant to "Guidelines and Procedures for Entering into JV Agreements between Government and Private Entities" issued by NEDA.

VI. CONCLUSION

While the persistence of the public health emergency brings dire consequences for the economy unless responsive State interventions are put into effect, it is not a justification for casting aside competition policy and the PCA. A recent Supreme Court decision shows how competition policy complements other legislative policies for the purpose of protecting and promoting not just consumer welfare, but also the public interest. Noting the significant impact on the affordability of an essential drug product as a result of the entry of another manufacturer, the Court determined that the public interest in this regard would be best served by rejecting a belated attempt to revive and prosecute the incumbent player's patent application.⁸¹ Arguments against the relevance of competition policy during times of emergency ignore the value of informing legislative and administrative recovery interventions and strengthening the institutional framework established for effective enforcement of competition laws, whether in times of crisis or recovery. As the country's primary competition authority, the PCC plays a crucial role in monitoring government interventions, offering pro-competitive solutions in the design of recovery strategies, and remaining accessible and responsive to enterprises and consumers alike. Competition policy is an indelible part of the Philippines' development agenda, and the enforcement of competition law is critical in building economic resilience and shaping the country's post-COVID-19 recovery.

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⁸¹ E.I. Dupont de Nemours and Co. v. Dir. Francisco, 794 Phil. 97 (2016).