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Comments on the Proposed House Bills on Competition Policy and Law

1. **First of all, I think it is time for the Philippines to pass an effective competition law.** Various laws and regulations are found in the Philippine legislation but implementation has been lacking and fragmented, and provisions are outdated. There have been many versions of competition bills filed in past Congresses, but the best result has been a third hearing and a consolidation of the different versions (still separately in the Senate and the House of Representatives). This was mainly due to the political environment at the time characterized by low public trust and the lack of competition culture (the latter largely a result of decades under martial law and a protectionist regime). Under the current administration, there is renewed effort to pass a new competition law. In the interim, it has created the Office for Competition (OFC) under the Department of Justice to enforce anti-trust law using the old and fragmented existing laws. However, in the longer run, a new and clear mandate, with clear functions, definitions, and responsibilities, is needed to implement such a huge task of implementing a working competition policy.

2. Just to briefly revisit the basis, what is competition policy for? The gist is that: The market in the real world is flawed. Firms would naturally seek to gain market advantage. If the firms do so by becoming more efficient than their rivals, then the market works and there are pro-competition effects of efficiency. However, some firms attempt to gain market advantage by using other non-efficiency related, ‘unfair’ methods. It enables them to extract excess profits (‘rents’), and this leads to efficiency losses, higher prices and/or lower quality of products, and reduction in overall welfare. In addition, there are the so-called ‘natural’ monopolies, mainly in the public utilities sectors, arising from economies of scale and huge capital requirements such that only one firm becomes economically viable. In these cases, the market, left to itself, cannot perform its price and allocation function.

As such, the objectives of competition policy (and law) are:

- 1) Promoting (effective) **competition**
 - a) In the many cases, this means ensuring that markets are contestable by removing barriers to entry.
 - b) For other cases, this could require imposing discipline on errant firm behavior (restrictive, anti-competitive business practices).
- 2) And for ‘natural’ monopolies, enforcing competition rules (**regulation**) to produce competitive-like outcomes

This suggests 2 major facets of competition policy:

- 1) **Competition** – protecting the competitive process, and
- 2) **Regulation** – putting in place rules and regulations in the case of ‘natural’ monopolies (usually in public utilities)

The proposed competition bills mainly cover the first facet: protecting the competitive process. They only have provisions for the relationship with sector regulators.

3. In drafting the national competition law, it is important to bear in mind the following considerations:
 - a. Difficult task to implement competition law
 - b. Must not become just another regulatory layer
 - c. Need to build up capability
 - d. Need for information and education campaign– public support and advocacy
 - e. Need to establish credibility
4. There are a number of bills filed on competition law in the House: HB 00211 (S. Ponce Enrile), HB 00388 (R. Rodriguez and M. Rodriguez, Jr.), HB 00453 (M. Teodoro), HB 01133 (S. Belmonte), HB 01281 (R. Umali), HB 02672 (D. Arroyo and G. Arroyo), HB 03366 (T. Haresco)
5. They all have the same rationale and scope. The most different among the bills is HB 00211. It updates, clarifies, defines and consolidates the existing anti-trust legislation. Also less similar is HB 01281. It provides more details and entrusts the anti-trust powers and functions to the existing National Consumer Affairs Council. The others are almost the same in substance, although HB 02672 differs from the rest as it basically provides a stronger and updated legislative mandate for the existing set up of competition law carried out by the Office for Competition under the Department of Justice. The rest creates a new competition policy body under the Office of the President (for budgetary purpose).
6. This leads to a major question that has been at the heart of past debates in crafting a competition law. Should a new competition body such as the Philippine Fair Competition Commission be created? Should it be under the Department of Justice (DOJ), the Department of Trade and Industry (DTI), or the Office of the President (OP)?
7. Because of the economy-wide implications of competition policy, the task to implement competition law is huge and formidable. In addition, the task of an ideal Competition Authority (CA) is not just to implement and enforce the competition ‘law’ as a matter of law, but more importantly to implement competition law as a matter of economic policy. As such, there are huge advantages to having a body that would espouse and champion competition principles. With the task and responsibility of creating a working competition

policy and law, starting from having to build capacity, capability and credibility to make this happen, the added weight of the OP could be a big factor. However, equally important is that the CA should be both independent and accountable.

8. The rest of the proposed bills, HB 00388 (R. Rodriguez and M. Rodriguez, Jr.), HB 00453 (M. Teodoro), HB 01133 (S. Belmonte), HB 03366 (T. Haresco) are almost identical, both in text and substance. They are also almost identical to SBN 1453 filed by Defensor Santiago and SBN 1027 filed by Senator Aquino IV. They all appear to have the required provisions of a well crafted bill:
 - a. The declaration of policy that lays down the basis for the bill.
 - b. The definition of terms.
 - c. Creation of the Competition Commission—composition, term of office, staffing, jurisdiction, powers of the Commission, et al
 - d. What are prohibited acts.
 - e. Fines and penalties
 - f. Enforcement
 - g. Transitory provisions.
 - h. There is also provision about the relation with sector regulators.
9. On the whole, I find the economic rationale for the provisions sound and necessary. They clarify and places enough limits. For example, the provisions on leniency, '*nolo contendere resolution*,' request for binding ruling (advance ruling) are very useful and practical. It is also good to find a section on 'Standards' that provide good economic guidelines in considering cases.
10. In particular, it is of utmost importance that the Act should have a clear declaration of policy, as there are bound to be difficulties in interpretation of the provisions in the law when it is actually implemented. As such, the text could matter. In this regard, SBN 1027 appears to be closer to the economic underpinnings of competition policy. For example, in SBN 1027, declaration of policy (b) states:

'(b) Ensure that industrial concentration does not result in the exercise of economic power by a few persons... '

in contrast with the statement in the proposed House Bills:

'(b) prevent the concentration of economic power in a few persons...'

The text in the former, I think, more explicitly recognizes that it is market contestability that matters, not market concentration *per se*.

11. In sum, these house bills (HB 00388, 00453, 01133, 03366) are well-thought out. Perhaps, there are a few provisions that could be debated on and modified. But on the whole, they could potentially become a real and effective instrument of competition policy. Over time, with capacity building, credibility established, it could also tackle reforming government regulations themselves that seriously (and unduly) impinge on the competitive process.