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from the Philippines****- Session II -****5 December 2019**

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More documentation related to this discussion can be found at: [oe.cd/cpta](http://oe.cd/cpta).

Please contact Ms. Lynn Robertson [E-mail: [Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)], if you have any questions regarding this document.

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## *Competition Provisions in Trade Agreements*

### **- Contribution from the Philippines\* -**

#### **Background**

1. The Philippines pursues its trade policy interests at various levels: multilaterally, through the World Trade Organization; regionally, through the Association of Southeast Asian Nations (“ASEAN”) and the Asia-Pacific Economic Cooperation (“APEC”); and bilaterally.<sup>1</sup>

2. The Philippines has eight trade agreements which are currently in force and effect, with three more under varying stages of negotiations. Of the eight trade agreements which have entered into force, two are bilateral in nature: the Philippine-Japan Economic Partnership (“PJEPA”), which entered into force in December 2008; and the Philippine-European Free Trade Area Free Trade Agreement (“PH-EFTA FTA”), which entered into force in June 2018. Both of these bilateral agreements contain a specific chapter on competition policy.

3. The other six trade agreements of the Philippines have been concluded by virtue of its membership in the ASEAN. These are: (1) ASEAN-China, whose text on Trade in Goods took effect in 2004; (2) ASEAN-Korea, which entered into force in 2007; (3) ASEAN-Japan, which entered into force in 2008 and has been amended in 2019; (4) ASEAN-India, whose text on Trade in Goods entered into force in 2010; (5) ASEAN-Australia-New Zealand (“AANZFTA”), which likewise entered into force in 2010; and (6) ASEAN-Hong Kong, the country’s latest FTA which took effect in January 2019. Of these ASEAN-negotiated FTAs, only the AANZFTA has a specific chapter devoted to competition. Nonetheless, competition-related provisions can be found in other chapters of the other ASEAN FTAs.

4. Compared to other countries with an advanced level of development in competition law, the FTAs of the Philippines only contain basic provisions on competition.<sup>2</sup> This may be in view of the fact that the Philippines’ comprehensive competition legislation, Republic Act No. 10667, otherwise known as the Philippine Competition Act (“PCA”), was enacted only in August 2015. Meanwhile, the establishment of the competition authority only happened a few months after, when the Philippine Competition Commission (“PCC”) was formally organized in February 2016. As such, there was little awareness of competition policy and its benefits prior to the law’s enactment a little over four years ago, much less the presence of a specialized government agency mandated to monitor fair market competition.

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\* This contribution was prepared by the Philippine Competition Commission.

<sup>1</sup> International Trade Agenda, Department of Trade and Industry, available at <https://www.dti.gov.ph/15-main-content/dummy-article/681-international-trade-agenda> (last accessed 7 October 2019).

<sup>2</sup> For a comprehensive overview of the Competition Chapters of Philippine FTA, please refer to the taxonomy in Annex A.

5. Generally, the FTAs with a specific chapter on competition policy recognize the promotion of competition by addressing anti-competitive activities, either in the text of the competition policy chapter, or in the general statement of the FTA's objectives itself. PJEPA takes this a step further, as its preamble recognizes that encouraging competition can enhance the State parties' ability to respond to such new challenges and opportunities. Two trade agreements under negotiations, the Philippine-Korea FTA ("PH-KR FTA") and the Regional Comprehensive Economic Partnership ("RCEP")<sup>3</sup> likewise contain expansive provisions governing competition policy.

6. While the PCA was enacted way later than the entry into force of most of the Philippine FTAs, it is not likely that these FTAs influenced or had an impact on the establishment of a domestic competition framework. These FTAs do not have provisions mandating the Parties to establish a competition law or competition authority within their respective jurisdictions. Note, however, that this is in contrast to the proposed PH-KR FTA and the RCEP, which both have provisions mandating the Parties to maintain its competition laws and regulations, and to maintain its competition authority to effectively implement such laws and regulations. If at all, the external impetus that influenced the Philippines' enactment of a comprehensive legislation was an undertaking to "endeavor to introduce competition policy in all (ASEAN) Member States by 2015".<sup>4</sup>

## 1. Impact of competition provisions

7. Considering the relative infancy of the PCA, the provisions of trade agreements, thus far, have minimal influence on the implementation and enforcement of competition law in the country. Neither was there any change in domestic policy effected yet in line with the provisions of a trade agreement.

