

General Notice No. 999 of 2016

CCM/DS/0014



Decision of the Commissioners of the Competition Commission

Potential Collusive Agreement in the Beer Market

Decision

22nd August 2014
CCM/DS/0014

Decision of the Commissioners of the Competition Commission

COMMISSION/DS/0014 - Investigation Into Potential Collusive Agreement In the Beer Market

Pursuant to the Report of the Executive Director of the Competition Commission ('the Executive Director'), under Section 51 of the Competition Act 2007 (the Act) upon completion of an investigation into 'Potential Collusive Agreement in the Beer Market' (INV027), the Commissioners of the Competition Commission of Mauritius (the CCM) convened a hearing in camera on 20th August 2014 where the following matters were considered:

- 1) The Final Report of the Executive Director.
- 2) The application by Phoenix Beverages Ltd (PBL) for leniency under the CCM Leniency Programme as provided in the CCM Guidelines on Collusive Agreements CCM3 ('CCM 3 Guidelines).
- 3) The Undertakings offered by PBL under Section 63 of the Act.
- 4) The intention of both PBL and Stag Beverages Ltd (SBL) not to challenge the recommendations of the Executive Director as contained in the Final Report.
- 5) The agreement of both PBL and SBL to the directions and financial penalties recommended by the Executive Director in the Final Report.

We, the Commissioners, state the following:

Background

- 1.1 This Decision is addressed to PBL and SBL, following the Executive Director's investigation, launched on 23rd March 2014 into a potential collusive agreement between PBL and SBL with the object and/or effect to share the market of beer in Mauritius and to restrict the supply of beer in Mauritius, in breach of the provisions of section 41 of the Act.
- 1.2 The Executive Director completed the investigation in a rather short lapse of time, taking into account the exceptional circumstances of the case and the collaborative approach of the parties.
- 1.3 The Executive Director did not issue any Statement of Issues Report during the course of the investigation. The Executive Director indicated in the Final Report that several factors were considered, including the evidence already in possession of the Executive

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Director and the extensive cooperation of both PBL and SBL during the investigation. In order to expedite matters, the Executive Director moved directly to the Provisional Findings stage without going through a Statement of Issues stage.

- 1.4 The Commissioners are satisfied that during the investigation, the parties were sufficiently aware of the concerns of the Executive Director and consequently the principles of natural justice were upheld and the parties were given reasonable opportunities to put their views on the provisional findings and recommendations of the Executive Director, as contained in the Provisional Findings Report of the Investigation.
- 1.5 PBL had applied for a marker and subsequently applied for leniency. The Executive Director recommended that a 75% reduction in the financial penalties as part of leniency be granted to PBL for breach of Section 41 of the Act. No such application was made by SBL and, therefore, SBL did not benefit from any leniency.

Findings of the Commission

Having taken cognizance of the Executive Director's Findings in the Report of Investigation and based on our own assessment of those Findings,

We, the Commissioners, decide that:

- a. We endorse the findings of the Executive Director that there has been an agreement between PBL and SBL with the object and/or effect of sharing the beer market in Mauritius and restricting the supply of beer in the beer market of Mauritius, in breach of the provisions of Section 41 of the Act; agreement which started in August 2013 and which continued to exist as at the date of the Final Report.
 - b. Though the Castel Group is a party to the agreement, the investigation pertains to the Mauritius beer market. The stake of the Castel Group and its economic activities that affect the Mauritius beer market are through SBL. We therefore decide that PBL and SBL have breached Section 41 of the Act.
- 1) Having determined that both PBL and SBL have been in breach of Section 41 of the Act, it is now incumbent on us to decide on the appropriate Directions and/or Financial Penalties, if any, to be imposed on PBL and SBL, in the light of all the circumstances of the case, including the cooperative attitude of the parties and their

agreement to the directions and financial penalties recommended by the Executive Director in the Final Report.

Conclusions on Directions/ Financial Penalties:

Having decided that there has been an agreement between PBL and the SBL with the object and/or effect of sharing the beer market in Mauritius and restricting the supply of beer in the beer market of Mauritius, in breach of the provisions of section 41 of the Act,

We, the Commissioners, decide as follows:

On the Undertakings provided by PBL

Cognisant that Section 63 of the Act empowers the CCM to determine a case on the basis of Undertakings if it considers that the Undertakings satisfactorily address all the concerns it has regarding restriction, prevention or distortion of competition:

- a. We endorse the assessment of the efficacy of the Undertakings offered by PBL which has been carried out by the Executive Director in the Final Report and we are satisfied that the Undertakings provided by PBL will to a large extent mitigate the potential concerns that the CCM had in terms of the continuing effects of the agreement.
- b. We hereby accept the following Undertakings (as per Annex), which would be effective as from the date of this decision.

Undertaking No. 1

For a period of 4 years:

- I. PBL undertakes to notify to the CCM any increase in beer prices attributable to an increase in costs, including direct and indirect costs, warehousing costs, selling and distribution costs, taxes, duties, raw and packaging materials, energy, labour, fuel, repairs and maintenance (the Costs); and
- II. PBL undertakes to seek the clearance of the CCM prior to any increase in prices when such increase is not attributable to an increase in the Costs.

