General Notice No. 34 of 2012

Decision of the Commissioners of the Competition Commission of Mauritius.

Hearing COMMISSION/HG/003 – Importation of Slaughter Cattle in Mauritius

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

Pursuant to the hearing requested by Socovia (Belle Vue) Ltee (*Socovia*) and Cattleco Ltd (*Cattleco*) in light of the report produced by the Executive Director of the Competition of Mauritius (*the Commission*) in the matter of the Importation of Slaughter Cattle in Mauritius, the Commissioners state the following:-

1. **Background**

1.1 Following the liberalization of the importation of slaughter cattle in 1996, several companies were set up to begin importation, including, amongst others, Socovia, Cattleco, Agromaster Ltd (*Agromaster*), Sodia Ltee (*Sodia*) and Norfarm Ltd (*Norfarm*).

1.2 Many of these companies suffered significant losses which led to many of them pulling out of the business and others, more pertinently, to enter into a strategic collaboration, in an attempt to lower costs and increase income.

1.3 Socovia, Cattleco, Agromaster, Sodia and Norfarm, through a series of either written agreements or working arrangements, entered into an association wherein each company became responsible for specific tasks relating to the importation of cattle for slaughter to Mauritius.

1.4 To this end, the companies became involved in the following activities, which continue to this date:

1.4.1 Socovia selects the cattle in South Africa and markets the sale of cattle in Mauritius, as well as having the livestock carrier chartered in its name;

1.4.2 Cattleco actually charters the vessel (in Socovia's name), as well as taking care of insurance cover, compliance with veterinary conditions in South Africa and seeking new sources of supply;

1.4.3 Agromaster and Norfarm take the responsibility for selling the cattle to the butchers in Mauritius;

1.4.4 Sodia provides the quarantine facilities.

1.5 During the initial years of liberalization, slaughter cattle were imported on a number of carriers. However, over time this situation has changed, with, seemingly, only one carrier almost always being used to bring cattle to Mauritius, namely the Murray Express.

1.6 The reduction in cattle carriers was due to two main factors. Firstly, a tightening of exportation regulations from South Africa (Mauritius' primary source of slaughter cattle)

and the limited size of the market for slaughter cattle in Mauritius. Between 800 to 1000 head of cattle per month satisfies the requirements for slaughter cattle in Mauritius.

1.7 On 21st December 2009, the Executive Director of the Competition Commission (the ED) launched an investigation into the importation of live cattle in Mauritius, focusing primarily upon the relationship between Socovia, Cattleco, Agromaster, Sodia and Norfarm and whether or not, as a result of this association there has been a detrimental effect on competition.

1.8 In his final report, issued on 20th June 2011, the ED concluded that the association constitutes a non-collusive horizontal agreement, as per Section 44 of the Competition Act 2007 (the Act) which might have the object or effect of preventing, restricting or distorting competition.

1.9 In the report, the ED concluded that the relevant market in this matter was the market for "the supply slaughter cattle in Mauritius"

1.10 Furthermore, the ED went on to explain and that as a result of the collaboration, Socovia is in a monopoly situation in the market for slaughter cattle in Mauritius and may be preventing, restricting or distorting competition by limiting access to the cattle carrier that it charters to bring cattle to Mauritius. This limitation of access to a restricted facility is referred to as the "**Essential Facilities Doctrine**".

1.11 Following the publication of the ED's Final Report setting out the allegations in this matter, Socovia and Cattleco requested that a hearing be held in order to put forward their respective points of view in this matter.

1.12 It should be noted that both parties, at the request of the Commission, submitted Skeleton Arguments outlining the broad lines of the arguments that they intended to make at the Hearing. These skeleton arguments, which were quite detailed, were deemed to be part of the evidence produced by the parties.

2. The Hearing

2.1 The Hearing was held on 2nd December 2011.

2.2 Both Socovia and Cattleco were represented at the Hearing by their respective legal representatives.

2.3 In a brief statement, the ED stated that he stood by the conclusions found in his Final Report and chose not to elaborate further other than to refer the Commissioners to the report for further details.

