

**In the Matter of Udenna Corporation,
Chelsea Logistics Holdings
Corporation, and Trans-Asia Shipping
Lines, Inc.'s Alleged Violation of the
Compulsory Notification Requirements
Under Section 17 of the Philippine
Competition Act and Rule 4, Section 3
of the Rules and Regulations to
Implement Republic Act No. 10667**

**(PCC Case No. M-2018-003)
(MAO Case No. 3/2017)**

**Udenna Corporation, Chelsea Logistics
Corporation, and Trans-Asia Shipping
Lines, Inc.¹**

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COMMISSION DECISION NO. 021-M-02/2018

I. STATEMENT OF THE CASE

1. This case involves the alleged failure of Chelsea Logistics Holdings Corporation ("Chelsea") and Trans-Asia Shipping Lines, Inc. ("Trans-Asia") to comply with the rules on compulsory notification of mergers and acquisitions under the Philippine Competition Act ("PCA") and the Rules and Regulations to Implement Republic Act No. 10667 ("IRR") with respect to Udenna Corporation's ("Udenna") purchase, through Chelsea, of 100% of the shares in Trans-Asia, through several Deeds of Absolute Sale of Shares² dated 12 December 2016 ("Subject Transaction") executed for a total consideration of PhP205,366,987.00.
2. Chelsea, the acquiring company, is an entity incorporated under the laws of the Philippines. Through its subsidiaries, Chelsea is engaged in the business of maritime trade by conveyance, carriage, loading, transportation, discharging and storage of petroleum products, goods and merchandise of every kind, over waterways in the Philippines.
3. Chelsea is a wholly-owned subsidiary of Udenna, a domestic holding company with registered principal office located in Davao City, Philippines, whose subsidiaries are engaged in the distribution and retail of petroleum products, commercial shipping, ship management, logistics, financial services, environmental services, and property development.

¹ Udenna, Chelsea, and Trans-Asia shall hereinafter be collectively referred to as "Respondents".

² Deeds of Absolute Shares dated 12 December 2016 executed by Arthur Kenneth L. Sy, Julian L. Sy, Jr., Abraham L. Sy, Judith Ann Sy Sandoval, and JG Symarine Management & Allied Ventures Corp. as Seller individually and Chelsea Shipping Group Corp as Purchaser.

4. Trans-Asia, the acquired company, is also an entity incorporated under the laws of the Philippines. It is primarily engaged in domestic shipping by transporting passengers and cargoes within Philippine territorial waters and in the high seas.³
5. Pursuant to a fact-finding inquiry carried out by the Mergers and Acquisitions Office ("MAO"), it found that there are reasonable grounds to believe that the Subject Transaction was executed and consummated without the requisite approval of the Philippine Competition Commission ("Commission"), despite being covered by the compulsory notification thresholds under the PCA and its IRR.
6. On 12 October 2017, the MAO sent *Letters to Explain* of even date ("Letter to Explain") to each of the Respondents informing them of MAO's preliminary findings and requiring the latter to explain in writing why no penalties should be imposed against them for a violation of Section 17 of the PCA and Rule 4, Section 3 of the IRR.
7. In response thereto, MAO received Udenna's and Trans-Asia's respective explanations on 27 October 2017.
8. MAO issued a Call for Conference dated 10 November 2017 inviting the Respondents for a meeting to explain its findings and to provide the Respondents another opportunity to submit additional evidence, in light of MAO's findings.
9. During the conference on 23 November 2017 between the Respondents and MAO's representatives, Chelsea and Trans-Asia were informed of MAO's findings and its processes. Both Respondents requested for a period of 15 days or until 8 December 2017 to submit additional documents.
10. On 5 December 2017, Chelsea requested for an additional 15 days from 8 December 2017 or until 23 December 2017 to submit the additional documents.
11. On the same day, Trans-Asia made a partial submission and requested for a period of 15 days to submit additional documents, which they did so on 27 December 2017.
12. Based on the foregoing submissions by Respondents and the fact-finding investigation conducted by MAO, the latter issued its Final Report dated 1 March 2018 ("Final Report") finding, among others, that the Subject Transaction breached the notification thresholds and that Respondents violated the provisions on compulsory notification under Section 17 of the PCA and Rule 4,

³ Tran-Asia directly owns 100% interest in the following subsidiaries:

- a. Oceanstar Shipping Corporation which is engaged in the business of domestic shipping for the transportation of passengers and cargoes.
- b. Quality Metal & Shipworks, Inc. which is established to provide machining and metal works on ship machineries and industrial plants.
- c. Dynamic Cuisine, Inc. which is engaged to establish and maintain restaurants, coffee shops, etc., and make, cook, arrange, serve and cater foods, drink, refreshment, etc.
- d. Starsy Shoppe, Inc. which is established to purchase all kinds of food and beverage products and merchandise, except rice and cor[n] for selling the same. (Trans-Asia 2016 Notes to Financial Statements, at 27-28.)

