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In the Matter of Udenna Corporation and KGL Investment Cooperatief U.A.'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-2017-001

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DECISION

I. STATEMENT OF THE CASE

1. This case involves the alleged failure of Udenna Corporation ("Udenna") and KGL Investment Cooperatief U.A. ("KGLI Coop") 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's purchase of 100% of KGLI Coop's shares in KGL Investment B.V. ("KGLI-BV") (the "Transaction") through the Share Purchase Agreement dated 28 July 2016 between Udenna and KGLI Coop and the Deed of Transfer dated 19 August 2016 executed by KGLI Coop assigning its shares of stock in KGLI-BV in favor of Udenna for a consideration of USD 120 Million.

2. Udenna, the acquiring company, is a domestic holding company with registered principal office located in Davao City, Philippines. Its subsidiaries are engaged in the distribution and retail of petroleum products, commercial shipping, ship management, logistics, financial services, environmental services and property development.

3. KGLI Coop, the seller, is a cooperative incorporated under the laws of The Netherlands. Prior to the Transaction, KGLI Coop was the parent company of KGLI-BV (the acquired company), which is a duly organized private limited liability company also incorporated under the laws of The Netherlands. At the time of the Transaction, KGLI-BV had a 39.71% share interest in KGLI-NM Holdings, Inc. ("KGLI-NM"), a domestic corporation.

4. Udenna and KGLI Coop are herein collectively referred to as "Respondents."

5. On 28 December 2016, the Mergers and Acquisitions Office ("MAO") received a letter dated 23 December 2016 from Negros Holdings & Management

Corporation, claiming that the Transaction was executed and effectuated[1] without compliance with the PCA and its IRR.[2] This prompted a fact-finding investigation by MAO on the Transaction by gathering publicly available information and documents and conduct of conferences and meetings.

6. After MAO issued Letters to Explain[3] to Respondents, Udenna and KGLI Coop submitted their respective Answers.[4] In their Answers, Respondents did not dispute the execution and consummation of the Transaction. However, they argued that the Transaction does not breach the thresholds for notification under Rule 4, Section 3 of the IRR.

7. MAO then called a conference in order to inform Respondents of its preliminary findings on the case. Subsequently, Udenna filed a supplemental letter dated 14 July 2017 reaffirming its position in its earlier Answer.[5]

8. On the basis of the foregoing submissions by Respondents and the fact-finding investigation conducted by MAO, the latter issued its Final Report dated 7 August 2017 ("Final Report")[6] finding, among others, that the Transaction breached the notification thresholds and that Respondents violated the provisions on compulsory notification under Section 17 of the PCA and Rule 4, Section 3 of the IRR when they executed and consummated the Transaction without notifying the Commission.

9. Acting on the Final Report, the Commission required Respondents to submit their respective Comments on the said report. In their Comments, Respondents maintained that the Transaction is not covered by the compulsory notification requirements. This time, Udenna changed its theory and claimed that KGLI Coop had control over KGLI-BV at the time of the Transaction and thus, the value of shares in the acquired company should be excluded from computing the acquired company's aggregate value of assets.

10. On 8 November 2017, the case was submitted for decision by the Commission.

11. On 19 January 2018, before promulgating its decision on the case, the Commission held a conference with Respondents to provide guidance on the applicable penalties arising from a violation of the compulsory notification

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1 On 19 August 2016, KGLI Coop transferred its shares of stock in KGLI-BV to Udenna for a consideration of USD 120 Million.

2 NHMC's Letter *Re: Acquisition of KGL Investment B.V. by Udenna Corporation* dated 23 December 2016, p. 7.

3 Mergers and Acquisitions Office ("MAO") issued *Notice to Explain* dated 3 March 2017 to the merger parties.

4 Udenna's *Answer* dated 21 March 2017; KGLI Cooperatief UA's *Answer* dated 28 March 2017.

5 Udenna's filed a *Supplemental Letter* dated 14 July 2017, received on 17 July 2017 by MAO.

6 "*Final Report on Case No. 2/2017*" dated 7 August 2017.

provisions of the PCA and its IRR, as well as the remedies available to Respondents in the event of an unfavorable ruling by the Commission.

II. THE ISSUE

12. 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.

13. Respondents do not dispute the fact that they did not notify the Commission of the Transaction. Similarly, it is a matter of record that Respondents have already consummated Udenna's acquisition of KGLI Coop's shares in KGLI-BV through a Deed of Transfer dated 19 August 2016.[7]

14. The issue for resolution in this case is **whether or not the Transaction breaches the notification thresholds under Section 17 of the PCA and Rule 4, Section 3(b)(4) of the IRR.**

III. DISCUSSION

15. 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
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> An agreement consummated in violation of this requirement to notify the Commission shall be considered void and

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[7] In its Verified Comment, KGLI Coop referred to August 2016 as the time when the Transaction "**closed**"; On the other hand, in Udenna's Answer dated 21 March 2017, it admitted its acquisition of 100% of KGLI-BV, *viz*:

"Please find below the key information summarizing the transaction:

(1) Prior to the acquisition, UIBV was 100%-owned by KGLI Cooperatief ('Cooperatief'), both companies being incorporated and existing under the laws of The Netherlands;

xxx xxx xxx

(2) **On August 19, 2016, Udenna acquired 100% of UIBV from Cooperatief for US$120 Million** (the 'Transaction')."

subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction. xxx

16. 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 the purpose of 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;

17. Under Rule 4, Section 3 of the IRR, parties to a merger or acquisition are required to notify when the tests provided therein are satisfied. These tests are referred to in MAO's Final Report as (1) the "Size of Person Test," and (2) the "Size of Transaction Test."[8]

18. The Commission notes that Udenna, in its Answer dated 21 March 2017, categorically admitted:

> **As to first element** [Size of Person Test] provided in Section 3(a) of Rule 4, **the Transaction will be covered by the Php1 Billion threshold** on the basis that **Udenna as ultimate parent entity and its subsidiaries have in the aggregate assets exceeding Php 1 Billion.**[9]

19. This fact is also reflected in Udenna's 2015 Financial Statement, hence, disproving KGLI Coop's assertion that it neither derives revenue nor has assets in the Philippines exceeding PhP 1 Billion.

20. The remaining issue, therefore, is whether the Size of Transaction Test was met.

A. The Transaction satisfies the Size of Transaction Test.

21. The Size of Transaction Test provided for under Rule 4, Section 3(b)(4) of the IRR, requires that the value of the transaction exceeds PhP 1 Billion,[10] and when used as a tool in evaluating the size of a proposed acquisition of voting shares of a corporation, is satisfied upon breach of the following thresholds:

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8 Final Report, p. 3.

9 Udenna's *Answer* dated 21 March 2017, p. 3.

10 "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 the entities that the ultimate parent entity controls, directly or indirectly, exceeds One Billion Pesos (PhP1,000,000,000.00)."

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 (PhP 1,000,000,000.00); 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 (PhP 1,000,000,000.00); 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.

22. In order to determine whether the Transaction satisfies the Size of Transaction Test, it is critical to resolve first whether KGLI-BV's shares in KGLI-NM should be included in the computation of the aggregate value of KGLI-BV's assets in the Philippines.

23. Based on MAO's Final Report, the value of KGLI-BV's 39.71% participating interest in KGLI-NM should be included in the computation of KGLI-BV's aggregate value of assets for purposes of determining whether the Transaction breaches the PhP 1 Billion threshold under Rule 4, Section 3(b)(4)(i) of the IRR.[11] MAO explained that the phrase "**other than assets that are shares of any of those corporations**" refers only to the acquired company's shares in the entities over which it has control.

24. Respondents, meanwhile, argue that the clause "**other than assets that are shares of any of those corporations**" means that the assets which are shares of KGLI-BV in KGLI-NM are excluded from the computation, and, therefore, the aggregate value of assets of KGLI-BV does not breach the notification thresholds in the IRR.

25. The Commission finds that MAO is correct in its interpretation of Rule 4, Section 3(b)(4)(i) of the IRR.

[11] *Final Report*, pp. 5-8.

26. Rule 4, Section 3(b)(4)(i) excludes the value of shares held by the acquired company in its controlled entities to avoid double counting of assets of the acquired company in its controlled entities. The reason for excluding the value of the acquired company's participating interest in its controlled entities is that the value of the controlled entities already forms part of the computation. If the value of the acquired company's participating interest in a controlled entity is aggregated with the value of such controlled entity itself, then the value of the same asset would end up being counted twice.

