

# Decision of the Competition Commission

CC/DS/0030/72

**Non-Confidential** 

Application for Immunity made by Fast Foods Limited under the Competition Commission Amnesty Programme for Resale Price Maintenance

29 June 2020

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# Decision of the Commissioners of the Competition Commission of 29 June 2020

relating to a proceeding under section 59(7) of the Competition Act 2007 further to a Report of the Executive Director on the matter referred to as 'INV042/RPM/013 – Review of Fast Foods Limited RPM Amnesty application'

(CC/DS/0030/72 – Application for Immunity made by Fast Foods Limited under the Competition Commission's Amnesty Programme for Resale Price Maintenance)

THE COMMISSION

Mr. M.A. Bocus

Chairperson,

Mrs. M. B. Rajabally

Commissioner,

Mrs. V. Bikhoo

Commissioner,

Having regard to the Competition Act 2007,

Having regard to paragraph 5.6A of CC3 Guidelines on Collusive Agreements regarding the Competition Commission's Amnesty Programme for Resale Price Maintenance,

Having regard to the Competition Commission Rules of Procedure 2009,

Having regard to the undertakings offered by Fast Foods Limited, dated 30<sup>th</sup> January 2018 and submitted to the Competition Commission on 2<sup>nd</sup> February 2018,

Having regard to a report of the Executive Director dated 29th June 2018,

#### WHEREAS:

#### I. Introduction

- 1.1 This Decision relates to an application for immunity dated 24 August 2017 made by Fast Foods Limited pursuant to the Competition Commission's Amnesty Programme for Resale Price Maintenance prescribed under paragraph 5.6A of CC3 Guidelines on Collusive Agreements (the 'Application'). As part of the conditions set out thereunder, undertakings have been offered to the Commission by Fast Foods Limited dated 30 January 2018 and submitted to the Competition Commission on 02 February 2018. ('the Undertakings').
- 1.2 Having taken cognizance of a report of the Executive Director dated 29 June 2018 on the matter, the Commission has determined the present matter on the basis of the provisions of section 59(7) of the Competition Act 2007 (the 'Act'), the conditions prescribed under paragraph 5.6A of CC3



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Guidelines on Collusive Agreements and considering in particular, the Undertakings offered pursuant to section 63(3) of the Act.

#### II. Background

# i. Competition Commission's RPM Amnesty Programme

- 1.3 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 05 June 2017 until 20 October 2017 inclusively¹, the Commission put in place a one-off, time-limited amnesty programme for any enterprise involved in resale price maintenance (RPM) by waiving the restriction at paragraph 5.3 of CC3 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').
- 1.4 The conditions prescribed under the RPM Amnesty Programme for providing immunity from financial penalties to any enterprise applying for RPM Amnesty are that the applicant
  - i. admits its participation in an agreement involving RPM,
  - ii. provides the Competition Commission with all the information, documents and evidence available to it regarding the RPM, and as required by the Competition Commission,
  - maintains continuous and complete co-operation until the conclusion of any action by the Competition Commission in relation to the matter,
  - offers undertakings that satisfactorily address the competition concerns of the Competition Commission.

### ii. The Applicant and the Application

1.5 The Applicant, Fast Foods Limited (bearing Business Registration Number C06004240), is a private company incorporated in Mauritius since 13 March 1984. Fast Foods Ltd, which trades as Charcuterie Isle de France, is a supplier of variable weight, chilled and frozen processed meat products. Resellers of Fast Foods Ltd include grocery stores, supermarkets, and hypermarkets. Around 356 resellers around the island were purchasing Fast Foods Ltd's products for resale.

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<sup>&</sup>lt;sup>1</sup> The Commission had extended the validity of the RPM Amnesty (CC 3 Guidelines - Amended 3<sup>rd</sup> October 2017) from 05 October 2017 to 20 October 2017.

- The director of Fast Foods Ltd, acting on behalf of the company, has, by 1.6 way of letter dated 24th August 2017, applied for immunity under the RPM Amnesty Programme.
- 1.7 Fast Foods Limited applied RPM Amnesty for being party to an agreement involving RPM in connection to the sale of pre-packed food items with weight and price information but excluding the words 'recommended' (the reported activity. Between November 2009 and July 2017, Fast Foods Ltd was involved in an RPM conduct where it determined and communicated in advance and through the reseller price list the retail price of the said products to dealers. Dealers would subsequently order their stock based on the price list and take delivery of Fast Foods Ltd's products on which the retail price, as determined by Fast Foods Ltd, was affixed without the words "recommended price" appearing next to the retail price.