Section 3 of the IRR when they executed and consummated the Subject Transaction without notifying the Commission.

13. Acting on the Final Report, the Commission required Respondents to submit their respective Comments on the said report. After requests for extension, Udenna and Chelsea submitted their Comment on 25 June 2018 while Trans-Asia submitted its Comment on 26 June 2018.
14. Udenna and Chelsea argue that in determining whether the Subject Transaction breaches the notification thresholds provided in the PCA, the value of the transaction should be based on the purchase price for the acquired shares of Trans-Asia. On the other hand, Trans-Asia argues that the value of the transaction should be based on the amount of its net assets.
15. On 26 June 2018, the case was submitted for decision by the Commission.

II. THE ISSUE

16. To sustain a finding of violation of the compulsory notification requirements under the PCA and its IRR, the following elements must concur: (i) the transaction breaches the notification thresholds provided under Section 17 of the PCA and Rule 4, Section 3 of the IRR; (ii) consummation of the transaction; and (iii) failure of the merger parties to properly notify the Commission of the transaction.
17. With respect to the second element, it is a matter of record that Respondents have already consummated Udenna's acquisition of Trans-Asia through several Deeds of Absolute Sale of Shares dated 12 December 2016.
 - 17.1. The Commission likewise takes note that (1) in Chelsea's Audited Financial Statement ("AFS") for year ended 2016, it unequivocally stated that "[Chelsea] acquired [Chelsea Shipping Corp.] and [Trans-Asia], though the purchase of said companies' outstanding shares of stock from their registered owners. The respective acquisitions of [Chelsea Shipping Corp.] and [Trans-Asia] were completed by the Company in the last quarter of 2016;" and (2) the Respondents paid the requisite Documentary Stamp Taxes and Capital Gains Tax necessary for the transfer of shares.⁴
18. With respect to the third element, Respondents do not dispute the fact that they did not notify the Commission of the Subject Transaction.⁵
19. However, with respect to the first element, Respondents argue that the Subject Transaction does not breach the notification thresholds provided in the PCA and its IRR such that the Size of Transaction Test is not satisfied.

⁴ "The appropriate taxes on this purchase transaction were paid to the Bureau of internal Revenue as shown by the Documentary Stamp Taxes and Capital Gains Tax Returns filed in connection with the said payment of taxes." Letter of Chelsea to PCC dated 24 October 2017.

⁵ "The purchase of Trans-Asia was not reported to the Commission based on CLC's interpretation of the following provision of Republic Act No. 10667." *Id.*

- 19.1. The Commission takes note of Chelsea's admission that the Subject Transaction breaches the threshold for the Size of Person Test since Chelsea, though its parent Udenna, meets the threshold amount in Section 3(a).⁶
20. Thus, the issue for resolution in this case is whether or not the Subject Transaction breaches the threshold for the Size of Transaction Test.

III. DISCUSSION

21. Section 17 of the PCA mandates compulsory notification of parties to a merger or acquisition:

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

An agreement consummated in violation of this requirement to notify the Commission shall be considered void and subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction. xxx

22. Section 4(a) of the PCA, in turn, defines an acquisition as follows:
- (a) Acquisition refers to the purchase of securities or assets, through contract or other means, for obtaining control by:
 - (1) One (1) entity of the whole or part of another;
 - (2) Two (2) or more entities over another; or
 - (3) One (1) or more entities over one (1) or more entities;
23. In this case, the Subject Transaction involves an acquisition by one entity of the whole of another as Udenna, though Chelsea, acquired 100% of the issued and outstanding shares of capital stock of Trans-Asia.
24. Under Rule 4, Section 3 of the IRR, parties to a merger or acquisition are required to notify the Commission when the tests provided therein are satisfied. These tests are the "Size of Person Test" and the "Size of Transaction Test."