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Undertaking No. 2

- I. PBL undertakes that, for the initial 2 (two) years, it shall not stop the commercial distribution of any of the brands of beer it presently sells in Mauritius, except with the prior agreement of the CCM; and
- II. PBL undertakes that, for the subsequent 3 (three) years, it will notify the CCM of the removal of any of the brands of beer it presently sells in Mauritius, provided that such removal is replaced by a reasonably equivalent brand of beer.

Undertaking No. 3

- I. PBL undertakes to extend the scope of the undertaking for beer coolers with the CCM to include additionally and specifically certain restaurants and bars where SBL has a beer cooler at the date the undertaking was offered. This extended scope of that undertaking shall be valid only for a period of 2 (two) years.
- c. Pursuant to section 63(5) of the Act, the above Undertakings offered by PBL shall have the effect of directions in a similar manner as under section 60 of the Act and shall have immediate effect.
- d. We further decide that, should SBL not exit from the beer market of Mauritius or be acquired and operated in that market by a third party, these undertakings will not be binding upon PBL.

On the other directions/ financial penalties to be imposed on PBL and SBL:

Taking into consideration the fact that the agreement may have already caused significant harm to competition, that Undertakings provided by PBL may not fully restore competition which may be lost through the exit of SBL from the beer market of Mauritius, that under section 56 of the Act the CCM shall not impose financial penalties on any enterprise unless it has held a hearing and that all the parties submitted at the hearing held on 20th August 2014 that they had no representations to make, in light of the Commissioners' Notice dated 1st August 2014,

We, the Commissioners, decide as follows:

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- a. We endorse the recommendations of the Executive Director with regards to the directions and financial penalties to be imposed on PBL and SBL, and consequently:
- I. declare the provision of the agreement in so far as it makes a condition to the agreement the exit of SBL from the beer market of Mauritius and the dismantling of the plant of SBL from Mauritius, prohibited and void;
 - II. direct PBL not to enter into any communication with SBL with regards to the exit of SBL from the beer market of Mauritius, except with the prior authorization of the Executive Director ;
 - III. direct PBL not to enter into any communication with SBL with regards to the dismantling of its plant, except with the prior authorization of the Executive Director;
 - IV. direct SBL not to communicate to PBL any of its decisions or intentions in relation to its closure or exit from the Mauritius beer market, except with the prior authorization of the Executive Director;
 - V. direct SBL not to communicate to PBL any of its decisions, plan or intention in relation to any dismantling of its plant in Mauritius, except with the prior authorization of the Executive Director; and
- b. Given that the agreement is a serious breach of the Act, in addition to the directions given above, we the Commissioners, decide as follows:
- I. We accept the leniency application of PBL and grant PBL 75% reduction in financial penalties.
 - II. We impose a financial penalty on PBL for breach of the provisions of section 41 of the Act, net of leniency, of MUR 20, 299, 355, subject to PBL's continued co-operation with the CCM and compliance with the Undertakings. We, therefore, order PBL to pay the financial penalty of MUR 20, 299, 355 to the CCM.
 - III. We impose a financial penalty on SBL for breach of the provisions of section 41 of the Act, of MUR 6, 575, 377. We, therefore, order SBL to pay the financial penalty of MUR 6, 575, 377 to the CCM.
 - IV. We further order that the respective financial penalties be paid within 25 working days of this Decision.

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Dated this 22nd August 2014


Mr. Ariranga G. Pillay
(Chairperson)


..... Date 22-8.2014

Mr. Rodney J. R. Rama
(Commissioner)


..... Date 22/08/2014

Mr. M. Reshad Sadool
(Commissioner)


..... Date 22/08/2014

Annex – Undertakings offered by PBL

The undertakings below are given under section 63 of the Act and Rule 28 of the Competition Commission Rules of Procedure.

A. MEASURES PROPOSED AS UNDERTAKINGS

- 1.0 PBL hereby gives the behavioural undertakings below concerning their commercial activities in Mauritius. These undertakings are designed to provide clear, objective and administrable rules governing the operations of PBL in Mauritius.
- 2.0 These undertakings are made without prejudice to PBL's position should any other party decide to initiate proceedings or commence any legal action against PBL.

Undertaking No. 1

- 3.0 For a period of 4 (four) years from the date of this document, in relation to the beer market in Mauritius, PBL shall:
- 3.1 notify the CCM of any increase in beer prices attributable to an increase in costs including direct and indirect costs, warehousing costs, selling and distribution costs, taxes, duties, raw and packaging materials, energy, labour, fuel, repairs and maintenance (collectively the 'Costs'); and
- 3.2 seek the clearance of the CCM prior to any increase in prices when such increase is not attributable to an increase in Costs.

