PHILIPPINE COMPETITION COMMISSION
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MERGERS AND ACQUISITIONS OFFICE,

Complainant,

- versus -

WATERFRONT MANILA PREMIER DEVELOPMENT INC. and THE CITY GOVERNMENT OF MANILA,

Respondents.

x----------x

PCC Case No. M-2021-001

For: Violation of Section 17 of the Philippine Competition Act and Rule 2.1 of the PCC Rules on Merger Procedure

COMMISSION DECISION NO. 02-M-004/2022

THE CASE

This instant Complaint involves an alleged violation by Waterfront Manila Premier Development Inc. ("Waterfront") and the City Government of Manila ("City of Manila") (together as "Respondents") of Section 17[1] of the Philippine Competition Act ("PCA"), and Rule 2.1[2] of the Philippine Competition Commission's Rules on Merger Procedure ("PCC Merger Rules"), particularly in relation to the Respondents' failure to notify the Philippine Competition Commission ("PCC") of a Joint Venture Agreement ("JVA") entered between them, within thirty (30) days from execution of their definitive agreement.

THE FACTS

Respondent Waterfront is a domestic corporation primarily engaged in the business of holding and developing real estate or other properties for industrial, commercial, residential, leisure, or sports purposes and in pursuance thereof, to acquire by purchase, reclamation, lease, or otherwise real estate and/or appurtenant properties and or interest therein.

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[1] SEC. 17. *Compulsory Notification.* – Parties to the merger or acquisition agreement referred to in the preceding section wherein the value of the transaction exceeds one billion pesos (P1,000,000,000.00) are prohibited from consummating their agreement until thirty (30) days after providing notification to the Commission in the form and containing the information specified in the regulations issued by the Commission: xxx.

[2] 2.1. Parties to a merger that meets the thresholds in Section 3 of Rule 4 of the IRR are required to notify the PCC within thirty (30) days from signing of definitive agreements relating to the merger ("notified merger"). If deemed necessary, the PCC may likewise investigate mergers by its own initiative ("*motu proprio* review").

Respondent City of Manila is a local government unit ("LGU") in the Philippines created on 24 June 1571 as a municipal government. It became the first chartered city by virtue of the Philippine Commission Act No. 183 and gained autonomy on 18 June 1949 with the passage of Republic Act No. 409 also known as the Revised Charter of the City of Manila.

On 27 September 2017, Respondents entered into a JVA for the reclamation and development of three hundred eighteen (318) hectares of foreshore land in Manila Bay (the "Transaction").

On 18 December 2019, the Philippine Reclamation Authority ("PRA"), after the revision and approval of the JVA, entered into a Memorandum of Agreement ("MOA") with the City of Manila. The MOA finalized the terms, conditions, rights, and obligations of the City of Manila, with Waterfront becoming a third-party assignee therein. The MOA was ratified by the PRA on 27 January 2020.

Thereafter, on 28 December 2020, Waterfront initiated the submission to the PCC's Mergers and Acquisitions Office ("MAO") of its notification form on the Transaction and completed its submission on 02 February 2021. On 26 February 2021, the Phase 1 review period of the Transaction commenced after the payment of the filing fees.[3]

On 09 March 2021, the PCC issued Commission Decision No. 03-M-004/2021 ("Decision") resolving to take no further action on the proposed transaction between the Respondents, thereby effectively clearing the proposed JVA.

On 06 May 2021, the MAO issued notices to the Respondents directing them to explain why they should not be held liable for failing to notify the Commission of the said Transaction within the 30-day notification period provided under Section 17 of the PCA and Rule 2.1 of the PCC Merger Rules. Waterfront submitted its response on 11 May 2021, which Respondent City of Manila adopted on 12 May 2021.

Unsatisfied with the responses, the MAO filed a Complaint for late notification on 16 June 2021, charging the Respondents with a violation of Section 17 of the PCA and Rule 2.1 of the PCC Merger Rules. The MAO alleges that the Respondents notified the Commission of the Transaction only on 28 December 2020, or one thousand one

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3 On 24 February 2021, Waterfront tendered payment of the filing fees upon the MAO's issuance of an order of payment. PCC Memorandum Circular No. 17-002 provides:

> A. Fees
>
> The notification and review of M&As required to be notified to the Commission under the Philippine Competition Act and its Implementing Rules and Regulations shall be subject to the payment of fees corresponding to the following stages of a notified M&A revies:
>
> (i) Notification Filing and Phase I Review – An Order of Payment shall be sent to the notifying parties once the Mergers and Acquisitions Office determines that the notification filing is complete pursuant to Rule 4, Section 5(f) of the Rules. Once payment has been made, the Mergers and Acquisitions Office shall issue notices of sufficiency to the notifying parties for purposes of commencing Phase I review of the M&A.
>
> xxx

hundred eighty-eight (1,188) days after the JVA was executed, and three hundred seventy-six (376) days after the MOA was executed. Pursuant to Section 16.2 of the PCC Merger Rules, the MAO recommended the imposition of a fine against the Respondents in the maximum amount Two Million Pesos (PhP 2,000,000.00).

