PHILIPPINE COMPETITION COMMISSION
Ensuring businesses compete and consumers benefit

25/F Vertis North Corporate Center 1,
North Avenue, Quezon City 1105
queries@phcc.gov.ph
(+632) 7719-PCC (7719-722)

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

PCC Case No. M-2018-005

Macsteel Global SARL B.V., and MSSA Investments B.V.

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COMMISSION DECISION NO. 38-M-031/2018

I. STATEMENT OF THE CASE

1. This case involves the alleged violation by Macsteel Global SARL B.V. ("MacGlobal") and MSSA Investments B.V. ("MSSA") (collectively the "Respondents") of the compulsory notification requirement provided under the Philippine Competition Commission's ("PCC" or "Commission") Rules on Merger Procedure with respect to the acquisition by MacGlobal of 50% of the shares of MSSA in Macsteel International Holdings B.V. ("Macsteel International") (the "Transaction"). The Parties executed the Sale of Shares Agreement on 5 July 2018 ("Sale of Shares Agreement")[1] with the value of the Transaction amounting to [redacted].

2. MacGlobal, the acquiring entity, is a private company registered and domiciled in Luxembourg. It is a wholly-owned subsidiary of Macsteel Holdings Luxembourg S.à.r.l. ("Macsteel Holdings") which, together with its subsidiaries (collectively, the "MacHold Group"), is engaged in steel processing and the distribution of value-added steel products.

3. Macsteel International, the acquired entity, is a joint venture company whose shares are equally owned by Macsteel and MSSA, an indirect subsidiary of a Dutch steel and mining company, ArcelorMittal S.A. ("ArcelorMittal").

4. Both MacHold Group and ArcelorMittal do not have assets in the Philippines. In fiscal year 2017 however, Respondents declared in their Merger Notification

[1] MacGlobal Notification Form; Appendices 7.1(A) and 7.1(B); Appendix 8.1 [MacGlobal's Affidavit of Good Faith] of MacGlobal's Notification Form.

Forms on the Transaction ("Forms") Philippine revenues amounting to [redacted] generated through the joint venture Macsteel International and its subsidiaries.[2]

5. On 6 August 2018, MacGlobal, on behalf of Macsteel Holdings, and MSSA, on behalf of ArcelorMittal, offered to submit their Forms to the PCC through the Mergers and Acquisitions Office ("MAO"). However, the Forms were not accepted[3] for failure of the Respondents to comply with the formal requirements for submitting Forms under Section 5.5 of the Rules on Merger Procedure.[4] Particularly, MacGlobal did not file the original copy of its Form, while MSSA failed to submit its Form.

6. On 23 August 2018, Respondents again submitted their Forms to the PCC but the MAO discovered that the acquired party's List of Authorized Signatories was not duly authenticated before the Philippine embassy or consulate. Again, the Forms could not be accepted for failure to comply with the formal requirements.[5]

7. Finally, on 24 August 2018, Respondents filed their Forms, sufficient in form, with the PCC.[6]

8. On 21 September 2018, MAO issued its Final Report of even date ("MAO Report") finding Respondents to have violated Section 2.1 of the Rules on Merger Procedure (Failure to Notify within the Period for Notification) and recommending the imposition of a fine.[7]

9. Acting on the MAO Report, the PCC issued a Notice on 24 September 2018 directing Respondents to file their respective verified comments on the MAO Report within fifteen (15) days from receipt of the notice.

10. After granting Respondents' requests for additional time to file their verified comments,[8] on 16 October 2018, the Commission received Respondents' verified comments,[9] which both pray that the Commission:

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2 Invoices of MUR Shipping BV, Sales Contract in relation to Macsteel International Far East Limited and Macsteel International Trading BV.

3 Rules on Merger Procedure, Section 5.5.

4 "PCC may refuse to accept the Form if it fails to comply with Section 5.3 or 5.4, or if it is not substantially in the prescribed form."

