



Decision of the Commissioners of the Competition Commission

IBL Consumer Goods' Sales Contract with Retail Stores

Decision and Directions

**09 September 2010
CCM/HG/001**

Decision of the Commissioners of the Competition Commission of Mauritius.

Hearing COMMISSION/HG/001- IBL Consumer Goods' Sales Contracts with Retail Stores.

Commissioners – *Mr Rajiv Servansingh – (Acting Chairperson) - Chairperson*
Mr Rodney Rama – Commissioner
Mrs Selvam Poonoosamy – Commissioner
Mr Reshad Sadool – Commissioner

Pursuant to the hearing requested by Ireland Blyth Consumer Goods (IBL) in light of the report produced by the Executive Director of the Competition Commission of Mauritius (the Commission) in the matter of IBL Consumer Goods' Sales Contracts with Retail Stores, the Commissioners state the following:-

1. Background

- 1.1 IBL Consumer Goods commenced a sales initiative called the Top Store Program (TSP) in or about June 2009. The TSP related specifically to the offering of volume-related discounts to retailers on Kraft block processed cheese coupled with the allocation of specified shelf-space to in the stores of those retailers to Kraft block processed cheese and other Kraft-branded products.
- 1.2 The volume-related discounts offered to retailers by IBL on Kraft block processed cheese via the TSP ranged from 2% to 4%.
- 1.3 The other Kraft-branded products that benefited from the specified shelf placement were other types of cheese (cream cheese spreads, sliced cheese, cans and Philadelphia), Chocolates (Milka, Toblerone, Cote D'Or), biscuits (Oreo and Chips Ahoy) and Powdered Flavoured Juice (Tang).
- 1.4 The agreement between IBL and various retailers was contained within a written contract and it is this contract that is known as the TSP.
- 1.5 The Executive Director launched an investigation into the conduct of IBL to determine whether or not the TSP could be seen as having the effect of preventing, restricting or distorting competition given that IBL holds a dominant position in the relevant market as far as sales of Kraft block processed cheese is concerned.
- 1.6 More precisely, the Executive Director sought to establish whether or not the conduct of IBL could be considered an abuse of its dominant position in the cheese market by either:
 - (i) protecting its market power for Kraft block processed cheese or reducing the market share of its competitors in that market by offering volume-related rebates;
 - (ii) protecting its market power for Kraft block processed cheese or reducing the market share of its competitors in that market by

requiring a certain percentage of shelf space and premium positioning on shelves;

- (iii) leveraging its dominant position in the block processed cheese market to benefit unfairly the other Kraft-branded products marketed by IBL (as mentioned above) either through premium positioning and minimum shelf space provisions for those other products or by eliminating the effective access of potential or actual competitors in those non-block cheese markets.

- 1.7 The conclusion of the Executive Director in his report following the investigation of the (Commissioner) was that the TSP utilised by IBL is likely to distort competition in the cheese, chocolates, biscuits and powdered juice markets.
- 1.8 In light of this conclusion, IBL sought a hearing as per the Competition Act, so that it might bring forth its views for the Commissioners to consider.

2. The Hearing

- 2.1 The hearing was held on 23rd August 2010.
- 2.2 The Executive Director stated that he would stand by the conclusions iterated in the report submitted by the Commission, which conclusions have already been stated above. Other than this the Executive Director did not seek to adduce further evidence.
- 2.3 IBL, through its spokesperson, chose to concentrate on three main issues in rebuttal of the conclusions reached by the Commission in its final report, namely:
 - (i) IBL Consumer Goods had engaged in an intensive promotion campaign in relation to Kraft block processed cheese since June 2009;
 - (ii) the amount of shelf-space allocated to Kraft block processed cheese in large retail stores merely reflects a widely accepted practice of “shelf space (being) proportional or less than the share of the market;
 - (iii) the fact that sales of Kraft block processed cheese grew between July and December 2009 was not wholly due to the TSP and the Commission omitted to consider relevant factors concerning the peculiarities of certain retailers, which counters the argument that the TSP was the sole factor for the abovementioned sales growth.
- 2.4 As regards the first point raised by IBL it was argued during the hearing that the volume discounts and rebates offered as part of the TSP, which had been in operation since June 2009, had not prevented, restricted or distorted competition in that the increase in sales of Kraft block processed cheese 2009 was due in great part to a vigorous promotional campaign undertaken in relation to this product by IBL. This campaign included television advertisement, the use of

billboard advertising, painting of bus shelters and increases in staff and distribution vans.