8. For now, the Philippines focuses in the area of technical cooperation and capacity building for the enforcement of its competition policy. Given the novelty of competition law in the country, there has been a lack of awareness on what antitrust is, its essentials, and its benefits. To address this gap in technical knowhow, the Philippines is fortunate to be the beneficiary of a number of capacity building initiatives from various organizations. These benefactors include different development partners and competition authorities from other jurisdictions which have an advanced level of competition law enforcement.

9. For instance, Japan has been very active in helping the Philippines in improving its capacity in competition law enforcement. While this may be due to a general objective to advance the level of understanding among countries with new competition laws, Japan's initiatives in capacitating Philippine antitrust practitioners are aligned with its commitments under the PJEPA. Under Article 13 of the PJEPA's Implementing Agreement,<sup>5</sup> the Parties recognize that it is in their common interest to work together in technical cooperation activities related to competition law enforcement and competition policy. Thus, the same

<sup>3</sup> These two FTAs are in varying stages of negotiations. A third FTA under negotiation is the Philippine-European Union FTA, but discussions have yet to resume.

<sup>4</sup> ASEAN Competition Action Plan 2016-2025.

<sup>5</sup> Similar to most economic partnership agreements concluded by Japan with other States, the PJEPA has a Basic Agreement and an Implementing Agreement. The Implementing Agreement contains more specific guidelines on how to operationalize the general commitments made under the Basic Agreement.

Article provides for technical cooperation activities that could be pursued by the Parties, such as the exchange of personnel for training purposes; participation of personnel as lecturers or consultants at training courses on competition law enforcement and competition policy organized or sponsored by each other's authority; assistance to each other's advocacy and educational campaigns for consumers, business sector and related agencies; and any other form of technical cooperation as the Parties may agree.<sup>6</sup>

10. To this end, the Japanese government has provided the Philippines with a number of opportunities that aim to strengthen the technical capacities of relevant personnel of the PCC. The Japan Fair Trade Commission ("JFTC"), Japan's competition authority, has been constantly sending experts to the Philippines to deliver lectures or learning sessions on key competition law topics. Similarly, the PCC has been constantly invited to various trainings, workshops, and study visits organized by Japanese donor agencies such as the Japan-ASEAN Integration Fund ("JAIF") and the Japan International Cooperation Agency ("JICA").

11. In the same vein, the provisions on technical cooperation and capacity building under the AANZFTA play a key role in the development and mainstreaming of competition policy in the ASEAN region. Under the AANZFTA, the Parties may engage in cooperation activities in the field of competition, including exchange of officials for training purposes; exchange of consultants and experts on competition law and policy; participation of officials as lecturers, consultants, or participants at training courses on competition law and policy; participation of officials in advocacy programs; and any other form of technical cooperation as agreed upon by the Parties.<sup>7</sup>

12. This provision on technical cooperation is operationalized primarily through the AANZFTA Competition Law Implementation Program ("CLIP"). Through the CLIP mechanism, Australia and New Zealand, being the jurisdictions with an advanced level of development in terms of competition law enforcement, deliver various capacity building programs to the competition agencies of ASEAN member-States. Aside from enhancing their capabilities in competition law enforcement, the workshops and trainings conducted under the auspices of CLIP are also good for fostering interagency cooperation, as staff from various competition agencies get to meet their regional counterparts. This can have a practical significance in the future, especially if there is a cross-border merger or enforcement case requiring international cooperation. In effect, aside from the direct effects on capacity improvement, the AANZFTA technical cooperation provision has an indirect benefit in improving and fostering the working relationships among different competition authorities.

13. The generous grant of technical assistance under the AANZFTA may likewise be anchored on a provision recognizing the significant differences in capacity between ASEAN Member States, Australia, and New Zealand in the area of competition policy,<sup>8</sup> while at the same time according respect to the sovereign rights of each Party to develop, set, administer and enforce its own competition laws and policies.<sup>9</sup> With the exception of two FTAs under negotiation, it is worthy to note that only the AANZFTA recognizes this differentiated level development of competition policy and the sovereign right of each country in the enforcement of competition law.

