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Agenda Item 3b. Challenges faced by young and small competition agencies in the design of merger control

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Roundtable on Challenges in the Design of a Merger Control Regime for
Young and Small Competition Authorities

The Philippines
**Competition Landscape, Challenges and
Lessons in Merger Control**

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Summary of the Presentation

- Brief Background
 - Economic Context and the Road to the Philippine Competition Act
 - Merger Notification
- Challenges Encountered
- Reflections



The ASEAN Economic Integration

- Philippines needs to scale up quickly
- Compete or perish



The Philippine Context:

The Philippine economy is on a higher growth trajectory since the beginning of the current decade

- No longer the “sick man” of Asia
- Resurgence beginning 2010
2010-2016 average growth: 6.3%, highest 7-year average since the mid 1970s



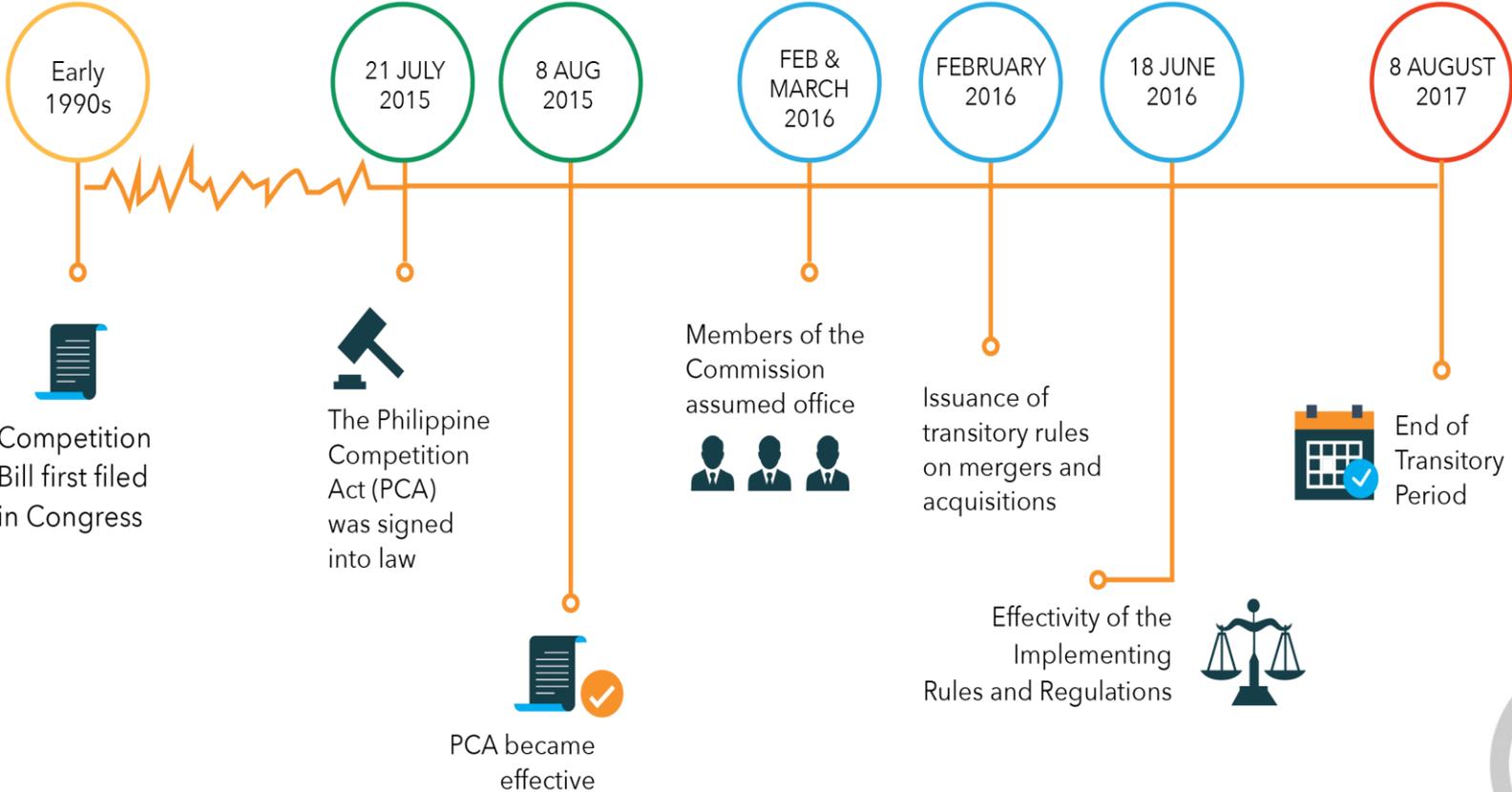
But big challenges remain:

- Slow poverty reduction
- Persistently high inequality in the distribution of wealth, income, and opportunities

...thus, the need to deepen reforms to *sustain* growth and make it *more inclusive*.



