Decision of the Competition Commission

CCM/DS/0030/53

Non-Confidential

Application for immunity under the Amnesty Programme for Resale Price Maintenance

by

Scott & Co. Ltd

21 June 2019

Competition Commission

Decision of the Competition Commission (the 'Commission') on the application made by Scott & Co. Ltd for immunity under the Amnesty Programme for Resale Price Maintenance.

THE COMMISSION -

Mrs. M. Rajabally - Commissioner,

Mr. C. Seebaluck - Commissioner,

Mrs. V. Bikhoo - Commissioner,

Having regard to the Competition Act 2007,

Having regard to the Competition Commission Rules of Procedure 2009,

Having regard to the Undertakings given by Scott & Co. Ltd on 10 December 2018,

Having regard to a report of the Executive Director of the Commission (the 'Executive Director') dated 15 February 2019 on the Undertakings given by Scott & Co. Ltd,

We, Commissioners, decide as follows:

Introduction

1.0 This is an application for immunity dated 29 September 2017 made by Scott & Co Ltd (the Applicant), through its Head of Commercial, Virginie Tadebois, pursuant to the Competition Commission's Amnesty Programme for Resale Price Maintenance (RPM) prescribed under paragraph 5.6A of CCM3 Guidelines on Collusive Agreements. As part of the conditions set out thereunder, undertakings ('the Undertakings') have been offered to the Competition Commission (the 'Commission') by the Applicant on 31 December 2018.

2.0 Having taken cognizance of a report (the Report) of the Executive Director dated 15 February 2019 in respect of this matter, the Commission has determined the present matter under section 59(7) of the Competition Act (the Act), the conditions prescribed under paragraph 5.6A of CCM3 Guidelines on Collusive Agreements and considering in particular, the Undertakings offered pursuant to section 63(3) of the Act.

The law

3.0 Section 43 of the Act prohibits and renders void 'any vertical agreement between enterprises to the extent that it involves resale price maintenance'. RPM is in turn defined under section 2 of the Act as 'an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing

a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers'.

3.1 An enterprise can only benefit from immunity to financial penalty if it is involved in conduct(s) that falls within the scope of section 43 of the Act and satisfies the conditions prescribed for the RPM Amnesty Programme, that is if it -

3.1.1 admits its participation in an agreement involving RPM;

3.1.2 provides the Commission with all the information, documents and evidence available to it regarding its RPM conduct;

3.1.3 maintains continuous and complete co-operation until the conclusion of any action by the Commission in relation to the matter; and

3.1.4 offers undertakings that satisfactorily address the competition concerns of the Commission.

3.2 The threshold for accepting undertakings under section 63(3) is that the Commission must be satisfied that they address "all the concerns it has about any prevention, restriction [or] distortion (...) of competition".

3.3 Pursuant to section 59 of the Act, the Commission may grant immunity or leniency to any person in such circumstances as may be prescribed. Effective from 05th June 2017 until 20th October 2017 inclusively, the Commission put in place a one-off, time-limited amnesty programme for any enterprise involved in resale price maintenance by waiving the restriction at paragraph 5.3 of CCM3 Guidelines on Collusive Agreements, *viz.,* that only RPM which facilitates a cartel can benefit from leniency and the associated footnote 3 thereat and subject to the applicant-enterprise fulfilling the conditions prescribed under paragraph 5.6A (b) of the said Guidelines (the 'RPM Amnesty Programme').

Facts

4.0 The Applicant was duly incorporated as a private company and bears Business Reg No. C06000577, and its registered office address is at Industrial Park 1, Riche Terre.

5.0 The Applicant is an importer and distributor of Fast Moving Consumer-Goods (FMCGs). FMCGs are products that are sold quickly and at relatively low cost. The Applicant supplies its FMCG products to its resellers such as hypermarkets, retail chains and supermarkets. The Applicant's resellers then sell the FMCG products to end-consumers. Moreover, the Applicant is also the exclusive distributor of rhum products manufactured by L'Exil Ltee which trades as Rhumerie de Chamarel.

6.0 The Applicant has admitted, in its application letter, its participation in RPM conduct by virtue of a distribution agreement it has entered with Scott & Co

Ltd. The distribution agreement contains some Resale Price Maintenance clauses. The reprehensible RPM conduct as disclosed by the Applicant and reported by the Executive Director of the Commission is six-fold –

6.1 The said 'Distribution Agreement' includes a price list which contains clauses on conditions of sales and promotional offers". These clauses are:-

6.1.1 Clause 2 expressly provides that "the Distributor undertakes to purchase the Products from L'Exil on the terms and conditions set out below and to promote and sell the Products to the best of its ability". As such, the inclusion of the price list in the Distribution Agreement is indicative of the binding effect it has on the Applicant.

6.1.2 Clause 21 stipulates that "the Distributor will comply with all reasonable directives of L'Exil relating to the promotion of products".

According to the Executive Director, Clause 21 limits the distributor's freedom to adopt its own promotion/discounting strategy.

6.2 The Applicant has also entered into distribution/commercial agreements with its dealers and such agreements include RPM clauses as follows:-

6.2.1 *"toute promotion retenue par le Client devra être appliqué en magasin. En cas de non-respect, le fournisseur se réserve le droit d'annuler la promotion après avoir prévenu le Client et que ce dernier n'ait pas pris d'action corrective".*

6.2.2 *"de plus, le client s'engage, pour tous les produits qui lui sont vendus par le fournisseur: A ne pas vendre en dessous du prix d'achat les produits mis en promotions".*

6.3 The has also admitted having sent emails to its dealers compelling them to apply the retail prices/price levels it has determined and/or otherwise linking the provision of wholesale discounts/rebates to dealers, via email or otherwise, upon the dealers respecting the retail prices it has determined.