- 2.5 It should be noted that at this stage, IBL sought to introduce a document to illustrate the point it was raising. The Chairperson sought clarification as to the nature of this document and whether or not it represented new evidence, in which case a decision would have to be made as to its admissibility. It was submitted by one of the IBL spokespersons that the document merely served as a visual illustration of issues raised previously.
- 2.6 The Commissioners ruled that the document, despite having not been submitted during the investigation, and as such was considered to be new evidence. This being so, the document did indeed merely enforce previously raised issues and would therefore be admissible in the interests of natural justice thus giving IBL the opportunity to make its case fully and to make representations thereon.
- 2.7 In relation to the second point raised by IBL during the hearing it was submitted that it was a regular practice that the shelf space allocated to a particular product be proportional to the market share of that particular product, and that this was the case of Kraft block processed cheese as it represented over 70% of the overall cheese market.
- 2.8 At this stage, IBL sought to introduce a second document which the Chairperson questioned as potentially being tantamount to the introduction of new evidence. Upon argument by one of the IBL spokespersons, it was stated that this was once again merely an illustrative document which served as support to a previously raised issue. It was even proposed to withdraw the document. The Commissioners nonetheless admitted the document as new evidence in the interests of natural justice, as not to admit it would deprive IBL of the opportunity of making full representations.
- 2.9 Finally, the third point raised by IBL concerned the fact that the Commission had failed to consider the peculiarities of certain retailers that had signed up to the TSP, namely:
 - (i) Lolo supermarket, which had grown from being a small supermarket to being a hypermarket in June 2009, with inevitable increases in total sales of all IBL products, including Kraft block processed cheese;
 - (ii) Winners Roche Bois, which is not a retail outlet, but a central buying office for the whole of the Winners group of supermarkets which occasionally buys on behalf of those outlets. Therefore, it was argued that in any given year, the total sales of Kraft block processed cheese to Winners should be the total of all of the outlets together with the purchases made by the Roche Bois central buying office on behalf of the outlets;
 - (iii) AG Nabee and M Savers, which saw their whole business, grow hugely in 2009, not just in relation to the sales of Kraft products.

- 2.10 At this stage, the Commissioner gave the opportunity to the Executive Director to rebut any of the points raised by IBL.
- 2.11 The Executive Director conceded that the new evidence introduced was merely in the form of illustrations of previously canvassed issues.
- 2.12 He emphasised that the Commission was well aware of the other marketing strategies that IBL had embarked upon in 2009, but distinguished the argument put forward by IBL by re-iterating the point made in the Commission report, namely that the real concern for the Commission is that by resorting to volume-related discounts tied in with the allocation of premium shelf-space, IBL is effectively preventing new entrants from entering the block processed cheese market in the future.
- 2.13 He iterated the point that the allocation of shelf-space has universally been practised, but that it is the linking up of this practice with the offer of volume-related rebates and discounts which may make it difficult for smaller brands to compete in future.

3. Findings of the Commissioners

- 3.1 As this case concerns the question of abuse of monopoly by IBL, the first question to be determined is whether or not IBL Consumer Goods is in a monopoly situation as regards Kraft block processed cheese. A monopoly for goods and services exists under Section 46 (1) (a) of the Competition Act where *“30% or more of those goods or services are supplied, or acquired on the market, by one enterprise...”*
- 3.2 It seems crystal clear from the market study carried out by the Commission, coupled with the non-rebuttal, and indeed, acceptance of IBL of this being the case, Kraft block processed cheese, as marketed by IBL in Mauritius, does effectively enjoy a dominant position in the cheese market which equates to being in a monopolistic position.
- 3.3 The second issue to determine is whether or not the actions of IBL, through the introduction of the TSP, have had or will have the effect or object (or both) of preventing, restricting or distorting competition and whether or not this constitutes an abuse of its (IBL's) dominant position in the market, which abuse has had or is likely to have *“an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are likely to be detrimental to consumers”*. This is covered by Section 46(3) of the Competition Act.
- 3.4 The TSP is a program which sets out to offer volume-related discounts or rebates to retailers of Kraft block processed cheese in return for premium shelf-space allocation not only for Kraft block processed cheese, but also for other Kraft-branded products. We are being asked to determine whether or not such an agreement has had or will have the effect of preventing, restricting or distorting competition.

