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**THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES -  
Contribution from the Philippines**

**- Session III -**

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This contribution is submitted by the Philippines under Session III of the Global Forum on Competition to be held on 6-8 December 2021.

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

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## *The Promotion of Competitive Neutrality by Competition Authorities*

### **– Contribution from the Philippines\* –**

#### **1. Background**

1. For most of the past 50 years, the Philippine economy's performance fell far short of its potential. Serious observers attribute this performance to the state policies chosen to govern the market economy. In particular, they indicate that many inefficiencies in the country's market economy—including those arising from business practices that substantially prevent, restrict, or lessen competition—have their roots in long-held policies, regulations, rules, and processes of various government agencies, local government units, and government-owned and controlled corporations. Indeed, various studies have long shown how the state itself has been introducing harmful distortions to the competition landscape through misinformed attempts to achieve a diverse set of social and economic objectives over the past few decades.

2. In its 2018 study on the overall state of competition in the Philippines, the World Bank found that the state control component contributes the most to the country's comparatively high Product Market Regulation (PMR) score, which indicates a high degree of restrictiveness.<sup>1</sup> Specifically, elements of public ownership constitute much of the identified restrictiveness, including the governance and scope of state-owned enterprises. Though crucial reforms have been introduced to this sector in recent years, further efforts are needed to correct market distortions and restrictions for a more competition-friendly economic landscape.

#### **2. State Owned Enterprises in the Philippines and the National Competition Policy**

3. The country has long acknowledged the distortive effects of state ownership of certain businesses and utilities in the market. As a response to the proliferation of State-owned Enterprises (SOEs) in the country in preceding decades, Administrative Order No. 59 was issued in 1988 by the President of the Philippines to stem discouragement of private initiative on account of undue government competition, and to rationalize the government corporate sector. Further reforms in SOEs have been facilitated by the enactment of Republic Act No. 10149, or the GOCC Governance Act of 2011, which established the Governance Commission for Government-Owned or -Controlled Corporation (GCG).<sup>2</sup> The law also recognized the need for a clear separation between the regulatory and proprietary activities of SOEs to achieve a level playing field with the private sector. Operational subsidies remained small relative to the dividends remitted by

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\* Contribution from the Philippine Competition Commission.

<sup>1</sup> pg. 46 of the World Bank Group report, *Fostering Competition in the Philippines: The Challenge of Restrictive Regulations* (Washington, D.C., 2018).

<sup>2</sup> *GOCC Governance Act of 2011* established the GCG as the central policy-making and regulatory body mandated to safeguard the State's ownership rights and ensure that the operations of GOCCs are transparent and responsive to the needs of the public.

Philippine SOEs, nonetheless, by 2019, thirty (30) SOEs were approved for abolition and three (3) for privatization, while thirty-four (34) were declared inactive or non-operational.<sup>3</sup>

4. Republic Act No. 10667, or the Philippine Competition Act (PCA), in defining the scope and coverage of the law, explicitly provides that it applies to any person and entity engaged in any trade, industry, and commerce in the Philippines. The law moreover expressly includes those owned or controlled by the government in its definition of “entity”<sup>4</sup>, thus making SOEs engaged in economic activities subject to competition law and principles.

5. Subsequent to its establishment in 2016, the Philippine Competition Commission (PCC) initiated the National Competition Policy (NCP) Review. Led by an independent Experts Review Team, the study served as a key document for the drafting and inclusion of a dedicated chapter on Competition Policy in the Philippine Development Plan (PDP) 2016-2022. The NCP provides for a holistic framework and a whole-of-government approach to ensure fair market competition and augment its implementation. The PDP reinforces the PCA through strategies that aim to foster an environment that facilitates the entry of players, supports regulatory reforms, and improves trade policies to stimulate investment and innovation and boost competitiveness.

6. The PDP identifies competitive neutrality as a key policy challenge since the Philippine economy has long been troubled by issues with state-enabled policies and barriers. These include: (a) long-standing government-owned monopolies; (b) government-authorized private monopolies; (c) government control of entry and expansion of market players; and (d) government provision of goods and services similar to those provided by private entities.

7. While SOEs engaged in economic activities do not have a large direct output contribution to the Philippine economy, state-enabled policies and barriers create non-trivial wedges in prices and relative profitability that distort market incentives and reduce market efficiency. Hence, while these policies may be justified on certain grounds, SOEs can raise problems from a competition standpoint.

8. In 2020, the PCC, as the primary competition authority of the country, together with the National Economic Development Authority (NEDA), issued Joint Memorandum Circular No. 01-2020 (JMC) which provides for guidelines on the adoption and implementation of the NCP. The three key pillars of the NCP established in the JMC are a) pro-competitive policies and government interventions; b) competitive neutrality; and c) enforcement of competition-related laws and issuances.