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<sup>6</sup> Article 13, Implementing Agreement of the Philippine-Japan Economic Partnership Agreement

<sup>7</sup> Article 2, Chapter 14, ASEAN-Australia-New Zealand Free Trade Agreement

<sup>8</sup> Article 1(2), Chapter 14, ASEAN-Australia-New Zealand Free Trade Agreement

<sup>9</sup> Article 1(3), Chapter 14, ASEAN-Australia-New Zealand Free Trade Agreement

14. Long-standing free trade principles such as non-discrimination, transparency, and procedural fairness can be found in PJEPA. However, among all the FTAs of the Philippines, only the PH-EFTA FTA contains a proscription against anticompetitive agreements and abuse of dominant position, noting that such practices are incompatible with the proper functioning of the FTA.<sup>10</sup> The PJEPA only contains a general statement mandating the Parties to take measures which they consider appropriate to promote competition by addressing anticompetitive activities, without specifically indicating what these instances of anticompetitive activities are.<sup>11</sup> Notably, no FTA currently in force contains a proscription against anticompetitive mergers and acquisitions. Further, no FTA mandates the establishment of a merger control regime.

15. None of the ASEAN FTAs contain specific provisions mandating the Parties to take action to address anticompetitive activities. While the AANZFTA has a specific chapter on competition policy, a provision therein expressly states that nothing in the FTA requires a Party to develop specific competition related measures to address anticompetitive practices, or prevents a Party from adopting policies in other fields, for example to promote economic development.<sup>12</sup> Nevertheless, all six ASEAN FTAs contain substantially similar provisions regulating monopolies and exclusive service suppliers in the chapter on trade in service. Moreover, all six generally recognize the concept of restrictive business practices, such that certain business practices of service suppliers may restrain competition and thereby restrict trade in service. To this end, the Parties are tasked to enter into consultations with each other, with a view to eliminating such restrictive business practices.

16. As regards disciplines on State-owned enterprises (“SOEs”), only the PH-EFTA FTA contains a provision expressly subjecting SOEs to competition laws. It provides that the rules proscribing anticompetitive agreements and abuse of dominance shall also apply to SOEs or enterprises with special or exclusive rights, in so far as its application does not obstruct the performance of the particular public tasks assigned to them.<sup>13</sup> Notably, this provision is not as comprehensive as the proposed provision governing SOEs in two FTAs currently undergoing negotiations. In any event, it should be stressed that the absence of provisions regulating SOEs in FTAs is of little relevance, considering that Philippine competition law applies to private and public entities alike.<sup>14</sup>

17. No Philippine trade agreement provides for comprehensive rules on subsidies. The PH-EFTA FTA just makes a general reference to the WTO Agreement on Subsidies and Countervailing Measures, specifically for the rights and obligations of the Parties with respect to trade in non-agricultural products.<sup>15</sup> Meanwhile, the ASEAN FTAs provide that the provision on trade in services are not applicable to subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic services,

<sup>10</sup> Article 10.1(1), Philippines-EFTA Free Trade Agreement

<sup>11</sup> Article 135(1), Chapter 10, Philippine-Japan Economic Partnership Agreement

<sup>12</sup> Article 1(4), Chapter 14, ASEAN-Australia-New Zealand Free Trade Agreement

<sup>13</sup> Article 10.1(2), Philippines-EFTA Free Trade Agreement

<sup>14</sup> Sec. 3, Republic Act No. 10667, Philippine Competition Act (2015).

<sup>15</sup> Article 2.12, Philippines-EFTA Free Trade Agreement

service consumers or service suppliers. Other than this, there are no competition-specific exemptions, nor are there provisions abolishing trade defenses.

18. The competition policy provisions in Philippine FTAs all provide for the non-applicability of the dispute settlement chapter. In lieu of a potentially adversarial and lengthy dispute settlement process, there are mechanisms established for consultations, especially if there are matters that affect the significant interests of a Party. For instance, in the PH-EFTA FTA, when a Party requests for consultations, the addressed Party shall promptly reply to the request and enter into consultations in good faith. The Parties are mandated to make every attempt to arrive at a mutually acceptable solution. If consultations are ineffective, such that the practice complained of still subsists, the matter may be referred to the Joint Committee established under the FTA.<sup>16</sup> As of yet, there seems to be no instance when the consultation mechanism under a Philippine trade agreement has been invoked or triggered, at least for matters affecting competition.