Size of Person Test

25. Under Rule 4, Section 3 (a) of the IRR, the Size of Person Test is satisfied when "[t]he 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 the entities that the ultimate

⁶ "Although CLC, through its parent Udenna met the threshold amount in Section 3(a), the threshold value stated in Section 3(b) was not present in CLC's purchase of Trans-Asia." Letter-Reply dated 24 October 2017.

parent entity controls, directly or indirectly exceeds One Billion Pesos (Php1,000,000,000.00).” To satisfy this test, it is enough that either the annual gross revenues in, into or from the Philippines or the value of assets in the Philippines of a party to a merger or acquisition be over PhP1 Billion.

26. Respondents satisfy the Size of Person Test. In its Letter-Reply dated 24 October 2017, Chelsea admits that the Size of Person Test was satisfied considering that the annual gross revenues, in, into, or from the Philippines, and the value of the assets in the Philippines of Udenna, its Ultimate Parent Entity (“UPE”), are both above PhP1 Billion.⁷

26.1. Under Rule 4, Section 3(f) of the IRR, the aggregate value of assets and gross revenues from sales shall be the amount stated on the last regularly prepared annual financial statements and annual statements of income and expense, respectively.

26.2. Considering that the Subject Transaction was consummated on 12 December 2016, the AFS of Udenna for the year ending 2015 shall be controlling. An examination of the AFS of Udenna for 2015 indicates that the Respondents breached the Size of Person Test, whether through assets or revenues, since the total assets and total revenues of Udenna are over Php1 Billion:

**UDENNA CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF FINANCIAL POSITION
FOR THE YEAR ENDED DECEMBER 31, 2015 AND 2014**

<u>ASSETS</u>	2015
XXX	
TOTAL ASSETS	P 31,292,299,461

**UDENNA CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF COMPREHENSIVE INCOME
FOR THE YEAR ENDED DECEMBER 31, 2015 AND 2014**

REVENUES	2015
Sale of Goods	P 29,155,491,668
Charter fees and other charged	562,523,731
Sale of real estate	455,692,000
Fuel service and storage income	320,179,086
Lease income	123,449,668
Others	120,449,668
	30,737,315,934

Size of Transaction Test

27. On the other hand, the Size of Transaction Test provided under Rule 4, Section 3(b)(4) of the IRR requires that the value of the transaction exceeds PhP1 Billion. In determining whether the value of the transaction exceeds PhP1 Billion

⁷ Letter of Chelsea to PCC dated 24 October 2017.

in the case of an acquisition of voting shares of a corporation, the following thresholds must be breached:

i. If the **aggregate value of assets in the Philippines that are owned by the corporation or non-corporate entity or by entities it controls**, other than assets that are shares of any of those corporations, exceed One Billion Pesos (PhP1,000,000,000.00); x x x (Emphasis supplied).

or

ii. The gross revenues from sales in, into, or from the Philippines of the corporation or non-corporate entity or by entities it controls, other than assets that are shares of any of those corporations, exceed One Billion Pesos (PhP1,000,000,000.00); x x x

and

iii. If as a result of the proposed acquisition of the voting shares of a corporation, the entity or entities acquiring the shares, together with their affiliates, would own voting shares of the corporation that, in the aggregate, carry more than the following percentages of the votes attached to all the corporation's outstanding voting shares:

I. Thirty-five percent (35%); or

II. Fifty percent (50%), if the entity or entities already own more than the percentage set out in subsection I as above, as the case may be, before the proposed acquisition.

28. In its Comment, Udenna and Chelsea argue that the value of transaction under Section 17 of the PCA refers to the purchase price for the acquired shares of Trans-Asia. Because the purchase price was only PhP205,366,987, and therefore does not exceed PhP1 Billion, the Subject Transaction is not covered by the compulsory notification requirement.

29. However, under Rule 4, Section 3(b)(4) of the IRR, parties to a merger or acquisition are required to provide notification with respect to a proposed acquisition of voting shares of a corporation, if either the aggregate value of the assets or the gross revenues from sales in, into, or from the Philippines of the acquired corporation exceed PhP1 Billion.

29.1. Under Section 3(f)(2) of the same rule, the aggregate value of assets in the Philippines shall be stated on the last regularly prepared balance sheet or the most recent audited financial statements in which those assets are accounted for. Similarly, the gross revenues from sales in, into, or from the Philippines shall be found in the last regularly prepared annual statement of income and expense of that entity.

30. There is no merit in Respondent's contention that the value of the transaction should be interpreted as the purchase price for the acquired shares of Trans-Asia. The IRR clearly defines the value of the transaction as either the "aggregate value of assets" or "gross revenue from sales".

