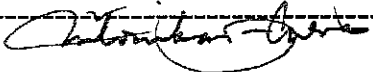


EN BANC

G.R. No. 208379 – LUIS R. VILLAFUERTE, CARIDAD R. VALDEHUESA AND NORMA L. LASALA, *Petitioners*, v. SECURITIES AND EXCHANGE COMMISSION, BANGKO SENTRAL NG PILIPINAS, SECRETARY OF FINANCE, NATIONAL TREASURER, BANKERS ASSOCIATION OF THE PHILIPPINES, PHILIPPINE DEALING & EXCHANGE CORP., PHILIPPINE DEPOSITORY & TRUST CORP., PHILIPPINE SECURITIES SETTLEMENT CORP., PHILIPPINE DEALING SYSTEM HOLDINGS CORP., and VICENTE B. CASTILLO, *Respondents*.

Promulgated:

March 29, 2022

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SEPARATE CONCURRING OPINION

LEONEN, J.:

I agree that the Petition suffers procedural infirmities, meriting its outright dismissal. Petitioners failed to establish their legal standing to institute the action¹ and have raised factual questions which cannot be resolved by this Court.²

Nevertheless, the Petition raises important questions surrounding our financial markets which have significant impact on our economy. Thus, we have to understand the impact of the securities market and the legal parameters set by the parties.

I

Petitioners mainly contend that the Securities and Exchange Commission cannot regulate the trade of government securities³ as these are not covered by the Securities Regulation Code.⁴ Thus, the Commission cannot authorize the Philippine Dealing & Exchange Corporation (PDEx) to operate an over-the-counter market for government securities.⁵ Instead, it is the Secretary of Finance who has jurisdiction over this market.⁶

¹ Ponencia, pp. 8–13.

² Id. at 13–14.

³ *Rollo*, pp. 60–63

⁴ Id. at 33.

⁵ Id. at 36–37.

⁶ Id. at 37, and 106–207.



They further argue that public respondents allowed PDEX to monopolize the over-the-counter market because the Securities and Exchange Commission required brokers and dealers to become members of a self-regulatory organization (SRO), which was only PDEX at that time, to be able to trade in this market.⁷

Republic Act No. 8799, or the Securities Regulation Code, governs our securities trading markets. Section 2 contains the State policy with respect to our financial market:

SECTION 2. *Declaration of State Policy.* — The State shall establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market.

To attain these goals, the Securities and Exchange Commission was created and mandated to regulate and supervise the securities market.⁸ It also protects the investing public from risks associated with financial investments. In *Securities and Exchange Commission v. Subic Bay Gold and Country Club, Inc.*⁹ we underscored the special role of the Commission:

The Securities and Exchange Commission's approval of securities registrations signals to the public that the securities are valid. It provides the public with basis for relying on the representations of corporations that issue securities or financial instruments.

Any fraud or misrepresentation in the issuance of securities injures the public. The Securities and Exchange Commission's power to suspend or revoke registrations and to impose fines and other penalties provides the public with a certain level of assurance that the securities contain representations that are true, and that misrepresentations if later found, would be detrimental to the erring corporation. It creates risks to corporations that issue securities and adds cost to errors, misrepresentations, and violations related to the issuance of those securities. This protects the public who will rely on representations of corporations and partnerships regarding financial instruments that they issue. The Securities and Exchange Commission's regulatory power over securities-related activities is tied to the government's duty to protect the investing public from illegal and fraudulent instruments.¹⁰

The securities market plays an important role in channeling funds from and across individuals, firms, and even the government. In securities trading, funds may be borrowed from lenders by selling them securities.

⁷ Id. at 37–39.

⁸ Republic Act No. 8799 (2000), sec. 5.

⁹ 755 Phil. 553 (2015) [Per J. Leonen, Second Division].

¹⁰ Id. at 578–579.

Securities are characterized as “claims on the borrower’s future income or assets.”¹¹ These can be shares of stock, bonds, or debentures, among other financial instruments. Financial markets act as intermediaries connecting a borrower with investment opportunities to a lender with excess funds but not enough productive investment. Thus, financial markets promote economic efficiency and production.¹²

There are two types of financial markets for securities: primary and secondary markets.

