PHILIPPINE COMPETITION COMMISSION
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MERGERS AND ACQUISITIONS OFFICE,
Complainant,
- versus -

JBROS CONSTRUCTION CORPORATION and THE CITY GOVERNMENT OF MANILA,
Respondents.
x----------x

PCC Case No. M-2021-002

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

COMMISSION DECISION NO. 01-M-005/2022

THE CASE

In the instant case, JBros Construction Corporation ("JBros") and the City Government of Manila ("City of Manila") (together as "Respondents") are charged for violation 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") for their failure to notify the Philippine Competition Commission ("PCC") of a Contractual Joint Venture Agreement ("JVA") entered between them, within thirty (30) days from execution of their definitive agreement.

THE FACTS

Respondent JBros is a domestic corporation primarily engaged in general construction and other allied businesses including constructing, developing, or engaging in any work upon buildings, roads, highways, including earth construction.

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

[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").

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 07 June 2017, Respondents entered into a JVA for the reclamation and development of four hundred nineteen (419) hectares of foreshore land in Manila Bay, into a mixed-use commercial, residential, and tourism estate (the "Transaction").

On 25 October 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 JBros becoming a third-party assignee therein. The MOA was ratified by the PRA on 12 November 2019.

Thereafter, on 02 February 2021, JBros initiated the submission to the PCC's Mergers and Acquisitions Office ("MAO") of its notification form on the Transaction, and completed its submission on 04 February 2021. On 03 March 2021, the Phase 1 review period of the Transaction commenced after the payment of the filing fees.[3]

On 11 March 2021, the PCC issued Commission Decision No. 04-M-005/2021 ("Decision") resolving to take no further action on the proposed transaction between the Respondents, thereby effectively clearing the proposed JVA. The dispositive portion of the decision reads:

> ***ACCORDINGLY**, the Commission resolves to take no further action with respect to the proposed Transaction between JBros Construction Corporation 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.*

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 Transaction within the 30-day notification period provided under Section 17 of the PCA and Rule 2.1 of the PCC Merger Rules. JBros submitted its response on 11 May 2021, which Respondent City of Manila likewise adopted on 12 May 2021.

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[3] JBros paid the filing fees on 02 March 2021. 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

Unsatisfied with the Respondents' 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 02 February 2021, or one thousand three hundred thirty-five (1,335) days after the JVA was executed, and four hundred sixty-six (466) 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 Respondents in the maximum amount of PhP2,000,000.00.

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

The Complaint filed by the MAO against the Respondents cannot prosper. The finality of Commission Decision No. 04-M-005/2021 issued on 11 March 2021 bars the institution of any action against the JVA concluded by the Respondents.

There is no disputing that Commission Decision No. 04-M-005/2021 had long attained finality when the Complaint in this case was filed by the MAO on 16 June 2022, which was more than three (3) months after the decision was issued on 11 March 2022. No motion for reconsideration or appeal was filed against the decision to prevent it from attaining finality.

The PCA bars subsequent scrutiny of a merger or acquisition agreement once it is cleared by the Commission. Section 23 of the PCA explicitly mandates this in the following manner:

> *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.*

The clear and unequivocal language of the above-quoted provision leaves no room for further challenges being brought against a merger or acquisition agreement that has received a favorable ruling from the Commission.

The underlying reason for this rule is not difficult to understand. It is to lend predictability and finality to the rulings of the Commission clearing merger and acquisition agreements subject to compulsory notification and review process. If it were otherwise, uncertainty will continue to hound the transacting parties to a merger or acquisition agreement even after receiving a favorable ruling from the Commission.

The transacting parties will have to be constantly on guard for new challenges that may be brought at any time against the merger or acquisition agreement. This lack of predictability and finality will wreak havoc to the stability of business, and commercial and trade transactions that have to constantly anticipate for challenges that may destabilize, or worse, unravel the merger or acquisition agreement.

During the deliberations on 15 June 2015 of the Bicameral Conference Committee to harmonize Senate Bill No. 2282 and House Bill No. 5286, which became the PCA, Senator Paolo Benigno Aquino explained the legislative intent behind Section 23. In his introduction of Section 23, he bared that the finality imposed on favorable merger rulings is to protect business from harassment by reopening or re-examining cleared transactions in the following words:

> Section 23 and let me explain. There might have been some confusion to this section. But this is really what we call the "touch move" provision otherwise known as the Gutierrez amendment which basically says if the commission decides already on a case, they cannot overturn themselves. And ***this is really for protection of the business sector that they won't be harassed. If a merger had already gone through, hindi pwedeng palitan or balikan.***[4] *(emphasis supplied)*

The finality prescribed by Section 23 for favorable merger rulings is absolute. It does not distinguish between rulings on absence of competition harm or compliance with notification requirements. For in either instance, the challenge to a favorable ruling will result to the evil sought to be prevented by the legislature in prescribing finality to a clearance given by the Commission to merger and acquisition transactions.

Even as Section 23 admits to very limited exceptions expressly provided in the law, none of the two (2) exceptions – fraud, or false material information – were raised in issue in this case. The Complaint neither alleges any of these two (2) exceptions, nor contains any evidence thereof. Absent such allegations or evidence, the earlier favorable ruling by the Commission clearing the merger transaction in this case cannot be challenge anew.

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 **JBROS CONSTRUCTION CORPORATION** and **THE CITY GOVERNMENT OF MANILA** is **DISMISSED**.

SO ORDERED.

17 March 2022.

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[4] Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2282 and House Bill No. 5286, 04 June 2015, at 150, 16th Cong., 2d Reg. Sess. (2015)

ARSENIO M. BALISACAN
Chairman

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

EMERSON B. AQUENDE
Commissioner

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 notify to the Philippine Competition Commission ("Commission") when their merger or acquisition 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 JBros Construction Corporation 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 07 June 2017, and submitted their Notification belatedly on 04 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. 04-M-005/2021 dated 11 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 11 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.

[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.

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

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 notifed 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 in the market 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, the 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

[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.

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 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.

[7] Memorandum by the Review Team dated March 8, 2021 re: PROPOSED UNINCORPORATED JOINT VENTURE BETWEEN JBROS CONSTRUCTION CORPORATION AND THE CITY GOVERNMENT OF MANILA (M-2021-005); Minutes of the 406th Regular Meeting of the Philippine Competition Commission on March 11, 2021.

[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.

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 revoke the final clearance or approval rendered by the Commission in favor of the notified transaction. An adverse finding in this instant late notification 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.

With these foregoing reasons, the undersigned Commissioner maintains that 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.

17 March 2022.

JOHANNES BENJAMIN R. BERNABE
Commissioner