Undertaking No. 2

- 4.0 PBL distributes several brands of beer in Mauritius. PBL hereby undertakes as follows:
- 4.1 For the initial 2 (two) years as from the date of this document, it shall not stop the commercial distribution of any of the brands of beer it presently sells in Mauritius except with the prior agreement of the CCM, and
- 4.2 For the subsequent 3 (three) years, it shall notify the CCM of the removal of any of the brands of beer it presently sells in Mauritius, provided that such removal is replaced by a reasonably equivalent brand of beer.

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Undertaking No. 3:

- 5.0 PBL has an undertaking for beer coolers with the CCM. PBL agrees to extend the scope of that undertaking to include additionally and specifically certain restaurants and bars where Stag Beverages has a beer cooler at the date of this document. This extended scope of that undertaking shall be valid only for a period of 2 (two) years from the date of this document.

B. GENERAL

6.0 ENTIRE AGREEMENT

The above undertakings comprise the entire extent of PBL's commitments to or agreements or understandings with the CCM.

7.0 SCOPE OF APPLICATION

7.1.1 PBL will be bound by these undertakings for the territory of Mauritius.

7.1.2 PBL will be responsible for ensuring its compliance with the undertakings.

8.0 REPORTING

For the duration of the above undertakings, PBL will provide annually to the CCM a written report describing the steps taken by PBL to comply with the undertakings. Such report shall confirm that PBL has implemented a compliance program according to which it has made the undertakings known to all of its management and commercial employees and that all such employees are familiar with the terms of the undertakings. The report will be delivered to the CCM on or before March 31 of each year.

9.0 PUBLICITY

PBL will use its best efforts to ensure that the above undertakings are made known to and are understood by its customers and other industry participants.

C. ADDITIONAL ISSUES

PBL further wishes to notify the CCM that it proposes to enter into the sale agreement pertaining to the purchase of the 'Eskid', 'Loela' and 'One & Co' trademarks as well as the immovable property rights of Stag Beverages Ltd as previously notified to the CCM. The completion of the transaction is subject to certain conditions precedent set out in the sale agreement.

D. FUTURE CONDUCT

- 10.1 PBL agrees to continue co-operating with the CCM. Without limiting the generality of the above, PBL specifically agrees to provide evidence, written or otherwise, which is in its possession or under its control and to its knowledge concerning the investigation.

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- 10.2 PBL agrees to continue to implement its compliance programme incorporating corporate governance, designed to ensure that employees, management and directors within PBL, and business units do not engage in any contraventions of the Act, details of which programme shall be submitted to the GCM within 60 days of the date of this document.
- 10.3 For the avoidance of doubt, the above undertakings do not preclude PBL from continuing to price competitively, and in so doing protect or increase its market share, in any market in which it participates.

Yours sincerely,



Bernard Theys.
CHIEF EXECUTIVE OFFICER

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**Dissenting Opinion of the Vice –
Chairperson Mr. Servansingh and
Commissioner Mrs. Poonoosamy of
the Competition Commission**

Potential Collusive Agreement in the Beer Market

**22nd August 2014
CCM/DS/0014**

COMMISSION/TS/0614

Dissenting Opinion of the Vice – Chairperson Mr. Servansingh and Commissioner Mrs. Poonoosamy of the Competition Commission

Dissenting Opinion - Investigation into Potential Collusive Agreement in the Beer Market

1. We the undersigned Commissioners wish to state that we are in agreement with the majority of the findings of the Executive Director. However we wish to put on record our disagreement with the view taken by the majority of Commissioners to the effect that the agreement reached between the parties in this matter was entered into negligently rather than intentionally.
2. After due consideration of all the evidence we have concluded that there has indeed been a deliberate breach of Section 41 of the Act (2007)
3. We are, in particular, concerned about and cannot agree with the content of the following:

Para 8.2 of Chapter 8 (page 70) of the Report of the Executive Director- Findings of the Commission which reads as follows:

Having concluded that there is an agreement between PBL and SBL in breach of section 41 of the Act, the Executive Director is to the view that whether the agreement was committed intentionally or negligently is finely balanced. Therefore in view of the finely balanced nature of the breach, the Executive Director recommends that the benefit of the doubt be afforded to the main parties and the agreement be considered to have been entered into negligently rather than intentionally.

And consequently

Sub Para b (ii) and (iii) (Decisions of the Commissioners)

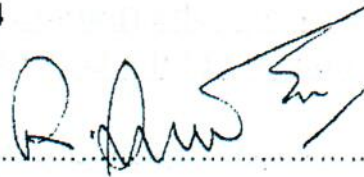
4. As a result of the above the value of the financial penalty to be imposed should be higher from the one proposed in the majority decision to the extent that the weightage attached to the variables in the formula for calculating the penalty will be different from the one used in reaching the amount presently determined. In our view there are aggravating factors.

Having expressed this dissenting opinion for the record we shall abide by the majority decision.

COMMISSION/DS/0014

Dated this 22nd August 2014

Mr. Rajiv Servansingh
(Vice - Chairperson)



Date 22/08/2014.

Mrs. Selvam Poonosamy
(Commissioner)



Date Aug 22 - 2014.