19. The Philippines has no formal mechanism to monitor the effects of a trade agreement. If at all, there is, however, an ad hoc mechanism provided for under each FTA. This is especially relevant for PJEPA, the country's first bilateral trade agreement, which has been in force for more than ten years already. Currently, the PJEPA is undergoing General Review,<sup>17</sup> under the auspices of the Joint Committee established under the agreement. The PJEPA General Review covers a wide range of subjects, including the possible expansion of the provisions on competition policy, especially in view of the enactment of the Philippines' comprehensive competition legislation and the establishment of a national competition authority—both of which were absent when the PJEPA entered into force in 2008. Should the culmination of the General Review come into fruition, this could lead to a more comprehensive text on competition policy, including the possible addition of new-generation FTA elements related to competition.

## 2. Role of the competition authority

20. The negotiations of trade agreements of the Philippines are lodged with the Bureau of International Trade Relations ("BITR"), a specialized office under the country's trade ministry. Nonetheless, considering the increasingly specialized nature of different components of FTAs, the BITR often solicits the participation of various government agencies in dealing with international trade matters, including FTA negotiations.

21. Prior to the enactment of the PCA, the negotiations of competition chapters is referred by the BITR to other government agencies such as the Department of Justice and the Tariff Commission. However, with the PCC's establishment in 2016, all international trade- matters related to competition are now handled by the Commission. Philippine competition law, in fact, expressly mandates the PCC to act as the official representative of the Philippine government in international competition matters.<sup>18</sup>

22. Thus far, the PCC plays an active role in the negotiations of FTAs. The PCC first became involved in trade negotiations in the Competition Chapter of the Regional Comprehensive Economic Partnership. Considering that this is a new area for the PCC and

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<sup>16</sup> Article 10.3, Philippines-EFTA Free Trade Agreement

<sup>17</sup> Article 161, Philippine-Japan Economic Partnership Agreement

<sup>18</sup> Section 12(p), Republic Act No. 10667, Philippine Competition Act (2015).

for other Southeast Asian nations, negotiations were mostly done as one ASEAN bloc. This allows the country to have a stronger position on issues which it has a substantial interest in. More recently, and with more experience to boot, the PCC has acted as the lead agency for the negotiations of the Competition Chapter of the proposed Philippines-Korea Free Trade Agreement, and the Competition Chapter of the PJEPA which is currently undergoing General Review.

23. Allowing the competition agency to play a huge role in the development of the country's trade agreements, and international competition policy in general, is ideal and beneficial in the long run. In the case of the PCC, this allows the Philippines to have a coherent approach in addressing competition issues, as domestic policy is aligned with its international commitments. Conversely, this allows the PCC to obtain the perspective of other jurisdictions on the way they approach international competition matters, thus providing an opportunity for the PCC to study and assess their applicability in the domestic setting.

24. In recognition of the multifaceted nature of competition policy, such that a number of economic sectors would be affected by competition rules, the PCC often engages in dialogue with other relevant government agencies, whether through formal or informal mechanisms. The PCC usually does this through the conduct of interagency meetings or technical working groups composed of representatives from various ministries and regulators including those belonging to trade, finance, investments, banking, agriculture, and government-owned and controlled corporations (Philippine SOEs). With these mechanisms in place, the PCC ensures that the inputs of these agencies are well considered in the negotiations of Competition Chapters especially to the extent that the FTA provisions would affect, or in some instances, effectively limit the policy space of these government agencies. This would also guarantee that whatever commitments the Philippines are making in these trade agreements would be duly reflected in the policies and programs implemented by the government. Ultimately, interagency coordination ensures not only the avoidance of possible conflict between domestic policy and international commitments, but also acts as a guarantee that the PCC and other government stakeholders are strategically aligned in pursuing their respective mandates.