5 Returned Notification Form dated 23 August 2018.

6 Transaction number SR-2018-032.

7 MAO Final Report dated 21 September 2018, p. 3, par. 11.

8 Letter-Requests for Extension from MacGlobal and ArcelorMittal both received on 9 October 2018.

9 MacGlobal's Verified Comment dated 3 October 2018, pp. 11-14 and MSSA's Verified Comment dated 9 October 2018, p. 12.

"1. ACCEPT the explanation provided by [the Respondents] in [their] Verified Comment[s]and its accompanying documents; and

2. DESIST from imposing the fine recommended by the MAO in the MAO Final Report amounting to PHP 526,219.50 on the Parties."

II. THE ISSUE

11. Section 2.1 of the Rules on Merger Procedure provides that the parties to a merger that meets the compulsory notification thresholds shall notify the PCC within thirty (30) days from the date of execution of the relevant definitive agreement, *viz*:

> "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")."

12. As the Commission has enunciated in the previous case of *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*,[10] a violation of the compulsory notification requirements under Section 2.1. of the Rules on Merger Procedure is committed upon the concurrence of the following elements:

> (i) The parties signed a definitive agreement relating to a merger or acquisition;
> (ii) The merger or acquisition is a notifiable transaction under Section 17 of the Philippine Competition Act ("PCA") and Rule 4, Section 3 of the Implementing Rules and Regulations ("IRR"), as amended by PCC Memorandum Circular 18-001 ("MC 18-001");
> (iii) The parties notified the Commission of the transaction beyond the 30-day period following the signing of the definitive agreement relating to the merger or acquisition; and

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[10] PCC Case No. M-2018-004, 30 August 2018

(iv) The parties have not consummated the transaction prior to the Commission's approval or clearance of the transaction.

13. With respect to the first element, it is a matter of record that on 5 July 2018, Respondents, through their respective authorized representatives, signed the Sale of Shares Agreement which provides for the acquisition by MacGlobal of 50% of the shares of MSSA in Macsteel International.

13.1 The Commission observes that the Sale of Shares Agreement is the primary instrument of the Transaction submitted by Respondents for purposes of compliance with the Commission's notification requirement.

14. The Sale of Shares Agreement falls squarely within the purview of a definitive agreement as it sets out the complete and final terms and conditions of the Transaction. The Respondents do not dispute this.[11]

15. As regards the second element, Respondents' act of filing a notification on the Transaction and their active participation and cooperation with MAO during the review of the Transaction is an admission that the Transaction is a notifiable transaction.

16. Respondents' admission of the Transaction's notifiability was clearly and expressly shown when they stated in their respective Comments that they have "at all times acted expeditiously as possible and in good faith endeavored to ensure compliance with the PCC's merger filing requirements."[12]

17. In any case, the Commission finds that the Transaction is a notifiable transaction as it satisfies both the Size of Person Test and the Size of Transaction Test:

17.1 Size of Person Test: [13] Macsteel Holdings, the Ultimate Parent Entity of MacGlobal, the acquiring entity, derived gross revenues from the

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11 MacGlobal's Verified Comment dated 3 October 2018, pp. 2-3 par. 2.3 and MSSA's Verified Comment dated 9 October 2018, p. 3 par. 2.3 which both state that: "...To clarify, the definitive agreement is called a Sale of Shares Agreement (the 'Agreement'), which was signed on 05 July 2018".

12 MacGlobal's Verified Comment dated 3 October 2018, p. 4 par. 3.1, MSSA's Verified Comment dated 9 October 2018, p. 4 par. 3.1.

13 The Size of Person Test is satisfied when the aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly, exceeds Five Billion Pesos (PHP 5,000,000,000.00). PCC Rules on Merger Procedure, Rule 4, Section 3(a).

Philippines amounting to [redacted] through Macsteel International.[14]

17.2 Size of Transaction Test:[15] Both Macsteel Holdings and ArcelorMittal, the Ultimate Parent Entities of Macsteel International, the acquired entity, derived gross revenues from the Philippines amounting to [redacted][16] Further, MacGlobal would own more than 50% of the voting shares in Macsteel International.

18. With respect to the third element, records show that Respondents filed their complete Forms with the MAO only on 24 August 2018, or fifty (50) days after the signing of the Sale of Shares Agreement on 5 July 2018. In fact, Respondents expressly admitted in their Comment that they were "delay[ed] in filing" the Forms.[17]

19. With respect to the fourth element, the Commission takes note of Respondent's submission to the MAO and their respective Comments that they have not committed any act constituting the consummation of the Transaction.[18]

19.1 The Commission also notes that no contrary submission was put forward by MAO on this point, nor did the MAO dispute that no act constituting consummation of the Transaction has been implemented by the Respondents.

