Decision of the Competition Commission

CCM/DS/0030/45

Non-Confidential

Application for immunity under the Amnesty Programme for Resale Price Maintenance

by

Li Wan Po & Compagnie Limitée

21 June 2019

Competition Commission

Decision of the Competition Commission (the 'Commission') on the application by Li Wan Po & Compagnie 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 Li Wan Po & Compagnie Limitée on 17 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 Li Wan Po & Compagnie Limitée,

We, Commissioners, decide as follows:

Introduction

1.0 This is an application for immunity dated 25 October 2017 made by Li Wan Po & Compagnie Limitée (the Applicant), through its Managing Director, Mr Michael Denys Li Wan Po, 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 25 January 2019.

2.0 Having taken cognizance of a 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 on 01 July 1948, bearing Business Reg. No. C07000713, and its business address is 19-21, Queen Street, Port Louis.

5.0 Li Wan Po & Compagnie Limitée operates in the wholesale sector as supplier of food and non-food items to resellers in Mauritius, in the consumer goods sector for foodstuff, culinary, pastry, confectionery, beverages, baby and cleaning products, for the brands All Gold, Almondco, Beacon, Blackcat, Cavendish & Harvey, Colman's, Crosse & Blackwell, Devon, Energade & Jungle, Goodmaid, Grozette, Hayat, Jacobsens, Keen, Koo & Silverleaf, Meiji,

Myojo, Mrs Balls, Nissin, Pokka, Pro A Pro, Prochem, San Remo, Signature, Rooiberg and Villiera brands, classified as the non-tobacco products.

6.0 Li Wan Po & Compagnie Limitée also operates in the wholesale sector as sub-distributor of tobacco products namely BAT brands, Benson & Hedges, Rothmans, Matinée, Dunhill, Embassy and Pall Mall in Mauritius, classified as the tobacco products.

7.0 The Applicant provided contracts with its resellers that included a minimum promotion resale price clause with reference to the products supplied by Li Wan Po & Compagnie Limitée, to be adhered to by the resellers, in support of its application with regards to RPM to show that the above stated agreements involved Resale Price maintenance in relation to the food and non-food items. These agreements indicate that Li Wan Po & Compagnie Limitée's conduct fall within the scope of RPM under section 43 of the Act.

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/054) 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 supplier of food and non-food items to resellers 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 not to accept any offers – whether periodic, promotional or otherwise – from the suppliers that involve RPM or are otherwise made conditional upon its observance of RPM; and

10.3.3 to include a clause in all existing agreements, contracts, or other express arrangements with the suppliers, existing and prospective, to the effect that it remains entirely free to fix or otherwise apply its own prices or price levels and that it is neither bound nor legally compelled to apply or comply with any recommended price or price levels communicated to it by its suppliers.

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 supplier of food and non-food items to 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 as follows:-

13.4.1 For the period 01 January 2014 to 20 October 2017 and only in respect of its dealings with the following suppliers:-

(a) Phoenix Beverages Ltd;

(b) Grays Inc. Ltd; and

(c) Scott & Co Ltd.

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

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

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

21 June 2019