

EXECUTIVE SUMMARY

Samahan Laban Sa Monopolyo (SLaM)

Position Paper Against Monopolies and Monopolistic Business Practices

A phenomenon is unfolding in various sectors of the Philippine economy today that many people notice but tend to ignore or dismiss as nothing but an inescapable fact of economic life.

Such a phenomenon can be observed in, for example, the retail, the airline, shipping and telecommunications industries. In retail, there is this practice of certain malls of repacking, rebranding and re-pricing products consigned to them by suppliers. In the airline industry, sister companies are pooling financial, material and operational resources to better compete with new entrants that bring in discount fare packages most attractive to majority of air travelers. Such has been the cases of Philippine Airlines and Cebu Pacific competition between which continue to be at its most intense. In shipping, companies are also practicing pool resourcing that has allowed one company in particular to dominate the profitable Visayas-Mindanao interisland routes. In the telecommunications industry (as in the airline and shipping industries), deregulation and liberalization have caused the rise of new companies that have brought telecommunications products and services within affordable reach of ordinary consumers.

The above-described are business practices that companies, especially the big players in an industry, engage in to corner a large share of the market. The basic objective of such practices is for companies to edge out their competitors, using whatever advantages they have in terms of resources and technology, access to markets and supplies.

Such practices are the hallmarks of monopolies, which arise when a business, usually a large corporation, is the only provider of a good or service. Monopolies are usually bad for an economy because they restrict free trade, which allows the market itself to set prices. Since monopolies are the only provider, they can set pretty much any price they choose, regardless of demand, because they know the consumer has no choice. They can also supply inferior products. They are also bad for an economy because the manufacturer has no incentive to innovate, and provide "new and improved" products.

Illegal in the US since 1890, monopolies and monopolistic business practices are also illegal in the Philippines. The 1987 Constitution has declared this so in Sec. 19, Art. XII which states that "The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed." Notably, while

combinations in restraint of trade and unfair competition are explicitly proscribed, there is no presumption of illegality when it comes to monopolies. Government regulation or prohibition only comes into play when the public interest requires. The organic law does not explain what constitutes an illegal monopoly nor define what combinations in restraint of trade or unfair competition are.

The martial law era saw the rise of monopolies particularly in the power and water utilities sector but these were broken up with the advent of democratization in the late 80s. Deregulation and liberalization in the 1990s gave way to the entry of independent power producers as alternative generators and distributors of electric supply to long-standing power supply monopoly Manila Electric Company (Meralco). The privatization of the Metropolitan Waterworks and Sewerage System (MWSS) took the operation of the water utility away from government and into what was then considered to be the abler hands of private companies, i.e., the Lopez-owned Maynilad and the Ayala-owned Manila Water Co.

In other sectors such as the airline, shipping and telecommunication industries, deregulation and liberalization has led to the dismantling of monopolies such as PAL in the airline industry and PLDT in the telecommunications industry. The beneficial effects of deregulation and liberalization, particularly for consumers, has come mainly in the form of lower plane fares in the airline industry and diversified services in the shipping industry. In the telecommunications industry, the entry of new players has been such that within a decade since the government started the liberalization process, the Philippines was already being tagged worldwide as a cellphone and texting capital with mass access to the technology reaching unprecedented levels.

Demonopolization indeed has brought benefits for consumers in many industries. But it is on the retreat, its gains threatened by processes and practices of business expansion and market consolidation that can only be described as monopolistic in nature. The irony is that this process of re-monopolization is being triggered by the very government policies that started it in the first place: deregulation and liberalization.

True, liberalization has improved the quality of and access to products and services by consumers and prevented the establishment of monopolies in such sectors as the airline and shipping industries. But this has happened only largely through the operation of market forces. Deregulation has not only robbed the country of the chance to steer its private sector towards the development direction that it needs. It has also allowed the biggest companies in the biggest industries to engage in and get away with monopolistic business practices.

Dominant telecommunications industry player PLDT's P74.1 billion merger deal with third industry player of Gokongwei-owned operator Digitel is the clearest example of a monopoly in the making in the country.