9. To initiate and implement competition principles under the NCP, all government agencies are tasked to review policies and interventions to determine, among other issues, if they render undue advantage to some firms within the same sector or industry. Agencies must also ensure that incentives do not distort the playing field, and that access to these incentives is open to all qualified participants in the market or across the industry.

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<sup>3</sup> pg. 11 of the 2019 GCG Annual Report.

<sup>4</sup> Section 4(h) of the Philippine Competition Act.

10. To promote competitive neutrality,<sup>5</sup> both the GCG and the Department of Budget and Management (DBM) are tasked to review the mandate of Government-Owned and -Controlled Corporations (GOCCs)<sup>6</sup> and recommend to the President, subject to GOCC Governance Act of 2011, structural measures to address identified anti-competitive behavior relating to such mandate and the operations of the GOCCs. This includes recommendations on the separation of proprietary and regulatory activities of these corporations.

11. Moreover, GCG and DBM shall assess the impact of existing subsidies and state interventions in favor of GOCCs on the business environment and establish guidelines on the grant of these subsidies. Both agencies are also tasked to implement regulatory and non-regulatory measures necessary to neutralize any advantage or disadvantage that may accrue due to public sector ownership. This ensures that these corporations participate fairly in the markets or industries they are part of.

12. On 19 October 2021, President Duterte signed Administrative Order no. 44<sup>7</sup> whereby all national government agencies and local government units are directed to adopt and implement the NCP according to their respective mandates—further strengthening the policy on competitive neutrality.

13. As of writing, there are a number of bills pending in the Philippine legislature that propose to integrate the NCP in the PCA itself. These bills seek to reinforce the existing law on competition and further underscore competition principles, including competitive neutrality, once adopted. However, as the 18<sup>th</sup> Congress comes to a close and the election season in 2022 draws closer, there is uncertainty whether these legislative measures will become law. Nonetheless, there is much confidence that pro-competition laws would be filed and garner support in the subsequent Congress.

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<sup>5</sup> Section 5.2.2 of the National Competition Policy provides under Competitive Neutrality that “(Government-owned and -controlled corporations) GOCCs shall not enjoy net competitive advantages or be subjected to disadvantages over private sector businesses simply by virtue of the public sector ownership, unless it can be clearly demonstrated that the greater public interest will be served and there is lack of commercial viability”

<sup>6</sup> As defined under the GOCC Governance Act of 2011, Government-Owned or -Controlled Corporation (GOCC) refers to any agency organized as a stock or nonstock corporation, vested with functions relating to public needs whether governmental or proprietary in nature, and owned by the Government of the Republic of the Philippines directly or through its instrumentalities either wholly or, where applicable as in the case of stock corporations, to the extent of at least a majority of its outstanding capital stock. The term "GOCC" shall include Government Instrumentalities with Corporate Powers (GICP)/Government Corporate Entities (GCE) and Government Financial Institutions (GFIs) as defined in the same law.

<sup>7</sup> AO No. 44, directing the implementation and adoption of the National Competition Policy, was enacted to support the objectives of the NCP and foster a culture of competition. It provides for the participation of national government agencies and local government units in the implementation of the NCP, as well as the integration of compliance with NCP as part of the good governance conditions criteria. A complete copy of the directive can be accessed [here](#).

### 3. Role of the PCC

14. The PCC oversees the enforcement and implementation of policies under the PCA through competition enforcement, merger control, and advocacy. Owing to its relative nascency, and competition law and principles in the jurisdiction being only recently codified into one law, PCC pushes for competitive neutrality primarily through advocacy for the implementation of the NCP, a whole-of- government approach in which PCC is at the forefront.

15. Such approach is anchored on the PCC's mandate under the PCA to review economic and administrative regulations, and to advise the government on the competitive implications of its policies and programs.<sup>8</sup> This is complemented by PCC's strong advocacy activities and engagement with other regulators that aim to promote pro-competition policies, particularly competitive neutrality.

16. In this regard, the PCC proactively participates in the legislative process. The PCC regularly lends its expertise on competition policy in legislative deliberations and submits formal pro-competition position papers and recommendations for emerging legislation. These engagements are key for certain industries that were previously vertically integrated such as power and water. The inputs of the PCC positively contribute to the development of these industries post-privatization, particularly in ensuring the harmonization of emerging legislation with generally accepted competition principles, as well as ensuring that rates do not increase and barriers to entry are rationalized, if not removed.

17. During the pandemic, legislation introduced to address the economic impacts of the public health emergency were closely monitored by the PCC. It stood vigilant in the legislative process and upheld the importance of competitive neutrality principles whenever economic exigencies and proposals for the government to participate in the market were made.<sup>9</sup>

18. Likewise, capacity-building, through knowledge-sharing with the legislature and other regulators, creates positive developments where anti-competitive frameworks are less likely to be enacted. These initiatives engender inter-agency collaborations to address emerging competition concerns or facilitate ease of doing business.<sup>10</sup>

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<sup>8</sup> Section 12(r) of the Philippine Competition Act.