2.4 Counsel for Socovia, prior to setting out his case raised a preliminary objection (which had been set out in submitted skeleton arguments) to the effect that "*the Competition Commission of Mauritius is not a legal entity known to the law and as such all its acts and doings are null and void to all intents and purposes. So therefore Socovia moves that the present hearing be permanently stayed.*"

2.5 The Commissioners, despite allowing Counsel for Socovia to state the preliminary objection, decided not to allow him to elaborate further stating, through its Chairperson that such an objection could not be heard before the Commission as it did not have the power to decide such an issue. It was pointed out to Counsel that the preliminary objection ought to be brought before a different forum altogether.

2.6 The Commissioners wish to state at this juncture that the raising of such preliminary objections, which are effectively points of law, cannot be entertained during a hearing as the powers of the Commission are limited to determining competition issues. Section 6 of the Act clearly sets out the powers of the Commission and these powers are all limited to acts and doings relating to the Act and related regulations. The preliminary point raised by Counsel for Socovia quite clearly did not relate to powers that the Commission can exercise under the Act and as such could not be heard from the outset, hence the decision not to allow Counsel to elaborate further.

2.7 Following the raising of this preliminary point, a request was made by Counsel for Cattleco to be heard out of turn on the merits, which request was accepted by the Commissioners.

2.8 At this stage, Counsel for Cattleco made a request to put questions to the ED in relation to his Final report. The ED expressed his unease as to Cattleco being allowed to do this, but the Commissioners decided to allow the cross-examination to go ahead. Section 23(6) of the Commission's Rules of Procedure states the following:

> *Where the Commission requires any evidence to be given orally, it shall, if it considers it necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross examine the person giving the evidence.*

2.9 The Commissioners are of the opinion that this section not only gives the parties the right to cross-examine any witnesses deponing, but also, most importantly, to cross-examine the ED. The ED gave evidence when he presented his Final Report and it is only just and equitable that he be open to cross-examination.

2.10 The ED delegated the Commission's Acting Chief Legal Advisor to answer the questions put by Counsel. This was objected to by Counsel who was insistent that the ED himself answer. In fact, this power of delegation is in line with Section 23(1) of the Commission's Rules of Procedure which states:

> *The Executive Director* ***or any other officer*** (bold text added) *shall have the right to be present during a hearing and to make submissions on any matter before the Commission, as well as to present any document or other evidence that may be relevant to the matter.*

2.11 The line of questioning of Counsel for Cattleco related to whether or not at the time of two factual meetings held on 29th January 2010 and 17th February 2010, between the ED and his team and Cattleco (and its representatives), the ED had gathered evidence from Cattleco under false pretences. The substance of the argument put forward by Counsel (which, incidentally, had also been stated in the skeleton arguments submitted by Cattleco) was that the ED had interviewed Cattleco as a witness, whilst it was already in presence of the formal accusation made against it (Cattleco) by the

Complainant, and that as a result, the ED ought to have interviewed Cattleco as a party accused of anti-competitive practices and not as a witness.

2.12 During the cross-examination, the Commissioners noted a certain hesitation, vagueness and unpreparedness on the part of the ED's representative which we find to be somewhat surprising especially as so much time has been spent by the Commission compiling this case.

2.13 Despite this patent evasiveness, the Commissioners wish to state that the argument put forward by Counsel cannot be entertained. The reason for this is that during the investigation, the ED is under no obligation to inform the party being questioned as to the capacity in which they are being questioned. In fact there is nothing to indicate this in the Act or in any of the affiliated regulations.

2.14 Further guidance may be sought in the wording of Sections 10(1) and 10(4) of the Commission's Rules of Procedure which read as follows:

> *10(1)*
> *Where the Executive Director exercises his powers of investigation, he may require* ***any person*** (bold text added) *to produce any book, document, record or article or to provide specified information in a written statement, which relates to any matter relevant to the investigation including market share information or a description of a particular market.*
>
> *10(4)*
> *A request for information may be made to any person including an enterprise suspected of breach, its officers (past or present) or any third parties, including a complainant, supplier, customer, a competitor or any other enterprise.*

2.15 These sections do not impose any obligation on the ED to inform a "person" (term used as per the definition in the Rules of Procedure) producing documents or information whether they are a party, a witness or otherwise. This would seem to indicate that it is the prerogative of the ED not to inform a "person" whether or not they are being formally accused during the course of the investigation, and this until such time as he thinks it fit to tell the accused party. This would normally occur at the stage of preliminary findings.