20. In their Comments, Respondents cite the following circumstances to excuse their late notification:

(i) that the "delay in filing" was of technical nature and did not result in any prejudice to the Commission or to any third party;

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14 This breaches the 5 Billion Peso-threshold under Section 3(a), Rule 4 of the IRR, as amended by PCC Memorandum Circular No. 18-001.

15 With respect to a proposed acquisition of voting shares of a corporation, the Size of Transaction is satisfied if (a) the aggregate value of assets in the Philippines that are owned by the corporation or by entities it controls, other than assets that are shares of those corporations; or (b) the gross revenues from sales in, into, or from the Philippines of the corporation or by entities it controls, exceed Two Billion Pesos (PHP 2,000,000,000.00); and as a result of such acquisition of the voting shares of a corporation, the acquiring entity would own 35% or 50% of the acquired corporation [if the entity or entities already own more than 35% before the proposed acquisition]. PCC Rules on Merger Procedure, Rule 4, Section 3(b)(4).

16 This breaches the 2 Billion Peso-threshold under Section 3(b), Rule 4 of the IRR, as amended by PCC Memorandum Circular No. 18-001.

17 MacGlobal's Verified Comment dated 3 October 2018, p. 7 par. 3.2.12, MSSA's Verified Comment dated 9 October 2018, p. 7 par. 3.2.13.

18 MacGlobal's Verified Comment dated 3 October 2018, p. 7 par. 3.2.13, MSSA's Verified Comment dated 9 October 2018, p. 7 par. 3.2.14.

(ii) that they have at all times acted expeditiously as possible and in good faith endeavored to ensure compliance with the PCC's merger filing requirements and never contravened the provision; and

(iii) that the imposition of penalties based on rules they are not aware of violates their right to procedural due process.[19]

21. Respondents do not dispute the fact that they belatedly notified the Commission of the Transaction. What Respondents essentially plead is that they be excused for their violation of Section 2.1 of the Rules on Merger Procedure due to the circumstances surrounding their notification.

22. Thus, for resolution by the Commission is whether the circumstances cited by Respondents constitute grounds to justify their late notification of the Transaction as to exempt them from liability for belated notification.

III. DISCUSSION

23. The Commission is not persuaded by the justifications set forth by Respondents. As discussed above, there are only four (4) elements that constitute a violation of the Section 2.1 of the Rules on Merger Procedure, and not one of the Respondents' defenses dispute the facts that support the findings of the Commission.

Good faith and lack of prejudice are not valid defenses against late notification

24. Respondents allege that they did their best to complete all documents and information required within the available time remaining, submitted the Forms in good faith on 6 August 2018,[20] have at all times acted expeditiously as possible, and in good faith endeavored to ensure compliance with the PCC's merger filing requirement.

25. Respondents further allege that the Sale of Shares Agreement and the Marketing Agreement have not been implemented. Hence, any non-compliance was of a technical nature and did not result in any prejudice to the Commission or any third party. Ultimately, Respondents argue that they never contravened the provisions of the PCA.

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19 MacGlobal's Verified Comment dated 3 October 2018, pp. 9-11 pars. 4.1-4.8, MSSA's Verified Comment dated 9 October 2018, pp. 9-12 pars. 4.1-4.9.

20 MacGlobal's Verified Comment dated 3 October 2018, p. 3 par. 2.4, MSSA's Verified Comment dated 9 October 2018, p. 3 par. 4.

26. At this point, it is useful to turn to the spirit and intent behind the compulsory notification requirement of the PCA.

26.1 The compulsory notification regime of the PCA is anchored in its Section 17, which provides:

> "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: *Provided,* That the Commission shall promulgate other criteria, such as increased market share in the relevant market in excess of minimum thresholds, that may be applied specifically to a sector, or across some or all sectors, in determining whether parties to a merger or acquisition shall notify the Commission under this Chapter."