6.4 The Applicant has circulated price lists to its dealers without the terms 'recommended price'.

6.5 Media and Advertisements showing the retail price of the products supplied by the Applicant to its dealers without the term 'recommended price' appearing therein or without making it clear that retail prices listed therein are recommended and non-binding.

6.6 Product presentation to customers by the Applicant showing the retail prices of the products without making it clear that such prices are merely recommended prices and are not binding

Investigation and findings

7.0 Upon receipt of the Application and pursuant to section 51 of the Act, the Executive Director proceeded to investigate (INV042/RPM/025) whether the reported conduct may amount to an RPM within the ambit of section 43 of the Act.

8.0 The Executive Director submitted his Report on the matter to the Commission on 15th February 2019. The Report contains the findings of the Executive Director, his assessment of whether the proposed Undertakings address all the concerns identified by him, and his recommendations in respect of the Application.

9.0 The findings of the Executive Director further to the assessments carried out are that-

9.1 the Application satisfies the conditions set out under paragraph 5.6A of CCM3 Guidelines for RPM amnesty;

9.2 the Applicant in its capacity as a distributor of rhum products and Fast Moving Consumer Goods has engaged in a conduct that raises competition concerns under section 43 of the Act.

9.3 the Undertakings offered as part of the Application satisfactorily address all the concerns he has about any prevention, restriction of competition as required under section 63 of the Act, in that the Applicant has undertaken:-

9.3.1 not to, in any manner whatsoever, implement or cause to be implemented any measure, including through economic advantages, incentives or otherwise, having the object or effect of retail price maintenance of any retail price, price levels or price components communicated to its resellers;

9.3.2 to ensure that all agreements, contracts, or other express arrangements with dealers, existing and prospective, expressly include a clause therein to the effect that dealers shall remain entirely free to fix or otherwise apply their own prices or price levels and that they are neither bound nor legally or contractually compelled to apply or comply with any recommended price or price level communicated to them;

9.3.3 to inform its suppliers that it is no longer party to the restrictive clauses constituting RPM in the contracts and shall either modify

the agreements or enter into new agreements which do not contain RPM clauses with the suppliers;

9.3.4 not to accept any offer, periodic, promotional or otherwise, from its suppliers (current or prospective) that involves RPM or is otherwise made conditional upon its observance of RPM;

9.3.5 to ensure that email communications from and to suppliers and from and to dealers do not contain RPM issues;

9.3.6 to continue to, where it issues a price list to its clients which contains a resale price, state clearly that the resale price is recommended price;

9.3.7 to ensure that the minimum retail price column in the promotion sheets circulated to its dealers is removed and that the terms 'recommended retail price' are inserted in the 'retail price column';

9.3.8 to inform all its dealers in writing, in clear and unequivocal words, that prices or price levels it has communicated to them are 'recommended prices' or 'price levels' and that they shall remain entirely free to fix or apply their own prices, price levels and thus are neither bound nor legally compelled to apply any price recommended price/price level communicated to them;

9.3.9 not to, in any manner whatsoever, enter into or otherwise facilitate, either explicitly or implicitly, the implementation of any agreement with its dealers that involves resale price maintenance; and

9.3.10 to take all appropriate measures to ensure that all its internal management, directors and employees engaged in the purchase and/or resale of goods and/or services are fully aware of and actively implement the present undertakings when implementing its pricing policy.

Executive Director's recommendations

11.0 The Executive Director recommends that the Commission accepts the Undertakings and grant immunity from fine to the Applicant for its participation in the RPM conduct it has reported to him.

Determination

12.0 Having regard to the Application submitted by the Applicant, the concerns which have been identified by the Executive Director in his Report, and the Undertakings offered by the Applicant, the Commission determines that –

12.1 the Applicant has, in its Application, admitted, in clear and unequivocal terms, its participation in one or more RPM agreement(s) *viz* admission of having participated in or otherwise having engaged in conduct in relation to its distribution of rhum products and FMCG, falling within the ambit of section 43 of the Act;

12.2 The Applicant has complied with requirements (ii) and (iii) of paragraph 5.6A(b) of the CCM 3 Guidelines, as stated in the Report; and

12.3 The Undertakings submitted by the Applicant satisfactorily address the Commission's concerns in so far as it will ensure that Applicant ceases its participation in RPM agreements.

Decision

13.0 The Commission therefore decides as follows:

13.1 We accept that the Applicant satisfies the conditions prescribed under the RPM Amnesty Programme as set out in paragraph 5.6A of the CCM 3 Guidelines on Collusive Agreements.

13.2 We accept the Undertakings offered by the Applicant.

13.3 The Undertakings shall be effective as from the date of this Decision.

13.4 We grant immunity from financial penalty to the Applicant pursuant to section 59(7) of the Act as follows:-

13.4.1 for the Reported RPM conduct in relation to its Distribution Agreement with L'Exil Ltee for the period 01 July 2010 to 29 September 2017; and

13.4.2 for the Reported RPM conduct in relation to its supply of FMCG to its dealers for the period 01 January 2014 to 29 September 2017.

Mrs. M. Rajabally (Chairperson) .....

Mr. C. Seebaluck (Commissioner) .....

Mrs. V. Bikhoo (Commissioner) .....

21 June 2019