#### iii. The Investigation

- 1.8 Upon receipt of the Application and pursuant to section 51 of the Act, the Executive Director proceeded to investigate whether the reported conduct may amount to an RPM within the ambit of section 43 of the Act.
- 1.9 Upon completion of his investigation, the Executive Director submitted a report on the matter to the Commission on 29th June 2018. 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 (the 'Report').
- 1.10 The Executive Director's findings are that:
- a. Fast Foods Limited has participated in agreement(s) involving RPM, as described above at paragraph 1.7, having a restrictive object or effect viz., directly establishing a fixed retail price ('pricing restriction') to be practised by dealers when reselling Fast Foods Ltd's products and affixing the retail price thereof without the terms 'recommended price' appearing next to the retail price.
- b. there remained a possibility that the reported activity has continued in terms of its anticompetitive effects, even after the reported duration of the said RPM conduct. The Executive Director however believes that an assessment of any continuing effect of the reported activity is not warranted insofar as such effect, being directly linked and confined to the reported activity, is covered under the application and can be satisfactorily addressed either by affirmative acts already taken by Fast Foods Ltd to remedy the reported RPM conducts and/or the Undertakings submitted by Fast Foods Ltd and which are intended to be implemented upon their acceptance by the Commission. BWM

- c. Fast Foods Limited has admitted having participated in an RPM conduct as a supplier of prepacked food item.
- d. Fast Foods Limited has maintained continuous cooperation with the Competition Commission by responding to the Competition Commission's information request and submitted all additional documents, and evidence required from it in a timely manner.
- 1.11 The Executive Director has further assessed the Undertakings offered by Fast Foods Limited. The Executive Director takes the view that the proposed Undertakings satisfactorily addresses the concerns identified in the Report for the following reasons –
  - a. Fast Foods Limited has ceased the reported RPM conduct and undertaken to inform all resellers, in writing, that they are free to apply or practise their own retail prices for all products supplied to them by Fast Foods Ltd, including for past stock of unsold products;
  - b. Fast Foods Ltd has already amended its product price list replacing the terms 'Retail price' by 'prix recommandé de vente' such that resellers are clearly informed, upon receiving the price list, that the retail prices contained therein are non-binding pricing recommendations. It has, in this vein, further undertaken not to implement any direct or indirect measure, whatever its form, that compels or induces resellers to apply or practise retail prices/price levels communicated to them;
  - c. Fast Foods Ltd has, since July 2017, been supplying its products in an amended packaging, which though affixing the weighted retail price, includes the terms 'prix recommandé'. In so doing, resellers retain the possibility of practising their own retail price, including discounting the price affixed on the products purchased from Fast Foods Ltd;
  - d. Fast Foods Limited has undertaken to inform its internal management and commercial employees engaged in the sales and marketing of Fast Foods Ltd's products of the behavioural measures it has adopted, thereby minimising risks of RPM conduct being promoted by employees and ensuring that commercial dealings with resellers are in compliance with the Act.



1.12 The Executive Director recommends that the Commission accepts the Undertakings and grants immunity from fines to the Applicant for its participation in the reported RPM conduct.

# III. Legal Framework

- 1.13 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 at 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'.
- 1.14 Having regard to the conditions prescribed under the RPM Amnesty Programme, an enterprise will benefit from immunity from financial penalty if it is involved in a conduct(s) that falls within the scope of section 43 of the Act and satisfies the conditions of the said programme.
- 1.15 In addition to admitting having participated in one or more RPM agreement(s), the applicant-enterprise is required to provide full and complete disclosure of all information, evidence and records available to it that relate to the reported RPM conduct. The enterprise is also required to maintain continuous and complete co-operation from the time of its application until the conclusion of any action by the CC on the matter, including by securing the cooperation of its directors, officers and employees in view of effectively and expeditiously concluding the assessment process.
- 1.16 Pursuant to section 63(3) of the Act, the threshold for the acceptance of undertakings under section 63(3) is that the Commission must be satisfied that the undertakings address "all the concerns it has about any prevention, restriction [or] distortion (...) of competition" which may arise from the matter at hand.

