

Closure of investigation on SM's retail leasing policy and practice involving SM-branded bottled water for possible abuse of dominant position

Industry	:	Retail leasing
Case Reference	:	CEO-19-0029-FAI
Case Closed	:	13 August 2024
Issue(s)	:	SM's retail leasing policy and practice involving SM-branded bottled water for possible abuse of dominant position
Relevant Provision(s)	:	Section 15(c) of the Philippine Competition Act

I. Background

1. In 2019, the Enforcement Office conducted monitoring of three SM shopping centers, namely SM Southmall, SM Manila, and SM Aura. It was observed that only SM-branded bottled water was available for sale by food and beverage ("F&B") tenants in the supermarket and food court areas, suggesting a possible tying practice in SM shopping centers.
2. Due to administrative constraints, the matter was temporarily archived. On 05 February 2021, the matter was re-opened for further assessment.
3. During Initial Assessment ("IA"), the IA Team visited twelve (12) SM establishments and confirmed previous observations that only SM-branded bottled water was available for sale by F&B tenants in SM supermarkets, shopping center kiosks, and food courts.
4. On 28 October 2021, the Commission directed the Enforcement Office to conduct a preliminary inquiry ("PI") on a possible tying practice involving bottled water in SM shopping centers in violation of Section 15(c) and (f) of the PCA.
5. During the PI, the PI Team conducted interviews with different stakeholders, a field mission, mystery shopping activities, market inquiries, and reviewed various documents submitted.
6. The PI Team's findings from these activities indicated that there are reasonable grounds to proceed to Full Administrative Investigation ("FAI").



7. In a Resolution dated 26 January 2022, the Enforcement Office resolved to proceed, based on reasonable grounds, to the conduct of an FAI.
8. During the FAI, the FAI Team conducted subpoena hearings, field missions, and additional interviews.
9. Pursuant to the FAI Team's findings, on 06 October 2022, the Enforcement Office issued *Show Cause Order No. 2022-004* of even date (the "*Show Cause Order*") to SMPHI, ordering it to show cause in writing an explanation of the conduct described, to wit:

SM Prime Holdings, Inc. ("SMPHI"), as the owner and operator of SM malls in the Philippines, makes lease transactions in SM malls subject to the acceptance by food and beverage ("F&B") tenants – particularly kiosks, carts, or stalls located in food courts and in common areas of SM malls – of other obligations, including selling SM-branded bottled water, which, by its nature or according to commercial usage, has no connection with transactions of lease.
10. The *Show Cause Order* likewise directed SMPHI to attend the Show Cause Conference (the "Conference") on 28 October 2022.
11. On 08 November 2022, the Enforcement Office received a copy of SMPHI's Written Explanation dated 04 November 2022 (the "Written Explanation").
12. On 24 March 2023, the Enforcement Office received a Written Proposal (As of March 21, 2023) from SMPHI (the "*Written Proposal*"). The Enforcement Office then submitted its Memorandum containing its comments to the *Written Proposal* filed by SMPHI. The Enforcement Office recommended that the *Written Proposal* filed by SMPHI be approved by the Commission as it appears to address the competition concerns raised in the *Show Cause Order*. Subsequently, the Enforcement Office received a *Notice* issued by the Commission instructing SMPHI to submit a revised written proposal with more acceptable terms.
13. On 23 November 2023, SMPHI submitted its revised written proposal with its annexes ("*Revised Written Proposal*"). The Enforcement Office submitted its Memorandum containing its comments to the *Revised Written Proposal* filed by SMPHI. In the same Memorandum, the Enforcement Office recommended that the *Revised Written Proposal* filed by SMPHI be approved by the Commission as it appears to address the concerns raised in the *Show Cause Order*, as well as the directive of the Commission.
14. On 06 February 2024, the Enforcement Office received the *Notice* issued by the Commission finding the Revised Written Proposal acceptable subject to changes and conditions.

15. On 28 February 2024, SMPHI submitted its Written Proposal As of February 26, 2024 ("*Final Written Proposal*").
16. On 29 February 2024, the Enforcement Office submitted its Memorandum containing its comments to the *Final Written Proposal* filed by SMPHI. In the same Memorandum, the Enforcement Office recommended that the *Final Written Proposal* filed by SMPHI be approved as it complied with all the conditions indicated in the *Notice*.
17. On 30 April 2024, the Enforcement Office received the Order dated 07 March 2024¹ issued by the Commission accepting and approving the *Final Written Proposal*.
18. The Enforcement Office will monitor SMPHI's compliance to the commitments detailed in the *Final Written Proposal*.

II. Conclusion

19. Pursuant to Section 3.14 and 3.16 of the 2017 PCC Rules of Procedure, should the Entity submit a written proposal and the same is accepted and approved by the Commission, the Show Cause Order proceedings shall be terminated, and the Enforcement Office may close the investigation.
20. Accordingly, on 13 August 2024, the Enforcement Office RESOLVED to CLOSE the FAI pursuant to Sections 3.14 and 3.16 of the Rules without prejudice to any other investigation with respect to the same or other possible violations of the PCA or other competition laws.
21. The foregoing findings are based solely on the facts and circumstances of this investigation and relevant only to the particular issues examined herein.

¹ <https://www.phcc.gov.ph/resource-details/pcc-case-no-e-2023-002-sco>