Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City

08 May 2014

SEC-OGC Opinion No. 14-06
Re: Marketing and Sale of Digital Publication Through the Internet and Mobile Technology; Advertising; Mass Media

ATTY. ALVIN O. GELI and
ATTY. REGINA G. SANTOS
Castillo Laman Tan Pantaleon
& San Jose Law Firm
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Dear Attys. Geli and Santos:

This pertains to your letter requesting for confirmation on whether Komli Network Phils. Inc. (Komli), a corporation the voting capital of which is wholly-owned and held by a foreign corporation, can engage in the following activities:

> "To conduct and carry on the following business, both locally and abroad, as principal and agent, using the internet or mobile technology as its primary medium:
>
> (a) wholesale marketing and sale of digital publication;
>
> (b) providing a digital platform to the client/merchant/marketers to reach out to their end/target audiences and advising them the online outlets that would best meet their promotional campaigns;
>
> (c) providing a digital platform to the third-party website to sell and monetize their online inventory; and
>
> (d) acquiring and undertaking the whole or part of the business, property and liabilities of any person or company carrying on the business as such contractors or agents or any other business which may be usefully carried on with those mentioned.

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Framed otherwise, the issue actually presented is whether or not the foregoing activities – if pursued through the internet and using mobile technology fall within the purview of advertising or mass media which are nationalized activities, and are thus subject to the foreign equity limitations imposed by the 1987 Constitution.

Professors Philip Kotler, Gary Armstrong, John Saunders and Dr. Veronica Wong define marketing as a combination of "many activities – marketing research, product development, distribution, pricing, advertising, personal selling and others – designed to sense, serve and satisfy consumer needs while meeting the organization's goals.[1]" In other words, advertising and distribution are two of the essential aspects in marketing of products.

Advertising, as defined in Article 4(b) of Republic Act No. 7394, is "the business of conceptualizing, presenting or making available to the public, through any form of mass media, fact, data or information about the attributes, features, quality or availability of consumer products, services or credit.[2]" Thus, the Implementing Rules and Regulations of the same law defines an advertising agency or agent as "a service organization or enterprise creating, conducting, producing, implementing or giving counsel on promotional campaigns or programs through any medium for and in behalf of any advertiser." (underscoring ours)

In its Opinion No. 22, s. 1975, the Ministry of Justice has ruled that "essentially the function of advertising agencies is to serve as agents or counselors (sic) of advertisers by writing, preparing or producing the commercial messages or materials used by advertisers in selling their goods and services and by selecting and recommending the medium or media to be used as the vehicle for disseminating such messages to the public."

Mass media in the Constitution, as opined by the Department of Justice,[3] refers to any medium of communication designed to reach the masses and that tends to set the standards, ideals and aims of the masses, the distinctive feature of which is the dissemination of information and ideas to the public, or a portion thereof. Mass media, as defined in Article 4(a) of Republic Act No. 7394, refers to "any means or methods used to convey advertising messages to the public such as television, radio, magazines, cinema, billboards, posters, streamers, hand bills, leaflets, mails and the like."[4]

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[1] Philip Kotler, Gary Armstrong, John Saunders and Veronica Wong Principles of Marketing, 2nd European Edition, (Italy: Prentice Hall Europe, 1999), p. 32.
[2] The Consumer Act of the Philippines. Approved 13 April 1992.
[3] DOJ Opinion No. 40, series of 1998; cited in SEC-OGC Opinion No. 11-08 dated 03 March 2011.
[4] See note 2.

With the continuing evolution and proliferation of digital communication technology, i.e. internet and mobile technology, individuals now are exposed to information that are previously restricted to a select group, making them susceptible to the influence of modern mass media techniques such as advertising and propaganda. Thus, the internet and mobile technology have become a recognized platform for mass media. In our jurisdiction, the Tobacco Regulation Act of 2003 specifically includes the internet in the definition of "mass media.[5]"

The Constitution mandates that a corporation must be wholly-owned and managed by Filipino citizens so that the corporation can validly undertake mass media activities.[6] The citizenship requirement is intended to prevent the use of such facility by aliens to influence public opinion to the detriment of the best interest of the nation.[7]

In SEC Opinion No. 12-16,[8] the Commission has distinguished an advertising agency from a mass media entity for the purpose of determining the extent of allowable foreign equity participation, viz –

> "xxx xxx xxx Advertising agencies do not actually disseminate the materials they prepare as they have to utilize or avail of the facilities of mass media, i.e., newspapers, radio, television, etc., for this purpose. Advertising agencies falling within this concept are not mass media, considering that they do not operate or control any medium of communication designed to reach or influence the masses, although the activities of such agencies, by their nature, are closely related to those of mass media.
>
> However, where the advertising agency actually disseminates information, or operates, controls or otherwise engages in the business of mass media, a specific example of which is an outdoor advertising firm which sells billboard space to advertisers, then such advertising agencies would fall within the purview of the constitutional limitation."