THE ISSUE

Whether the Respondents failed to comply with the period for notification provided under Section 17 of the PCA and Rule 2.1 of the PCC Merger Rules.

DISCUSSION

Section 23 of the PCA provides that the decision of the Commission on Mergers and Acquisitions shall be final, thus:

> *SEC. 23. Finality of [Rulings] on Mergers and Acquisitions. – Merger or acquisition agreements that have received a favorable ruling from the Commission, except when such ruling was obtained on the basis of fraud or false material information, may not be challenged under this Act.*

Notably, the Transaction being challenged in this case has already been cleared by the Commission in Commission Decision No. 03-M-004/2021 dated 09 March 2021, whereby it resolved to take no further action with respect to the proposed Transaction ("Decision"). The Decision's dispositive portion provides:

> ***ACCORDINGLY**, the Commission resolves to take no further action with respect to the proposed Transaction between Waterfront Manila Premier Development, Inc. and the City Government of Manila.*
>
> *This Decision is rendered solely on the basis of the facts disclosed and circumstances of the proposed Transaction and documents submitted by the Parties.*

Absent any averment and evidence in the Complaint that the subject ruling was obtained on the basis of fraud or false material information, the above-quoted Decision is considered final and conclusive. Any further action in the subject case by the Commission will constitute a challenge to the Decision, in contravention of Section 23 of the PCA.

In the *Republic v. Espina & Madarang, Co.*, the Supreme Court had the opportunity to reiterate that under the doctrine of finality of judgment, a decision that has acquired finality becomes immutable and unalterable, and may no longer be modified in any

respect.[4] The Supreme Court even made a pronouncement that any act that violates this principle must immediately be struck down.[5]

It must be emphasized that the basic doctrine of finality of judgment is grounded upon the fundamental principle of public policy and sound practice that the judgment of courts and quasi-judicial agencies must become final at some definite date fixed by law.[6] As such, Commission Decision No. 03-M-004/2021 should remain undisturbed; and, should the complaint have been allowed, it should have been filed prior to the issuance of the said Decision.

Hence, the Commission shall no longer rule on any matter related to the proposed Transaction of the Respondents, respecting the favorable ruling the Respondents obtained in the Decision dated 09 March 2021.

DISPOSITIVE PORTION

WHEREFORE, premises considered, the Complaint for Late Notification under Section 17 of the Philippine Competition Act and Rule 2.1 of the Philippine Competition Commission's Rules on Merger Procedure, against the Respondents **WATERFRONT MANILA PREMIER DEVELOPMENT, INC.** and **THE CITY GOVERNMENT OF MANILA** is **DISMISSED**.

SO ORDERED.

22 March 2022.

ARSENIO M. BALISACAN
Chairman

JOHANNES BENJAMIN R. BERNABE
Commissioner
(See attached Dissenting Opinion)

EMERSON B. AQUENDE
Commissioner

[4] Republic v. Espina & Madarang, Co., G.R. No. 226138, March 23, 2022, citing FGU Insurance Corp. v. Regional Trial Court of Makati City, Branch 66, G.R. No. 161282, February 23, 2011.
[5] *Id.*
[6] *Land Bank of the Philippines v. Commission on Audit*, G.R. No. 224288 (Notice), September 15, 2020.

MARAH VICTORIA S. QUEROL
Commissioner

(INHIBITED)
MICHAEL B. PELOTON
Commissioner

Copy furnished:

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DISSENTING OPINION

BERNABE, C.:

Section 17 of the Philippine Competition Act ("PCA" or "the Act") requires parties to the merger or acquisition agreement to provide notification to the Philippine Competition Commission ("Commission") when the transaction satisfies the relevant notification thresholds. Rule 2.1 of the Rules on Merger Procedure ("Merger Procedures") provides that such notification shall be made within thirty (30) days from the signing of the definitive agreements and before consummating the same.[1] Failure to notify within this said notification period renders the merger parties liable for late notification, and will be subjected to a fine amounting to ½ of 1% of 1% of the value of the transaction, but not exceeding two million pesos.[2]