27. Thus, for purposes of computing the Size of Transaction Test under Rule 4, Section 3, the **acquired company's shares in entities it controls are excluded.** However, **the assets of said controlled corporations are still included in the valuation**.

28. Conversely, the value of the acquired company's shares **in entities it does not control cannot be excluded** from the valuation of the transaction because the value of such shares must be properly accounted for in computing the aggregate value of the acquired company's assets. Otherwise, the value of the acquired company's participating interest in entities it does not control will not be properly reflected in the valuation of the acquired company's assets.

29. KGLI-BV not having control over KGLI-NM at the time of the Transaction,[12] the proper determination of the aggregate value of the assets of KGLI-BV requires inclusion of the value of its shares in KGLI-NM in the computation.

30. In this case, KGLI-BV's 39.71% interest in KGLI-NM amounting to **USD 41,791,704 or PhP 1,966,717,590.24** should be included in the valuation of the Transaction. With this, the aggregate value of KGLI-BV's assets in the Philippines exceeds the Php 1 Billion threshold provided under Section 17 of the PCA and Rule 4, Section 3(b)(4)(i) of the IRR.

31. The phrase "**other than assets that are shares of any of those corporations**" cannot be interpreted to mean that all shareholdings of the acquired company in all other entities shall be excluded in the valuation. It must be remembered that the purpose of Rule 4, Section 3(b)(4)(i) is to implement the PhP 1 Billion threshold for compulsory notification set forth in Section 17 of the PCA. The PhP 1 Billion threshold serves as a filter such that only the transactions that are large enough to likely affect the market are mandatorily notified to the Commission.[13] Thus, the various formula for computation provided in Rule 4 are meant to, on one hand, screen out the small transactions, and on the other hand, ensure that the large transactions are notified.

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[12] Udenna's *Answer* dated 21 March 2017, pp. 4-5; KGLI Cooperatief's *Answer* dated 28 March 2017 pp. 2 and 5.

[13] *Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2282 and House Bill No, 5286*, VI-2, 4 June 2015, pp. 123-127.

32. If Respondent's interpretation is accepted, entities holding billions of shareholdings in other companies would have a very small valuation simply because those assets happened to be shares in other companies. This would lead to an absurd situation where mergers or acquisitions involving multi-billion peso corporations may conveniently evade regulatory scrutiny by ensuring that most of their assets take no form other than shareholdings, effectively concealing their true worth. Merger parties would practically be able to circumvent the compulsory notification requirement under the PCA. This is not the intent of the law or the IRR. As such, Respondent's interpretation cannot be countenanced.

Udenna's subsequent and contradictory allegation of KGLI-BV's control over KGLI-NM is without basis and is unavailing to Respondents.

33. In the proceedings before MAO, Udenna claimed that KGLI-BV has no control over KGLI-NM and that KGLI-BV's ownership of 39.71% shares in KGLI-NM does not translate to control, to wit:

> We have likewise considered whether to include in the computation, assets of KGLI-NM which is 39.71%-owned by UIBV. **This ownership percentage, however, does not translate to control,** hence, we deemed it no longer relevant to include in the computation the assets of KGLI-NM. xxx **There are other vestiges of control when a company owns less than ½ of the voting power of an entity, however, none of these circumstances apply to UIBV in relation to KGLI-NM.** x x x[14]

34. However, upon seeing MAO's interpretation of Rule 4 Section 3(b)(4)(i) of the IRR that only shares in entities that the acquired company controls may be excluded in its aggregate value of assets, Udenna conveniently switched positions to say that notwithstanding the fact that 39.71% interest constitutes minority shareholding, KGLI-BV was vested with "certain shareholder rights" which enabled it to acquire control over KGLI-NM, to wit:

> If the proper application of Section 3(b)(4)(i), Rule 4 of the PCC Rules is that explained by MAO in its Final Report... Udenna is indeed entitled to exclude the shares of KGLI-NM held by UIBV in determining whether the aggregate assets of the Target in the Philippines is more than Php 1.0 Billion... **because UIBV, had, at the time it was purchased, control over KGLI-NM because of certain shareholder rights it held.**[15]

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[14] Udenna's *Answer* dated 21 March 2017, pp. 4-5.

[15] Udenna's *Comment* dated 31 August 2017, pp. 3-4.

35. Udenna refers to the aforementioned shareholder rights as "veto rights", which allegedly grant KGLI-BV the right to nominate 2 out of 5 members of KGLI-NM's Board of Directors and which require the concurrence of at least one of the nominee directors of KGLI-BV for "virtually all corporate acts of the Board of Directors of KGLI-NM." On this basis, Udenna claims that KGLI-BV had control over KGLI-NM and therefore, following MAO's interpretation of Rule 4 Section 3(b)(4)(i) of the IRR, KGLI-BV's shares in KGLI-NM should be excluded from the computation.

36. The Commission takes serious note of Udenna's contradicting claims to suit its position. In *People v. Casiano*,[16] the Supreme Court held that a party will not be allowed to make a mockery of justice by taking inconsistent positions, which, if allowed would result in brazen deception. To allow the parties to conveniently flip-flop between contrary positions would adversely affect the credibility of the proceedings.

37. Even assuming, however, for the sake of argument, that KGLI-BV has control over KGLI-NM, the Transaction would still satisfy the Size of Transaction Test.

38. Per the 2015 Consolidated Financial Statements of KGLI-NM submitted by Respondents,[17] its total assets in the Philippines were valued at PhP 18.3 Billion.[18] Granting that KGLI-BV had control over KGLI-NM, the value of the assets of the latter would consequently be aggregated in the assets held by KGLI-BV in the Philippines. The consequence of such amount being included in KGLI-BV's aggregated value of assets in the Philippines would still breach the PhP 1 Billion threshold in Rule 4, Section 3(b)(4)(i) of the IRR.

39. **Thus, whether KGLI-BV had control over KGLI-NM at the time of Transaction or not, the Transaction would still be notifiable** under Section 3(b)(4)(i) of the IRR given that (i) the aggregate value of assets of KGLI-BV breaches the PhP 1 Billion threshold in Rule 4, Section 3(b)(4)(i) of the IRR; and (ii) the resulting voting shares acquired by Udenna breach the 35% or 50% thresholds in Rule 4, Section 3(b)(4)(iii).

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[16] G.R. No. L-15309, 16 February 1961.

[17] Copies of KGLI-NM's *2015 Consolidated Financial Statements* were submitted by Respondents on 26 October 2017.

[18] KGLI-NM's *2015 Consolidated Financial Statements*.

B. Acquisition of 100% shares of KGLI-BV is construed to be for the purpose of obtaining control.

40. Respondents likewise argue that the Transaction is not covered by the rules on compulsory notification under Section 17 of the PCA on the basis of their claim that the Transaction was not carried out for the purpose of obtaining control.[19]

41. However, MAO found that since the acquisition by Udenna involves the entire shareholding of KGLI-BV, the Transaction is deemed to be for the purpose of obtaining control.

42. Respondents contested MAO's findings in their respective Comments, claiming that it cannot be concluded that the investment rationale for the Transaction is for the purpose of obtaining control.[20] Respondents argue that voting rights held by KGLI-BV over KGLI-NM was not the objective but merely a consequence of the Transaction, adding that Udenna merely stepped into the shoes of KGLI Coop, subject to the voting rights that were already in place pre-acquisition.[21] Respondents are mistaken.

43. Section 3(b)(4)(iii) of the IRR serves as the objective standard in determining whether a transaction is executed for the purpose of obtaining control. The 35% or 50% baselines in the said provision integrate the component of control in the satisfaction of the Size of Transaction Test.

44. Proceeding therefrom, if acquisition of at least 35% of the shares in an acquired corporation is the proxy for concluding that an acquisition is for the purpose of obtaining control, the fact that the Transaction results in Udenna obtaining **100% of KGLI-BV's capital stock** is overwhelmingly sufficient to find that it was carried out for the purpose of obtaining control. The Share Purchase Agreement[22] is clear in stating that Udenna will acquire "ownership" over 100% of the shares of KGLI-BV, which carries with it every conceivable ownership right under the law, including voting rights.

