



Decision of the Competition Commission

CC/DS/0030/74

NON CONFIDENTIAL

**Application for Immunity made by Pharmacie Nouvelle
Ltd under the Competition Commission Amnesty
Programme for Resale Price Maintenance**

29 June 2020

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A handwritten signature in blue ink, possibly reading 'J. Smith'.

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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/059 – Review of Pharmacie Nouvelle Ltd RPM Amnesty
application'**

**(CC/DS/0030/74 – Application for Immunity made by Pharmacie Nouvelle Ltd
under the Competition Commission's Amnesty Programme for Resale Price
Maintenance)**

THE COMMISSION

Mr. M. A. Bocus - Chairperson,
Mr. C. Seebaluck - 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,

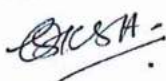
Having regard to the undertakings offered by Pharmacie Nouvelle Ltd on 11 December
2018,

Having regard to a report of the Executive Director dated 26 December 2018,

WHEREAS:

I. Introduction

- 1.1 This Decision relates to an application for immunity dated 20 October 2017 made by Pharmacie Nouvelle Ltd (hereinafter referred to as 'PNL' or the 'Applicant') 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 PNL on 11 December 2018 ('the Undertakings').
- 1.2 Having taken cognizance of a report of the Executive Director dated 26 December 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 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 05th June 2017 until 20th October 2017 inclusively¹, the Commission put in place a one-off, time-limited amnesty programme for any enterprise involved in resale price maintenance by waiving the restriction at paragraph 5.3 of 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 -

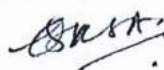
- i. admits its participation in an agreement involving RPM,
- ii. provides the Competition Commission ('CC') with all the information, documents and evidence available to it regarding the RPM, and as required by CC,
- iii. maintains continuous and complete co-operation until the conclusion of any action by the CC in relation to the matter, and
- iv. offers undertakings that satisfactorily address the competition concerns of the CC.

ii. The Applicant and the Application

1.5 The Applicant, PNL, operates as a distributor of pharmaceuticals, general goods, dyestuffs and chemical auxiliaries in Mauritius and bears the following Business Registration Number C07001598.

1.6 On 20th October 2017, the Head of Commercial Operations at PNL, made an application under the RPM Amnesty Programme to the CC, through its legal advisors, in its capacity as supplier.

¹ The Commission had extended the validity of the RPM Amnesty (CC3 Guidelines - Amended 3rd October 2017) from 05th October 2017 to 20th October 2017.



1.7 PNL applied for immunity under the RPM Amnesty for the following conducts (the 'reported conducts'):-

- (a) For having provided price lists with pre-determined resale prices for specified products (as listed in corresponding Annexure to its Application) to its resellers (as specified in its Application) without the words "recommended price"; and
- (b) For having affixed price tags on pharmaceutical products, it supplies to pharmacies, without the mention of 'Recommended price'. As part of its application, PNL submitted information and evidence in support of the reported conducts viz., list of PNL resellers, its price lists without mentioning the words 'recommended price' and examples of VAT invoices issued by PNL.

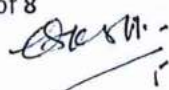
iii. The Investigation

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 26 December 2018 (the 'Report'). 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.

1.10 The Executive Director's findings are that PNL -

- (a) qualifies as enterprise engaged in commercial activities for gain or reward in the supply of pharmaceuticals, general goods, dyestuffs and chemical auxiliaries as a supplier in the upstream market;
- (b) is in a vertical business relationship with the resellers in as much as it is a wholesale supplier selling pharmaceuticals, general goods, dyestuffs and chemical auxiliaries to its resellers;
- (c) has admitted having participated in or otherwise having engaged in a conduct which falls within the ambit of section 43 of the Act in so far as the pharmaceutical products (excluding medicines), para pharmaceutical and other products are concerned viz., price lists provided by PNL, with regards to resale prices without the mention of 'recommended' price; and the affixing of price labels by PNL, without the mention of 'recommended' price on products; and





- (d) has maintained continuous and complete cooperation with the Competition Commission from the time of its Application to the present Report.

