



Decision of the Competition Commission

CCM/DS/0030/42

Non-Confidential

**Application for immunity under the Amnesty
Programme for Resale Price Maintenance**

by

The Brandhouse Ltd

21 June 2019

Competition Commission

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

THE COMMISSION –

Mr. A. Mariette	-	Vice-Chairperson,
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 The Brandhouse Ltd 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 The Brandhouse Ltd,

We, Commissioners, decide as follows:

Introduction

- 1.0 This Decision relates to an application for immunity dated 18th October 2017 made by The Brandhouse Ltd (the Applicant) through its Chief Executive Officer, (✂), 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 Commission as an annex to the Application.
- 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 is a distributor and retailer of home appliances and electronics in Mauritius and it was duly incorporated as a private company limited by shares on 06 July 1999, bearing Business Reg. No. C06001091. Its registered office address is Industrial Park 1, Riche Terre and its holding company is Scott Investments Ltd.
- 5.0 The Applicant was incorporated following the merger of JM Goupille & Co, founded in 1930, important importers and distributors in the country, and Waterfalls Marketing, owner of the Galaxy chain of retail stores since 1991. There are 23 Galaxy multi-brand retail stores in Mauritius and JMG imports, markets and distributes top international brands such as Samsung, Panasonic, Beko, Zanussi, Black and Decker, Elba, Alcatel, Galanz.

- 6.0 The Applicant has admitted being party to an agreement involving RPM in connection with the distribution or resale of consumer electronic products in Mauritius. The particulars of the RPM conduct of Applicant are as follows:-

6.1 **Reported Conduct 1 – Applicant as Supplier/Distributor**

In its capacity as Distributor/Supplier, the Applicant reported that it issued monthly price lists to retailers with no mention of whether the indicated retail prices therein are recommended. In so doing, the Applicant may have negligently and in effect, imposed retail prices on its resellers and as such, has limited retail price competition.

6.2 **Reported Conduct 2 (in place since 2010) – Applicant as Supplier/Distributor**

In letters sent to selected retailers to achieve minimum targets of purchases, mention was made that 'recommended selling prices must be complied with'. This would indicate that retail prices were being imposed on resellers, thus raising an RPM concern.

6.3 **Reported Conduct 3 (in place since 2014) - Applicant as Supplier/Distributor**

6.3.1 The Applicant regularly engages in nationwide advertisements of its products through national press and billboards wherein photos of selected products are advertised together with their respective selling prices, product details and list of retailers with no mention of whether these prices are recommended prices to where such products are available for sale.

6.3.2 The Applicant regularly assists specific retailers in promoting its products by financing advertisement campaigns for them. The applicable promotional prices are sometimes proposed by the retailer and on some occasions by the Applicant. In the latter case, it is brought to focus that when prices are proposed to the retailer by the Applicant, they are not bound to adhere strictly to the suggested price.

6.3.3 By carrying out advertising of its products or assisting retailers in advertising its products without specifying that the prices advertised by the Applicant are 'recommended retail prices', this may negligently and in effect purport that the said retail prices in the campaign are to be applied by the resellers and in effect limit retail price competition.

6.4 **Reported Conduct 4 (in place since 2016)– Applicant as Supplier/Distributor**

6.4.1 As a distributor, the Applicant receives in some cases, directives from the suppliers regarding the sale, marketing and pricing of

products and the Applicant is compelled to pass on the directives to retailers. One of the directives and communications pertain to the retail prices of the products. More precisely, the Applicant received directives from its Samsung branded consumer electronics' supplier which it then passes on to its resellers and these directives are qualified as Golden rules by the supplier in order to maintain a healthy sell-out environment for all parties. One of the rules for instance is that: 'All retailers should respect RRP (Galaxy S8 / S8+) and this must be enforced via respective Disty' as is observed in one of its email to its resellers wherein it enforces the rule set for adherence to retail prices as imposed by the suppliers. In imposing, on behalf of the suppliers, such a rule on resellers, it can be easily deduced that the Applicant is a party to an agreement to restrict competition at downstream level and such an act by the Applicant, in the circumstances, amounts to an RPM within the ambit of section 43 of the Act

- 7.0 Based on the above, the Executive Director is of the view that the Applicant has, in its capacity as a distributor/supplier participated in the reported conducts 1 – 4 which are agreements involving RPM within the ambit of section 43 of the Act, with its resellers with the object of directly establishing retail prices/price level to be observed when reselling the products to final customers.

Investigation and findings

- 8.0 Upon receipt of the Application and pursuant to section 51 of the Act, the Executive Director proceeded to investigate (INV042/RPM/041) whether the reported conduct may amount to an RPM within the ambit of section 43 of the Act.
- 9.0 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.
- 10.0 The findings of the Executive Director further to the assessments carried out are that-
- 10.1 the Application satisfies the conditions set out under paragraph 5.6A of CCM3 Guidelines for RPM amnesty;
 - 10.2 the Applicant in its capacity as distributor and retailer of home appliances and electronics, has engaged in a conduct that raises competition concerns under section 43 of the Act.
 - 10.3 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:-

- 10.3.1 not to implement or cause to be implemented, in any manner whatsoever, any measure (including through the use of economic advantages, incentives or otherwise), having the object or effect of compelling, inducing or attempting to compel or induce dealers to apply the retail prices or retail price levels or retail price components it has communicated to them;
- 10.3.2 to inform all dealers, in writing and in clear and unequivocal terms, that prices or price levels it has communicated to them are "recommended" prices or price levels;
- 10.3.3 to amend all existing agreements, contracts, or other express arrangements with dealers, existing and prospective, to 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 compelled to apply or comply with any recommended price or price level it has communicated to them;
- 10.3.4 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

- 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 as a distributor and retailer of home appliances and electronics to specified resellers, that falls 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 -

13.4.1 for the period 01 January 2010 to 18 October 2017 in respect of RPM conduct 1 at paragraph 9 above and only in respect of dealings with resellers as per lists marked and annexed as 'Annex 8' and Annex 9 to the Report;

13.4.2 for the period 01 January 2014 to 18 October 2017 in respect of RPM conduct 2 at paragraph 9 above and only in respect of dealings with resellers as per lists marked and annexed as 'Annex 8' and 'Annex 9' to the Report;

13.4.3 for the period 01 January 2016 to 18 October 2017 in respect of RPM conduct 3 at paragraph 9 above and only in respect of dealings with resellers and distributors as per lists marked and annexed as 'Annex 8' and 'Annex 9' to the Report; and

13.4.4 for the period 01 January 2016 to 18 October 2017 in respect of RPM conduct 3 at paragraph 9 above and only in respect of dealings with resellers and distributors as per lists marked and annexed as 'Annex 8' and 'Annex 9' to the Report.

Mr. A. Mariette
(Vice-Chairperson)

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Mr. C. Seebaluck
(Commissioner)

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Mrs. M. B. Rajabally
(Commissioner)

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Mrs. V. Bikhoo
(Commissioner)

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21 June 2019