45. Thus, the purchase of 100% shares of an acquired company renders the Transaction as one carried out for the purpose of obtaining control.

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19 Udenna's *Comment* dated 31 August 2017, p. 7; and KGLI Coop's *Verified Comment* dated 11 September 2017, pp. 1-3.

20 Udenna's *Comment* dated 31 August 2017, p. 7.

21 *Id.*

22 *Share Purchase Agreement* between Udenna Corporation and KGL Investments Cooperatief U.A. dated 28 July 2016.

C. Section 21 may not be invoked as a defense in cases involving violations of the compulsory notification rule under Section 17 of the PCA.

46. Respondents further cite the proviso of Section 21[23] in claiming that the Transaction shall not be prohibited under the PCA, contending that the Transaction was carried out for the sole purpose of investment and does not "bring about or an attempt to bring about the prevention, restriction, or lessening of competition in the relevant market."[24]

47. Section 21, as invoked by Respondents, finds no application in this case. Sections 20 and 21 of the PCA contemplate a situation where a transaction has been subjected to the Commission's review of its implications on competition. In this case, the issue is whether Respondents failed to notify under Section 17 of the PCA and Rule 4, Section 3 of the IRR.

48. We underscore that the determination of whether or not a merger or acquisition will bring about the prevention, restriction or lessening of competition in the relevant market is a statutory mandate of the Commission which is separate and distinct from the power to determine whether a transaction has breached the notification obligation under Section 17 of the PCA. These two independent powers of the Commission should not be confused with one another.

49. The power to determine whether or not a merger or acquisition will bring about the prevention, restriction or lessening of competition requires a substantive analysis of the relevant markets, possible horizontal or vertical overlaps which may result from the merger or acquisition and the theories of harm that may be applicable, using economic analysis within the legal framework established under the statute and the Commission's various rules, regulations and guidelines.

50. On the other hand, the power to determine whether a transaction has breached the notification obligation under Section 17 requires a straightforward determination of whether the notification thresholds have been met by a transaction, whether the parties thereto have in fact consummated their transaction, and whether or not a notification has been submitted to the Commission as required by law. The Commission cannot and should not be compelled or bear a duty to undertake a substantive review or make a preliminary finding on the presence or absence of any harm to the market as an excuse to exempt a compulsory notification. To do so would be to confuse,

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[23] Said proviso reads: "Provided, further, That the acquisition of the stock or other share capital of one or more corporations solely for investment and not used for voting or exercising control and not to otherwise bring about, or attempt to bring about the prevention, restriction, or lessening of competition in the relevant market shall not be prohibited."

[24] KGLI Coop's *Verified Comment* dated 11 September 2017, p. 3; Udenna's *Comment* dated 31 August 2017, p. 6.

and worse, render nugatory the clear and explicit mandate vested by Section 17 of the PCA upon the Commission.

D. Finding of the Commission

51. Based on the foregoing and as evidenced by publicly available information and documents, the Commission therefore finds that the Transaction satisfies the Size of Transaction Test, considering that the aggregate value of KGLI-BV amounts to PhP 1,966,717,590.24, which exceeds the Php 1 Billion threshold provided under Section 17 of the PCA and Rule 4, Section 3(b)(4)(i) of the IRR. Accordingly, consummation of the Transaction by the Respondents without complying with the compulsory notification requirements is a violation of Section 17 of the PCA and Rule 4, Section 3(b)(4)(i) of the IRR.

E. Penalties for non-notification according to PCA

52. Section 17 of the PCA provides for the penalties for violation of the compulsory notification requirement:

> **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 (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: x x x
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> 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.)

53. Thus, Section 17 provides for twin penalties: (i) the transaction shall be considered void; **and** (ii) an administrative fine. The use of the conjunction "and" in Section 17 indicates that where parties violate the compulsory notification requirement, **both penalties will be imposed. It is not a choice of one penalty over the other**. Only the amount of the administrative fine, which can range between 1% to 5% of the value of the transaction, may be subject to evaluation and determination of the Commission. Thus, Respondents shall be subject to these twin penalties for violation of Section 17.

54. The majority notes the partial dissent with respect to the imposition of the twin penalties described above. Whereas there is concurrence on the imposition of the fine, the minority view posits that the Transaction should not be considered void but, at most, merely voidable. However, a look at the express wording of Section 17 as well as the legislative intent behind it clearly manifest that a transaction that is consummated in violation of the compulsory notification

requirement is considered void. The language is clear and categorical, leaving no room for interpretation. The legislative records likewise bear out a deliberate choice to consider such non-notified transactions as void, and not merely voidable.

The law is clear: an agreement consummated in violation of the compulsory notification requirement is considered void.

55. A cardinal rule in statutory construction is that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application.[25] The second paragraph of the provision on compulsory notification states that:

> 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.[26] (Emphasis supplied.)

56. The IRR likewise provide:

> A transaction that meets the thresholds and does not comply with the notification requirements and waiting periods set out in Section 5 shall be considered **void** and will subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction.[27] (Emphasis supplied.)

Legislative intent is to consider non-notified transactions void, not voidable.

57. In the legislative drafts that formed the basis for Republic Act No. 10667 as enacted, the Senate's version considered as "voidable," while the House of Representatives' version considered as "void," the transactions that transgressed compulsory notification requirements.

58. Senate Bill No. 2282, the Senate's version that was submitted to the Bicameral Conference Committee, provided:

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[25] Amores v. House of Representatives Electoral Tribunal, G.R. No. 189600, June 29, 2010; *citing* Twin Ace Holdings Corporation v. Rufina and Company, G.R. No. 160191, 490 SCRA 368, 376, June 8, 2006.

[26] Rep. Act No. 10667 [hereinafter "PCA"], Sec. 17. The Philippine Competition Act of 2015. (Emphasis supplied.)

[27] PCC IRR, Rule 4, Sec. 3(g). (Emphasis supplied.)

> **Section 2. *Compulsory Notification*** - Parties to the merger or acquisition agreement referred to in the preceding Section that will produce a relative market concentration greater than the threshold determined by the Commission pursuant to Section 4 of this Chapter are prohibited from implementing their agreement until thirty (30) calendar days have lapsed from notification to the Commission. An agreement implemented in violation of this requirement shall be considered **voidable** and subject the parties to the corresponding penalties therefor.[28] (Emphasis supplied.)

59. The House version, House Bill No. 5286, contained a counterpart provision:

> SEC. 8. *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.
>
> 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.[29]

60. Given the conflicting Senate and House versions, the final wording that appears in the statutory text, as enacted and signed into law, evinces the legislators' express and deliberate intent to consider as void—and not merely voidable—any agreement that violates compulsory notification requirements.

61. This is borne out by the Bicameral Conference Committee Report and Joint Explanation on the disagreeing provisions of Senate Bill No. 2282 and House Bill No. 5286.[30] In this report and joint explanation, Senator Aquino reported that the conferees agreed to use the Senate version as the working draft:

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[28] S. No. 2282, 16th Cong., 2nd Sess., Ch. IV, Sec. 2 (2014). The Fair Competition Act of 2014. (Emphasis supplied.)

[29] H. No. 5286, 16th Cong., 2nd Sess., Ch. III, Sec. 8 (2014). The Philippine Competition Act of 2014. (Emphasis supplied.)

[30] S. Journal 85, 16th Cong. 2nd Sess. (June 10, 2015).

> The Conference Committee on the disagreeing provisions of Senate Bill No. 2282 and House Bill No. 5286, after having met and fully discussed the subject matter in a conference, hereby report to their respective Houses the following that:
>
> 1. The conferees agreed to use the Senate version as the working draft;[31]

62. However, when it came to the provision on compulsory notification, the Bicameral Conference Committee adopted the House version:

> *Section* 17 *(Compulsory Notification), Chapter IV.* Section 8, Chapter III of the House version was adopted with some amendments to read as follows:
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> 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.[32]

63. Clearly, therefore, the legislature intended for such transactions to be considered void.

The rationale and policy behind Section 17

64. At this point, it is useful to understand the rationale and policy behind Section 17 and the penalties provided therein. The void penalty for non-notification is primarily intended to deter parties to a merger or acquisition from non-compliance with the notification requirement under the PCA. Given the compulsory system of notification adopted therein, Congress deemed it imperative that the sanctions for non-compliance have real deterrence effect. Otherwise, transacting parties may be tempted to disregard the legal requirement with impunity.