A primary market is a financial market which issues new securities. For instance, a bond or a stock is sold to initial buyers by a corporation or by the government. Meanwhile, secondary markets involve reselling securities that have been previously issued. Brokers and dealers are crucial in secondary markets as they match buyers and sellers of securities.¹³

Issuers of securities do not acquire new funds when their securities are sold from the secondary market. However, the secondary market makes the securities more liquid or easier to exchange. As investors can easily buy and sell their securities, this makes the securities more attractive to investors which, in turn, makes it easier for issuers to sell more securities in the primary market.¹⁴

Secondary markets are further organized through exchanges and over-the-counter markets.

Exchange markets are organized facilities where buyers and sellers of securities, or their agents, trade securities.¹⁵ In contrast, in over-the-counter markets, “dealers at different locations who have an inventory of securities stand ready to buy and sell securities over the counter to anyone who comes to them and is willing to accept their prices.”¹⁶

Petitioners confuse primary with secondary markets. The Secretary of Finance performs a primary and exclusive role in the *issuance* of government securities through the primary market.

Under Republic Act No. 245, the Secretary of Finance is mandated to determine the terms and conditions of issuance, placement, sale, servicing, redemption, and payment of all evidence of indebtedness of the Philippine

¹¹ FREDERIC MISHKIN, THE ECONOMICS OF MONEY, BANKING, AND FINANCIAL MARKETS, 24 (7TH Ed., 2004).

¹² *Id.*

¹³ *Id.* at 26.

¹⁴ *Id.* at 26–27.

¹⁵ *Rollo*, p. 30 citing Republic Act No. 8799 (2000), sec. 3.7

¹⁶ FREDERIC MISHKIN, THE ECONOMICS OF MONEY, BANKING, AND FINANCIAL MARKETS, 27 (7TH Ed., 2004).

government.¹⁷ Through the Bureau of Treasury, government securities are issued to the public. Section 1 of the law states:

SECTION 1. In order to meet public expenditures authorized by law or to provide for the purchase, redemption, or refunding of any obligations, either direct or guaranteed, of the Philippine Government, the Secretary of Finance, with the approval of the President, after consultation with the Monetary Board, is authorized to borrow from time to time on the credit of the Republic of the Philippines such sum or sums as in his judgment may be necessary, and to issue therefor evidences of indebtedness of the Philippine Government.

Such evidences of indebtedness may be of the following types:

(a) Treasury bills issued on a discount basis and payable at maturity without interest. Treasury bills may be offered for sale either on a competitive basis or at a fixed rate of discount and may be made payable at any date not later than one year from the date of issue.

(b) Interest-bearing certificates of indebtedness having maturities not exceeding eighteen months from the date of issue.

(c) Interest-bearing notes having maturities of not less than one or more than five years from the date of issue.

The Secretary of Finance, in consultation with the Monetary Board, shall prescribe the form or forms, the interest and discount rates, the denominations, maturities, negotiability, convertibility, call and redemption features, and all other terms and conditions of issuance, placement, sale, servicing, redemption, and payment of all evidences of indebtedness issued under the authority of this Act[.]

These government securities, such as treasury bills and bonds, are issued and sold by the Bureau of Treasury to investors through a network of licensed dealers called Government Securities Eligible Dealers (GSED).¹⁸

The securities are mainly issued and sold through an auction where the Bureau of Treasury issues a public notice to invite tenders.¹⁹ They can also be sold through the tap method where sales are “open exclusively to Accredited Government Securities Dealers (AGSDs) in the event of an acute and protracted shortage of Government Securities.”²⁰ The Secretary of Finance may also authorize the sale through over-the-counter method, where government securities are sold through negotiation, not auction.²¹

¹⁷ Republic Act No. 245 (1948),

¹⁸ *Banco De Oro v. Republic*, 793 Phil. 97 (2016) [Per J. Leonen, En Banc].

¹⁹ DOF Department Order No. 141-95 (1995), sec. 9

²⁰ DOF Department Order No. 141-95 (1995), sec. 18.

²¹ DOF Department Order No. 141-95 (1995), sec. 16.

Under DOF Department Order No. 141-95, the Securities and Exchange Commission can license an eligible financial institution to participate in the primary sale of government securities.

**V. Dealers Eligible to Bid at Primary or
Origination Sale of Government Securities**

SECTION 28. Any Financial Institution licensed by Bangko Sentral ng Pilipinas, Insurance Commission or Securities and Exchange Commission to deal in securities shall be eligible to participate in the primary sale of government securities as long as they meet the following criteria.