- 3.5 At this stage we, the Commissioners, would wish to refer to the Coca Cola Company Case¹, which the Commission cited in its report, pertaining to the offering of growth and target rebates by the company as regards sales of Coca Cola to customers in return for tying arrangements relating to less well-selling carbonated drinks marketed by the company. The arrangements also included the allocation of premium shelf space to those products. It was found that these conditions deteriorated the access to retailers for rival suppliers of carbonated soft drinks to the detriment of the consumer.
- 3.6 We, the Commissioners, would argue that a similar state of affairs exists in the current situation. By signing the TSP contracts with retailers, IBL, which enjoys a dominant, monopolistic foothold on the cheese market in Mauritius, is effectively preventing entry into this market for potential new entrants by shoring up its barriers through the TSP. The use of volume-related rebate and discounts is tantamount to forcing retailers to ensure that the minimum sales figures meet the requirements of the TSP, thus guaranteeing the retailer its discount or rebate, and in the same breath ensuring that the sales of Kraft block processed cheese are continuously kept at that level. Therefore, the TSP effectively compels the retailer to selling X amount of Kraft block processed cheese over a given period, which it will do, often to the detriment of rival suppliers. This action would also have the effect of restricting the choices open to consumers as new products would effectively be prevented from entering the market.
- 3.7 Furthermore, by linking the allocation of premium shelf-space to less well-selling other Kraft-branded products, IBL is in effect leveraging artificially the potential sales of those products, given that they are allocated shelf space that does not necessarily represent the share of the market that they enjoy. This has been done to the detriment of the suppliers of similar products to those other Kraft-branded products as they may not have benefited from the percentage of shelf space that they merited.
- 3.8 We, the Commissioners, therefore conclude that the TSP may have the effect of:
- (i) preventing competition in the cheese market by foreclosing the entry of any potential new entrants into the market in the future;
 - (ii) leveraging IBL's dominant position in the block processed cheese market in order to benefit unfairly the other Kraft-branded products marketed by IBL either through premium positioning and minimum shelf space provisions for those other products or by eliminating the effective access of potential or actual competitors in those non-block cheese markets.

The practice of the TSP by IBL is therefore in contravention of Section 46 of the Competition Act. It has been proven that IBL is abusing its dominant position in the market and that abuse has had or is likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius and has been or is likely to be detrimental to consumers as per Section 46 of the Competition Act.

¹ http://ec.europa.eu/competition/antitrust/cases/decisions/39116/commitments_fr.pdf

4. Remedies

- 4.1 Given the nature of the conclusions above, it is incumbent upon the Commissioners to decide upon the remedies that should be imposed in this case, whilst taking into account any off-setting benefit to the public.
- 4.2 It would appear that there is little or no benefit to be offset by permitting IBL to continue with the TSP.
- 4.3 The Competition Act provides under Section 60 that where an abuse of a monopoly situation occurs, the Commissioners are empowered to “*give the enterprise such directions as it considers necessary, reasonable and practicable to:*
- (A) *remedy, mitigate or prevent the adverse effects on competition that the Commission has identified; or*
 - (B) *remedy, mitigate or prevent any detrimental effects on users and consumers so far as they have resulted from, or are likely to result from, the adverse effects on, or the absence of, competition.”*
- 4.4 We, the Commissioners, having decided that a remedy is warranted in the current case, hereby issues the following direction:

IBL Consumer Goods, having been adjudged to be in breach of Section 46 of the Competition Act 2007, we the Commissioners hereby direct IBL Consumer Goods to cease its practice of giving retailers retroactive rebates on volume in relation to Kraft block processed cheese in exchange for any or all of the following:

- a. ***a minimum sales threshold of Kraft block processed cheese;***
- b. ***premium shelf-space (whether expressed in a percentage or as facings) for Kraft block processed cheese;***
- c. ***premium shelf-space (whether expressed in a percentage or as facings) for Kraft other branded products, namely other types of cheese (cream cheese spreads, sliced cheese, cans and Philadelphia), Chocolates (Milka, Toblerone, Cote D’Or), biscuits (Oreo and Chips Ahoy) and Powdered Flavoured Juice (Tang);***
- d. ***excluding Amila powdered juice from the retailer’s stock listings.***

Failure to comply with this direction shall constitute an offence under Section 70(a) of the Competition Act 2007 and shall, on conviction, render the party liable to pay a fine not exceeding Rs 500,000 and to imprisonment for a term not exceeding 2 years.

Dated this 16th September 2010

Mr Rajiv Servansingh Date.....
(Chairperson)

Mr Reshad Sadool Date.....
(Commissioner)

Mrs Selvam Poonoosamy Date.....
(Commissioner)

Mr Rodney Rama Date.....
(Commissioner)