65. Indeed, the penalty subjecting transgressing parties to a fine, while arguably substantive, may be seen simply as an additional transaction cost which will not sufficiently prevent parties from 'gun-jumping' or proceeding with their transaction without notifying the Commission. A void status on the other hand, with all the legal and practical consequences it entails, poses a real threat and impediment to transacting parties' ability to validly implement their agreement. This is consistent with the objective of discouraging transacting parties from executing or subsequently consummating their contracts and ensuing rights and obligations if they know that these will be considered void. Coupled with the imposable fine, the void status may be considered as the most effective

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31 S. Journal 85, 16th Cong. 2nd Sess. at 489 (June 10, 2015).

32 S. Journal 85, 16th Cong. 2nd Sess. at 495-6 (June 10, 2015).

measure available to the Commission in ensuring compliance with the notification requirements under the law. Moreover, it is worth noting that the void penalty under the PCA is self-executing and does not need any corresponding rule or regulation to allow for its implementation.

66. The minority argues that the penalty of voiding the transaction is more for purposes of preventing competitive harm, and less for deterrence. This suggests that it is a finding of competitive harm that triggers the penalty. Corollarily, absent harm by a non-notified transaction to a relevant market, the transaction should not be voided. However, this position confuses not only the processes the Commission undertakes under its rules, but worse, blurs the distinction between the mandate of the Commission under the statute to require notification vis-a-vis its power to conduct a review of mergers and acquisitions.

67. The PCA is clear in that the trigger for the penalty is consummation of the agreement without notifying the PCC, or if notified, without awaiting the PCC's approval. So long as the transaction meets the threshold, it must be notified and the parties must refrain from consummating the agreement. For purposes of declaring a transaction void due to premature consummation, the law disregards whether the subject transaction is or is not harmful to competition. The substantial review of a transaction is a separate matter. In fact, the penalties are different.

68. **Whereas the penalty for non-notification is that the transaction shall be considered void, the penalty provided for a transaction that is found to substantially prevent, restrict, or lessen competition is prohibition**. Unlike Section 17 which explicitly states that an agreement consummated in violation of the compulsory notification requirement is void, Sections 18 and 20 state that a transaction that substantially prevents, restricts, or lessens competition is prohibited. This further illustrates the distinction between the two and reinforces the deterrence purpose, as opposed to preventing harm, behind the penalties provided in Section 17.

Foreign law and jurisprudence in the context of the PCA.

69. The Commission recognizes that it may refer to foreign law and jurisprudence for guidance on best practices. However, such have no binding effect. In the case of *Philippine Airlines v. Court of Appeals*,[33] the Court rejected petitioner's reliance on foreign jurisprudence, saying that "resort to foreign jurisprudence would be proper only if no law or jurisprudence is available locally to settle a controversy. Even in the absence of local statute and case law, foreign jurisprudence is only persuasive." The Court went on to say that, "[f]or the settlement of the issue at hand, there are enough applicable local laws and jurisprudence" and consequently applied Philippine law and jurisprudence.

[33] G.R. No. L-54470, May 8, 1990.

70. Similarly, where there are applicable provisions in the PCA, foreign law and jurisprudence do not and cannot apply, moreso, to contravene the clear language of the PCA. Thus, reference to foreign law and jurisprudence must be made with caution.

71. The minority cites Irish law which provides that transactions that meet certain criteria must be notified to the Irish Competition and Consumer Protection Commission ("CCPC") within a prescribed period.[34] Irish law likewise provides that non-notification would void the transaction.[35] Indeed, this is how the CCPC applies the law; there is no discretion on the part of the CCPC to consider the transaction otherwise. A non-notified transaction is **automatically** void.

72. Now, if a belated notification is made, the CCPC may receive said notification, conduct a substantial review, and eventually clear the belatedly notified transaction. Where the CCPC clears the transaction, the transaction may acquire validity **from the date of the notification only. Prior to that, however, the transaction is still void for non-notification**: "[t]he Authority considers that a merger or acquisition which has been put into effect prior to a clearance determination from the Authority, remains void until such time as the Authority issues a clearance determination."[36]

73. Thus, it is only after a review of the transaction pursuant to the belated notification that a transaction may eventually gain the status of a valid and

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[34] Competition Act of 2002, *available at* https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/Competition-Act-2002.pdf (last accessed Feb. 6, 2012); *See* Amendment of Section 18 of Act of 2002, *available at* http://www.irishstatutebook.ie/eli/2014/act/29/section/55/enacted/en/html#sec55 (last accessed Feb. 6, 2018); *See also* Amendment of Section 19 of Act of 2002, *available at* http://www.irishstatutebook.ie/eli/2014/act/29/section/56/enacted/en/html#sec56 (last accessed Feb. 6, 2018).

[35] 19.— (1) A merger or acquisition to which paragraph (a) or (b) of section 18(1) applies, or which is referred to in subsection (3) of section 18 and has been notified to the Authority in accordance with that subsection, shall not be put into effect until—

(a) subject to subsection (3), the Authority, in pursuance of section 21 or 22, has determined that the merger or acquisition may be put into effect, or
(b) the Authority has made a conditional determination in relation to the merger or acquisition, or
(c) subject to subsection (4), the period specified in subsection (2) of section 21 has elapsed without the Authority having informed the undertakings which made the notification concerned of the determination (if any) it has made under paragraph (a) or (b) of that subsection (2), or
(d) subject to subsection (5), 4 months after the appropriate date have elapsed without the Authority having made a determination under section 22 in relation to the merger or acquisition, whichever first occurs.

(2) Any such merger or acquisition which purports to be put into effect, where that putting into effect contravenes subsection (1), is void.

[36] Determination No. M/04/003 of the Competition Authority (Irish Competition and Consumer Protection Commission), under Section 21 of the Competition Act, 2002, ¶ 8 (2004).

approved merger. In this context, the CCPC explained that it can still perform substantive review: "the Authority considers that it can make a determination under section 21 of the Act despite its view that there has been a contravention of section 19(1) (a) and that the notified acquisition is thus void."[37]

74. In other words, **the CCPC still considers a non-notified merger void for failure to notify within the prescribed time, but the CCPC is not precluded from receiving the erring parties' belated notification, reviewing the merger, and eventually giving the transaction a green light.** In this way, the CCPC still protects its right of review.[38]

75. **In the case at bar, however, the parties did not at all notify. Thus, the transaction remains void.**

The PCA does not provide for an exception under Section 17.

76. It is further argued by the minority that the Transaction may be exempt from the void penalty because of attendant special circumstances: the PCC was able to obtain details on the transaction via indirect means other than through compulsory notification; such details reveal that the Transaction does not pose competitive harm; and the subject of the acquisition is a corporation with no business operations.

77. While current PCC rules do not preclude use of information obtained in a merger review from being utilized in the review of another, related transaction, it is a different matter to use the first set of information as basis for an immediate finding that there is no competitive harm in the related transaction, without the benefit of a review of the latter even on a cursory basis. The Commission cannot acquiesce to the view that if the details of a non-notified transaction comes to the knowledge of the Commission via a related transaction and, based on such general information, can make an assumption that there is no competitive harm and therefore not consider the non-notified transaction void. Otherwise, this would result in a legally infirm procedure because the Commission would in effect, forego the conduct of a review, assume that there is no harm to the market arising from the transaction, and then use that assumed finding as basis for non-application of the law. Clearly, there is no basis in law for making such a conclusion that a transaction will not substantially lessen competition absent even a cursory review. Relying on the supposed absence of competitive harm to justify non-imposition of the penalty called for by law for non-notification sacrifices at the altar of convenience the fundamental principle that the power of the Commission to review transactions is separate and distinct from the mandate to enforce the compulsory notification requirement under the law.

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[37] Determination No. M/04/003 of the Competition Authority (Irish Competition and Consumer Protection Commission), under Section 21 of the Competition Act, 2002, ¶ 8 (2004).

[38] Determination No. M/04/003 of the Competition Authority (Irish Competition and Consumer Protection Commission), under Section 21 of the Competition Act, 2002, ¶ 8 (2004).