Annex

Figure 1. Taxonomy of Competition Provisions in Philippine FTAs

| Taxonomy of Competition Provisions in Philippine FTAs        |           |      |                    |                    |       |       |       |       |      |    |
|--|-----------|------|--------------------|--------------------|-------|-------|-------|-------|------|----|
| ELEMENTS   | Bilateral |      |                    |                    | ASEAN |       |       |       |      |    |
|  | Japan     | EFTA | Korea <sup>i</sup> | RCEP <sup>ii</sup> | China | Korea | Japan | India | A-NZ | HK |
| Preamble   |           |      |                    |                    |       |       |       |       |      |    |
| FTA Objectives   |           |      |                    |                    |       |       |       |       |      |    |
| <b>COMPETITION POLICY</b>                                    |           |      |                    |                    |       |       |       |       |      |    |
| Definitions  |           |      |                    |                    |       |       |       |       |      |    |
| Objectives (Promote Competition)                             |           |      |                    |                    |       |       |       |       |      |    |
| Sovereign Rights in Enforcement                              |           |      |                    |                    |       |       |       |       |      |    |
| Differences in Capacity                                      |           |      |                    |                    |       |       |       |       |      |    |
| Maintain Competition Law                                     |           |      |                    |                    |       |       |       |       |      |    |
| Maintain Competition Authority                               |           |      |                    |                    |       |       |       |       |      |    |
| Independence of Authority                                    |           |      |                    |                    |       |       |       |       |      |    |
| Non-discrimination   |           |      |                    |                    |       |       |       |       |      |    |
| Application and Exemptions                                   |           |      |                    |                    |       |       |       |       |      |    |
| Transparency   |           |      |                    |                    |       |       |       |       |      |    |
| Procedural Fairness  |           |      |                    |                    |       |       |       |       |      |    |
| Timeliness   |           |      |                    |                    |       |       |       |       |      |    |
| Address Anticompetitive Activities                           |           |      |                    |                    |       |       |       |       |      |    |
| Proscribe Anticompetitive Agreements                         |           |      |                    |                    |       |       |       |       |      |    |
| Proscribe Abuse of Dominance                                 |           |      |                    |                    |       |       |       |       |      |    |
| Proscribe Anticompetitive Mergers                            |           |      |                    |                    |       |       |       |       |      |    |
| Cooperation  |           |      |                    |                    |       |       |       |       |      |    |
| Coordination in Enforcement                                  |           |      |                    |                    |       |       |       |       |      |    |
| Exchange of Information                                      |           |      |                    |                    |       |       |       |       |      |    |
| Confidentiality of Information                               |           |      |                    |                    |       |       |       |       |      |    |
| Technical Cooperation / Cap. Bldg.                           |           |      |                    |                    |       |       |       |       |      |    |
| Dispute Settlement   |           |      |                    |                    |       |       |       |       |      |    |
| Consultations  |           |      |                    |                    |       |       |       |       |      |    |
| Consumer Protection  |           |      |                    |                    |       |       |       |       |      |    |
| State Enterprises  |           |      |                    |                    |       |       |       |       |      |    |
| Subsidies  |           | iii  |                    |                    | iv    | v     | vi    | vii   | viii | ix |
| <b>COMPETITION-RELATED PROVISIONS</b>                        |           |      |                    |                    |       |       |       |       |      |    |
| Trade in Services (Monopolies & Exclusive Service Suppliers) |           |      |                    |                    |       |       |       |       |      |    |
| Restrictive Business Practices                               |           |      |                    |                    |       |       |       |       |      |    |
| Telecommunications   |           |      |                    |                    |       |       |       |       |      |    |
| Investment (Technology Transfer)                             |           |      |                    |                    |       |       |       |       |      |    |



*Notes:* <sup>ii</sup> Currently undergoing negotiations

<sup>ii</sup> Currently undergoing negotiations on the ministerial level; negotiation have been concluded on the working group level

<sup>iii</sup> PH-EFTA FTA provision on subsidies is in Chapter 2 (Trade in Non-Agricultural Products) and adopts the WTO Agreement on Subsidies and Countervailing Measures

<sup>iv</sup> ASEAN-China provision on subsidies in in the Chapter on Trade in Services v ASEAN-Korea provision on subsidies in in the Chapter on Trade in Services

<sup>vi</sup> ASEAN-Japan provision on subsidies in in the Chapter on Trade in Services vii ASEAN-India provision on subsidies in in the Chapter on Trade in Services

<sup>viii</sup> AANZFTA provision on subsidies in in the Chapter on Trade in Services

<sup>v</sup> ASEAN-Korea provision on subsidies in in the Chapter on Trade in Services

<sup>vi</sup> ASEAN-Japan provision on subsidies in in the Chapter on Trade in Services

<sup>vii</sup> ASEAN-India provision on subsidies in in the Chapter on Trade in Services

<sup>viii</sup> AANZFTA provision on subsidies in in the Chapter on Trade in Services

<sup>ix</sup> ASEAN-HK provision on subsidies in in the Chapter on Trade in Services "