Comments on the House Bills on Competition Policy

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1. I believe the proposed bills (House Bills (HB) 211, 388, 453, 1133, 1281, 2672, 3366, and 4090) can be consolidated into one bill or serve as sources of significant inputs for the formulation of a substitute bill that aims to legislate a competition policy in the Philippines. Such competition law must have provisions that basically **promote competition** in an industry and **prevent firms or specific individuals from distorting the competitive process**.

2. The components of a competition law that would serve the aforementioned purpose have been outlined well in the proposed bills and are framed in the House of Representatives (HOR)'s request for positions from resource persons. The HOR Committee on Trade and Industry, jointly with the Committee on Economic Affairs, requested that resource persons address the following specific components:

    i. Coverage of the law (i.e. general application or provision of exemptions)
    ii. Implementation (independent body or existing line agency)
    iii. Functions and powers of the competition authority
    iv. Range of penalties
    v. Relationship between competition authority and regulatory agency
    vi. Other issues and concerns (definition of certain terms, e.g. market power, relevant market, control, leniency)

3. In what follows, I give my views on these components except item (iv). I do not have a position on the range of penalties as I my professional experience and exposure to literature related to this concern are lacking. I use as framework the World Bank-OECD publication *A Framework for the Design and Implementation of Competition Law and Policy* by R. Shyam Khemani, et al. (2009), particularly "Annex 3 - A Framework for Competition Law".[1]

[1] R. Shyam Khemani, et al. 1999. *A Framework for the Design and Implementation of Competition Law and Policy*. World Bank and Organisation for Economic Co-operation and Development (OECD) publication. Washington, D.C.: World Bank and OECD.

4. **Coverage of the law**. The application of a competition policy (implemented through a competition law) should be on market transactions and all entities engaged in commercial transactions irrespective of ownership. The proposed bills cover this when they include firms and natural persons who are acting on behalf of the firms. The proposed bills grant exemptions in the case of intellectual property privileges and collective bargaining with respect to conditions of employment. Such exemptions should not be controversial as the economic agents' privileges in these instances are well covered by existing laws and the economic principles behind these do not necessarily conflict with the need for a competition policy applied to industries.

5. As the competition law should be very much focused on preserving effective competition and preventing anti-competitive behavior, provisions specific to consumer affairs may be better addressed by consumer protection laws; besides, increased consumer welfare is a natural end-product of effective competition through lower prices, increased consumer choice, and improved product quality. Thus, the proposal under HB 1281 to expand the powers and functions of the National Consumer Affairs Council, created under Republic Act (RA) 7394 or the Consumer Act of the Philippines, in order for it to implement the competition law may not be a good thing as this may result in a less focused competition authority.

6. **Implementation.** As much as possible, the independence of the competition authority should be aimed for in the design of the competition policy/law. It is necessary to ensure that the competition authority's decisions are not easily overruled or its decision-making power is not easily influenced so as to make the process of enforcing the competition law highly credible. A high degree of autonomy in budget matters and the lack of political interference in appointing members of the decision-making body can help strengthen the independence of the competition authority. Setting up the competition authority as a **commission** with highly qualified and independent commissioners seems to work well in advanced countries.

7. Khemani et al. (1999) highlight the need for independence of the competition authority from other parts of the government (i.e., in the Philippine case, other national government agencies) as the former’s decisions may affect the interests of entrenched businesses which may have a strong influence in one or more government ministries. The framework they outlined suggest that the competition office be under the authority of the president of the state and receive its budget directly from and report directly to the legislature. In the Philippine case, placing the competition authority under the Office of the President could be an administrative setup for budgeting purposes only.