<sup>9</sup> As was the case in the GUIDE bills (pending- SB2003, SB2048, & HB7749), which proposes for equity investment from the State for strategically important companies that were heavily affected by the pandemic. While the objective is valid, PCC raised the concept of competitive neutrality and cautioned the legislative body on the possible distortive effects of capital infusion from the state, proposing that any advantages that private enterprises may have under the bill should be time-bound.

<sup>10</sup> Example: JMC No. 1, series of 2021, entitled "Streamlined Guidelines for the Issuance of Permits and Clearances for the Erection of Poles, Construction of Underground Fiber Ducts, and Installation of Aerial and Underground Cables and Facilities to Accelerate the Roll Out of Telecommunications and Internet Infrastructure" signed by PCC with other agencies such as Department of Information and Communications Technology (DICT), Department of the Interior and Local Government (DILG), Department of Human Settlements and Urban Development (DHSUD), Department of Public Works and Highways (DPWH), Civil Aviation Authority of the Philippines (CAAP), National Telecommunications Commission (NTC), National Electrification Commission (NEA), and the Energy Regulatory Commission (ERC).

19. PCC also issues advisory opinions and guidelines on competition matters and provides comments and interventions on existing legislation and regulation. It seeks to propose new or amendatory legislation for the promotion of competition in niche areas of commerce, trade, and industry. PCC's advocacy for pro-competitive policies is also implemented through reviews of economic and administrative regulations and recommendations to offices and agencies with regard to the implications of such government actions and programs.

20. The PCC also conducts proactive review of existing laws or regulations affecting critical or priority industries<sup>11</sup> through a competition impact assessment (CIA). The conduct of CIA covers the review of the regulatory framework in the sector and the competitive environment in the industry. These CIAs generally include an assessment of competitive neutrality whenever possible.

21. PCC also conducts and commissions the preparation of market studies for identified priority sectors. These studies seek to identify industry practices that may be anti-competitive. Further, market studies flag policies and regulations that may restrict competition. Findings are used by the PCC to initiate discussions with relevant sector regulators with a view to ensuring that government policies do not themselves become barriers to entry or stifle competition.

22. PCC also conducts research to identify subsidy and subsidy-like measures which are granted by the government, with a view to assessing their likelihood to distort trade or alter the competitive landscape. This guides the PCC's position in international trade negotiations.

23. On merger control procedures, the PCC issued circulars to provide exemptions to standard Mergers & Acquisitions review processes for joint ventures between the government and private entities,<sup>12</sup> and for exemption in the notification requirement for solicited public-private partnership projects.<sup>13</sup> Although both provide different procedures, PCC is still given the opportunity to screen and flag possible competition issues in both activities and provide for conditions to guard against anti-competitive tendencies.

24. On capacity-building, PCC has conducted numerous trainings and seminars to emphasize the principle of competitive neutrality. In partnership with various development partners, including the OECD, these capacity-building activities have benefitted officials and personnel from GOCCs, regulatory agencies of the national government, as well as private firms.

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<sup>11</sup> The priority sectors for the years 2020-2021 include e-commerce/ICT, energy, real estate/housing, logistics, food/agriculture, insurance, water, and pharmaceuticals. The sectors were chosen on the basis of a) the Product Market Regulation (PMR) indicators of the World Bank; b) relevance to addressing the CoVID-19 pandemic; and c) relevance to the PCC'.

<sup>12</sup> PCC Memorandum Circular 20-001: 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 the National Economic Development Authority.

<sup>13</sup> PCC Memorandum Circular 19-001: Process for Exemption from Compulsory Notification in Solicited Public-Private Partnership (PPP) Projects.

#### 4. Future of Competition Policy

25. Under the Competition Chapter of the PDP, relevant government agencies, such as the GCG, have been made target-beneficiaries for PCC to initiate corrective measures to address competitive neutrality issues.

26. PCC is also part of the technical committee of the Fiscal Incentives Review Board (FIRB).<sup>14</sup> The FIRB is the interagency government body given the authority by the Philippine law to grant tax incentives to registered business enterprises to promote investments in the country. As part of the FIRB technical committee, PCC plays an important role in assessing the possible distortive effects of the grants of incentives and promoting competitive neutrality.

27. The government procurement framework is under the jurisdiction of another regulator, the Government Procurement Policy Board (GPPB). PCC sees GPPB as a partner in the assessment of the policy framework governing public procurement and its alignment with market competition principles.

28. Focusing on a proactive and collaborative approach, the PCC is optimistic that it can maximize all opportunities in the coming years to push for competitive neutrality in government policies and actions.

29. PCC's strong performance and track record for integrity steadily strengthens its voice and credibility in weighing in on economic matters and public policy. It endeavors to continue to champion pro-competition policies, including competitive neutrality, in all levels of government.

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<sup>14</sup> Section 298 of Republic Act No. 11534, or the Corporate Recovery and Tax Incentives for Enterprises Act or "CREATE". Signed into law on 26 March 2021.