# IV. Determination under sections 59(7) and 63 of the Act

- 1.17 Having regard to the Application submitted by Fast Foods Limited, the concerns which have been identified by the Executive Director in his Report, and the Undertakings offered by Fast Foods Limited, the Commission determines that
  - Fast Foods Limited has, in its Application, admitted its participation in one or more RPM agreement(s) viz for having been party to an agreement involving RPM in connection with the sale of pre-packed food items with weight and price information but excluding the words 'recommended retail price' between November 2009 and July 2017.

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- Fast Foods Limited has complied with requirements (ii) and (iii) of paragraph 5.6A(b) of the CC 3 Guidelines, as stated in the Report;
- The Undertakings submitted by the Fast Foods Limited satisfactorily address the Commission's concerns in so far as –
  - Fast Foods Limited has ceased its participation in/terminated all RPM agreements to which it was a party, as reported in its Application;
  - b. Fast Foods Limited has ceased the reported RPM conduct and undertaken to inform all resellers, in writing, that they are free to apply or practise their own retail prices for all products supplied to them by Fast Foods Ltd, including for past stock of unsold products;
  - c. Fast Foods Ltd has already amended its product price list replacing the terms 'Retail price' by 'prix recommandé de vente' such that resellers are clearly informed, upon receiving the price list, that the retail prices contained therein are non-binding pricing recommendations. It has, in this vein, further undertaken not to implement any direct or indirect measure, whatever its form, that compels or induces resellers to apply or practise retail prices/price levels communicated to them;
  - e. Fast Foods Ltd has, since July 2017, been supplying its products in an amended packaging, which though affixing the weighted retail price, includes the terms 'prix recommandé'. In so doing, resellers retain the possibility of practising their own retail price, including discounting the price affixed on the products purchased from Fast Foods Ltd; and
  - f. Fast Foods Limited has undertaken to inform its internal management and commercial employees engaged in the sales and marketing of Fast Foods Ltd's products of the behavioural measures it has adopted, thereby minimising risks of RPM conduct being promoted by employees and ensuring that commercial dealings with resellers are in compliance with the Act.

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#### Decision

## NOW THEREFORE,

For the reasons set out in this Decision, the Commission decides as follows:

- We accept that the Application made by Fast Foods Limited satisfies the conditions prescribed under the RPM Amnesty Programme as set out in paragraph 5.6A of the CC3 Guidelines on Collusive Agreements;
- We grant immunity from financial penalty to Fast Foods Limited pursuant to section 59(7) of the Act for the Reported RPM conduct;
- We accept the Undertakings offered by, which are being published as per section 63(4) of the Act (see Annex);
- 4) The Undertakings shall be effective as from the date of this decision.

Done at Port-Louis this 29 June 2020.

Mr.M. A. Bocus (Chairperson)

Mrs. M. B. Rajabally (Commissioner)

Mrs. V. Bikhoo (Commissioner)

Annex: Undertakings offered by Fast Foods Limited, dated 30<sup>th</sup> January 2018 and submitted to the Competition Commission on 2<sup>nd</sup> February 2018

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# Undertakings to the CCM

Undertakings provided by Fast Foods Ltd to the Competition Commission

Pursuant to an Application for Amnesty dated 24<sup>th</sup> August 2017

In connection with the Competition Commission's Amnesty Programme for Resale Price Maintenance

30th January 2018

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1. Background:

By its letter dated 24<sup>th</sup> August 2017 made pursuant to paragraph 5.6A of the 'CCM 3 Guidelines – Collusive Agreements' (amended June 2017), Fast Foods Ltd has notified the Executive Director of the Competition Commission of its application for immunity under the CCM Amnesty Programme for Resale Price Maintenance (the 'Application').

The RPM agreement, in place since November 2009, is in relation to the supply of prepacked variable-weight food items by Fast Foods Ltd to its dealers whereby Fast Foods Ltd would determine and communicate, in advance, the retail price of the said products to dealers. Dealers would subsequently order their stock based on the price list and take delivery of Fast Foods Ltd's products on which the retail price, as determined by Fast Foods Ltd, was affixed without the words "recommended price" appearing next to the retail price.

Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017) for the purpose of obtaining immunity, Fast Foods Ltd is, by the presents, providing undertakings related specifically to the impugned conduct and any restrictive effects it has had on competition under section 63 of the Competition Act 2007 with a view to allaying the concerns of the Competition Commission in relation thereto and obtaining the requested immunity.

#### 2. Definitions:

For the purpose of the present undertakings, the following terms shall have the following meaning:

FFL: Fast Foods Ltd and includes its branches, subsidiaries, or affiliates;

Act: the Competition Act 2007, any amendment brought thereto and any regulations made thereunder;

Affiliate: any enterprise directly or indirectly controlled by FFL;

Commission: the Competition Commission established under section 4 of the Competition Act 2007;

Dealer: any distributor, reseller, retailer, or other entity involved in the resale of FFL's goods or services in Mauritius;

# Measures proposed as Undertakings

FFL hereby undertakes to apply the following measures in its commercial dealings with all existing dealers involved in the resale of FFL's products in Mauritius;

# 3.1. Behavioural Undertakings

FFL shall not, in any manner whatsoever, implement or cause to be implemented 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 price(s) or retail price level(s) or retail price component(s) communicated to them by FFI:

FFL shall clearly and unequivocally inform all dealers, in writing, that prices affixed by FFL on products supplied to dealers, including past stock of unsold products, and/or prices or price levels communicated to them by FFL are recommended prices and that dealers remain entirely free to fix or otherwise apply their own prices or price levels and that they are neither bound

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nor legally compelled to apply or comply with any recommended price or price level communicated to them by FFL;

FFL undertakes that it has, since August 2017, ceased the impugned conduct by conspicuously affixing the terms 'prix recommandé' and/or 'prix recommandé de vente' on all product price lists communicated to and all products supplied to dealers, in accordance with the 'Amended reseller price list' (Annex 1) and 'Amended scale label' (Annex 2) respectively annexed to the present Undertakings;

FFL shall, where it recommends a retail price that appears on the products supplied to dealers, continue to affix the terms 'prix recommandé' and/or 'prix recommandé de vente' in a conspicuous place on all products supplied to them, and undertakes to promptly notify the Commission of any change in its product packaging and/or labelling that is likely to affect FFL's obligations under the present Undertakings;

FFL shall, where it enters into any agreement, contract, or other express arrangement with dealers, existing and prospective, ensure that such agreement, contract, or other express arrangement 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 communicated to them by FFL;

#### 3.2. Information Dissemination

FFL shall take all appropriate measures to ensure that its internal management, all directors, and employees engaged in the sales and marketing of FFL's products with dealers (hereinafter 'commercial employees') are fully aware of and actively implement the present undertakings when designing and/or implementing the commercial policy of FFL vis-à-vis dealers, in line with the provisions of the Act;

FFL shall use its best efforts to ensure that the present undertaking is made known to and is understood by all dealers;

#### 3.3. Reporting

FFL shall, as from the date of the present undertakings, take all reasonable steps to ensure that all communications, negotiations, arrangements with dealers are properly documented and archived to demonstrate FFL's compliance with the present undertakings and a general understanding among dealers of their freedom and ability to fix or otherwise apply their own prices or price levels when reselling FFL's products;

FFL shall, within 3 months from the date of acceptance of the present undertakings by the Commission, submit a written report to the Commission that *inter alia* -

- confirms that FFL has implemented a compliance programme, details of which shall be submitted to the Commission; and
- ii. describes the steps taken by FFL to comply with the present undertakings and in particular, setting out all the appropriate measures taken by FFL to deter on the one hand and detect and correct any deviation by FFL's management, directors, or commercial employees from the present undertakings.

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4. Scope of Application

FFL shall be bound by the present undertakings and shall be responsible for ensuring its compliance therewith.

5. Entry into force

The present undertakings shall take effect upon the date of their acceptance by the Commission.