26.2 The compulsory notification requirements seek to protect the power and mandate of the Commission to review proposed mergers and acquisitions for possible anticompetitive effects. In order to protect the Commission's power to review proposed mergers, it is imperative that the sanctions for non-compliance with the notification requirement have a real deterring effect. Otherwise, transacting parties may be tempted to disregard the legal requirement with impunity.

26.3 To further operationalize the compulsory nature of merger notification, Section 2.1 of the Rules on Merger Procedure was created by the PCC. It provides for a period of thirty (30) days, reckoned from the signing of the relevant definitive agreement, within which the transacting parties shall notify the PCC of a proposed merger or acquisition ("Notification Period"). As clearly stated in the provision:

> "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")."

26.4 The Notification Period thus provides the transacting parties with sufficient time to complete the notification form and to prepare the documentary requirements to be submitted together with the form. More importantly, **the Notification Period ensures that merger review and investigation is conducted within a specific period and is not left to the parties' discretion**.

27. Hence, Respondents' defense that they never contravened the provisions of the PCA is misplaced as every instance of non-compliance with Section 2.1 of the Merger Procedure contravenes the PCA, as it threatens the Commission's power to conclude a timely review of the merger.

28. The Commission notes that some of the justifications raised by Respondents are similar to those raised by the respondents in *AXA SA*.

29. In *AXA SA*, the respondents prayed for the Commission's "leniency," alleging, among others, that they immediately took steps to comply as soon as it had determined its notification obligation, that they have provided all cooperation required to enable MAO to conduct and complete the review of the proposed transaction, and that the delay in the filing of the notification has not led any harm to public interest.[21]

30. The Commission, however, was not persuaded by these justifications and ruled:

> "Thus, to sustain a finding of a violation of Section 2.1 of the Merger Procedure, all that must be shown is the existence of all the elements of the failure to notify within the period for notification. **Lack of intent to avoid compliance, the fact that the delay did not harm public interest, the fact that PCC was not deprived of its ability to review the Transaction, or the fact that the delay was due to the large-scale global operations are not accepted as defenses.**
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[21] *AXA SA*, p. 3

> Whether Respondents [did not] intend to belatedly notify, and whether such late notification has not resulted in public harm or deprivation of PCC's ability to review the Subject Transaction are immaterial insofar as the proceedings under Section 2.1 of the Merger Procedure are concerned. **Once it is determined that transacting parties failed to observe the Notification Period, the liability under Section 16.2 of the Merger Procedure attached to the transacting parties, regardless of the intent or the effects of late notification.**" (Emphasis supplied.)

31. In the same vein, Respondents claim of good faith and lack of prejudice cannot be sustained.

There is no violation of Respondents' right to procedural due process

32. Respondents claim that the imposition of the penalty under the Rules on Merger Procedure – to which they were not aware of – is a violation of their right to due process. They add that they cannot be assumed to have knowledge of the Rules on Merger Procedure since they are both foreign entities that have no business presence in the Philippines.[22]

33. It is a basic legal principle that "ignorance of the law excuses no one from compliance therewith." Considering that the Philippine Competition Act, its Implementing Rules and Regulations, and the Rules on Merger Procedure have always been accessible online and are publicly available, Respondents cannot just feign ignorance of the rule and use the same as a defense to justify their failure to timely notify the PCC of the Transaction.

34. Moreover, their own Sale of Shares Agreement belies their claims that they were not aware of the competition laws in the Philippines or that they had to investigate whether merger filings were required in the 97 countries.[23] The said agreement specifically stated only four countries which have "Suspensory Competition Territories" – which included the Philippines, among only three (3) other countries.[24] Thus, at the time the Sale of Shares Agreement was signed, it should be readily apparent to Respondents that the Transaction needed PCC's prior approval.

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22 MacGlobal's Verified Comment dated 3 October 2018, p. 9 par. 4.2, MSSA's Verified Comment dated 9 October 2018, p. 9 par. 4.3.

23 MacGlobal's Verified Comment dated 3 October 2018, p. 4 par. 3.2.2., MSSA's Verified Comment dated 9 October 2018, p. 4 par. 3.2.2.