The Road to the Philippine Competition Act & its IRR



Brief Background - Notification Regime

- PCA: 1 Billion Pesos (19M USD) threshold
- IRR: Size of party + size of transaction
- Review Period
 - Sufficiency (IRR) – 15 calendar days
 - Phase 1 – 30 calendar days
 - Phase 2 – 60 calendar days



Challenges Encountered

A. Legal Environment

B. Competition Environment

1. Stakeholders' Perception

2. Underdeveloped cooperation and coordination with other sector regulators, government agencies, and market players

C. Capacity Constraints

1. Internal

2. External



A. Legal Environment

- First challenge after enactment of law: how to implement it in a legal environment that had scant foundations on competition law.
- No existing national rules or jurisprudence to draw from in the immediate implementation of the law
- PCC had to formulate implementing rules within a short period of time.
- Challenges in adopting best practices from mature jurisdictions that are suitable to and consistent with the Philippine legal system.
- The newness of competition law → fertile source of debate on the manner of implementing the various provisions of the law
- PCC exercises transparency by posting clarificatory notes and guidelines and conducting public consultations



A. Legal Environment

- Parties hesitate to provide information required in the form
- Parties were encouraged to attend a pre-notification consultation with the Mergers and Acquisitions Office
- MAO issued materials to aid the parties in supplying information in the forms
- Public advocacy



A. Legal Environment

- PCC's exercise of its regulatory mandate was challenged before the courts less than four months from the start of its operations in 2016
- Judiciary is unfamiliar with competition law and the implications of PCC's mandate --> the court ended up issuing an injunction order against the PCC
- A gag order was likewise issued against the PCC, preventing the Commission from speaking about the case publicly.
- PCC has asked the Supreme Court to review the ruling of the court issuing the injunction.



B. Competition Environment

1. Stakeholders' Perception:

- Concern that merger review is another dilatory bureaucratic step
- Issues of confidentiality
- Misconception that One Billion Peso (19.8 M USD) Notification Threshold is too low
- Solutions:
 - PCC staff focused on improving its interfaces with the parties, the market players and the legal professionals
 - PCC conducted a review of businesses in the Philippines. Finding: Notification Threshold is reasonable and comparable to jurisdictions and economies similar to that of the Philippines.



Notification threshold is reasonable relative to GDP

Country	Size-of-Transaction ¹ (in million PHP or USD ³)	Size-of-Party ² (in million PHP or USD)	GDP (2015; in USD)
Philippines	1,000 (19.8)	1,000 (19.8) for either	292,451,392,607
South Africa	297 (5.9)	2,072 (41.0) combined	314,570,000,000
Colombia	1,795 (35.5)	-	292,000,000,000
Canada	3,300 (65.3)	15,116 (299.3) combined	1,550,536,520,142
United States	4,000 (79.2)	8,000 (158.4)	18,036,648,000,000
Indonesia	-	18,600 (368.3) combined	861,930,000,000