78. Even assuming *arguendo* that this is possible, this 'special circumstance' does not allow the Commission to exempt the transacting parties from the void penalty under the law. There is simply no legal basis for asserting "special circumstances" as an excuse for the non-application of the law. To admit of "special circumstances" as basis for exemption from the penalties explicitly stated in the statute sets a dangerous precedent that leads to a slippery slope of subjectivity and arbitrariness on the part of the Commission, and worse, susceptibility to corruption in future cases.

79. Section 17 of the PCA does not in and of itself provide exceptions to the notification requirement spelled out therein. Nowhere in the *proviso* which empowers the Commission to promulgate other criteria for notification does it state grounds or conditions for exception. A careful reading of the subject *proviso* in fact evinces that such other criteria are in addition to or in substitution of the statutory criteria for notification. If these alternative criteria were to be promulgated by the Commission, these can only have prospective effect. These cannot be applied retroactively to a past transaction which has already been found to breach the criteria prevailing at the time of its execution. To hold otherwise would again invite legal uncertainty and unpredictability into the notification system. Furthermore, such alternative criteria must be measurable or determinable in concrete terms and certainly not in the guise of some amorphous "special circumstances."

80. Given the absence of any explicit reference in the statute to an exemption from notification that would be applicable herein, the Transaction cannot be exempt from the provisions of Section 17. It bears emphasis that exceptions are strictly construed and apply only so far as their language fairly warrants, with all doubts being resolved in favor of the general rule rather than the exception.[39]

81. Neither does an exception under the Forbearance provisions of the PCA and its IRR apply in this case, as the minority asserts. In the first place, the Respondents never sought an exemption under Section 28 of the PCA. Furthermore, the Commission has likewise taken the stance that Forbearance is specifically relevant only in cases involving Anti-Competitive Agreements under Section 14 and Abuse of Dominant Position under Section 15 of the PCA, such that entities may seek exemption from the application of these provisions to their agreements or conduct for a limited time, under conditions to be imposed by the Commission. Forbearance is not intended to apply to Prohibited Mergers, where an exemption from prohibition is specifically governed by Section 21 of the PCA. Nor does it apply to non-notification of notifiable transactions, the exemptions from which are presently limited to cases of internal restructuring.[40] Moreover, it is the Commission's position that an application for Forbearance is an *ex ante* procedure which must be initiated

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[39] Benedicto v. Court of Appeals, G.R. No. 125359, Sept. 04, 2001; citing Salaysay v. Castro, G.R. No. L-9669, Jan. 31, 1956.

[40] PCC Clarificatory Note 16-002, issued on September 16, 2016.

by concerned entities prior to an investigation by the Commission or the relevant office thereunder. It can not be that an entity will seek Forbearance, much less the Commission initiate *motu proprio* Forbearance proceedings, after a prohibited act has been found out and made the subject of an investigation by the Commission.

PCC has no discretion to refrain from imposing the void penalty.

82. Administrative agencies are empowered to interpret the law that they are entrusted to enforce, and such interpretation is entitled to great weight and respect.[41] However, they cannot go beyond the limits of the power given to them. An administrative agency may not, through its rules and regulations amend, alter, supplant, enlarge, or limit the terms of the statute.[42] Thus, in *Lokin, Jr. v. COMELEC*,[43] the Supreme Court ruled that an administrative agency cannot expand the law's meaning when the provisions of the law are plain and clear:

> The provision is daylight clear. The Legislature thereby deprived the party-list organization of the right to change its nominees or to alter the order of nominees once the list is submitted to the COMELEC, except when: (*a*) the nominee dies; (*b*) the nominee withdraws in writing his nomination; or (*c*) the nominee becomes incapacitated. The provision must be read literally because its language is plain and free from ambiguity, and expresses a single, definite, and sensible meaning. Such meaning is conclusively presumed to be the meaning that the Legislature has intended to convey. Even where the courts should be convinced that the Legislature really intended some other meaning, and even where the literal interpretation should defeat the very purposes of the enactment, the explicit declaration of the Legislature is still the law, from which the courts must not depart. When the law speaks in clear and categorical language, there is no reason for interpretation or construction, but only for application. **Accordingly, an administrative agency tasked to implement a statute may not construe it by expanding its meaning where its provisions are clear and unambiguous**. (Emphasis supplied.)

83. It is through this principle that the PCC adopted the plain language of Section 17 of the PCA into Section 3, Rule IV of the IRR. Thus, in both the law and the IRR governing the case at hand, the rule is that a non-notified transaction shall be considered void. Accordingly, PCC has no basis to declare otherwise.

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41 Nestle Philippines, Inc. v. Court of Appeals, G.R. No. 86738, Nov. 13, 1991.

42 *See* Phil. International Trading Corp. v. Commission on Audit, G.R. No. 152688, Nov. 19, 2003.

43 G.R. 179431-32, June 26, 2012.

F. Mitigating Circumstances

84. As mentioned above, the only aspect of the penalties that may be subject of evaluation and determination by the Commission based on the factual circumstances is the amount of the administrative fine, which cannot be higher than 5% but also not lower than 1% of the transaction value. In determining the appropriate amount of the fine, the Commission may consider attendant aggravating and mitigating circumstances, as provided under the PCC Merger Rules of Procedure:

> **16.1 Non-consummation 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 the transaction.

The mitigating circumstances invoked by Respondents cannot be given merit.

85. Respondents claim mitigating circumstances, particularly, that: (i) the PCA and its IRR is new and untested; (ii) that Respondents applied the same in good faith; and (iii) that the complaint from which the proceedings had emanated had already been withdrawn by the complainant.

86. After careful consideration, the Commission is of the view that the mitigating circumstances cited by Respondents to diminish their liability may not be given any weight.

87. The claim that a law is new and untested does not make it any less binding. It is axiomatic that as soon as a law takes effect, all of its provisions—new as they are—apply in full force.

88. If Respondents had any uncertainties or questions on the PCA and IRR, they could have easily availed of pre-notification consultations with the MAO. This would have been the prudent course of action. Respondents had every opportunity to consult and seek clarification from the Commission considering that the IRR was already effective at the time of the Transaction.

89. Respondents cannot justify their violation of the law by their rush to consummate the Transaction since there were several potential buyers of the KGLI-BV shares. This is not a legal excuse that warrants glossing over the compulsory requirements of the law. Otherwise, parties can easily circumvent the requirements of Section 17 by merely claiming they are in a rush to make the acquisition to beat other potential acquirers.

90. Anent the claim that Negros Holdings & Management Corporation "has agreed to withdraw with finality any complaint filed with any governmental authority,"[44] the mere withdrawal of a complaint, by itself, does not terminate the Commission's proceedings involving an alleged violation of the PCA. Where the Commission finds sufficient basis to conduct proceedings on whether parties violated the compulsory notification requirements, it has full authority under the PCA and its IRR to proceed with its inquiry even without the participation of the complainant.

Respondents' cooperation in the case and in related matters merits adjustment of the fines.

91. Nevertheless, the Commission is cognizant that Respondents actively cooperated during the investigation of the violation beyond what is normally required of them. Apart from diligently submitting pleadings required under the rules, Respondents promptly appeared in all conferences called by the Commission and voluntarily submitted documents to aid the Commission in its resolution of the case.

92. The Commission likewise observed cooperative behavior exhibited by Udenna in a related investigation. In that said investigation, Udenna attended a conference requested by MAO and even submitted documents, which helped the latter in its investigation.

93. Under the Rules on Merger Procedure, 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.[45]

94. Considering the foregoing, the Commission is minded to adjust the penalty from the basic fine of 3% of the Transaction value to 1%.[46]

IV. ORDER

95. After careful consideration of the facts and evidence on record, the Commission hereby rules that Respondents consummated the Transaction in violation of the notification requirements under Section 17 of the PCA and Rule 4, Section 3(b)(4) of the IRR.

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[44] Udenna's *Comment* dated 31 August 2017, p. 9.

[45] Section 16, PCC Rules on Merger Procedure.

[46] Section 16 of the PCC Rules on Merger Procedure provides that the basic fine of 3% imposable for violation of the compulsory notification requirements may be adjusted depending on the gravity and duration of the violation, and taking into account all relevant circumstances of the case, including the presence or absence of any aggravating and mitigating factors: *Provided,* That, in no case shall the imposable fine for each violation exceed (5%) of the value of the transaction nor shall the imposable fine be less than one percent (1%) of the value of the transaction.

