



REPUBLIC OF THE PHILIPPINES

PHILIPPINE COMPETITION COMMISSION

6/F DAP Building, San Miguel Avenue, Ortigas Center, Pasig City 1600

COMMISSION DECISION No. 42-M-017/2017

Acquisition by SM Retail, Inc. of Goldilocks Bakeshop, Inc.

PCC Case No. M-2017-002

The Commission,

Having regard to the acquisition by SM Retail, Inc. of Goldilocks Bakeshop, Inc. ("Goldilocks") ["Transaction"],

Having regard to Section 16 and 20 of Republic Act No. 10667 and Section 1, Rule 4 of the Rules and Regulations to Implement the Provisions of Republic Act No. 10667,

Has adopted this Decision:

WHEREAS, the Transaction was notified to the Commission for review and competition concerns were identified arising from the Transaction at the end of Phase I review such that a favorable decision cannot be issued. Particularly, there were concerns on total and partial foreclosure in the supply of retail space for cakes and bakeshops in SM malls and sharing of competitors' business information;

WHEREAS, the Parties were issued a Phase II Notice and Request for Additional Information ("Phase II Request") on 3 August 2017;

WHEREAS, the Parties submitted proposed voluntary commitments on 13 October and 06 November 2017 to remedy the competition concerns identified by the Mergers and Acquisitions Office ("Office") at the end of the Phase I review of the Transaction. However, the proposed commitments were found to be insufficient to address the competition concerns identified by the Office;

WHEREAS, on 1 December 2017, the Office issued a Statement of Concerns ("SOC") on the Transaction;

WHEREAS, the acquiring party, SM Retail, Inc. ("SMRI"), and its ultimate parent entity SM Investments Corporation ("SMIC") including its subsidiary SM Prime Holdings, Inc. ("SMPHI") [collectively, the "Acquiring Party"], sought to address the competition concerns identified in the SOC by proposing voluntary commitments to remedy, mitigate or prevent the negative effects on competition resulting from the Transaction;

WHEREAS, the Acquiring Party submitted their proposed undertaking to the Commission on 14 and 21 December 2017. A revised, consolidated version of these submissions was submitted on 22 December 2017. After several conferences with the Commission, a final undertaking was submitted on 28 December 2017 ("Undertaking");

WHEREAS, the Acquiring Party submitted, together with its Undertaking, the sworn statement of SMPHI's Vice President for Information Technology declaring that SMPHI cannot require, nor has any access to, information relating to Stock Keeping Units sold or maintained by its tenants or any specific transaction data at any point in time from data entry at the point of sale to storage of sales summaries by SMPHI, and further commits in its Undertaking to submit a statement under oath through its duly authorized representative(s) describing the capture and flow of sales data;

WHEREAS, the Commission considered the Undertaking sufficient to address the competition concerns raised during the review;

RESOLVED THEREFORE, that the Commission will take no further action with respect to the Transaction, subject to the following conditions:

- I. The Acquiring Party shall comply with their obligations under the Undertaking and submit the reports to the Commission as provided thereunder or as will be provided under the monitoring plan to be jointly formulated by the Commission and the Acquiring Party;
- II. SMPHI shall, post-Transaction, treat SM mall tenants and lease applicants engaged in the sale of Goldilocks-like products or those in the same relevant product market as Goldilocks ("Goldilocks competitors") in a fair, reasonable, and non-discriminatory ("FRAND") manner, regardless of any affiliation with SMRI. SMPHI, shall contract with Goldilocks' competitors on FRAND terms at all times and in all geographic markets considering relevant circumstances. SMPHI shall likewise not refuse Goldilocks' competitors from locating in SM malls

in a manner that is contrary to FRAND terms or will result in foreclosure;

- III. Entities of the Acquiring Party shall observe and comply with their governance and fiduciary rules and obligations to operate their business independently and in the best interests of their respective corporations. The decisions taken by the entities under the Acquiring Party shall consider their respective corporate benefit, without consideration of benefits to any other company, whether it is an affiliate or otherwise;
- IV. SMPHI shall maintain data protection protocols and firewall systems that it represents to be currently in place between Goldilocks competitors and SMIC, SMPHI and SMRI which prevent the ability of the latter to access detailed sales data or information of SMPHI tenants at the points where such data is generated, stored, or accessed. Should the Commission determine that additional protocols or firewalls are appropriate or necessary, the Acquiring Party shall install the needed protocols and firewalls between GBI competitors and the Acquiring Party;
- V. The Acquiring Party shall not use tenant sales data in its possession or control (whether from the POS system, as submitted to it during a tenant audit or any other source) and ensure that the same will never be used by any person for any purpose outside the computation of rent due from such SM malls tenant. SMPHI shall not require its tenants to disclose product category level or Stock Keeping Unit level information, including prices or quantities sold. Further, the Acquiring Party confirms and commits that such data is not and will not be used to the disadvantage of any Goldilocks competitors post-Transaction;
- VI. SMIC and SMPHI shall keep confidential and inaccessible the access safeguards and protocols over Goldilocks competitors' sales data from Goldilocks and SMRI;
- VII. For the purpose of monitoring the above-mentioned commitments concerning the Acquiring Party's access to tenant sales data:
 - a. The Acquiring Party shall allow the Commission to confer with its Information Technology providers, including SAP COIN providers,

and their successors and assigns, to determine access controls of SM malls' tenants' data;