You stated in your letter that the nature of Komli's business involves providing professional advice to its clients on what online outlets would best meet their promotional campaigns, such that when its client would like to increase public awareness of its products, it consults Komli, which in turn, studies the product, its

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[5] Section 4(f), RA 9211: "Mass Media" – refers to any medium of communication designed to reach a mass of people. For this purpose, mass media includes print media such as, but not limited to, newspapers, magazines and publication; broadcast media such as, but not limited to, radio, television, cable television, and cinema; electronic media such as but not limited to the internet.

[6] Section 11, Article XVI, 1987 Constitution. "The ownership and management of mass media shall be limited to citizens of the Philippines or corporations, cooperatives or associations wholly owned and managed by such citizens. x x x"

[7] MOJ Opinion No. 24, s. 1986 citing Quisumbing-Fernando, Constitutional Law, 1984 ed., p. 345.

[8] Addressed to Puno & Puno Law Offices dated 13 September 2012, citing SEC Corporate Legal Department Opinion dated 02 September 1988.

target populations and the target populations' online habits and recommends to its client what online outlets to utilize or focus on in order to connect with its target populations.

Given the foregoing, Komli's business of wholesale marketing and sale of digital publications through the internet and mobile technology necessarily includes the conceptualization, creation, preparation and production of the commercial web layout and communication messages intended by the digital publications' creators to attract and lure their target consumers to purchase said digital publications. By engaging in these activities, Komli comes within the purview of an advertising agency following the Ministry of Justice in its Opinion No. 22, s. 1975, viz -

> "xxx essentially the function of advertising agencies is to serve as agents or counsellors of advertisers by writing, preparing or producing the commercial messages or materials used by advertisers in selling their goods and services, and by selecting and recommending the medium or media to be used as the vehicle for disseminating such messages to the public. xxx"

Accordingly, Komli is considered subject to the thirty percent (30%) maximum foreign equity limit on advertising entities under Section 11 of Article XVI of the 1987 Constitution.[9]

Note, however, that your proposed activity of selling digital publications does not qualify whether it is done in wholesale or retail. The thirty (30%) percent foreign equity limit discussed above presupposes that Komli sells digital publications in wholesale. Should Komli sell digital publications in retail, it is subject to the foreign equity restrictions imposed by Section 5 of the Retail Trade Liberalization Act of 2000,[10] i.e. retail trade enterprises with a paid-up capital less than the Philippine Peso equivalent of Two Million Five Hundred Thousand US dollars (US$2,500,000.00) shall be exclusively owned by Filipino citizens and corporations wholly-owned by Filipino citizens.

Moreover, your letter states that Komli intends to provide a digital platform to third-party websites to sell and monetize online inventory. Although Komli will not own or operate any online media outlet nor will affiliate with any internet service provider, online retailer or social networking site and will merely act as a middleman by bringing together the product manufacturers and third-party websites, it will provide an online platform intended to increase the sale of a particular product. In SEC Opinion No. 12-16,[11] this Commission opines that if the corporation is engaged in the operation of a voucher platform on the internet with the purpose of increasing

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[9] Section 11, Article XVI, 1987 Constitution. "xxx Only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry. x x x"

[10] Republic Act No. 8762.

[11] See note 8.

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the sales of a particular product or service, it, in effect, disseminates information to the general public through the internet and is thus considered a mass media entity subject to the requirement of paragraph 1, Section 11, Article XVI of the 1987 Constitution[12] and List A (1) of Executive Order No. 858.[13]

In sum, it is our opinion that Komli, by engaging in the aforementioned activities, cannot be owned by a corporation the voting capital of which is wholly-owned and held by a corporation wholly owned by foreigners.

This opinion is based solely on the facts disclosed in the query and relevant only to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be sued in the nature of a standing rule binding upon the Commission in other cases or upon the courts.

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

[12] See note 6.
[13] Ninth Regular Foreign Investment Negative List. List A: Foreign Ownership is limited by mandate of the Constitution and specific laws. No foreign equity: 1. Mass media, except recording (Art. XVI, Sec. 11 of the Constitution; Presidential Memorandum dated 04 May 1994).