1.11 The Executive Director has further assessed the Undertakings offered by PNL. The Executive Director takes the view that the proposed Undertakings satisfactorily addresses the concerns identified in the Report for the following reasons –

- a. PNL has undertaken that it shall, where it affixes price tags on its products which are distributed to its resellers, state clearly that the resale price is a recommended price, and in relation to price list to include a clause which clearly states that the recommended price is not binding on the resellers and the resellers are free to determine their own resale prices. PNL has to this effect submitted a template of its new proposed price list; and
- b. PNL has undertaken that it shall not, in any manner whatsoever, enter into or otherwise facilitate, either explicitly or implicitly, the implementation of any agreement with the above-mentioned resellers and/or any other reseller that involves resale price maintenance.

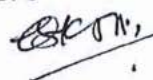
1.12 The Executive Director recommends that the Commission accept the Undertakings and grant immunity from financial penalty to the Applicant for its participation in the reported RPM conduct.

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



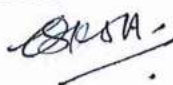
application until the conclusion of any action by the CC on the matter, including by securing the cooperation of its directors, officers and employees in view of effectively and expeditiously concluding the assessment process.

- 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 PNL, the concerns which have been identified by the Executive Director in his Report, and the Undertakings offered by the Applicant, the Commission determines that –

- 1) PNL has, in its Application, admitted its participation in specified reported conducts which fall within the ambit of section 43 of the Act viz., -
 - (a) for having provided price lists with pre-determined resale prices for specified products (as listed in the corresponding Annexure to its Application) to its specified resellers without the words "recommended price"; and
 - (b) for having affixed price tags on the products it supplies to resellers, without the mention of "recommended price".
- 2) PNL has complied with requirements (ii) and (iii) of paragraph 5.6A(b) of the CC 3 Guidelines, as stated in the Report;
- 3) The Undertakings submitted by PNL satisfactorily address the Commission's concerns in so far as –
 - a. PNL has ceased its participation in/terminated all RPM agreements to which it was a party, as reported in its Application;
 - b. PNL has undertaken that it shall, where it affixes price tags on its products which are distributed to its resellers, state clearly that the resale price is a recommended price, and in relation to price list to include a clause which clearly states that the recommended price is not binding on the resellers and the resellers are free to determine their own resale prices. PNL has to this effect submitted a template of its new proposed price list; and





- c. PNL has undertaken that it shall not, in any manner whatsoever, enter into or otherwise facilitate, either explicitly or implicitly, the implementation of any agreement with the above-mentioned resellers and/or any other reseller that involves resale price maintenance.

V. Decision

NOW THEREFORE,

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

- 1) We accept that the Application made by Pharmacie Nouvelle Ltd satisfies the conditions prescribed under the RPM Amnesty Programme as set out in paragraph 5.6A of the CC 3 Guidelines on Collusive Agreements;
- 2) We grant immunity from financial penalty to Pharmacie Nouvelle Ltd pursuant to section 59(7) of the Act for the reported RPM conducts;
- 3) We accept the Undertakings offered by Pharmacie Nouvelle Ltd, 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)

Mr. C. Seebaluck
(Commissioner)

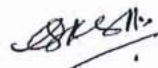
Mrs. V. Bikhoo
(Commissioner)

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ANNEX: Undertakings offered by Pharmacie Nouvelle Ltd under section 63 of the Competition Act 2007 pursuant to paragraph 5.6A of the CC 3 Guidelines – Collusive Agreements (RPM Amnesty Programme)



Confidential version

Undertakings to the CCM

Undertakings provided by Pharmacie Nouvelle Ltd to the Competition Commission

Pursuant to an Application for Amnesty dated 18th October 2017

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

11th December 2018

Page 1 of 5

Definitions:

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

Pharmacy Nouvelle Ltd (herein 'Pharmacie Nouvelle') : Pharmacy Nouvelle includes its branches, subsidiaries, or affiliates;

Affiliate: any enterprise directly or indirectly controlled by Pharmacie Nouvelle;

Act: the Competition Act 2007;

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

Effective Date: the date on which the Commission delivers its decision to accept these Undertakings;

Full Implementation Date: a maximum of three (3) months as from the effective date;

Resale price maintenance: means 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;

RPM: resale price maintenance.