As PLDT's number 1 rival, second industry players Globe Telcom has put it, the PLDT-Digitel merger deal is "a throwback to the dark ages when one dominant player was free to dictate pricing without having to deliver better services to consumers. Globe has asked the government to intervene and stop the merger.

PLDT has denied this, accusing Globe as merely "sour-graping", having lost its earlier bid to buy Digitel. Be that as it may, the following facts remain:

1. The PLDT-Digitel deal, which will affect 9 out of 10 Filipinos (given a total of 82 million subscribers against a population of 92 million), will, as Globe and other telcos claim, allow the PLDT group to corner 70% of the market. The combination of Smart's 45 million subscribers and Sun's 15 million subscribers will definitely serve as a clear advantage against Globe, which currently has a subscriber base of only 25 million. Such control of the market by itself already indicates the existence of a monopoly based on internationally recognized anti-monopoly rules that considers a company to be a monopoly when it controls more than 50% of the market even if does not yet engage in overtly monopolistic practices. More specifically, according to such rules, "to be punishable, a dominant carrier or monopoly need not necessarily engage in acts 'in restraint of trade or free competition', nor is proof thereof required by law. It is enough that the monopoly or dominant carrier violates the structural limitation that one carrier or group must never control 50% or more of the total market in any service sector, otherwise it shall be branded as a monopoly or dominant carrier sanctionable and subject to stricter regulation for the protection of market rivals."

2. The deal will also allow the PLDT group to further control the market with its acquisition of more radio frequencies for the operation of mobile services. PLDT itself has admitted it has 77% more frequencies than Globe but that it has 126% more subscribers. Globe has claimed that the ratio of the spectrum holdings of Globe and PLDT on the 3G 2100 Mhz spectrum stands at 1:3.5 in favor the latter. With more frequencies in its possession, PLDT is placed in a position to further diversify its product and service offerings to the public and with this, to further attract more customers to its side. For Globe, PLDT's control of more than thrice as many 3G frequencies will prevent it (Globe) from improving its services due to limited resources. Globe has called on the NTC to reallocate the frequencies "more equitably" among all industry players so that all will have the tools to better compete with one another. PLDT has refused to surrender its excess frequencies, saying they are already in use.

The Samahan Laban sa Monopolyo (SLAM), a group of Filipino citizens dedicated to an anti-monopoly advocacy aims to convene and inform people of the evils of monopolies. Consequently, SLaM is opposed to the PLDT-Digitel merger deal. But this is not because SLaM supports one company over another but because the merger deal is a well-timed, easily

understandable example of monopolistic business practices. With the telecommunications industry directly affecting 9 out of 10 Filipinos today which in reality affects every facet of life for practically all Filipinos, below presents a host of consumer complaints experienced at present:

- “Stolen” loads
- Single text messages that become 2 or 3 messages when received
- False advertising, such as post-paid promos and loyalty programs that fail to deliver on their promises (where, for instance, lower-end hand-phones are issued to loyal subscribers instead of the high-end ones promised on grounds that these have already gone out of stock). Many promos that promise free products or services are not actually free.
- Payment of SMS or text messages. There was a time early on in the advent of cellular and mobile telephony services in the country, when texting was free. This, until the telcos realized consumers were using the SMS feature of cellphones, which was free, more than the call feature, which is paid for. An opportunity to earn mega-profits arose that the telcos exploited by levying a P1 charge for each SMS. This was later reduced to P0.50, which remains a non-consolation because telcos do not really spend on the installation of the SMS feature in their infrastructure, and therefore do not have a cost to recover from the same. Further proof the negligible cost of text messages for telcos are the unlimited texting promos for a fixed amount per day.
- 2 to 3 years locked-in contracts that cannot be discontinued in spite of poor, even non-service
- “Prepaid” load system for calls and/or texts that actually costs more than a regular monthly telephone landline.
- Weak, intermittent, often lost broadband internet access as promised for a fixed monthly fee. One company offers 120 hours free upon purchase of a wireless services but these free hours must be used within 5 days or 120 hours straight. A consumer has to pay again for a reload on the 6th day.
- Time limits in the use of loads, which should not be the case. The service is paid for and should not be time-bound.