2.16 Counsel then proceeded to put forward the main arguments of the defence of Cattleco, which were also submitted in the skeleton arguments. These can be summarised as follows:

2.16.1 That the ED was wrong in finding that the agreement between Socovia and the 4 other companies mentioned above was a non-collusive horizontal agreement. Whilst accepting that there was indeed an agreement and that it was non-collusive, Counsel did not agree that the agreement was horizontal, claiming that the companies were not all operating in the same market, that is the market for the supply of slaughter cattle. Counsel further elaborated by stating that the companies could not to be considered to be actual or potential competitors as mentioned in the definition of "horizontal agreement" under Section 2 of the Act;

2.16.2 That the relevant market as determined by the ED, i.e. the market for the supply cattle in Mauritius, has been erroneously chosen and the relevant market ought to be the much wider market for beef;

2.16.3 That even if one accepts that the relevant market is for the supply of slaughter cattle and that Socovia holds a monopoly in this market as a result of the existence of the non-collusive horizontal agreement, the ED has shown no evidence whatsoever of the detrimental effects of this monopoly on the consumer, i.e. that it has the object of preventing, restricting or distorting competition;

2.16.4 That the ED has erroneously concluded that Socovia and its other partners have restricted access to an essential facility to potential competitors. Counsel contended that the essential facility in question, a cattle carrying ship named Murray Express, is anything but an essential facility given that Socovia's competitors have alternatives available to them, but that they do not avail of these alternatives as they are too expensive to charter. It was further submitted that the acts of Socovia were not exclusionary in that it has simply not been feasible to allow others to make use of the ship as Socovia imports full ship loads of cattle, making it impossible to allow others to make use of the facility.

2.17 Following the arguments put forward by Counsel for Cattleco, Counsel for Socovia then proceeded to outline his defence, raising the following points:

2.17.1 That applying the Essential Facilities Doctrine to this matter is unjustified and erroneous in as much that when the Murray Express was not being used, Socovia proved that it was possible to charter other ships to bring live cattle to Mauritius. In fact, Socovia has produce evidence showing that it had successfully negotiated a new carriage contract dated 7th June 2011 with the owners of a different carrier namely the Lincoln Express. Furthermore, it was argued that the Murray Express is not the property of Socovia, but in fact belongs to a third party which means that if anyone is preventing other persons from chartering the carrier it is that third party and not Socovia. This argument is strengthened by the fact that over the last year Socovia has brought cattle to Mauritius on a CIF basis which means that the supplier provides the carrier. This, in the opinion of Counsel, clearly indicates that other avenues for carriage are open to potential importers of slaughter cattle to Mauritius;

2.17.2 The Commissioners wish to point out at this stage that it allowed Counsel for Socovia to introduce a number of documents which had not been previously made available. These documents are effectively additional evidence as per Section 23 (3) of the Commission's Rules of Procedure. It is within the ambit of the Commission's powers not to allow this evidence to be used as per Section 23(3), however we believe that in the interests of natural justice and because of the unavailability of the information prior to the hearing, use of this evidence should be allowed.

2.17.3 That the relevant market is the market for beef, which is a much wider market in which the industry players are totally different to those involved in this matter;

2.17.4 That the ED was wrong in concluding that the monopoly that exists is likely to prove detrimental to consumers, and this in light of the fact that in the 9 years during which the monopoly has existed no detrimental effect has been experienced by consumers. Counsel went on further to state that the ED has at no time been able to highlight any such detriment.

3. The Findings of the Commissioners

3.1 Perhaps the most appropriate place to begin with our findings would be the question of the relevant market. There are very clear divergences between the ED and the parties as to what this market is. On the one hand, the ED is unequivocal in his interpretation of matters: the relevant market is the market for the supply of slaughter cattle in Mauritius. On the other hand, the parties have argued that the market is the market for beef.

3.2 The Commissioners conclude that the relevant market is indeed the market for the supply of slaughter cattle in Mauritius, based on the following:

3.2.1 The methodology used by the ED in determining the relevant market is convincing and applicable, taking into consideration a number of pertinent factors before reaching a conclusion;

3.2.2 The definition of relevant market is "a defined set of products which could compete with other products and a defined geographical area within which competition occurs." Inherent in this description is the necessity to define the product market and the geographic market. The latter is in this case is Mauritius. It is the product market that is a little harder to determine.