8. **Functions and powers.** The competition authority must have sufficient powers to enforce and implement sanctions against the prohibited acts (i.e., anti-competitive practices). In enumerating what constitutes prohibited acts, most of the proposed bills seem to try to be as comprehensive as possible. The tradeoff between the comprehensiveness of a competition law and the ease of its implementation may be significant in a country which has no strong culture of competition. It may therefore be easier to clearly state the policies in the competition law and emphasize the principles in the definitions of the prohibited acts and leave much of the details to the implementing rules and regulations (IRR), which are easier to amend than the law itself. The definitions of the prohibited acts in HBs 388, 453, 1133, and 3366 appear consistent with economic principles. (Note that these bills have similar provisions with very limited differences). The prohibited acts are:

- *Anti-Competitive Agreements. It is unlawful for firms to engage in horizontal or vertical agreements that prevent, distort or restrict competition.*

    - *Horizontal Agreements – agreement between two or more enterprises operating at the same level in the market*

    - *Vertical Agreements – agreement between enterprises operating at different levels of production or distribution train*

    There shall be a prima facie case for anti-competitive agreements when the Commission finds two or more enterprises in the same relevant market engaging in uniform or complementary actions that results in artificial or unreasonable increase or decrease in prices, thereby lessening competition in the market. This includes price fixing and bid rigging.

- *Abuse in Dominant Position. It is unlawful for firms to abuse their dominant position by engaging in unfair or deceptive methods of competition such as a) predatory behavior, b) any agreement limiting and controlling the markets to the effect of creating a monopoly, c) agreement to divide the market such as by volume sales or purchase by territory, by type of goods, etc., d) any arrangements to share markets or sources of raw materials with the purpose and effect of creating a monopoly, e) discriminatory pricing systems, f) exclusivity agreements, g) tie-in arrangements or supply of particular goods dependent on the purchase or lease of other goods, and h) boycott. Moreover, it is unlawful for persons or firms who are not in the dominant position to commit such acts.*

- *Anti-Competitive Mergers. No firm shall acquire, directly or indirectly, any part or whole of stock of one or more firms engaged in any line of commerce or trade where the effect of an acquisition may be to substantially lessen competition, or tend to create a monopoly.*

9. **Relationship between competition authority and sectoral regulators**. The powers and functions of the competition authority or commission should not conflict with the scope for sectoral regulation by existing regulators like the National Telecommunications Commission, Energy Regulatory Commission, Maritime Industry Authority, and Toll Regulatory Board. Interfaces between competition law and sector-specific regulations can actually be explored and sectoral regulators can give technical assistance to the competition authority on sector-specific matters. Jurisdictional conflicts may be avoided when it is clear that antitrust matters are within the ambit of the competition law and industry pricing, quantity and quality regulation, and firm entry and exit are covered by sectoral regulation.

10. **Other issues and concerns (definition of certain terms).** The market share test in defining what constitutes a monopoly has been used in a few of the bills; particularly, monopoly has been defined as a situation when a firm has a market share of 50% or more. Given that there is no standard definition of monopoly based on market share, using an arbitrary figure is acceptable in other countries (e.g., under the United States Sherman Anti-trust Act, a market share of greater than 75% constitutes monopoly power, and a business with a market share of greater than 25% in the UK is deemed to have monopoly power). However, the competition law must impress that although the market share test is necessary, it is not a sufficient condition in determining anti-competitive behavior that warrants sanctions. An additional condition is that the firm must be engaging in anti-competitive practice or limiting competition in the industry.

11. The bills do not have provisions on and a definition of monopsony. It is necessary to tackle this too as it reflects the situation wherein market power is exercised on the buying side, i.e., by the purchaser (e.g., a single processor of agricultural outputs from many farmers). Predatory buying behavior is also a form of anti-competitive behavior and breaking up the monopsony through anti-trust intervention may be covered by a competition law.

12. Finally, I would like to reiterate the comment of my colleague at PIDS, Dr. Erlinda Medalla, in her March 2014 appearance at the House of Representatives,[2] where she highlighted that the time for the Philippines to pass an effective competition law is now. She also emphasized the renewed effort in this regard under the current administration, starting with the creation of the Office for Competition under the Department of Justice to enforce anti-trust policies albeit using the old and fragmented existing laws. But a new and clear mandate, with clear institutional setup, functions, definitions, and responsibilities, is now needed.

[2] During the first hearing on the House Bills on competition policy and law on 10 March 2014.