But we are particularly irked by PLDT’s actuations in the merger deal, which we see as a manifestation of the arrogance of the dominant market power particularly in its apparent cavalier attitude that it can go ahead with the deal without government having any say on it. As one respected commentator has put it: PLDT has been “pushing the monopolistic merger, brushing aside norms of fair competition, and apparently believing that the Philippine state is non-existent.”

According to PLDT, the deal does not require intervention by the NTC, the government’s regulatory agency.” The problem with PLDT’s position is that it seems to be forgetful of the fact that its business involves a public utility and therefore government must have a say in all dealings relating to such public utility particularly when consumer interests are at stake.

This is the same dismissive posturing that one can detect in PLDT’s insistence that it needs to get more radio frequencies because it needs to be able service more consumers. With this, PLDT seems to be saying that it alone can deliver the public service despite the fact that there are other companies that are also capable of doing the same, given the chance in a level-playing field. PLDT seems to be also saying that it alone, being the market leader, has the right to possess more radio frequencies and that it can enjoy such a right for as long as it remains the market leader.

This goes against the spirit of the law (RA 7925), which stipulates that “the radio frequency spectrum is a scarce public resource that shall be administered in the public interest.” Its allocation and assignment “shall be subject to periodic review” and “where demand for specific frequencies exceed availability, the (government) shall hold open tenders for the same and ensure wider access to this limited resource.”

What the law is saying, for us, is clear: no entity can enjoy access to more radio frequencies simply by reason of market dominance. PLDT’s insistence that it has the right to own more radio frequencies because it has more customers to service smacks of the same arrogance that it has shown in refusal to abide by a Supreme Court ruling promulgated on October 18, 1990, ordering PLDT to allow Express Telecom , Inc. to interconnect with the facilities of the former on the ground that “interconnection (will) promote the rapid expansion of telecommunications facilities in all areas of the Philippines ... maximize the use of telecommunications facilities available ... in nation-building ... and insure that all users of public telecommunications servie have access to all other users of the service wherever they may be in the Philippines at an acceptable standard of service and at reasonable cost.”

Beyond the PLDT-Digitel merger deal, there are larger issues that confront Filipino consumers. Foremost among these issues are:

- Government’s, in this case, the National Telecommunications Commission’s (NTC) failure to enforce the law, in particular, RA 7925, which had been passed precisely to break PLDT’s monopoly hold on the industry. We have observed this in NTC’s actuations with regard to the PLDT-Digitel merger issue. Such actuations indicate for us that NTC already considers the PLDT-Digitel merger transaction as a done deal and that all that needed to be done was but procedural and ministerial on its part.

Such actuations and attitude on the part of a regulatory agency smacks of an institutional wimp that shakes in fear of the juggernaut moves of a dominant market player, that would do anything, even nothing, to let such market player get away with its schemes.

- Government's failure to check the monopolistic practices of the First Pacific group, majority owner of PLDT. The telco giant is chaired by Manuel V. Pangilinan who also chairs First Pacific, which has controlling stakes not only in PLDT but also in Maynilad Water Services, Inc., Metro Pacific Tollways Corp., Medical Doctors, Inc., and Metro Rail Transit, all of which represent strategic utilities. We share the concern of other sectors about the extent of power that First Pacific and Mr. Pangilinan now wields over major sectors of the Philippine economy. Indeed, Mr. Pangilinan and his First Pacific group have become the most powerful economic entities in the country. Unless they are checked, Mr. Pangilinan and his First Pacific group will become politically powerful enough to dictate not only the shots in the telecommunications industry but in all other strategic sectors as well.

In view of all the above-mentioned issues and developments, we urge President Aquino to expand his order to probe monopolistic business practices to include not only the PLDT-Digital deal but also other transactions of a similar nature that the First Pacific group has forged or is planning to enter into in other sectors of the economy.