96. Pursuant to Section 17 of the PCA and Rule 4, Section 3(b)(4) of the IRR, the Transaction is hereby declared void.

97. Considering the mitigating circumstances discussed above, Respondents, together with their pre-acquisition ultimate parent entities, shall be solidarily liable for a fine of **Nineteen Million Six Hundred Sixty Seven Thousand One Hundred Seventy Five and 90/100 Pesos (PhP 19,667,175.9)**, which is equivalent to 1% of the value of the Transaction.

SO ORDERED.

ARSENIO M. BALISACAN
Chairman

I concur as to the imposition of the administrative fine but not as to the void penalty. (w/ separate opinion)

JOHANNES BENJAMIN R. BERNABE
Commissioner

STELLA LUZ A. QUIMBO
Commissioner

AMABELLE C. ASUNCION
Commissioner

Copy furnished:

Udenna Corporation
Respondent

KGL Investment Cooperatief U.A.
Respondent

The Port Fund L.P.
Ultimate Parent Entity of Respondent KGL Investment Cooperatief U.A.

KGL Investments B.V.
Acquired Company

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Collaborating Counsel for Respondent KGL Investment Cooperatief U.A.

PCC Mergers and Acquisitions Office

DISSENTING OPINION

QUIMBO, SA.

"the letter killeth, the spirit gives life"

I respectfully register my partial dissent from the position of the majority as to the imposition of the void penalty on the case of *Udenna Corporation* and *KGL Investment Cooperatief U.A.'s* violation of the compulsory notification under Section 17 of Republic Act 10667 and Rule 4, Section 3 of its Implementing Rules and Regulations.

The majority voted to void the subject transaction mainly on the ground that the language of the law is clear. I am of the position that the current circumstances surrounding the Commission and the subject transaction call for restraint on the part of the Commission in applying the void penalty. It is unfortunate that, knowingly or unknowingly, the majority has misconstrued the bases of my dissent, which are clearly outlined below.

Purpose of the Philippine Competition Act

Republic Act 10667 or the Philippine Competition Act ('the Act") was passed to promote fair market competition, to ensure the well-being of consumers, and to preserve the effectiveness of competition in the market.

In the Act's Declaration of Policy, the State is mandated to penalize all forms of anti-competitive agreements, abuse of dominant position, and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.[1]

The Act regulates and prohibits mergers and acquisitions that are anti-competitive, or those that result in a substantial lessening of competition in the market, because they lead to higher prices, lower product quality and, narrower consumer choices.

To be sure, not all mergers and acquisitions are prohibited, as the State recognizes that they may also give rise to potential benefits for consumers. Mergers and acquisitions **that are not** anti-competitive can enable businesses to operate more efficiently, ensuing economies of scale and increases in productivity—ultimately resulting in prices and outputs that increase consumer welfare.

Across mature competition jurisdictions,
the application of the void penalty varies.
Striking a balance between the letter of the law
and its spirit is key.

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[1] Section 2, Philippine Competition Act of 2015.

Many jurisdictions, like the Philippines, have a compulsory notification regime, where failure to comply results in the imposition of administrative fines. For some jurisdictions, an additional penalty is that the non-notified transaction is rendered voidable, or void (herein, referred to as the "void penalty"). A survey of competition authorities by William Vidgor in 2006 reveals that only in seven jurisdictions (i.e. Austria, Germany, Hungary, Ireland, Japan, Netherlands, and Russia) do competition statutes impose a void penalty for non-notified transactions.[2] The Philippines is a recent addition to this list of countries.

Among the seven countries mentioned, the application of the void penalty varies considerably.

In *AEGON N.V., Jast, and Kamerbeek B.V.*, the parties only notified the Netherlands Competition Authority (known as the "NMa") of their transaction after it had already been consummated.[3] In lieu of voiding and re-executing the same transaction, the parties offered a standstill agreement[4] until clearance was granted. This was accepted by the NMa.

In Germany, *Druck-und Verlagshaus Frankfurt am Main GmbH ("DuV")* acquired *Frankfurter Stadtanzeiger GmbH ("FSG")* in 2001 but failed to notify the Federal Cartel Office ("FCO"). [5] It was only seven (7) years after that FCO learned of the non-notified transaction. DuV was fined for EUR 4.13 million.

In Ireland, non-notified mergers and acquisitions are covered by Part 3 of Section 19 (2) of the Competition Acts of 2002 to 2014. Their law provides that a notifiable transaction that is put into effect prior to a clearance determination **"is void".** In practice, the Irish Competition and Consumer Protection Commission ("CCPC") has applied a nuanced interpretation of the law wherein the transaction is merely void until the CCPC issues its clearance, as in the case of *Radio 2000 Limited and News 106 Limited.*[6] In subsequent announcements, the CCPC has stated that transactions which are found to have breached the pre-merger waiting period will be "**deemed void**" until such time as the authority issues a clearance determination.[7]

While I recognize that such variations in applicability depend in part on the legal framework of these jurisdictions, it is evident that various competition authorities take into account the circumstances of a particular non-notified transaction—including willingness

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[2] Vigdor, W. *Premerger Coordination: The emerging law of gun jumping and information exchange* (2006). ABA Publishing.

[3] Vigdor, W. *Premerger Coordination: The emerging law of gun jumping and information exchange* (2006). ABA Publishing.

[4] In the standstill agreement, the acquiring party committed not to exercise voting rights.

[5] Federal Cartel Office. *Publishing house Druck- und Verlagshaus Frankfurt am Main GmbH fined for violating the prohibition of putting concentration into effect* (2009).

[6] Irish Competition and Consumer Protection Commission. Determination No. M/04/003.

[7] Collins, E. *Gun jumping in merger cases* (2006).

of parties to rectify a wrongdoing and the duration of time from the consummation of a transaction to the discovery of the non-notification—in their application of the void penalty.

The European Union (EU), has recently increased efforts to track down and penalize non-notified transactions.[8] While under EU competition law, a non-notified transaction is voidable[9], the policy response has simply been to increase fines rather than to declare non-notified transactions void.[10] To void a non-notified transaction is costly not only for the parties involved, but also for the third parties that have conducted legitimate business with the post-transaction entity. The sparing use of the void penalty by the EU despite their increasing enforcement against non-notified transactions is indicative that the EU is mindful that the costs of imposing the penalty can greatly overwhelm the benefits.

Competition law is undoubtedly new in the Philippines. Foreign competition laws and jurisprudence, though not considered precedents, have served as strong references in the development of the Act, the Implementing Rules and Regulations ("IRR"), and of the Philippine Competition Commission ("the Commission") itself. I agree with the majority that the case of *Philippine Airlines v. Court of Appeals*[11] provides useful guidance: resort to foreign jurisprudence would be proper only if no law or jurisprudence is available locally to settle a controversy. I disagree, however, with the majority on the application of this doctrine. Herein, although the law exists, there is no local jurisprudence yet to address the controversy at hand.

Foreign jurisprudence helps provide a starting point for newly instituted competition authorities such as the Commission, as they present a whole host of effective measures and recommendations from which the Commission can take guidance. This is precisely the reason behind the Commission's continuous engagement in seminars on competition law conducted by officers of competition authorities from all over the world.

With that, I submit that the non-imposition of the void penalty by these competition authorities reflects the noble goal of striking a balance between the letter and spirit of the law.

Section 17 (par. 2) admits of various interpretations. Hence, ambiguity exists.

Section 17 of the Act provides that 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.

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[8] Talbot, Conor C. *Developments in Merger Control and the Need to Notify* (2015). Bar Review 2015, 3, 50-53.
[9] Dionnet, S. and Giroux, P. *Gun jumping* (2017). Skadden Arps Slate Meagher & Flom LLP.
[10] Burnside, A. and Kidane, A. *Gun-jumping and incomplete notifications: the European Commission pursues several more infringements of EU merger control rules* (2017). Dechert LLP.
[11] G.R. No. L-54470, May 8, 1990.

The law provides that consummated agreements in violation of this requirement **"shall be considered void."** The law does not use the language **"shall be void."** The plain meaning of the word "void" is simple. It is unquestionable that "to void" is "to give no effect." I do not contest the same. However, I submit that the use of the word "considered" before the word "void" is not without any purpose.