- a. Unimpaired capital and surplus account as defined in Sec. 29 of at least P100 Million at any one time. This must be proven by certification from Bangko Sentral ng Pilipinas or the Securities and Exchange Commission or the Insurance Commission; and
- b. Certification by Bangko Sentral ng Pilipinas, Securities and Exchange Commission or Insurance Commission that the institution is in good standing.
- c. For purposes of participating in the auction, such Financial Institution defined in Sec. 29 shall have an account with Bangko Sentral ng Pilipinas where the settlement of the award may be debited in order to avoid making the deposit prior to bidding.²²

The Secretary of Finance and the Bureau of Treasury are not active participants in the trading of government securities in the secondary market.

In the secondary market, the trading of government securities involve brokers, salespersons, and other securities market professionals. The Securities and Exchange Commission is mandated to supervise and regulate the membership and transactions of these professionals. Under Chapter VIII, Section 28 of the Securities Regulations Code:

CHAPTER VIII
Regulation of Securities Market Professionals

SECTION 28. *Registration of Brokers, Dealers, Salesmen and Associated Persons.* —

28.1. No person shall engage in the business of buying or selling securities in the Philippines as a broker or dealer, or act as a salesman, or an associated person of any broker or dealer unless registered as such with the Commission.

28.2. No registered broker or dealer shall employ any salesman or any associated person, and no issuer shall employ any salesman, who is not registered as such with the Commission.

²² DOF Department Order No. 141-95 (1995), sec. 28.

28.3. The Commission, by rule or order, may conditionally or unconditionally exempt from Subsections 28.1 and 28.2 any broker, dealer, salesman, associated person of any broker or dealer, or any class of the foregoing, as it deems consistent with the public interest and the protection of investors.

28.4. The Commission shall promulgate rules and regulations prescribing the qualifications for registration of each category of applicant[.]

The Securities and Exchange Commission does not usurp the power and authority of the Department of Finance.

The functions of the Secretary of Finance and the Securities and Exchange Commission with respect to the issuance and trade of government securities are not irreconcilable. The Secretary of Finance's exclusive authority to *issue* government securities in the primary market should not be misconstrued to preclude the Securities and Exchange Commission from *trading* government securities. This is because they operate exclusively in different financial markets.

Government securities are still covered by the regulatory powers of the Securities and Exchange Commission. The exemption of government securities under Section 9 of the Securities Regulations Code is an exemption *from the registration requirement*. The provision reads:

SECTION 9. *Exempt Securities.* —

9.1. *The requirement of registration under Subsection 8.1 shall not as a general rule apply* to any of the following classes of securities:

(a) Any security issued or guaranteed by the Government of the Philippines, or by any political subdivision or agency thereof, or by any person controlled or supervised by, and acting as an instrumentality of said Government. (Emphasis supplied)

Moreover, the Securities Regulations Code intended to delete the exclusion of government securities from over-the-counter markets. The Revised Securities Act of 1982 expressly excluded trading in exempt securities. Section 35 states:

SECTION 35. *Over-the-counter markets.* — It shall be unlawful, in the contravention of such rules and regulations as the Commission may prescribe as necessary and appropriate in the public interest or to insure to investors protection comparable to that provided by and under authority of this Act in the case of securities exchanges:

(1) For any broker or dealer, singly or with any other person, to make or create, or enable another to make or create, a market, otherwise than on a securities exchange, for both the purchase and sale of **any security, other than an exempted security** or commercial paper,

banker's acceptances, or commercial bills, or securities which have not previously been registered or listed with an exchange, or

- (2) For any broker or dealer to use any facility of any such market.
(Emphasis supplied)

The counterpart provision in the Securities Regulation Code deleted this exclusion. Under Section 32.2(a) of the Securities Regulations Code:

CHAPTER IX
Exchanges and Other Securities Trading Markets

SECTION 32. *Prohibition on Use of Unregistered Exchange; Regulation of Over-the-Counter Markets.* —

....

32.2. (a) No broker, dealer, salesman or associated person of a broker or dealer, singly or in concert with any other person, shall make, create or operate, or enable another to make, create or operate, any trading market, otherwise than on a registered Exchange, for the buying and selling *of any security*, except in accordance with rules and regulations the Commission may prescribe. (Emphasis supplied)

Thus, over-the-counter trading in exempted securities, such as government bonds, are now subject to the Securities and Exchange Commission's authority.

Moreover, prohibiting the Commission from trading government securities will injure the liquidity of these financial instruments. Without trading in the secondary market, buyers of government securities from the primary market will have no options on how to sell these instruments, ultimately discouraging any investor from buying newly issued government securities. Thus, it is reasonable and necessary to allow the trading of government securities in the secondary market through brokers and dealers.