3.2.3 The ED, by making use of empirical evidence, in the form of a commissioned independent market survey, and by considering the demand-side and supply-side substitutes in both the upstream market (i.e. the market for the importation of cattle) and the downstream market (i.e. the market for the distribution and sale of fresh beef), provides a thorough analysis of all possibilities before reaching his conclusion.

3.2.4 Demand–side substitutes are quite simply other products to which consumers could switch to if ever there was a small but significant price rise, whereas supply-side substitution is the ability of alternative suppliers to rapidly switch into supply of the product in question in the same circumstances.

3.2.5 Through the survey commissioned, the ED was able to conclude that on the demand side, the extent of substitution for fresh beef was not significant enough to make a price rise in fresh beef unprofitable, which led him to conclude that the downstream market is the market for the supply of fresh beef in Mauritius. Based on this argument, the contentions of the parties do not hold water. If the relevant market is quite simply the market for beef, then there ought to be a significant upward shift in the consumption of frozen and chilled beef if there is a small but significant rise in the price of fresh beef. The survey carried out shows us that this is not so and leads us to construe that the market for fresh beef and frozen/chilled beef are in two different markets.

3.2.6 The upstream market, based on the ED's conclusions, does not have a supply-side substitute. A small but significant rise in the price of fresh beef cannot be remedied with easy access to the market by other competitors as there are considerable costs, the market is relatively limited and there are logistical problems which may occur, such as securing carriage from the exporting country to Mauritius.

3.2.7 The arguments of the parties seem somewhat vague and unsubstantiated as to the definition of the relevant market. As a result, their arguments are less convincing than the ED's conclusions as to the market which leads us to agree with the latter's conclusions as regards the relevant market.

3.3 Having determined what the relevant market is, let us now consider the ED's conclusion that there exists within that market a non-collusive horizontal agreement which has had the effect of creating a monopoly in favour of Socovia in the market for slaughter cattle in Mauritius. It is also contended that this Socovia may be preventing, restricting or distorting competition by limiting access to the cattle carrier that it charters to bring cattle to Mauritius. This limitation of access to a restricted facility is referred to as the "Essential Facilities Doctrine" (EFD).

3.3.1 The first element to consider is whether or not an agreement exists. It is clear from the evidence gathered that there is indeed an agreement between Socovia and its four other partners. Socovia and Cattleco accepted the existence of various agreements, both verbal and written, which have created a collaboration between the 5 companies. It is however, worth noting that the two parties present revealed that the agreements had been in existence for many years.

3.3.2 One can conclude that as a result of this consensus there is an agreement in place.

3.3.3 The second consideration is whether or not it is a horizontal non-collusive agreement. Once again, there is no issue regarding the aspect of non-collusion. The ED has stated that the element of collusion is not present and the parties, naturally, agree with this.

3.3.4 As far as the agreement being horizontal, one needs to look at the definition in Section 2 of the Act, which states:

> *"horizontal agreement" means an agreement between enterprises which, for the purpose of that agreement, operate in the same market and are actual or potential competitors in that market.*

3.3.5 The ED contests that the agreement between the 5 companies falls within this definition. The parties disagree and have stated that the 5 companies were not operating as actual or potential competitors at the time the agreement was entered into. Counsel contended that the companies were all involved in different aspects related to the importation of cattle and that they were all happy for Socovia to be the sole importer. At no time since they pulled out of importation of cattle have the 4 other companies attempted to import cattle again.

3.3.6 This is a convincing argument and the more so when one considers that the ED had originally considered the agreement to be collusive, only to retract this contention in his final report. Such volatility of an essential element of a report is indicative of uncertainty on the part of the ED.

3.3.7 One might actually be minded to argue that the agreement is more vertical than horizontal, especially in light of the definition found in Section2 of the Act:

> *"vertical agreement" means an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services.*

3.3.8 Each of the parties seemingly operates at "a different level of the production or distribution chain and their roles are distinct from one another.

