



Decision of the Competition Commission

CCM/DS/0030/32

Non-Confidential

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

by

Phoenix Beverages Ltd

21 June 2019

Competition Commission

Decision of the Competition Commission (the 'Commission') on the application by Phoenix Beverages 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 Phoenix Beverages Ltd on 11 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 Phoenix Beverages Ltd,

We, Commissioners, decide as follows:

Introduction

- 1.0 This Decision relates to an application for immunity dated 3rd October 2017 made by Phoenix Beverages Ltd (the Applicant), 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 11th 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’.

- 4.0 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 -
 - 4.1 admits its participation in an agreement involving RPM;
 - 4.2 provides the Commission with all the information, documents and evidence available to it regarding its RPM conduct;
 - 4.3 maintains continuous and complete co-operation until the conclusion of any action by the Commission in relation to the matter; and
 - 4.4 offers undertakings that satisfactorily address the competition concerns of the Commission.
- 5.0 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”.
- 6.0 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

- 7.0 The Applicant is a private Company and is duly registered to the Registrar of Companies bearing Company Registration No. C 1183 and Business Registration No. C07001183. It was first incorporated on 09 September 1960 as Mauritius Breweries Ltd and in the year 2003, it changed its name into Phoenix Beverages Ltd. Its trade name since year 2016 is *Phoenixbev*.
- 8.0 The Applicant is a producer, bottler and distributor of more than 50 brands of alcoholic and non-alcoholic beverages across 7 beverage categories including beer, carbonated soft drinks, bottle water, still beverages, energy drinks, wine and spirits.

Investigation and findings

- 9.0 Upon receipt of the Application and pursuant to section 51 of the Act, the Executive Director proceeded to investigate (INV042/RPM/067) whether the reported conduct may amount to an RPM within the ambit of section 43 of the Act.

- 10.0 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.
- 11.0 The findings of the Executive Director further to the assessments carried out are that the Applicant has been:-
- 11.1 establishing a minimum retail price ('pricing restriction') to be practised by retail customers in the reported *protocoles d'accord*/commercial agreements concluded and/or through email communication exchanged with retail outlets and retail chains with regards to the resale of its beverage products to end-consumers;
 - 11.2 requiring its regional distributors (managed distribution centres - MDCs), through its MDC contracts, to apply or at the very least to align to its wholesale pricing policy (WSP) communicated to them and imposing a price reporting requirement in the event of deviation from its WSP;
 - 11.2 determining and affixing the retail price of its beverage products in its media and advertising materials without the terms 'recommended price' appearing thereon; and
 - 11.4 determining and imposing, by way of agreement, a fixed selling price to be practised by its distributors when reselling its Crystal-branded water carboys.

Executive Director's recommendations

- 12.0 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 for the relevant period for the following reasons:-
- 12.1 the Application satisfies the conditions set out under paragraph 5.6A of CCM3 Guidelines for RPM amnesty; and
 - 12.2 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:-
 - 12.2.1 to inform all its resellers (more than 10,000 in Mauritius), in writing, within three months of this Decision, that prices or price levels, and changes thereto communicated to them are to be regarded as recommended public resale prices;
 - 12.2.2 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; and

- 12.2.3 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 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.

Determination

- 13.0 Having regard to the Application submitted by the Applicant, the concerns and findings of the Executive Director in his Report, and the Undertakings offered by the Applicant, the Commission determines that –
- 13.1 there has been a clear and undisputed participation of the Applicant in RPM agreement(s) when distributing its beverages products to its clients and such behaviour amounts to conducts falling within the ambit of section 43 of the Act;
- 13.2 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
- 13.3 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

14. The Commission therefore decides as follows:
- 14.1 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;
- 14.2 We accept the Undertakings offered by the Applicant;
- 14.3 The Undertakings shall be effective as from the date of this Decision;
- 14.4 We grant immunity from financial penalty to the Applicant pursuant to section 59(7) of the Act for the Reported RPM conduct which occurred during the period 25 November 2009 to 03 October 2017 only.

Mr. C. Seebaluck
(Chairperson)

Mrs. M. B. Rajabally
(Commissioner)

Mrs. V. Bikhoo
(Commissioner)

21 June 2019