2. Background:

The Pharmacie Nouvelle is a distributor of pharmaceuticals, general goods, dyestuffs and chemical auxiliaires in Mauritius.

By its letter dated 18th October 2017 addressed to the Competition Commission and pursuant to paragraph 5.6A of the 'CCM 3 Guidelines – Collusive Agreements' (amended June 2017), Pharmacie Nouvelle has made an application for amnesty under the CCM Amnesty Programme for Resale Price Maintenance (RPM) (the 'Application').

The reported activity involves the following practices whereby Pharmacie Nouvelle has:

- (i) In its own name, sent an email to a reseller, which contain possible Resale Price Maintenance practice; (the 'Practice I');
- (ii) Affixed price tags on pharmaceutical products it supplies to pharmacies as per The Consumer Protection (Consumer Goods) (Maximum Mark-up) Regulations 1998 GN 150/1998. However, the price tags did not contain the terms "recommended price"; (the 'Practice II'); and
- (iii) Communicated its price lists and invoices, for its various products, to its dealers without mentioning the terms "recommended price"; (the 'Practice III').

QASA

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Pharmacie Nouvelle Ltd

By virtue of Section 30 and 31 of the Competition Commission Rules of procedure 2009, Pharmacie Nouvelle is hereby submitting the following documents, with the heading "restriction of publication claimed" and "confidential", in relation to:

- i. Practice I, the email sent to its dealer, which is herewith annexed as Annex A;
- ii. Practice II, the lists of pharmaceutical products whereby price tags have been affixed and the name of the relevant dealers, which is herewith annexed as Annexes B and C respectively;
- iii. Practice III, a list of distributors to which a price list has been communicated, including the price lists for years 2009 to 2016 and a sample of Invoices, which is herewith annexed as Annexes D, E, F and G1 to G8.

The identified pharmacies and dealers/distributors shall altogether herein after be referred to as 'the Resellers' and are provided in Annexures C & D.

Section 43 of the Act prohibits resale price maintenance and section 43(3) of the Act provides that 'where a supplier or producer has recommended a minimum resale price to a reseller of goods and the resale price appears on the goods, the words 'recommended price' shall appear next to the resale price.'

With reference to Practices I to III above, Pharmacie Nouvelle verily believes that it has made a full and frank disclosure of all its commercial practices that might be in contravention of Section 43 of the Act, either directly or indirectly, and may therefore pose a concern in respect to the application of same.

With regards to the above reported activities and/or any similar commercial dealings which might have RPM concerns, Pharmacie Nouvelle avers that it have occurred during the period of the year 2009 to 20th October 2017 and is therefore claiming full immunity in regards of same.

The products supplied by Pharmacie Nouvelle, being pharmaceutical products, infant milk powder, para pharmaceutical and other products, have been classified in three categories:

- i. Medicines, which fall within the definition of 'Pharmaceutical products' under The Pharmacy Act 1983 and subject to the Consumer Protection (Price and Supplies Control) Act 1998 and Consumer Protection (Consumer Goods) Maximum Mark-Up Regulations 1998 and to which reg. 9 of the latter Regulations applies;
- ii. Pharmaceutical products (excluding medicines) and infant milk powder which are subject to the Consumer Protection (Price and Supplies Control) Act 1998 and Consumer Protection (Consumer Goods) Maximum Mark-Up Regulations 1998 and to which reg. 9 of the latter Regulations does not apply; and
- iii. Para pharmaceutical and other products not subject any of the aforementioned regulations.

SKBA

DAAD
[Signature] *[Signature]*



Pharmacie Nouvelle Ltd

With reference to Practices III and IV, Pharmacie Nouvelle is given to understand that these agreements may be in contravention of Section 43 of the Competition Act 2007, excluding its application or parts thereof which relate to the practice of affixing maximum prices on medicine, and may therefore pose as concerns which have arisen during an investigation in respect to the application.

Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017), for the purpose of obtaining RPM Amnesty, Pharmacie Nouvelle is, by the present, providing undertakings, for the other products excluding medicines (as Annex H), related specifically to the impugned agreement and any restrictive effects it has had on competition under section 63 of the Competition Act 2007 with a view to allaying any possible concerns of the Competition Commission in relation thereto and obtaining the requested amnesty.

Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017), for the purpose of obtaining RPM Amnesty, Pharmacie Nouvelle is, by the present, without prejudice, providing undertakings to the above reported activities and/or any similar commercial dealings and any restrictive effects it has had on competition under section 63 of the Competition Act 2007 with a view to allaying any possible concerns of the Competition Commission in relation thereto and obtaining the requested amnesty.

3. Measures proposed as Undertakings

Pursuant to section 63 of the Act, Pharmacie Nouvelle hereby, undertakes to apply, by the full implementation date, the following measures in its commercial dealings with the above-mentioned resellers, in the resale of their respective goods or services in Mauritius:

3.1. Behavioural Undertakings

In relation to Practices II and III, where Pharmacie Nouvelle affixes price tags and/or issues a price list to resellers which contains a resale price as determined by Pharmacie Nouvelle, it undertakes to state clearly that the resale price is a recommended price, and in relation to price list it undertakes to include a clause which clearly states that the recommended price is not binding on the retailers and the retailers are free to determine their own resale prices (as Annex I).

In relation to Practices I, Pharmacie Nouvelle undertakes not, in any manner whatsoever, enter into or otherwise facilitate, either explicitly or implicitly, the implementation of any agreement with the above-mentioned resellers and/or any other reseller that involves resale price maintenance;

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3.2. Information Dissemination

Pharmacie Nouvelle shall take all appropriate measures to ensure that all its internal management, directors, and employees engaged in the purchase and/or resale of goods and/or services are fully aware of and actively implement the present undertakings when implementing Pharmacie Nouvelle pricing policy, in line with the provisions of the Act.

3.3. Reporting

Pharmacie Nouvelle shall provide the Commission with a copy of any amended price lists governing its commercial relationship with each of the above-mentioned retailers as proof that Pharmacie Nouvelle has irrevocably ceased the impugned resale price maintenance;

Pharmacie Nouvelle shall, as from the effective date, take all reasonable steps to ensure that all communications, negotiations, arrangements with the above-mentioned resellers are properly documented and archived to demonstrate compliance with the present undertakings when selling goods to the above-mentioned resellers;

Pharmacie Nouvelle shall, by the full implementation date, submit a written report to the Commission detailing the implementation of this undertaking.

For the avoidance of doubt, the above undertakings do not preclude Pharmacie Nouvelle from continuing to price competitively, and in so doing increase or decrease its prices and/or volumes and/or market shares (in compliance with the "Act"), in any market in which it participates currently or which it may enter into in the future.

Finally, all the documents that the Pharmacie Nouvelle has produced and all the information that Pharmacie Nouvelle has revealed to the CCM are strictly confidential and LMC is therefore formally informing the Commission not to divulge, reveal or disclose in full or in part, those documents and any information contained therein, to any third party without Pharmacie Nouvelle's prior written authorization.

4. Entry into force

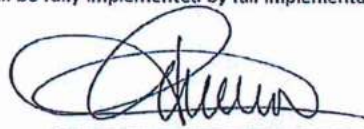
These undertakings shall be effective as from the date it is accepted by the Commission in the form of a decision of the Commission and shall be fully implemented by full implementation date.


[Signature of Director No 1]

Name: MR DANIEL D'ARIFAT

Position: CHIEF EXECUTIVE OFFICER

Duly authorised for and on behalf of:
Pharmacie Nouvelle Ltd


[Signature of Director No 2]

Name: MR JEAN-NOEL LENNON

Position: CHIEF OPERATING OFFICER

Duly authorised for and on behalf of:
Pharmacie Nouvelle Ltd

