

Comments to the Competition Rules

These rules, once effective, are significant for two main reasons. First, it governs one of the country's key industries. Second, they provide the model upon which other anti-trust regulations in the Philippines may be based. Thus, there is a strong incentive to ensure that the language of the rules is both clear and concise so that it may serve as a durable and useful framework that addresses the needs of all involved and furthers the public good.

In response to solicitation from the Energy Regulatory Commission, the comments below are submitted from the perspective of legal practitioners in the Philippines and are not aimed to advocate one interest against any other. Emphasis has thus been placed on the procedural and administrative processes set out therein and these comments express our views as such. The overall aim of our review has been to provide a measure of input as to how, if at all, the provisions of the Competition Rules can better achieve the goals of the Department of Energy. We hope we have served the Commission in this respect.

Executive Summary

Given the history of the Philippine electric power market, the perception may develop among regulators and participants in the industry that any agreement among actual or potential competitors will be uniformly viewed with skepticism and, worse, be the subject of expensive litigation. It has been recognized by the US Congress, the Federal Trade Commission and the Department of Justice that many collaborations among industry participants are not only benign but pro-competitive overall.¹ The Competition Guidelines bear this out and clearer reference to the latter in the Competition rules may be beneficial.

While the Rules seem to reflect the US perspective, the comparative absence in the depth of Philippine anti-trust experience seems to us to require emphasis on certain procedural and substantive safeguards. Certain aspects of the Rules may not translate directly into the Philippine legal system. We believe it would be in the interest of the all concerned, and for the public welfare, that the Rules find application with the least resort to the courts over questions of administrative and corporate law. Our main concerns lie in the procedural due process issues and corporate liability issues raised by certain provisions. This is the perspective from which our comments are respectfully submitted and we hope that we have been of assistance to the Commission.

¹ See the National Cooperative Research Act of 1984 ("NCRA") and the National Cooperative Research and Production Act of 1993 ("NCRPA") enacted by the U.S. Congress to protect certain collaborations from full antitrust liability (codified together at 15 U.S.C. § § 4301-06). See also, the *Statements of Antitrust Enforcement Policy in Health Care* ("Health Care Statements") on the approach to certain health care collaborations, among other things, and the *Antitrust Guidelines for the Licensing of Intellectual Property* ("Intellectual Property Guidelines") outlining enforcement policy with respect to intellectual property licensing agreements among competitors, among other things. The 1992 DOJ/FTC *Horizontal Merger Guidelines*, as amended in 1997 ("*Horizontal Merger Guidelines*"), outline the Agencies' approach to horizontal mergers and acquisitions, and certain competitor collaborations.

Comments to Specific Provisions

Provision of the Rules	Comments	Proposed Revision Suggestions are blacklined for ease of reference
4(1)(a) and (b)	Consistent with the Competition Guidelines, it is understood that the mere fact that an agreement decreases one aspect of competition in a market would not make such an agreement unlawful if it has other pro-competitive effects which can be found to offset such an anti-competitive aspect. Such a rule may restrain industry initiative and development if construed too narrowly. While the word “substantially” does much to avoid this danger, it would be better if the sense of public benefit mitigation in the Competition guidelines would be included at the outset.	Change the last phrase to read “the effect of substantially lessening <u>overall</u> competition in a market <u>without providing sufficient public benefit.</u> ”
Rule 5(4)	The Rules should, as far as practicable, provide the analytical framework upon which the Commission may act when a case involving alleged anti-competitive behavior comes before it. In the interest of making this framework as robust as possible, it would be ideal for all the key factors for determining the presence of a misuse of market power.	Addition of a paragraph (c) which reads “ <u>whether, substantial public benefit was realized from the person’s actions, including such benefits as set forth in the Competition Guidelines.</u> ”
Rule 5(7)	Clarification comment.	Replace “where that is permitted by virtue of” with “ <u>that is covered by</u> ”
Rule 6(4)(a) and (b)	In common Philippine legal usage, the words “lien or encumbrance” would appear in place of the word “charge.” Further, this carve-out should cover cases where a person merely exercises one’s rights as a creditor against the security provided.	Addition of the phrase “ <u>including the exercise of legal remedies by a creditor upon default.</u> ”
Rule 7(1)	Clarification comment. We believe it would be best to ensure that this provision is properly invoked for the benefit of a person accused of a violation of the Competition Rules.	Replace “into account” with “ <u>against such a person.</u> ”
Rule 8(2)	We are concerned that there is no time frame set out within which the ERC has to act upon an application for a clearance or an authorization. A prescribed period, after which, the application should be considered complete in all material respects (and not lacking in particulars as referred to in Rule 8(2)) and processing of such an application may proceed.	Include a reasonable period within which an application shall be deemed complete unless specific particulars have been previously required of the applicant.