The case at hand involves a complaint for late notification filed by the Mergers and Acquisitions Office ("MAO") on 16 June 2021 against Waterfront Manila Premier Development Inc. and the City Government of Manila ("Respondents") in relation to their merger notification on their unincorporated joint venture. To recall, the Respondents entered into a notifiable joint venture agreement on 27 September 2017, and submitted their Notification belatedly on 02 February 2021. After reviewing the transaction to determine whether or not it will cause substantial lessening of competition in the relevant market, the Commission, in Decision No. 03-M-004/2021 dated 09 March 2021, resolved to take no further action on the proposed transaction. In deciding the instant case, the Commission *en banc* dismissed the complaint primarily on the basis of Section 23 of the PCA. The Commission *en banc* argues that the 09 March 2021 Decision bars the institution of any action against the transaction already reviewed and cleared, including the subject complaint on late notification.

The undersigned Commissioner dissents. A clearance decision on a proposed merger does not preclude a complaint on and a finding of late notification, nor bars the Commission from imposing the corresponding penalties on erring entities for failing to comply with the Commission's notification procedures.

The Commission's power to review mergers and acquisitions is separate and distinct from its power to determine breach of the period for notification

[1] Rule 2.1 of the Rules on Merger Procedure amends Section 2(a) of the PCA Implementing Rules and Regulations.
[2] Rules 3.4 and 16.2 of the PCC Rules of Merger Procedure.

From the very start of its implementation of the PCA and the Merger Procedures, the Commission has always recognized the determination of whether or not transacting parties have belatedly notified their merger or acquisition as entirely separate and distinct from the determination of whether the subject transaction is likely to result in substantial lessening of competition through the conduct of its merger review. The former emanates from Section 12(e) of the PCA which empowers the Commission to "conduct administrative proceedings, impose sanctions, fines or penalties for any noncompliance with or breach of this Act and its implementing rules and regulations (IRR) and punish for contempt." The latter, meanwhile, stems from the Commission's power to "review proposed mergers and acquisitions…and prohibit mergers and acquisitions that will substantially prevent, restrict or lessen competition in the relevant market" under Section 12(b).

These two functions are also governed by different sets of rules and procedures. Late notification and other Section 17 investigations are initiated by MAO by issuing a notice to the merger parties and their ultimate parent entities, directing the concerned parties to submit an explanation.[3] Should the MAO find that the explanation is deficient or fails to justify the suspected violation, MAO may proceed to file a Complaint describing the alleged violation, stating the relevant facts and information, and indicating its recommended fine.[4] The Commission then acts on the Complaint by requiring the named Respondents to submit its responsive pleading, and thereafter proceeds with the adjudication on the issues in due course.[5] On the other hand, the merger review, particularly of those mergers and acquisitions required by law to be notified, primarily commences with the submission of the accomplished notification forms by the parties to the agreement, thereby initiating the merger review process and the corresponding proceedings before the Commission.[6]

The merger review process and the late notification proceedings are also controlled by different timelines. Section 17 of the PCA provides for a 30-day period with which the Commission shall complete its review of the notified transaction; such period can be extended up to ninety (90) days when the Commission deems the extension necessary. Considering the strict mandate of the PCA to undertake the merger review proper within the 30/90-day timeline, the MAO reasonably gives priority and precedence on the conduct of its merger analysis of the transaction being notified, as well as on the presentation of its final recommendations to the Commission, including the filing of a Statement of Objections when it finds that allowing the transaction will pose substantial harm on competition. Faithful adherence to this merger review period is critical, since the expiration of the said period without any decision being issued by the Commission operates to effect a deemed approval of the transaction. On the contrary, there is no provision, explicit or implied, indicating that the conduct of Section 17 investigations or any other investigation or proceeding related to a violation of the PCA and its rules shall be done within a specific period other than those periods stated under Section 46 *(Statute of Limitations)* of the Act.

In recognizing these clear and apparent distinctions, the assigned Review Team has accordingly recommended for the Commission to take no further action on the subject

[3] Rule 14, PCC Rules of Merger Procedure.
[4] *Id.*
[5] Rule 15, PCC Rules of Merger Procedure.
[6] Rules 5-11, PCC Rules of Merger Procedure.

transaction, without prejudice to a separate investigation that would be undertaken on the fact of late notification.[7] This course of action adopted by the Review Team, as well as the separate exercise by MAO of its investigatory powers, are not only consistent with the aforementioned rules but also concur with the established practice of the Commission in the promulgation of its late notification decisions.[8]

Section 23 of the PCA does not apply to a complaint for late notification

Section 23 of the PCA provides:

> SEC. 23. *Finality of Rulings on Mergers and Acquisitions.* – Merger or acquisition agreements that have received a favorable ruling from the Commission, except when such ruling was obtained on the basis of fraud or false material information, may not be challenged under this Act.