3.3.9 It is for these reasons that the Commissioners wish to state that the conclusion put forward by the ED that this is a horizontal agreement ought to be questioned and would need seriously to be re-considered. On this basis alone, this case should fall and the allegation withdrawn. We are of the opinion that given the nature of the relationship that exists and the fact that each party plays a different role in the supply chain, it would have been more logical if the ED had chosen to level the accusation against the parties as per Section 45 of the Act which reads as follows:

> ***45. Other vertical agreements***
> *A vertical agreement that does not involve resale price maintenance may be reviewed where the Commission has reasonable grounds to believe that one or more parties to the agreement is or are in a monopoly situation that is subject to review under section 46.*

3.3.10 If the agreement between the 5 companies is deemed to be vertical, this section provides the ED with the opportunity to look at any vertical agreement where he believes that one of the parties in is a monopoly situation (allegedly in this case, Socovia). Potentially, this monopoly could be reviewed under Section 46 of the Act, which describes the conditions that need to be present for a monopoly to exist and in which circumstances this monopoly might become reviewable by the Commission. We believe that had this been done, in light of the different roles of each of the 5 companies involved in the agreement, it would have been a more appropriate and credible accusation. Whereas in the past the 5 companies had all been importers, at the time when the various agreements (written or otherwise) had been made, their individual roles had changed and it is clear that the relationship was a vertical one.

3.3.11 Assuming that the arrangement is indeed a non-collusive horizontal agreement (or indeed a vertical agreement under Section 45 of the Act, as argued above), we now need to determine whether or not a monopoly situation exists and whether the alleged monopolist has acted in such a way as to prevent, restrict or distort competition.

3.3.12 There seems little argument that the relevant market as described by the ED is indeed correct. A monopoly situation, as per Section 46(1)(a) of the Act, does indeed prevail, in that there exists a situation where 30% or more of the goods supplied are supplied by one enterprise, in this case, Socovia. The parties have expressed little opposition to this contention, save and except that they have contested the definition of the relevant market. We have already explained the reasons as to why we believe the relevant market as described is correct and from that standpoint we should apply that definition to the question of the existence of a monopoly situation. Indeed, the parties have conceded that if the relevant market, as defined by the ED is correct, then there is little doubt that a monopoly situation exists. In fact, the market share of Socovia has been estimated to be as high as 98%.

3.3.13 The next step is to consider whether or not the monopoly situation has had the object or effect of preventing, restricting or distorting competition, as per Section 46(2) of the Act.

3.3.14 The ED has argued that whilst reviewing this monopoly situation, one should take into consideration Section 46(3) of the Act, which states:

(3) In reviewing a monopoly situation, the Commission shall take into account –

(a) the extent to which an enterprise enjoys or a group of enterprises enjoy, such a position of dominance in the market as to make it possible for that enterprise or those enterprises to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;

(b) the availability or non-availability of substitutable goods or services to consumers in the short term;

(c) the availability or non-availability of nearby competitors to whom consumers could turn in the short term; and

(d) *evidence of actions or behaviour by an enterprise that is, or a group of enterprises that are, a party to the monopoly situation where such actions or behaviour that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumer.*

3.3.15 In addition, the ED makes reference to CCM Guideline 4 relating to monopolies in particular Section 3, which deals with exclusionary practices. The ED is most concerned with Section 3.5 and 3.23, the relevant parts of which read as follows:

3.5 'Anticompetitive foreclosure' is said to occur when the conduct of a monopoly enterprise restricts or eliminates the effective access of actual or potential competitors to customers or to supplies, to the detriment of consumers or the economy in general.

and

> 3.23 *Refusals to supply are more likely to be anti-competitive, but again the CCM will proceed with caution. In general, it is perfectly legitimate for businesses freely to decide whether to supply a potential customer or not, and on what terms. A refusal to supply is most likely to be anti-competitive only where it concerns an essential upstream input, over which a supplier exerts significant market power, without which competitors to that supplier's downstream business are at a serious disadvantage. For example (...) a refusal to provide access to an essential facility (such as a dock) might have the effect of anti-competitive exclusion downstream, and thereby constitute abuse of monopoly.*

3.3.16 The combination of the above considerations in the law have led the ED to conclude that the monopoly situation held by Socovia is preventing, restricting or distorting competition by limiting access to the cattle carrier that it charters to bring cattle to Mauritius, and that this limitation of access to the restricted facility is referred to as the "**essential facilities doctrine**".