24 The other countries being South Africa, Namibia, and Pakistan. See Sales of Shares Agreement, p. 10 par 3.1.1.7.

35. The Commission also notes Respondents' admission in their respective Comments that they have already been in communication with ACCRALAW Offices as early as 6 June 2018 – a month before the execution of the Sale of Shares Agreement. These communications with ACCRALAW Offices had commenced with a view to determining whether the Transaction was the proper subject of compulsory notification.[25]

36. Considering that Respondents have already been receiving advice from a Philippine-based counsel prior to the signing of the definitive agreement, which triggered the running of the 30-day Notification Period, they cannot claim ignorance on the notification procedure under the guise of being a foreign entity with no presence in the Philippines. As a global business entity, "it is incumbent and expected of Respondents, when attending to commercial affairs of this magnitude, to observe a standard of diligence sufficient to enable them to comply with various regulatory requirements in different jurisdictions in which they operate or maintain pecuniary interests."[26]

37. Respondents also assert that the 30-day period under the Rules on Merger Procedure is an insufficient period to comply with the notification requirement in the format required by the PCC.[27] In support, they allege that the currently superseded Section 6(b) of Clarificatory Note No. 16-001 issued by the PCC recognizes that there is a distinction between "global transactions requiring notification in multiple jurisdictions" and other transactions.[28]

38. The Commission has reviewed similar transactions where both parties are foreign entities that do not have presence in the Philippines but derive revenues therefrom. If other parties similarly situated as Respondents were able to file their respective Forms with the Commission in a timely manner, there is no reason why Respondents cannot do the same.

39. As explained by the Commission in *AXA SA*, the notification period has to be strictly enforced to ensure that the merger review and investigation is conducted at a specified period and is not left to the parties' discretion."[29]

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25 MacGlobal's Verified Comment dated 3 October 2018, p. 5 par. 3.2.5, MSSA's Verified Comment dated 9 October 2018, p. 5 par. 3.2.5.

26 *AXA SA*, p. 7

27 MacGlobal's Verified Comment dated 3 October 2018, p. 8 par. 3.2.14, MSSA's Verified Comment dated 9 October 2018, p. 8 par. 3.2.15.

28 MacGlobal's Verified Comment dated 3 October 2018, p. 8 par. 3.2.14, MSSA's Verified Comment dated 9 October 2018, p. 11 par. 4.8.

29 *AXA SA*, p. 7

40. Respondents' reliance on Section 6(b) of Clarificatory Note No. 16-001 is unwarranted given that this has been superseded by express repeal by the Rules on Merger Procedure.[30]

Amount of Fine

41. Section 16.2 of the Rules on Merger Procedure provides a fine equivalent to ½ **of 1% of 1% of the value of transaction,** which in no case shall exceed the statutory limit of PHP2 Million.

42. Under Section 16.4 of the Rules on Merger Procedure, the fine shall be based on the value of transaction which shall be set with reference to: (a) the aggregate value of assets in the Philippines subject of the proposed transaction or owned by the acquired corporation, including entities it controls, or (b) the gross revenues generated by assets subject of the proposed transaction or from sales in, into, or from the Philippines of the acquired corporation, including entities it controls, whichever is higher. As mentioned above, the value of the Transaction is [redacted].

IV. DISPOSITIVE PORTION

43. On the basis of the discussions above, the Commission finds Respondents MacGlobal and MSSA in violation of Section 2.1 of the Rules on Merger Procedure (failure to notify within the period for notification). Respondents are hereby directed to pay a fine of ½ of 1% of 1% of the value of the Transaction amounting to [redacted], equivalent to **FIVE HUNDRED TWENTY-SIX THOUSAND TWO HUNDRED NINETEEN PESOS AND FIFTY CENTS (PHP 526,219.50)**, within forty-five (45) days from the issuance of this Decision.

DONE, this 14th day of November 2018, Quezon City, Philippines.

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30 Rules on Merger Procedure, Section 19.3.

ARSENIO M. BALISACAN
Chairman

JOHANNES BENJAMIN R. BERNABE
Commissioner

STELLA LUZ A. QUIMBO
Commissioner

AMABELLE C. ASUNCION
Commissioner

MACARIO R. DE CLARO, JR.
Commissioner

Copies Furnished:

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Macsteel Holdings Luxembourg S.à.r.l.

Macsteel International Holdings B.V.

ArcelorMittal S.A.

MSSA Investments B.V.

Mergers and Acquisitions Office