31. The purchase price for the acquired shares of Trans-Asia is different from the value of the transaction. The purchase price is what the parties to a contract have agreed to pay the buyer in exchange of the object of the contract. The purchase price cannot be the basis for the determining whether a transaction is notifiable because it does not properly capture the size of the transaction.
32. On the other hand, the value of transaction, as contemplated by the PCA and its IRR, is based on either the aggregate value of the assets in the Philippines, or the gross revenues from sales in, into, or from the Philippines, of the acquired entity as stated in the last regularly prepared balance sheet, or statement of income and expense, or the most recent audited financial statements. Unlike the purchase price which the parties can determine in their own discretion, the value of transaction shall be the amount as stated in the audited financial statements.
33. The rationale for setting a threshold for notification is to ensure that mergers or acquisitions that are more likely to substantially lessen competition in the market for goods and services are subject to compulsory notification, and to exclude those that are less likely to pose competition concerns. Ensuring that certain mergers and acquisitions be subject to compulsory notification cannot be left to the discretion of persons or entities who are operating within those market for goods and services.
34. Purchase price may be increased or decreased subject to the discretion of parties. Its value can be negotiated above or below the actual value of the transaction. However, the aggregate value of assets or gross revenues from sales accurately reflects the value of transaction. Such value is not subject to any arbitrary valuation, or negotiation from the parties. The amount was also made subject to an independent audit, following a clearly defined guidelines and rules for financial reporting.
35. Respondents argue that even considering the threshold provided in the IRR, such that reference is made to either the aggregate value of the assets or the gross revenues from sales of the Trans-Asia, the transaction will still be below the compulsory notification threshold as Trans-Asia's net assets were only PhP162 Million at the time of the Subject Transaction.
36. This argument has no merit. The law simply provides that in determining whether notification must be made, the *aggregate value of assets* is controlling.
37. "Aggregate value of assets" or "gross assets" or "total assets" is the total resource controlled by the entity as a result of a past events and from which future economic benefits are expected to flow to the entity.⁸ On the other hand, net asset, or the difference between the Total Assets and Total Liabilities, is more conceptually similar to capital⁹ or equity.¹⁰

⁸ IASB, IFRS Conceptual Framework for Financial Reporting, para. 4.3.

⁹ "Under a financial concept of capital, such as invested money or invested purchasing power, capital is synonymous with the net assets or equity of the entity." *Id.* para. 8.1

¹⁰ "Equity is the residual interest in the assets of the entity after deducting all its liabilities." *Id.* para 4.63 and 5.3.

38. The basis of the Size of the Transaction test is the aggregate or the gross assets as reflected in the latest available financial statements. Based on the 2015 AFS of Trans-Asia, the threshold of the Size of Transaction test is met:

TRANS-ASIA SHIPPING LINES, INC	
STATEMENT OF FINANCIAL POSITION	
	As at December
<u>ASSETS</u>	31
	2015
XXX	
TOTAL ASSETS	<u>P 1,142,700,772</u>

39. Under the IRR, if either the gross assets or the gross revenues exceed PhP1 Billion, it already satisfies the Size of Transaction test is already satisfied. The value of Trans-Asia total assets (PhP1,142,700,772) breaches the threshold for the Size of Transaction Test.
40. The Commission takes note of the Guidelines on the Computation of Merger Notification Thresholds (“Threshold Guidelines”) which gave more detailed guidelines on the calculation of the aggregate value of assets and gross revenues from sales for the purpose of determining whether a proposed merger or acquisition is notifiable to the Commission.
- 40.1. Under the Threshold Guidelines, except for allowance for depreciation and amortization, allowance for impairment losses and other allowances used to derive the carrying values of the assets, no other deduction shall be made against the value of the assets.
41. Even if the computation under the Threshold Guidelines is adhered to, the Subject Transaction will still breach the notification threshold.
- 41.1. In Tran-Asia’s 2015 AFS, no impairments were provided to its financial and non-financial assets.¹¹ Assets were also carried on at cost less accumulated depreciation, if applicable, and impairment in value.¹² Tran-Asia’s assets were already presented in the Statement of Financial Position after deduction of respective accumulated depreciation.¹³ Liabilities are not considered an allowable deduction under the Threshold Guidelines.¹⁴
42. Udenna and Chelsea further argue that their interpretation of the compulsory notification rules was made in good faith. They claim that the IRR had only recently come into effect before the Subject Transaction, and that there were no precedents or jurisprudence which they could review or rely upon to determine whether the Subject Transaction was notifiable. However, this cannot be given credence. As noted by MAO in its Final Report, Udenna was

¹¹ Trans-Asia 2015 Notes to Financial Statements at 22.