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Rule 8(3)(b)	: It is common to see qualifications in respect of reimbursement obligations and this is a circumstance where it may be beneficial. Further, administrative due process prevents quasi-judicial bodies such as the ERC from merely adopting the findings of consultants. For the guidance of the officials of the ERC hearing such applications, language from relevant jurisprudence ² may be of assistance.	: Modify the phrase “costs of such external consultant” with the word <u>“reasonable.”</u> Add the sentence, <u>“In every case, the ERC shall act on its own independent consideration of the facts, law and rules applicable.”</u>
Rule 8(5)	: Harmonization comment. This covers situations to which Rule 4(8) may provide an exemption.	: Begin the provision with “Subject to Rule 4(8).”
Rule 8(7)	: Under administrative law, decisions of quasi-judicial bodies such as the ERC must, among others, be supported by substantial evidence. ³ Substantial evidence has acquired a jurisprudential meaning as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” ⁴ Decisions must also set forth the facts and law	: Reword the provision to read <u>“The ERC shall render its decision under subsection (6) in writing, setting forth the various issues involved, its factual findings and the legal reasons for the determination made.”</u>
Rule 8(10)	: Harmonization comment. The situation contemplated by Rule 4(8) includes a situation where the agreement has been made but the relevant portions thereof have not yet been made effective.	: Add <u>“or render it effective”</u> after the phrase “applicant may make the agreement or arrangement.”.
Rule 8(16)	: See comments under Rule 8(2).	: Include a reasonable period within which an application shall be deemed complete unless specific particulars have been previously required of the applicant.
Rule 8(20)	: Harmonization comment. The situation contemplated by this Rule is qualified by the exemptive provisions of Rule 4(8).	: Insert the words <u>“Rule 4(8) and”</u> , in between “Subject to” and “subsection (21)”.
Rule (8)22	: Administrative due process requires the notice and hearing, although such hearings are not restricted by the technical rules and procedures of judicial proceedings.	: Replace “may” with <u>“shall”</u> and “in which case that hearing must” with <u>“to”</u> .

² *Ang Tibay vs. CIR*, 69 Phil. 635.

³ *Ang Tibay*, Supra.

⁴ *Ang Tibay*, Supra, citing *Appalachian Electric Power vs. National Labor Relations Board*, 4 Cir., 93 F. 2d 985.

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Rule 24	: In the interest of expediency, perhaps there should be a time frame within which the ERC may be expected to issue its determination after the last hearing has been held and the case has been closed.	
Rule 8(28)	: A full description of the public benefit test to be applied by the ERC appears in sections 4.6.20 et. seq. of the Competition Guidelines and it may benefit all concerned to explicitly cross refer the reader of this Rule to the former text. The two items set out here appear to limit the robust treatment given to this topic in the Competition Guidelines.	: Incorporate or refer to the public benefit test in the Competition Guidelines as part of the ERC's determination what amounts to a public benefit.
Rule 8(34)	: This provision may cover a situation contemplated by Rule 8(21).	: Add " <u>Subject to subsection (21)</u> " to the beginning of this provision.
Rule 8(34)	: There seems to be a degree of uncertainty in respect of whether clearances and authorizations need to be renewed. To clarify that such processes are one-time events, subject to review upon a change of situation or discovery, of course.	: Add a new subsection which states: " <u>Once granted, the clearance or authorization (as the case may be) shall have the effect set forth in rule 8(10) and 8(30), and, subject to rule 8(35), such clearance or authorization need not be renewed from time to time by the applicant(s), its successor(s) or any person affected thereby.</u> "
Rule 8(35)	: As a penal provision, the section should be not be totally unqualified, as circumstances change with time.	: Insert the qualification, " <u>when given</u> ", between the phrases "information that was" and "false or misleading."
Rule 8(36)	: Such a proceeding, which may result in the revocation of a clearance or authorization, is likewise subject to the administrative due process requirements.	: Insert the phrase, " <u>conduct a public hearing after due notice following the process set forth in subsection (22) before it shall</u> " between the words "the ERC must" and "make a determination."
Rule 9	: Insofar as these mirror the provisions of Rule 8 on clearances and authorizations for anti-competitive agreements, arrangements and understandings, please consider our comments reiterated.	