II

Petitioners argue that public respondents created a monopolistic market when it required brokers and dealers to become members of an SRO, which was only PDEX at that time. They claim that this allowed PDEX to capture both the exchange and over-the-counter markets,²³ forcing stakeholders in the markets to do business with PDEX.²⁴ They claim that this is violative of the constitutional proscription against monopoly, unfair competition, and combination in restraint of trade.

²³ *Rollo*, p. 37.

²⁴ *Id.* at 39-40.

They further question the Securities and Exchange Commission's grant of authority for PDEX to operate in both exchange and over-the-counter markets for government securities.

Our Constitution does not absolutely prohibit monopolies as can be gleaned in Article XII, Section 19:

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.

A monopoly arises when "there is only one seller or producer of a product or service for which there are no substitutes."²⁵ A monopoly can "control and dominate trade and commerce in a commodity. . . to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power."²⁶

Meanwhile, a combination in restraint of trade is a way to produce a monopoly.²⁷ It "is an agreement or understanding between two or more persons, in the form of a contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution and price, or otherwise interfering with freedom of trade without statutory authority."²⁸

Monopolies are caused by barriers to entry—factors which prevent other entities from entering the market. Barriers to entry can be due to monopoly in resources, wherein a key component required for the market is owned by a single entity, or due to production process, where one entity can produce the good or service at a lower cost than others. Government regulations can also result in a barrier to entry when the government grants a single entity the exclusive right to produce a good or service.²⁹

Petitioners contend that Section 6 of SEC Memorandum Circular No. 14-06 is a government regulation unduly creating a monopoly in favor of the PDEX. Section 6 provides:

SEC MEMORANDUM CIRCULAR NO. 14-06
SUBJECT: Rules Governing the Over the Counter (OTC) Market

SECTION 6. *Membership in an SRO* —

²⁵ *Garcia v. Corona*, 378 Phil. 848, 860 (1999) [Per J. Ynares-Santiago, En Banc].

²⁶ *Id.*

²⁷ *Tatad v. Secretary of the Department of Energy*, 346 Phil. 321 (1997) [Per J. Puno, En Banc].

²⁸ *Id.* at 365.

²⁹ N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS*, 288 (9th ed., 2021).

A. *No broker or dealer shall participate in an OTC market unless he is a member of an SRO that has been registered with the Commission for the purpose of regulating and supervising the activities of the broker or dealer in an OTC market.*

B. In case a broker or dealer is already a member of an existing SRO whose current status is for the purpose of regulating and supervising a market other than the OTC market, such broker or dealer may be allowed to participate in the OTC market; Provided, that the broker or dealer shows proof and the existing SRO is able to demonstrate that said SRO is capable of performing its regulatory and supervisory obligations relative to the activities of the broker or dealer in the OTC market; Provided further, that the SRO has committed to regulate and supervise the broker or dealer with respect to such activities; Provided finally, that the SRO files an amendment to its current SRO registration to reflect its intention to act as SRO in such OTC market.

C. The Commission may prescribe the governance and ownership structure of an SRO or require amendment thereto to ensure the effective regulation and supervision of the OTC market.³⁰ (Emphasis supplied)

An SRO is “an organized Exchange, registered clearing agency or any organization or association registered as an SRO under Section 39 of the SRC to enforce compliance with relevant provisions of the SRC and IRR issued thereunder, and mandated to make and enforce its own rules, which have been approved by the Commission, by their members and/or participants.”³¹ In *Palanca IV v. RCBC Securities, Inc.*³²

It has been generally recognized that due to the large number of market participants and the lack of resources, full government regulation of securities markets is impractical. As such, stock exchanges and securities markets are allowed to regulate their own operations, subject to the control and supervision of the government regulatory authority. This principle is known as self-regulation; and is embodied in the SRC’s declaration of policy, which states inter alia that “the State shall establish a socially conscious, free market that regulates itself x x x.” As explained by a commentator:

In lieu of direct regulation by the SEC of Exchanges and other securities-related organizations, the statutory scheme involves, in the first instance, the adoption by SROs of rules that are subject to SEC review and approval, and the enforcement of such rules by the SROs against their members. Under this SEC-supervised self-regulation, the SEC will step in only if the SROs are unable to perform properly their functions. In the process, the SEC is able to conserve its own resources, since the SROs effectively serve as its instrumentalities in the surveillance of the markets.³³ (Citations omitted)

³⁰ SEC Memorandum Circular No. 14-06 (2006), sec. 6.