¹² *Id.* at 16-17.

¹³ *Id.* at 27.

¹⁴ Even the Philippine Financial Reporting Guidelines do not allow a deduction of liabilities from assets. “An entity shall not offset assets and liabilities or income and expenses, unless required or permitted by an IFRS.” PAS1 (Revised), no. 33.

able to notify prior transactions based on a correct computation of total assets or gross revenues.

Penalties for Non-notification

43. Section 17 of the PCA provides for twin penalties for violation of the compulsory notification requirement: (i) the transaction shall be void and (ii) an administrative fine shall be imposed. As stated therein:

Section 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 (PhP 1,000,000,000.00) 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: x x x

An agreement consummated in violation of this requirement to notify the Commission shall be considered void and subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction.”
(Emphasis supplied)

44. Further, the obligation to pay the monetary penalties imposed above shall be extended to the UPEs of the parties to the non-notified transaction. As stated in Section 16.1 of the PCC Rules on Merger Procedure (“Rules on Merger Procedure”):

Section 16.1 Non-notification of a consummated merger and gun-jumping. Parties to a merger and their ultimate parent entities failing to notify the PCC prior to consummation of their merger, or violating the waiting period provided under Section 17 of the Act and Rule 4, Section 5 of the IRR, shall be imposed a fine equivalent to one (1) to five (5) percent of the value of transaction.

45. In this case, prior to the Subject Transaction, Trans-Asia was a UPE in itself while Chelsea’s UPE is Udenna. Considering the foregoing, Udenna shall be held solidarily liable with the Respondents for the payment of the fine imposed.
46. Under Section 16.5 of the Rules on Merger Procedure and Section 4, of Memorandum Circular No. 17-001 (“MC 17-001”), the basic fine shall be three percent (3%) of the value of the transaction. If warranted by the circumstances attending the violation, the Commission may adjust such basic amount.
47. Under the Rules on Merger Procedure and MC 17-001, the Commission may consider Respondents’ cooperation during the investigation or review beyond what is required in the PCA and its IRR as a mitigating circumstance, which has the effect of reducing the imposable fine.
48. The Commission observed the cooperative behavior exhibited by Udenna and Chelsea in a related transaction. In said transaction, the parties exhibited cooperation and compliance with the notification requirements of the PCA even

upon the return of their Notification Forms. The Commission considers this a mitigating circumstance that merits the reduction of the penalty to two percent (2%) of the value of the Transaction.

49. Under Section 16.4 of the Rules on Merger Procedure and Section 2 of MC 17-001, the fine is 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 in controls, whichever is higher. As the aggregate value of Trans-Asia's assets in the Philippines is equivalent to PhP1,142,700,772, and the gross revenues generated by sales subject of the proposed transaction is PhP881,934,459, the value of the aggregate assets is higher. Thus, the imposable penalty is two percent (2%) of the aggregate value of assets, or PhP1,142,700,772, which is equivalent to **PhP22,854,015.44**.

IV. DISPOSITIVE PORTION

50. The Deeds of Absolute Sale of Shares dated 12 December 2016 executed by Chelsea Shipping Group Corp. with each of Arthur Kenneth L. Sy, Judith Ann S. Sandoval, Abraham L. Sy, Julian L. Sy, Sr., and JG Symarine Management and Allied Ventures Corp. are hereby declared void.
 - 50.1. Parties are directed to submit to the Commission a Compliance Report outlining any and all actions of the parties in relation to the effects of the Subject Transaction being void, supported by documents, including but not limited to the Trans-Asia's General Information Sheet, the relevant entries in the Stock and Transfer Book, cancelled Stock Certificates, other corporate records, public disclosures, other reportorial documents and contracts, if any, within forty-five (45) days from the issuance of this decision, extendible for justifiable reasons upon motion with the Commission.
 - 50.2. Trans-Asia Shipping Lines, Inc. is directed to inform the Commission within thirty (30) days from execution of definitive agreements relating to any merger or acquisition involving any of its shares by any person or entity.
51. Udenna Corporation, Chelsea Logistics Holdings Corporation, and Trans-Asia Shipping Lines, Inc. are hereby directed to pay a fine of 2% of the value of the Subject Transaction or **PhP22,854,015.44** within **forty-five (45) days** from the issuance of this decision.



ARSENIO M. BALISACAN
Chairman



JOHANNES BENJAMIN R. BERNABE
Commissioner



STELLA LUZ A. QUIMBO
Commissioner



AMABELLE C. ASUNCION
Commissioner