3.3.17 The "essential facilities doctrine" (EFD) is a concept that has its origins in the jurisprudence of the United States and has been widely referred to and adopted in other jurisdictions. The US case *MCI Communications Corp v AT&T – 708 F.2d 1081, 1132-33 (7th Cir. 1983)* spelt out the principal considerations to be applied in this doctrine, namely that:

(a) The monopolist has control over the essential facility;

(b) The competitors are practically or reasonably unable to duplicate the essential facility;

(c) There is a denial of the use of the facility by the monopolist to the competitors;

(d) It is feasible that the monopolist could provide the facility to competitors.

3.3.18 The facility that the ED has claimed is essential in this case is the cattle carrier that Socovia regularly charters to bring cattle to Mauritius, named the Murray Express. The claim is that Socovia has chartered this carrier over the years and has refused access to it to other potential importers. In so doing, it is argued, Socovia has control over this facility, which is a facility that cannot be easily duplicated by other potential importers. Furthermore, it is contended that use of the facility has been denied to those importers, despite the fact it could have been put at their (the other potential importers) disposal.

3.3.19 Vital for the EFD to be relevant in any particular case is the monopolist's control over the facility. Can it be argued to be so in this case? A broad look at the leading cases leads us to conclude that this question of control is invariably linked to ownership of the essential facility.

3.3.20 Thus in the *MCI* case, the refusal of AT & T to allow MCI to interconnect with a local telecommunications distribution facility was deemed to be a refusal to deal as per the EFD. The interconnection facility belonged to AT & T. Similarly, in *Otter Tail Power Co v United States – 410 U.S. 366, 368 (1973)*, a refusal by Otter Tail to allow a co-operative access to its electricity transmission lines was deemed to be within the EFD principles. There exist several other similar US cases, all of which espouse the element of ownership as being tantamount to control.

3.3.21 The European Commission has determined in several cases that owners of various infrastructural facilities had used their control over those facilities to prevent competition from developing. The facilities ranged from ports *[B&I Line PLC v. Sealink Harbours Ltd. & Sealink Stena Ltd., 5 C.M.L.R. 255 (1992)]*, harbours *[Sea Containers v. Stena Sealink, 1994 O.J. (L 15) 8]* to tunnels *Eurotunnel, 1994 O.J (L 354) 66*. This has been extended further in the Microsoft case *Microsoft, 2007 O.J.(L 32) 23* where Microsoft was obliged to open access to information needed for interconnection to certain of its networks. The leading European case is *Oscar Bronner GmbH & Co. v Mediaprint Zeitungs, 1998 E.C.R. I-7791, 4 C.M.L.R. 112 (1999)*. Mediaprint, which owned the only newspaper distribution system in Austria refused access to this system to its competitors. In all of these cases the EFD was linked inextricably to ownership of the facility.

3.3.22 In the current case, the facility in question is a cattle carrier. Most pointedly, it is not owned by the monopolist, Socovia. In fact, Socovia charters the boat as and when it requires it. The owner of the boat is a foreign company named Vroon BV. The question that now arises is whether or not Socovia can exert sufficient control over a foreign-owned facility to such an extent as to be able to exclude its local competitors in the relevant market. The Commissioners do not believe that this is possible. Socovia, by partaking in legitimate business practices, charters the Murray Express with a view to bringing in 800 to 1000 heads of cattle per shipment. The risks and expense of the chartering all inherently belong to Socovia. In the circumstances, there is no obligation for it to allow others to transport their cattle on the ship. Furthermore, not being the owner, it is not up to Socovia to decide to whom the carrier can be chartered. This decision lies with the ship's owner, Vroon BV. There is no evidence to show that Socovia is colluding with Vroon BV in order to restrict access to the carrier to other Mauritian importers. Thus, the facility cannot be said to be controlled by Socovia, which in turn means that the first principle of the EFD has not been met.

3.3.23 The second element of the EFD relates to the inability of competitors or potential competitors to duplicate the facility. The ED has argued that the costs of chartering or purchasing another carrier are prohibitive, as is the option of air travel. Based on its interviews with industry competitors, the ED has concluded that Socovia actively excluded others from using the facility, knowing full well it could not be duplicated.

