Decision of the Competition Commission

CCM/DS/0030/64

Non-Confidential

Application for immunity under the Amnesty Programme for Resale Price Maintenance

by

Grays Inc. Ltd

21 June 2019

✂ represents excised confidential information

Competition Commission

Decision of the Competition Commission (the 'Commission') on the application made by Grays Inc. 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 Grays Inc. Ltd on 26 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 Grays Inc. Ltd,

We, Commissioners, decide as follows:

Introduction

1.0 This Decision relates to an application for immunity dated 09 October 2017 made by Grays Inc. Ltd (the Applicant), through its Commercial Executive, (✂), 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 by the Applicant on 26 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').

<u>Facts</u>

4.0 The Applicant is a private limited company and bears Business Registration Number C06061754. It is a producer and marketer of wines, rums, spirits and liqueurs and supplies other products such as consumer goods, personal care, fragrances and pharmaceuticals and home care products to hypermarkets, leading supermarkets and small self-service outlets island wide. Its registered office situates at Beau Plan Business Park, Pamplemousses.

5.0 The Application and documents in support thereof has revealed that the Applicant has participated in RPM conduct in the following manner:-

5.1 the Applicant has included a standard clause (entitled 'Remise Promotionelle') in its commercial agreements with its retail customers to the effect that it determined and established a minimum pricing policy to be practised by resellers when reselling its products during promotional offers. In respecting the terms of the said clause, the resellers would benefit from wholesale discounts; and

5.2 the Applicant has established and communicated fixed retail prices for its products through its 'end-of-month promotional proposal' to specified retail customers without making it clear that such retail prices mentioned therein were 'recommended prices' and non-binding.

6.0 The above practices by the Applicant, according to the Executive Director, are evidence of its participation in agreements which may have a restrictive object or effect and thus, may fall under section 43 of the Act.

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/065) 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 supplier of consumer goods, personal care, fragrances and pharmaceuticals and home care 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 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;

9.3.2 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;

9.3.3 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;

9.3.4 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; and

9.3.5 to take necessary steps to deliver training to its staff on the importance of clearly and unequivocally informing dealers, in their respective dealings with its customers, that the prices communicated to dealers are merely 'recommended prices' or price levels and that dealers remain free to practise their own retail prices.

Executive Director's recommendations

10.0 The Executive Director recommends that the Commission accepts the Undertakings and grant immunity from fines to the Applicant for its participation in the RPM conduct as aforesaid.

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 as supplier of consumer goods, personal care, fragrances and pharmaceuticals and home care products, 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 in respect of its dealings with its resellers as per annexed list of resellers (Annex 3) to the Report for the period 25 November 2009 to 09 October 2017 only.

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

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

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

21 June 2019