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Rule 10 (1) :	As these are penal provisions, determinations must follow due notice and hearing.	: Insert the phrase, “ <u>after due notice and hearing</u> ” between the words “ERC” and “determines.”
Rule 10 :	The ERC’s power to cite a person in violation of the Competition Rules carry serious penalties, such as a 50 Million Peso fine; thus, for the guidance of all concerned, this power should be guided by certain parameters. Ideally, the ERC should have a scale of penalties which graduate the gravity of the offense and the severity of the sanction.	: A new subsection (8) providing that, “In all cases, the fines and penalties set out in this rule shall be imposed by the ERC with due regard to the specific circumstances of every case and in accordance with such scales and schedules as the ERC may prescribe, from time to time.”
Rule 11(1) :	Under Philippine corporation law, corporate powers are exercised through its board of directors and officers authorized by the board ⁵ . While there are instances where corporations are held bound by actions of officers that are held out by the corporation as possessing authority ⁶ , such apparent authority was the product of a pattern of general practice custom and policy. However, this rule, as written, allows the attachment of potential liability to a corporation, in effect all its stockholders, upon the finding that a single person’s “intent” was to violate the Competition Rules. Under the articles of incorporation of every Philippine company, no corporation or its representatives is authorized to undertake unlawful behavior. Unless it can be shown that the corporation was established for uncompetitive practices, we express our reservations at the soundness of such a serious departure from current corporate law norms. What makes this provision all the more dangerous is that corporate officers will almost always have apparent authority to negotiate contracts for the corporation and such negotiations should not lead to liability by the corporation absent valid corporate action.	: Should this provision be retained, we suggest that the term apparent authority be narrowly defined to cover only corporate conduct, omission or ratification and inaction which clearly was directed at a violation of the Competition Rules. In addition, it is recommended that the quantum of evidence for attributing such intent to the corporation should be set as high as possible.
Rule 11(2) :	We believe that corporations need to be protected from the possibility that a rogue or ill-motivated employee may bring serious penalties upon the corporation by his or her actions.	: See above.

⁵ Section 35, The Corporation Code of the Philippines, Batas Pambansa Bldg. 68.

⁶ *Yu Chuck vs. Kong Li Po* 46 Phil. 608.

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Rule 13 (1) and (2)	: These provisions are relevant to mergers and acquisitions which are usually confidential and competitively sensitive issues.	: Add <u>“rule 9(13) and”</u> between “Subject to” and “subsections (3) and (4).”
Rule 13 (5)(a)(i)	: There appears to be a reference to authorizations missing in this provision.	: Add <u>“or authorization”</u> between “clearance” and “that is made”
Rule 13 (5)(a)(ii)	: There are references which are applicable to this provision that appear to be missing.	: Add <u>“(a) or 9(18)(a)”</u> to the end of the provision.
Rule 13 (5)(b)(l)	: There a reference which is applicable to this provision that appear to be missing.	: Add <u>“9(21)”</u> at after the reference to <u>“rule 9(6)(a)”</u> .
Rule 16 (1)	: This provision, while laudable in its objective, may be unduly burdensome to comply with and may, as written, result in compliance which would not be helpful to the ERC.	: Insert, <u>“stating the purpose for which such information is requested”</u> and adding the sentences: <u>“Provided that the ERC shall give such person reasonably sufficient time within which to provide such information. Information requested by the ERC pursuant to this rule shall be clearly germane to the stated purpose for which it is sought.”</u>
Rule 18 (4)	: It appears that the Competition Rules and the Competition Guidelines are very useful pieces of regulation that would fulfil their stated purposes if more closely linked.	: At the end of this provision, insert <u>“including, but not limited to the Competition Guidelines.”</u>