- b. The Acquiring Party undertakes and acknowledges that the Commission's inspection and monitoring may necessitate viewing the actual data under the aegis of reasonable safeguards for the protection of SMPHI's tenant information;
- c. The Acquiring Party shall provide access to the Commission's inspection and monitoring team to verify with relevant SM information technology personnel and systems that sales data of Goldilocks competitors are being kept confidential and fire-walled from Goldilocks and SMRI. The Acquiring Party shall further ensure that access safeguards and protocols over sales data of Goldilocks competitors will be kept confidential and inaccessible to Goldilocks and SMRI;

VIII. The Acquiring Party's compliance with its Undertaking and this Decision shall be monitored by the Commission through a monitoring team, under the following protocols:

- (a) The Acquiring Party shall jointly formulate with the Commission a reasonable monitoring plan within thirty (30) days from receipt by the Acquiring Party of this Decision;
- (b) The Commission's monitoring team may, at the instance of the Commission, include third-party experts who shall possess the appropriate credentials in the fields relevant to the monitoring tasks;
- (c) The experts appointed will work under the supervision of and be accountable to the Commission, subject to the same duties of confidentiality as the Commission's personnel;
- (d) The Acquiring Party and the Commission shall consult one another regarding the selection of any such experts for the purpose of mutual agreement on the appointment. In the event of disagreement, the Commission shall make the appointment, provided that the expert is qualified and does not have a conflict of interest with SMPHI and SMRI;
- (e) The Acquiring Party shall bear reasonable costs of such third-party experts, provided that the frequency of inspections does not exceed twelve (12) times in a given year for a period of five

(5) years. Payment of fees to any third-party experts shall be subject to the prior approval of the Commission;

- (f) Should the Commission's monitoring team identify any material and substantiated deficiency arising from their inspection, it shall notify the Acquiring Party in reasonable detail, and the Acquiring Party shall take measures to address such concerns, at its own cost, within a reasonably prompt period;
- (g) For a period of five (5) years, the Acquiring Party shall provide periodic reports of its compliance and comply with the monitoring measures as provided in this Decision, the Undertaking, and the monitoring plan;
- (h) Random inspections may be conducted, with such frequencies and at such occasion as not to unduly burden the Acquiring Party's operations and resources;
- (i) Access shall be granted during reasonable business hours to the monitoring team for both random and periodic inspection, subject to reasonable security measures but without need for any special permits;

IX. The Acquiring Party shall faithfully observe its commitment to address the Commission's concerns to forestall a substantial lessening of competition in the cakes and baked goods market, as emphatically stated in its own Undertaking:

- A. The Acquiring Party shall comply with its obligations set out in the Undertaking and to submit the reports to the Commission as mentioned therein. The Acquiring Party further acknowledges that its consolidated voluntary commitments contained in its Undertaking are as binding on its part as a decision rendered or order issued by the Commission;
- B. SMPHI shall continue to set lease terms and provide leasing opportunities to tenants in businesses or with products competing with those of GBI in a fair, reasonable and non-discriminatory manner, and maintain a non-discriminatory practice in the evaluation and processing of applications for store locations in SM malls. The Acquiring Party confirms that SMPHI does not and will not require its tenants to disclose

granular sales data to SMPHI;

- C. Notwithstanding the consolidation of SMPHI and SMRI in SMIC's annual reports, SMPHI, and SMRI will continue to operate as functionally separate and independent entities, with operating policies that are consistent with the undertakings made in this letter; and
- D. Neither SMPHI nor SMRI shall refuse competitors of GBI from locating in SM malls in a manner that is discriminatory or designed to result in foreclosure of competition;

RESOLVED FURTHER, that the Acquiring Party has not submitted a statement under oath through its duly authorized representative(s) describing the capture and flow of sales data, and given that the Commission has been informed, in the course of its investigation and exercise of adjudicative mandate, of representations that SMPHI in fact requires submission or transmittal of, or has the ability to access detailed sales data of its mall tenants at the product category or Stock Keeping Unit level, including the quantities and prices at which these are sold, the Acquiring Party is hereby required to submit, no later than 8 January 2018, a statement under oath through its duly authorized representative(s): (a) describing in reasonable detail the electronic processes for generation, capture, storage, and transmission of product category level and Stock Keeping Unit sales data of tenants in SM Malls, and if these are not in fact transmitted, describing the protocols which prevent such transmittal from occurring; (b) confirming that the Acquiring Party can not and does not access such product category level and Stock Keeping Unit sales data through any other manner or means, including among others, through physical delivery of tenant sales data by tenants. Failure to comply will result in the nullification of this Decision, without further act from the Commission.

This Decision was entered into based on the foregoing premises and the Undertaking and submissions of the Parties in relation to said Undertaking, without final adjudication on the Statement of Concerns.

Any breach of the conditions set forth herein will subject the Acquiring Party to fines, additional remedies, and such other measures as the Commission may deem necessary, including nullification of this Decision.

DONE, this 29th day of December 2017, in the City of Pasig,
Philippines.



ARSENIO M. BALISACAN

Chairman



JOHANNES BENJAMIN R.

BERNABE

Commissioner



STELLA LUZ A. QUIMBO

Commissioner



AMABELLE C. ASUNCION

Commissioner