Jacques Chan

Director

Duly authorised for and on behalf of:

**Fast Foods Ltd** 

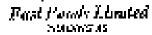
Benoit Bundhoo

Director

Duly authorised for and on behalf of:

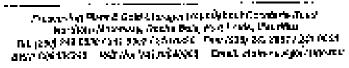
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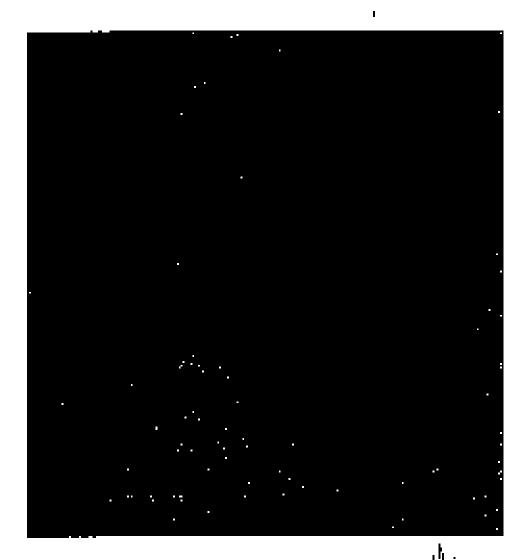


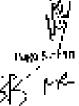


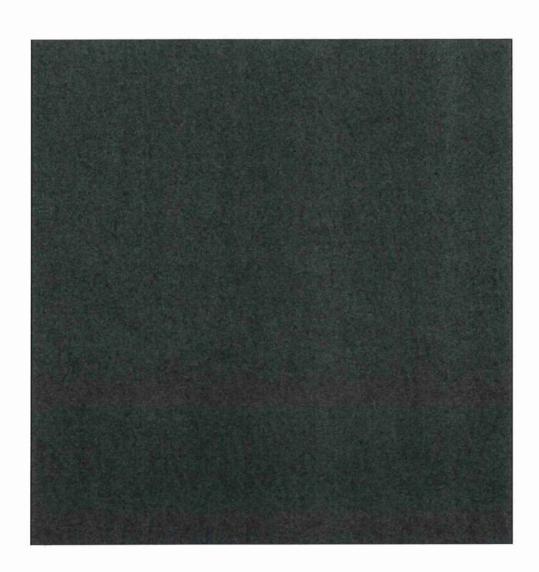
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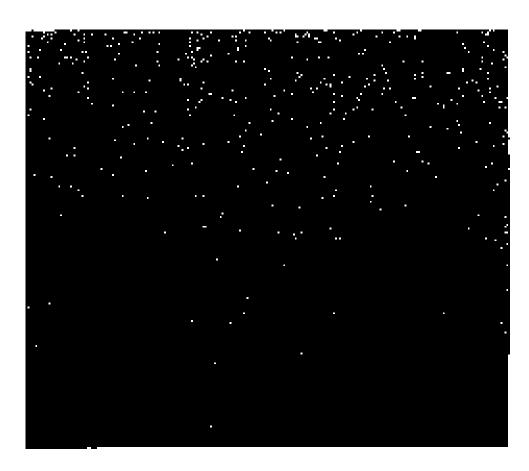




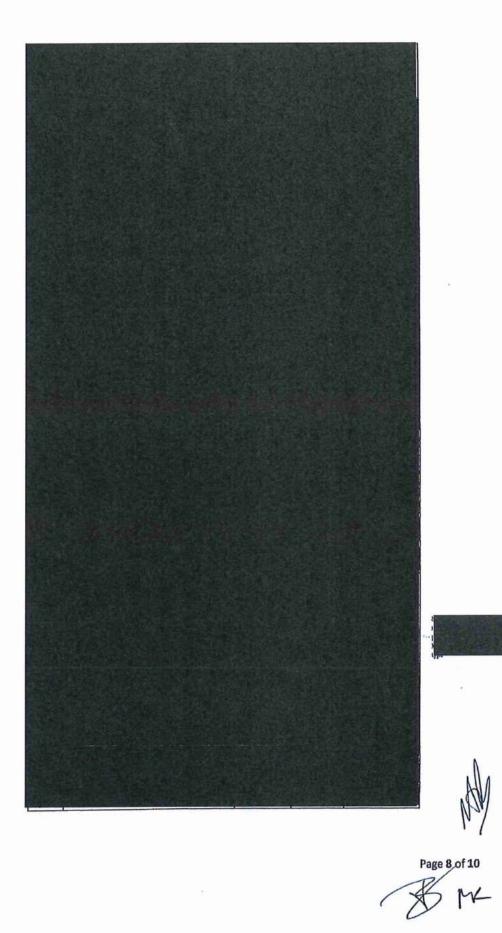




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