3.3.24 Counsel for Socovia has demonstrated that during a period when the Murray Express was not available, it was able to charter two other vessels for the carriage of slaughter cattle, namely the Hereford Express and the Lincoln Express. It seems that the only barrier preventing competitors from doing

likewise is financial. The Commissioners are of the opinion that Socovia should not be found liable merely because it has the funds to charter a vessel to legitimately carry out its business, and, indeed, is willing to bear the associated risks. Arguably, other competitors could potentially charter vessels in much the same way, if they pooled their resources. It appears that they have either not been willing to do so or are not willing to take the associated risks of such a venture.

3.3.25 In Oscar Bronner, the Court held that there were no "technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in co-operation with other publishers, its own nationwide home delivery scheme." This tallies with the argument above that legitimate co-operation between Socovia's competitors may well be the solution to their inability to charter a carrier.

3.3.26 We shall now look at the question of whether or not there has been a refusal to allow use of the facility. The evidence provided by the ED is somewhat flimsy as regards the question of refusal to allow use of the facility. Indeed, there is no actual evidence of outright refusal. The evidence provided by competitors skirts around the issue of whether they had asked Socovia directly to make use of the facility. Can Socovia be deemed to have refused to provide the facility if none of the competitors had actually requested it to do so? We think not, and therefore this element of the EFD cannot be deemed to have been fulfilled.

3.3.27 The final element of the EFD relates to the feasibility of providing the facility. Socovia has a business which supplies slaughter cattle to Mauritius. Inherent in its business is the need to ensure that its supply keeps up with the demand for slaughter cattle. Is it reasonable to expect Socovia to give up part of its business, together with part of the facility that it makes use of, on the basis of this complaint against it? Is it feasible for Socovia to do this? We find that it would not be reasonable, nor feasible to ask Socovia to do this. As mentioned before, the most viable option would be for potential competitors to pool their resources to import slaughter cattle.

3.3.28 In the circumstances, the Commissioners affirm that the requirements of the EFD have not been satisfied and that to apply this doctrine to this case would be erroneous and misguided. Although some of the elements seem to be present, upon closer inspection this is clearly not the case.

4. Conclusion

4.1 The Commissioners wish to conclude that although the relevant market has clearly been defined, the ED has used some tenuous arguments to justify the other elements of this case. The nature of the agreements has not been determined with any clear arguments. In fact, the ED has demonstrated evident difficulty in his determination of the nature of the agreements, jumping from the agreements being collusive to being horizontal and non-collusive. This is further compounded by the fact that when one looks closer at the agreements, they appear to be, if anything, vertical in nature.

4.2 As explained above, although there is no doubt as to the existence of a monopoly situation, it is again impossible to apply the EFD to this case due to the numerous flaws in the arguments put forward by the ED.

4.3 As a result of the findings, the Commissioners have no choice but to find that the allegations against Socovia, Cattleco, Agromaster Ltd (*Agromaster*), Sodia Ltee (*Sodia*) and Norfarm Ltd (*Norfarm*) have not been proven.

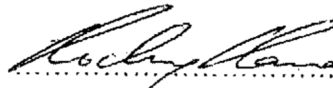
4.4 The Commissioners are concerned that they are left with the unfortunate impression that the ED has seemingly tried to fit the evidence, (especially as regards the EFD), into a pre-conceived view that the arrangements between the parties, coupled with the ensuing monopoly situation, was ample proof of anti-competitive behaviour. This is clearly not the case.

4.5 Finally, we wish to state that a direct consequence of these findings is there is no remedy to apply or consider here as there has been no finding of uncompetitive behaviour.

Dated this 21st Day of December 2011

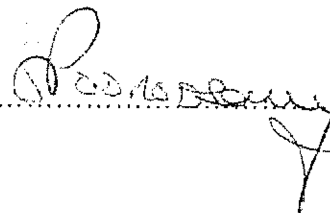
Mr Rajiv Servansingh .... Date 21/12/2011

(Chairperson)



Mr Rodney Rama .... Date 21st December 2011

(Commissioner)



Mrs Selvam Poonoosamy .... Date Dec 21-2011

(Commissioner)

Mr Reshad Sadool .... Date 21.12.2011

(Commissioner)