Decision of the Competition Commission

CCM/DS/0030/50

Non-Confidential

Application for immunity under the Amnesty Programme for Resale Price Maintenance

by

L'Exil Limitée

21 June 2019

Competition Commission

Decision of the Competition Commission (the 'Commission') on the application made by L'Exil Limitée 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 L'Exil Limitée on 04 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 L'Exil Limitée,

We, Commissioners, decide as follows:

Introduction

1.0 This is an application for immunity dated 04 October 2017 made by L'Exil Limitée (the Applicant), through its Managing Director, Mr Herbert Couacaud, 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 08 May 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, bearing Business Reg No. C06016220, and its registered office address is at Royal Road, Chamarel.

5.0 The Applicant is a manufacturer of rhum products and its tradename is 'rhumerie de chamarel'. Its sole and exclusive distributor of its rhum products is Scott & Co. Ltd.

6.0 The Applicant has admitted, in its application letter, its participation in RPM conduct by virtue of a distribution agreement with Scott & Co. Ltd which 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 two-fold –

6.1 The said 'Distribution Agreement', includes a price list and 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 Scott & Co Ltd;

6.1.2 Clause 5 provides that "at any time, the other party commits any material breach of its obligations under this agreement and, if such breach shall be capable or remedy, shall fail within thirty days or receipt of notice served by the non-defaulting party requiring it to do to make good such breach"; and

6.1.3 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 2 is indicative of the binding effect of the price list on Scott & Co Ltd and Clause 21 limits the distributor's freedom to adopt its own promotion/discounting strategy. As regards Clause 5, the Commission is unable to identify any RPM conduct as the wordings are clear and unequivocal.

6.2 The Applicant has attached a price list to the Distribution Agreement but for the terms 'recommended price'. In the Executive Director's opinion, the Applicant may have been involved in an RPM conduct within the ambit of section 43 of the Act by establishing the price at which Scott & Co Ltd will resell the products to other dealers.

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/038) 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 producer of rhum products 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 enter into a new distribution agreement with its distributor to expressly provide that the distributor is free to set the price and level of discounts at which it will commercialise the products;

9.3.3 to inform its internal management and all its employees engaged in the sales and marketing of its products about the above behavioural undertakings, thereby minimising risks of RPM conduct being promoted by employees and ensuring that commercial dealings with its distributor are consistent with the provisions of the Act;

9.3.4 to ensure that its Distributor remains entirely free to fix or apply its own prices, price levels and thus is neither bound nor legally compelled to apply any recommended price/price level communicated by the Applicant; and

9.3.5 to, where a minimum resale price has been recommended to dealers and the resale price appears on the goods, either affix or cause to be affixed the words "recommended price" next to the resale price, in compliance with the provisions of section 43(3) of the Act.

Executive Director's recommendations

10.0 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

11.0. 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 –

11.1 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 the supply of its rhum products to specified resellers, that falls within the ambit of section 43 of the Act;

11.2 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

11.3 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

12.0 The Commission therefore decides as follows:

12.1 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.

12.2 We accept the Undertakings offered by the Applicant.

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

12.4 We grant immunity from financial penalty to the Applicant pursuant to section 59(7) of the Act for the Reported RPM conduct for the period 24 June 2010 to 04 October 2017.

Mr. C. Seebaluck
(Chairperson) .....

Mrs. M. B. Rajabally
(Commissioner) .....

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

21 June 2019