We also urge the President to expand this probe to also include other companies such those in the retail sector that are engaged in monopolistic and exclusionary business practices that harm not only consumers but also small businesses. We further urge the President to make these companies, PLDT foremost among them, the first targets of Executive Order (EO) No. 45 for the Department of Justice to "investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade and to enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices."

Further, we urge the President and the Philippine Congress to heed calls and proposals for the passage of anti-trust legislations that would particularly regulate mergers and acquisitions such as the PLDT-Digital merger deal. In deliberating on the need for new anti-trust, anti-monopoly laws, we agree and echo calls specifically for support to the following proposals:

1. Senate Bill No. 123, filed by Sen. Juan Ponce Enrile during the 14th Congress, entitled An Act Prohibiting Monopolies, Attempt to Monopolize an Industry or Line of Commerce, Manipulation of Prices of Commodities, Asset Acquisition and Interlocking Memberships in the Board of Directors of Competing Corporate Bodies and Price Discrimination Among Customers, Providing Penalties Therefor and for Other Purposes." This proposed bill penalizes combinations

or conspiracies in restraint of trade and all forms of artificial machinations that will injure, destroy or prevent free market competition. It prohibits stock or asset acquisitions, grant of proxies or voting rights, and board membership in two or more corporations that have the effect of substantially lessening competition or tending to create a monopoly.

2. Senate Bill No. 1835, entitled An Act Amending Republic Act No. 8315, filed by Sen. Miriam Santiago in the current Congress and also Known as the Revised Penal Code, as Amended, Article 186 on Monopolies and Combinations in Restraint of Trade, prescribing the penalty of prison mayor, or a fine not exceeding One Million Pesos (P1,000,000.00) if a corporation, or, if any person, Five Hundred Thousand Pesos (P500,000.00), or both, to be imposed upon any person who shall take part in any monopoly or combination in restraint of trade.

3. Review of proposed mergers and consolidations to ensure prevention of abuse of dominant market position. A threshold should be set to determine when and under what conditions an enterprise is said to be enjoying a “dominant market position.” A comprehensive review of proposed mergers and consolidations should be undertaken before they are approved. Arrangements that do not comply with fair competition guidelines and those that significantly limit competition should not be allowed.

4. Establishment of a simplified mechanism by which interested parties can obtain relief by way of prohibition or injunction against mergers and consolidations that can potentially result in anti-competitive practices. Guidelines on the availment of provisional remedies in criminal cases (provided for under Rule 127 of the Revised Rules on Criminal Procedure) may be drafted addressing anti-trust violations.

5. Enactment by the NTC of anti-trust policies and regulations in the form of memo-circulars whose provisions, remedial or curative in nature, can and may be given retroactive effect, also to level the now mismatched playing field between PLDT group and Globe Telecom in the market of competition. Specifically, there is a need for the NTC to issue a memo-circular defining a monopoly or a dominant position carrier (or a significant market power), such that when any one telecommunications carrier or group controls a minimum 50% of the market in a single service sector of telecommunications, that single entity or group shall be branded as a dominant or monopoly carrier and thus will be subject to sanctions or restrictions by the government to protect market rivals and allow the latter to fairly and freely compete with the dominant carrier.

6. Strict and aggressive enforcement by the NTC of the 20-year old Supreme Court ruling on the interconnection of telecommunications service providers. Indeed, without direct interconnection between such providers, the public suffers as they are made to pay the expensive long-distance call charges instead of the free local landline calls.

7. Creation, as proposed by Rep. Erin Tanada and the IDEALS group, of an independent Competition Commission that shall have original and exclusive jurisdiction to enforce and implement all competition laws.

8. Stronger consumer representation, first, in the crafting of new anti-monopoly legislations, and second, in monitoring and implementing the law against monopolies and monopolistic business practices. We believe that such representation, particularly in the Office of Competition that the President wants established by virtue of EO 45, will be an effective foil against the powerful business lobby that has enabled big corporate powers to get away with anti-competitive business practices.