The presence of the word "considered" before the word "void" opens the provision to several interpretations. At this point, it is imperative to define the word "consider." According to Merriam-Webster[12], "consider" means "to think of especially with regard to taking some action." Applying such to the language of the law, the void penalty becomes susceptible to several questions. What does "void" mean in the context of Section 17? Does it mean the transaction is void for the time being while the parties comply with the notification requirement? If instead, such is to mean that the consummated agreement is of no effect, will there be a restoration of the status quo ante and a return of the cash paid and property exchanged? If this is so, how will the Commission ensure that there is full compliance by the parties? These are valid interpretations that make the phrase "shall be considered void" ambiguous.

Irish law, as mentioned earlier, provides that a merger or acquisition that is put into effect prior to a clearance determination **"is void;"** a straightforward provision that calls for a straightforward application. Upon closer inspection, however, even this ostensibly straightforward provision contemplates important questions such as whether a transaction that is completed prior to a clearance is rendered "void for all time," or merely until such time as the CCPC issues a clearance determination.[13] While the language of the Irish law appears clear and categorical, there is certainly room left for interpretation as evidenced by the CCPC's own determination.

In the case of *Kua Suy v. The Commissioner of Immigration*[14] the Court declared that the word "deemed" is the equivalent of "considered." In the same vein, the word "considered" is the equivalent of "deemed." This said, I submit that the Commission can interpret the phrase "shall be considered void" to mean "deemed void until cleared." Alternatively, the phrase can also mean "void for all time." The existence of multiple possible interpretations makes the law ambiguous.

Moreover, Section 17, paragraph 2 should not be interpreted independent of the entire Act. An important rule in statutory construction states that every part of the statute must be interpreted with reference to the context- that is every part of the statute must be considered together with other parts, and kept subservient with the general intent of the whole enactment.[15] Thus, in determining the legislative intent, Section 17 must not be read separately from the entire Act. The Supreme Court, in a line of cases, declared that the law must not be read in truncated parts; its provisions must be read in relation to the

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[12] "consider". Merriam-Webster, 2018.

[13] Irish Competition and Consumer Protection Commission. Determination No. M/04/003.

[14] G.R. No. L-13790, October 31, 1963.

[15] Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation, G.R. No. 192398, September 29, 2014.

whole law. Further, in *Carlos Alonzo and Casimira Alonzo v. Intermediate Appellate Court*[16] the Court elucidated the following:

> "xxx we interpret and apply the law not independently of but in consonance with justice. To be sure, there are some laws, that while generally valid, may seem arbitrary when applied in a particular case because of its peculiar circumstances. In such a situation, we are not bound, because of our nature and functions, to apply them just the same, in slavish obedience to their language. What we do instead is find a balance between the word and the will, that justice may be done even as the law is obeyed."

The void penalty under the circumstances of the Commission and the subject transaction is a surplusage

Herein, the parties of the subject transaction consummated their agreement without notifying the Commission. The transaction satisfies both the Size of Person Test and Size of Transaction Test of the IRR, and thus clearly breaches the one billion pesos (PHP 1,000,000,000.00) threshold for compulsory notification. Thus, without a doubt, paragraph 2 of Section 17 sets in.

With this in mind, I am for the imposition of the administrative penalty. My disagreement with the majority only pertains to the **imposition of the void penalty** as to the subject transaction.

The purpose of a void penalty under the Section 17 of Act is not sufficiently articulated in the legislative records. The legislative drafts would reveal that the Senate used the term "voidable" while the House of Representatives used the term "void." It is unquestionable that the Congress intended the void penalty rather than voidable when the former was the one adopted in the enrolled bill which eventually became the law. However, perusal of the Bicameral Conference Committee Report on the Disagreeing Provisions of the Law would show that there was no discussion as to why the House of Representative's version was adopted. Hence, it cannot be gainfully concluded that the legislative intent of the Congress in adopting the void penalty is primarily for deterrence.

Having said that, I am of the position that by reading Section 17 together with the entire law, it can be reasonably surmised that a void penalty for non-notified transactions achieves two equally important purposes: (i) to deter parties to transactions from refusal to submit to the compulsory notification procedures of the Commission; and (ii) to ensure that a non-notified transaction, pending a subsequent notification, will not continue to harm the market in the event that it was already doing so prior to notification.

The majority argues that the void penalty is the most effective measure available to the Commission in ensuring compliance with the notification requirements under the Act. The Commission has been in existence for only two years. The Act itself has been in

[16] G.R. No. 72873, May 28, 1987.

existence for less than three years. In *NPC Drivers and Mechanics Association v. The National Power Corporation*[17] the Court declared that a law is tested by its results. In the limited time that the Act and the Commission has been in operation, there are already cases of non-notification, including the present case. Hence, it is premature to say that the void penalty is the most effective measure to ensure compliance with the requirements under the law. Even if we assume this to be true, for the sake of argument, the non-imposition of the void penalty for the subject transaction does not in any way preclude the Commission from imposing the void penalty in future cases of non-notification.

As to the effect of the subject transaction on the market, the factual circumstances are as follows. First, it involves the acquisition of a minority stake in a related transaction, one which has been notified to the Commission and is currently under Phase 2 review. It is through this other related transaction that the Commission incidentally obtained a mode of discovery on the structural effects of the subject transaction on the market. Second, the subject transaction involves the acquisition of a corporation with no business operations. Hence, it has no direct structural effect on any market. Finally, the subject transaction's only nexus to the Philippines is through its sole subsidiary, which is a notifying party to the related transaction. As such, in the event that the related but notified transaction will likely result in a substantial lessening of competition, the Commission has the power to either disapprove the transaction or impose remedies to ensure that competition in the market is protected.

Therefore, I submit that the prospect of the subject transaction, post-acquisition, causing a direct structural effect on the market is virtually absent. Thus, imposing the void penalty is, arguably, a surplusage. There is no continuing, direct harm to the market by the subject transaction that the void penalty needs to prevent. Any possible indirect harm to the market of the subject transaction is currently within the jurisdiction of the Commission through the notified related transaction. A basic tenet in economics is that there should be as many policy instruments as there are objectives. If there is only one policy objective that the penalties seek to address, then a single policy instrument suffices. I further submit that the administrative penalty is sufficient for this case.

The majority, in insisting that the use of incidentally acquired information results in a "legally infirm procedure," exists in a vacuum where events transpire in a linear manner as they conveniently want them to be. The real world is fluid and complex, and the Commission must be able to respond to such dynamism. To turn a blind eye on information about the subject transaction - which the majority does not refute - is to turn my back on my sworn duty.

Deficiency of the IRR of the Act as to a voided agreement warrants restraint on the part of the Commission

[17] G.R. No. 156208, December 2, 2009.

I will now point out why the particular circumstances of the Commission warrants the suspension of the imposition of the void penalty.

Under the current IRR, how the void penalty will be applied, implemented, and monitored in the context of the case at hand is debatable. The current guidelines on the void penalty and the infrastructure to implement the same are insufficient.

It is a well settled rule that **jurisdiction is the power or authority to hear and decide a case and execute the same.** The Commission is given the power by the Act to impose the void penalty and administrative fine for non-notified transactions. Attached to this power is the Commission's obligation to ensure that its decisions are faithfully executed so as not to create a legal farce. I do not disagree that Section 17, paragraph 2 is self-executing, but to implement a decision under a cloud of doubt presents a danger of emasculating the powers of the Commission as vested by the Act. This would open a window of opportunity to circumvent the law (e.g. parties merely changing the dates in their paperwork and then refiling). To void an agreement sans a clear-cut procedure on how this is to be executed would depreciate the seriousness of the effects which the law intended.

I submit that due to the deficiency of the IRR as to the implementation of a voided agreement, the Commission should not impose the void penalty on the subject transaction.

This is not the first time the Commission would have taken this path. In February 2016, the Commission, in fact, prior to the issuance and effectivity of the IRR, applied transitory rules for compulsory notification of mergers and acquisitions. During this transitory period, the Commission suspended its power to conduct full (Phase 1 and Phase 2) reviews of notifiable transactions. The practical justification for the suspension was that the Commission, at that time, did not have the manpower, guidelines, and budgetary support to conduct full reviews. To proceed with full reviews without the necessary rules, staff complement, and training would mean infidelity in the implementation of the Act with the risk of false positives (i.e., finding a merger potentially anti-competitive when in fact, it is not) or false negatives (i.e., clearing a merger because it has a small prospect of substantially lessening competition, when in fact, it does not). Instead, it is apparent that the Commission managed such risks by issuing transitory rules under which transactions can be "deemed approved."