³¹ SEC Memorandum Circular No. 14-06 (2006), sec. 2(L).

³² *Palanca IV v. RCBC Securities, Inc.*, G.R. No. 241905, March 11, 2020, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66453>> [Per J. A.B. Reyes, Jr., Second Division].

³³ Id.

SROs enhance the efficiency of the financial market. Self-regulation is a combination of private interests and government oversight. By their nature, SROs are able to craft effective and efficient rules because they have an intimate and specialized knowledge of the market which enables them to respond immediately and flexibly to the ever-changing market conditions.³⁴

The Securities and Exchange Commission strictly regulates the registration and performance of SROs.

CHAPTER X
**Registration, Responsibilities and Oversight of Self-Regulatory
Organizations**

SECTION 39. *Associations of Securities Brokers, and Dealers, and Other Securities Related Organizations.* —

39.1. The Commission shall have the power to register as a self-regulatory organization, or otherwise grant licenses, and to regulate, supervise, examine, suspend or otherwise discontinue, as a condition for the operation of organizations whose operations are related to or connected with the securities market such as but not limited to associations of brokers and dealers, transfer agents, custodians, fiscal and paying agents, computer services, news disseminating services, proxy solicitors, statistical agencies, securities rating agencies, and securities information processors which are engaged in the business of: (a) Collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security; or (b) Distributing or publishing, whether by means of a ticker tape, a communications network, a terminal display device, or otherwise, on a current and continuing basis, information with respect to such transactions or quotations. The Commission may prescribe rules and regulations which are necessary or appropriate in the public interest or for the protection of investors to govern self-regulatory organizations and other organizations licensed or regulated pursuant to the authority granted in Subsection 39.1 including the requirement of cooperation within and among, and electronic integration of the records of, all participants in the securities market to ensure transparency and facilitate exchange of information.³⁵

SROs are bound to comply with the provisions of the Securities Regulations Code. The rules they create and the subsequent amendments they propose are all subject to the prior approval of the Securities and Exchange Commission. The Commission can also suspend and revoke an

³⁴ *Report of the SRO Consultative Committee of the International Organization of Securities Commissions, Model for Effective Regulation*, available at <<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD110.pdf>> (Last accessed on March 24, 2022).

³⁵ Republic Act No. 8799 (2000), sec. 39.1.

SROs registration if it willfully violates or is unable to comply with the rules.³⁶

Here, contrary to petitioners' submission, the rules do not exclusively grant an SRO status to PDEX. The Securities Regulations Code does not restrict the registration of other entities who wish to register as SROs. That PDEX was the only SRO at that time does not equate to a monopolistic market due to government regulation.

Further, an allegation or charge of monopoly is a factual matter which must be established and proven by petitioners. At the very least, they must define and characterize what a monopolistic market is and lay down the parameters in claiming the entity's dominance in the market. There must be sufficient evidence showing how the entity behaves, how market dominance was brought about by the alleged barrier to entry, and how this prevents the entry of other entities.

As noted in the *ponencia*, petitioners failed to establish these allegations.³⁷ It must be stressed that this Petition is filed directly before this Court in disregard of the concurrent jurisdiction of the trial and appellate courts. Generally, direct recourse to this Court is only warranted for resolution of questions of law. Here, petitioners merely assert that the securities trading is a monopolistic market without demonstrating how PDEX dominates the market, such as its ability to dictate market price. More importantly, they failed to prove how government regulations unreasonably restrained the entry of other companies in favor of PDEX.³⁸

The Securities Regulations Code does not provide specific requirements which only PDEX is able satisfy. In fact, in 2017, the Money Market Association of the Philippines (MART) has been granted a license to operate as an SRO in an over-the-counter market.³⁹ Clearly, the required membership of brokers and dealers in an SRO does not intend to create a monopoly but to regulate the securities trading market.

Thus, Section 6 of SEC Memorandum Circular No. 14-06 and other related issuances of public respondents do not violate the constitutional proscription on unfair competition and combinations in restraint of trade.

ACCORDINGLY, I vote to DISMISS the Petition.


MARVIC M.V.F LEONEN
Associate Justice

³⁶ Republic Act No. 8799 (2000), sec. 40.

³⁷ Ponencia, p. 13.

³⁸ *Rollo*, pp. 37, 109–110.

³⁹ *Draft Resolution*, p. 14.