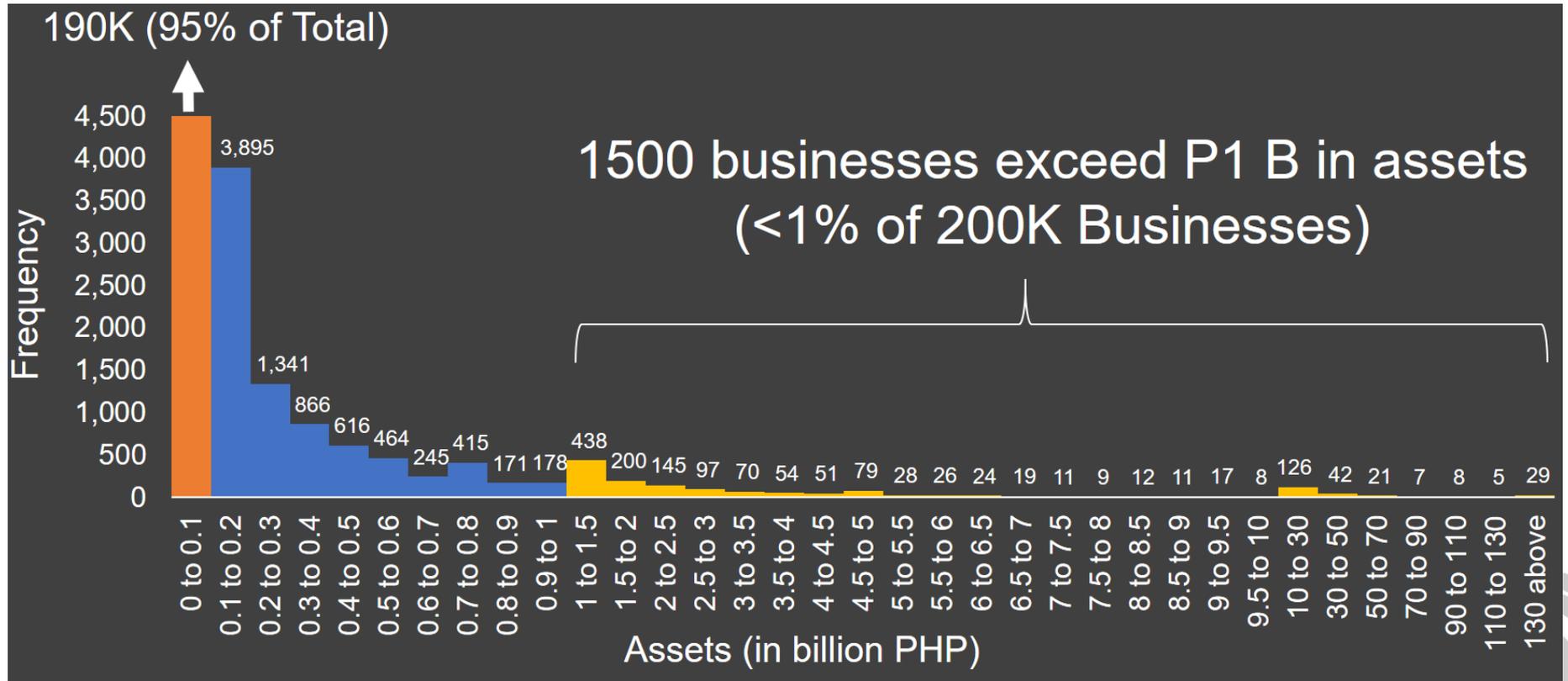
Note 1: Measured through assets/revenues of acquired party.

Note 2: Measured through assets/revenues of involved parties.

Note 3: Exchange rate used is Php50.50/USD1.00 as of July 3, 2017



Compulsory notification threshold may only subject less than 1% of all businesses in the Philippines



B. Competition Environment

2. Underdeveloped relationships with other government agencies

- Some government agencies are hesitant to provide data/information requested by the PCC for review, due to lack of understanding of the PCC's mandate.
- Other government agencies issue rules and regulations that do not consider the potential effects of such regulations on market competition.
- Solutions:
 - Memoranda of Agreement with other regulators on information sharing, cooperation, and coordination obligations
 - Mainstream competition policy in the national government's development agenda through the inclusion of a chapter on competition in the Philippine Development Plan (PDP) for 2017-2022.



C. Capacity Constraints

- Internal
 - Implementing antitrust polices in the Philippines is constrained by lack of technical and administrative capacities.
 - No one in the PCC had a prior firsthand experience in working for a competition authority.
 - PCC's lawyers have had to surmount a steep learning curve to be able to enforce merger control with credibility.
 - Solution:
 - Assistance provided by PCC's development partners in capacity building was a huge help to the PCC Mergers and Acquisitions Office (MAO), and the Economics Office (EO). The PCC faces zero backlog of merger cases to review.



C. Capacity Constraints

- External
 - Philippines has yet to produce competition experts for two reasons:
 - the lack of a culture of competition in the country.
 - Unlike tax and labor laws, competition law has yet to be prioritized as a subject in Philippine law school curriculums.
 - Solution:
 - PCC has initiated discussions with several local and international universities for the development of a program in Law and Economics in the Philippines.



Reflections

Challenges relate to the infancy of the Philippines' competition law regime

- Legal Environment
 - New competition agency with no previous competition regime will face challenges in the details of implementation.
 - A new agency must be steadfast in pursuing its objectives so as not to be dissuaded by such pressures.
 - Adoption of implementing rules: agency must discern the nuances of competition regimes and tailor-fit them to the unique needs of its jurisdiction.
 - Agency must establish a rational, consistent, credible and dependable system.
 - Need to have clear policies on the merger review procedures, rules on confidentiality, data protection and security.



Reflections

- Competition Environment

- In a business environment where competition is almost non-existent, advocacy efforts play a significant role.
- Buy-in of stakeholders is necessary to gain their cooperation in the merger review process.
- Useful to conduct both case-specific and general consultations on ways to improve the merger review process.



Reflections

- Capacity Constraints

- Need to continue its focus on building the capacity of its staff to ensure highest standards in merger reviews
- Capacity building is essential in ensuring that the agency officials and staff maintain a high sense of integrity and professionalism.



An aerial, high-angle view of a dense urban skyline, likely New York City, featuring numerous skyscrapers and high-rise buildings. The image is rendered in a light, monochromatic grey tone. The text "Thank you" is overlaid in the center in a dark blue, bold, sans-serif font.

Thank you