In the consolidated cases of *Philippine Long Distance Telephone Company and Globe Telecom v. Philippine Competition Commission*[18], the Court of Appeals declared that the transitory rules issued by the Commission are not *ultra vires* since it is settled that executive issuances and regulations have the force and effect of the law. Hence, the Commission has the power and obligation to establish necessary rules of procedure, such as to effectively execute the void penalty.

[18] CA-G.R. SP No. 146528 & G.R. NO. 146538, October 18, 2017.

The Commission has the power to suspend the application of the void penalty.

The majority is of the argument that the Commission has no discretion to refrain from imposing the void penalty and that the Act does not provide for an exception under Section 17.

I respectfully disagree.

Four important provisions in the Act must be noted.

First, Section 17 Paragraphs 1 and 2 provide:

> "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.
>
> 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..."

The above provision provides the Commission the power to promulgate other criteria, define the notification requirement, and the circumstances under which notification is warranted. The Congress recognized that the applicability of the notification requirement cannot be fully determined ex ante. Hence, the framers of the law through the Act give the Commission the power to define requirements. This is clearly seen in the Commission's authority to treat some sectors differently on the question of whether a transaction needs to be notified.

Second, Sections 20 and 21 provide:

> *Section 20. Prohibited Mergers and Acquisitions.* Merger or acquisition agreements that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services as may be determined by the Commission shall be prohibited.
>
> *Section 21. Exemptions from Prohibited Mergers and Acquisitions.* Merger or acquisition agreement prohibited under Section 20 of this Chapter may, nonetheless, be exempt from prohibition by the Commission when the parties establish either of the following:

(a) The concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or likely to result from the merger or acquisition agreement; or

(b) A party to the merger or acquisition agreement is faced with actual or imminent financial failure, and the agreement represents the least anti-competitive arrangement among the known alternative uses for the failing entity's assets:

Provided, That an entity shall not be prohibited from continuing to own and hold the stock or other share capital or assets of another corporation which it acquired prior to the approval of this Act or acquiring or maintaining its market share in a relevant market through such means without violating the provisions of this Act:

Provided, further, That the acquisition of the stock or other share capital of one or more corporations solely for investment and not used for voting or exercising control and not to otherwise bring about, or attempt to bring about the prevention, restriction, or lessening of competition in the relevant market shall not be prohibited.

Sections 20 and 21 clearly allow the Commission to exempt prohibited mergers and acquisitions upon establishment of certain requirements of the Act by the parties. These include whether the acquisition of shares was intended solely for investment and not for purposes of exercising control, and thus, cannot bring about a substantial lessening of competition in a relevant market.

The Act gives the Commission the power to exempt prohibited mergers or acquisitions even after a finding that such transactions are potentially harmful to the market. To reiterate, I note that the Commission has the power to exempt a merger or acquisition, notwithstanding a finding after a substantive review that the transaction will lessen, restrict, or prevent competition - the one great evil sought to be prevented by the Act. **Hence, it is more likely than not that the framers of the law, in using the word "considered" with reference to the void penalty in paragraph 2 of Section 17, behoove the Commission to exercise careful thinking and reasonable application of the penalty while recognizing the broad powers it is granted.**

Finally, Section 28 of the Act provides:

The Commission may forbear from applying the provisions of this Act, for a limited time, in whole or in part, in all or specific cases, on an entity or group of entities, if in its determination:

(a) Enforcement is not necessary to the attainment of the policy objectives of this Act;

(b) Forbearance will neither impede competition in the market where the entity or group of entities seeking exemption operates nor in related markets; and

(c) Forbearance is consistent with public interest and the benefit and welfare of the consumers.

> A public hearing shall be held to assist the Commission in making this determination.
>
> The Commission's order exempting the relevant entity or group of entities under this section shall be made public. Conditions may be attached to the forbearance if the Commission deems it appropriate to ensure the long-term interest of consumers.
>
> In the event that the basis for the issuance of the exemption order ceases to be valid, the order may be withdrawn by the Commission.

It is very apparent from the cited provision that the Commission has the power to forbear from applying the provisions of the Act **in whole or in part**. Section 28 does not make any qualification as to which provisions of the Act the power to forbear may be used. Henceforth, in the context of Section 17 (paragraph 2) the Commission is with authority not to impose both the void penalty and the administrative fine, or solely the void penalty or the administrative fine.

The majority errs on the following points relating to forbearance. First, nowhere does it state in Section 28 of the Act that forbearance must be at the instance of the parties. The law is clear. Second, the Act does not limit application of forbearance to Sections 14 and 15. While the law is clear, the basis for the majority's reference to the Commission making a position to the contrary is unclear. Third, the Act does not impose a timing requirement on the initiation of forbearance proceedings.

These aside, the majority, unfortunately, misses my main point. If the Act vests broad powers to the Commission such as carving out an entire sector from compulsory notification, exempting from prohibition mergers found to be potentially harmful, and forbearing the application of certain provisions, then how can the Commission be without any power to suspend the imposition of the void penalty for compelling reasons?

The majority argues that the non-imposition of the void penalty on the basis of circumstances, I quote, "sets a dangerous precedent that leads to a slippery slope of subjectivity and arbitrariness on the part of the Commission, and worse, susceptibility to corruption." I fervently disagree.

First, I argue for the suspension of the void penalty because of the particular circumstances of the Commission: the deficiency of the IRR with respect to the void penalty, and the transaction-related relevant information that became incidentally known to it despite the absence of a notification. Suspension of the void penalty applies only to this case due to specific circumstances of both the Commission and the subject transaction. In geometry, a slope does not exist when there is only one point. A "slippery slope" will not exist outside the majority's imagination.

Second, the law provides for necessary checks and balances to prevent the imagined fear of the majority. Section 52 of the Act provides for a transparency clause: all final decisions, orders, and rulings of Commission require publication. In the Rules of Merger Procedure of the Commission, Section 8.22 reiterates the same publication

requirement. With respect to forbearance, the Act requires a public hearing, including a justification that the application of forbearance is "consistent with public interest and the benefit and welfare of consumers."[19]

Conclusion

In sum, the ambiguity of the phrase "shall be considered void," the guidance from decisions of mature competition jurisdictions, the circumstances of the subject transaction, the deficiency of the implementing rules and regulations, and the broad but checked powers of the Commission to apply restraint when circumstances warrant the same constitute the factual milieu surrounding the present case. All of these call for restraint on the part of the Commission in applying the full force of the law.

The suspension of the void penalty will not set a dangerous precedent because of the specificity of the factual milieu. What is dangerous is for the Commission to impose a void penalty, merely because the law "plainly" requires so, without regard to the Commission's obligation to apply the law in consonance with its legislative intent, and without regard to the current state of rules on implementing the void penalty. If there is a "slippery slope" to be feared, it is more with respect to the adjudication of pending and future non-notification cases in the absence of relevant rules, rather than to the specific case at hand.

Borrowing Justice Isagani Cruz's words:

> "xxx As judges, we are not automatons. We do not and must not unfeelingly apply the law as it is worded, yielding like robots to the literal command without regard to its cause and consequence. "Courts are apt to err by sticking too closely to the words of a law," so we are warned, by Justice Holmes again, "where these words import a policy that goes beyond them." While we admittedly may not legislate, we nevertheless have the power to interpret the law in such a way as to reflect the will of the legislature. While we may not read *into* the law a purpose that is not there, we nevertheless have the right to read *out of it* the reason for its enactment. In doing so, we defer not to "the letter that killeth" but to "the spirit that vivifieth," to give effect to the law maker's will."

I partially concur with respect to the imposition of the administrative fine (i.e. one percent (1%) of the transaction value). However, I urge the Commission to suspend the imposition of the void penalty until such time that adequate rules have been issued. Accordingly, I vote not to impose the void penalty on the subject transaction.

Stella Luz A. Quimbo

[19] Section 28 (c), Implementing Rules and Regulations of the Philippine Competition Act.