A plain reading of the above provision will suggest that the "favorable ruling" being referred to is a 'clearance decision' issued by the Commission, or a decision that allows the merger, after the Commission has duly determined that the transaction will not lead to a substantial prevention, restriction, or lessening of competition in the relevant market, to be consummated. This has been reiterated and clarified in Rules 11.2 and 11.3 of the PCC Rules of Merger Procedure, which respectively state:

> 11.2. **Decisions allowing the merger**. If the Commission determines that a merger, if carried into effect, will not lead to an SLC in the relevant market, the Commission shall allow the merger. A favorable decision may be rendered in Phase 1 or Phase 2 review. Where a favorable decision is rendered, the Commission will notify the merger parties.
>
> 11.3. Merger agreements that have received a favorable decision from the Commission, except when such decision was obtained on the basis of fraud or false material information, may not be subsequently challenged under the Act.

Indubitably, Section 23 applies exclusively to the merger review function of the Commission provided for in Section 12(b) of the PCA. Section 23 cannot be reasonably expanded and applied to administrative proceedings conducted by the Commission pursuant to Section 12(e) of the Act. The regular exercise of the latter functions does not in any manner contravene or defeat the mandate of Section 23, as shown in this instant late notification case and other identical cases previously decided by the Commission, as these Section 17 investigations do not reopen, modify, or

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[7] Memorandum by the Review Team dated March 1, 2021 re: PROPOSED UNINCORPORATED JOINT VENTURE BETWEEN WATERFRONT MANILA PREMIER DEVELOPMENT, INC. AND THE CITY GOVERNMENT OF MANILA (M-2021-004).

[8] *In the Matter of AXA SA, Camelot Holdings Ltd., and XL Group Ltd.'s Alleged Violation of the Compulsory Notification Requirements Under Section 2.1 of the PCC Rules on Merger Procedure,* Commission Decision No. 30-M-03/2018, 30 August 2018; *In the Matter of Macsteel Global SARL B.V. and MSSA Investments B.V.'s Alleged Violation of the Compulsory Notification Requirements Under Section 2.1 of the PCC Rules on Merger Procedure,* Commission Decision No. 38-M-031/2018, 14 November 2018; *Mergers and Acquisitions Office v. Bases Conversion and Development Authority AND SM Prime Holdings, Inc.,* Commission Decision No. 07-M-047/2019, 5 March 2019; *Mergers and Acquisitions Office v. Wingtech Technology, Co, Ltd. AND Nexperia Holding B.V.,* Commission Decision No. 26-M-020/2019, 28 August 2019.

revoke the final clearance or approval rendered by the Commission in favor of the notified transaction. An adverse finding in this instant case will not disturb or challenge in any way the clearance decision previously promulgated by the Commission. Thus, the clearance decision allowing a merger or acquisition to be consummated should not preclude the Commission from conducting the requisite investigation and administrative proceedings to determine whether the entities required by the Act to notify have done so in faithful compliance with the procedural rules duly promulgated by the Commission.

The doctrine of finality of judgment finds no application and relevance in the instant case

The decision of the Supreme Court in the *Republic v. Espina & Madarang, Co.*,[9] which is partly relied upon by the Commission Decision, discusses extensively the doctrine of finality of judgment and the closely related principle of *res judicata*. It emphasized that a decision that has already attained finality becomes immutable and unalterable, and may no longer be modified in any respect. The ruling likewise enumerates requisites for the applicability of *res judicata* as a bar by prior judgment, including the identity between the two actions in terms of subject matter and of causes of action.

As already established above, the clearance decision promulgated by the Commission in favor of the JV between Waterfront Manila Premier Development and the City Government of Manila, and the instant case for late notification, pertain to different subject matters and involve distinct causes of action. The former relates to the exercise of the Commission of its administrative power to review and approve mergers and acquisitions, while the latter deals with a violation of the Commission's rules on notification.

With all these foregoing reasons, the undersigned Commissioner maintains that the finality of the Decision clearing the subject transaction does not bar the institution of a Complaint for late notification. Thus, the Commission *en banc* should have given due course to the Complaint for late notification filed by MAO against the Respondents, and found the latter in breach of the Commission's rules on notification.

22 March 2022.

JOHANNES BENJAMIN R. BERNABE
Commissioner

[9] G.R. No. 226138, 23 March 2022.