

General Notice No. 157 of 2019

CCM/DS/0030/3



## Decision of the Competition Commission

**CCM/DS/0030/3**

Non-Confidential

**Application for Immunity made by SHAH JAHAN Co Ltd  
under the Competition Commission Amnesty  
Programme for Resale Price Maintenance**

12 December 2018

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**Decision of the Commissioners of the Competition Commission  
of 12 December 2018**

**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/018--Review of SHAH JAHAN Co Ltd RPM Amnesty application'**

**(CCM/DS/0030/3 –Application for Immunity made by SHAH JAHAN Co Ltd  
under the Competition Commission's Amnesty Programme for Resale Price  
Maintenance)**

THE COMMISSION

Mr. D. P. A. Mariette - Vice-Chairperson,  
Mr. C. Seebaluck - Commissioner,  
Mrs. M. B. Rajabally - Commissioner,  
Mrs. V. Bikhoo - Commissioner,

Having regard to the Competition Act 2007,

Having regard to paragraph 5.6A of CCM3 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 SHAH JAHAN Co Ltd on 5<sup>th</sup> February 2018,

Having regard to a report of the Executive Director dated 29<sup>th</sup> June 2018,

**WHEREAS:**

**I. Introduction**

1.1 This Decision relates to an application for immunity dated 2<sup>nd</sup> October 2017 made by SHAH JAHAN Co Ltd pursuant to the Competition Commission's Amnesty Programme for Resale Price Maintenance prescribed under paragraph 5.6A of CCM3 Guidelines on Collusive Agreements (the 'Application'). As part of the conditions set out thereunder, undertakings have been offered to the Commission by SHAH JAHAN Co Ltd on 5<sup>th</sup> February 2018 ('the Undertakings').

1.2 Having taken cognizance of a report of the Executive Director dated 29<sup>th</sup> June 2018 on the matter, the Commission has determined the present matter on the basis of the provisions of section 59(7) of the Act, the

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conditions prescribed under paragraph 5.6A of CCM3 Guidelines on Collusive Agreements and considering in particular, the Undertakings offered pursuant to section 63(3) of the Competition Act 2007 (the 'Act').

## II. Background

### *I. Competition Commission's RPM Amnesty Programme*

- 1.3 Pursuant to section 59 of the Competition Act 2007 (the 'Act'), the Commission may grant immunity or leniency to any person in such circumstances as may be prescribed. Effective from 05<sup>th</sup> June 2017 until 20<sup>th</sup> October 2017 inclusively<sup>1</sup>, 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 CCM3 Guidelines on Collusive Agreements, viz., that only RPM which facilitates a cartel can benefit from leniency and the associated footnote 3 thereof 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 (CCM) with all the information, documents and evidence available to it regarding the RPM, and as required by the CCM,
  - iii. maintains continuous and complete co-operation until the conclusion of any action by the CCM in relation to the matter, and
  - iv. offers undertakings that satisfactorily address the competition concerns of the CCM.

### *ii. The Applicant and the Application*

- 1.5 The Applicant, SHAH JAHAN Co Ltd bearing Business Registration Number C15127488, is a private company incorporated in Mauritius since 13 January 2015. SHAH JAHAN Co Ltd is a supplier of spices and condiments of the brand "Aisha". [REDACTED]
- 1.6 SHAH JAHAN Co Ltd has applied for immunity under the RPM Amnesty Programme, in its capacity as supplier, in writing, to the CCM, through its

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

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authorised signatory on the 02<sup>nd</sup> October 2017. The reported conduct to which SHAH JAHAN Co Ltd has admitted participation involves the affixing of retail price on products, provided to its resellers for resale, without the terms 'recommended price' appearing on the product label.

**iii. The Investigation**

- 1.7 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.
- 1.8 Upon completion of his investigation, the Executive Director submitted a report on the matter to the Commission on 29 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').
- 1.9 The Executive Director's findings are that the application satisfies the conditions i, ii and iii set out under paragraph 5.6A(b) of CCM3 Guidelines for RPM amnesty. The Executive Director is satisfied that SHAH JAHAN Co Ltd has admitted its participation in conduct falling within the ambit of RPM under section 43 of the Act, as supported by the documentary evidence submitted and has maintained continuous and complete co-operation from the time of its Application to the issuance of the Executive Director's Report.
- 1.10 Further to his assessment of Application, the Executive Director, in his Report, takes the view that SHAH JAHAN Co Ltd in its capacity as supplier, has engaged in a conduct that raises competition concerns under section 43 of the Act with respect to its commercial dealings [REDACTED], [REDACTED] which resell its products.
- 1.11 The Executive Director views that the affixing of the retail price on its products, being spices and condiments of the brand "Aisha", sold to its resellers without the terms "recommended price" raises a competition concern in so far as resellers does not retain the possibility of practicing their own retail price and cannot freely determine the price at which they want to resell. By not affixing the words "recommended price" on the product label, SHAH JAHAN Co Ltd did not make it clear to the resellers that such price is only a 'recommended price' and is not binding. In so doing, SHAH JAHAN Co Ltd has in effect affixed the final price of the product and restricted dealers' freedom to independently decide on their own pricing policy at retail level and compete among themselves when supplying SHAH JAHAN Co Ltd's products to customers.

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1.12 The Executive Director has further assessed the Undertakings offered by SHAH JAHAN Co Ltd pursuant to condition iv paragraph 5.6A(b) of CCM3 Guidelines. The Executive Director takes the view that the proposed Undertakings satisfactorily addresses the concerns identified in the Report for the below-stated reasons:

- a. SHAH JAHAN Co Ltd has undertaken not to implement or cause to be implemented, in any manner whatsoever, 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 prices or retail price levels communicated to them by SHAH JAHAN Co Ltd;
- b. SHAH JAHAN Co Ltd has undertaken to clearly and unequivocally inform all its resellers, in writing, that prices affixed on products supplied to them, including past stocks of unsold products, and/or prices or price levels communicated to them by SHAH JAHAN Co Ltd 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 nor legally compelled to apply or comply with any recommended price or price level communicated to them by SHAH JAHAN Co Ltd;
- c. SHAH JAHAN Co Ltd has, since October 2017, ceased the impugned conduct by conspicuously affixing the terms 'recommended price' and 'prix recommandé' on all products supplied to dealers.
- d. SHAH JAHAN Co Ltd, has undertaken, where it enters into any agreement, contract or express arrangement with dealers, existing or prospective, ensure that such agreement, contract or 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 SHAH JAHAN Co Ltd; and
- e. The behavioural measures undertaken by SHAH JAHAN Co Ltd shall be disseminated to its internal management and commercial employees engaged in the sales and marketing of SHAH JAHAN Co Ltd's products, thereby minimizing risks of RPM conduct being promoted by employees and ensuring that commercial dealings with the resellers are in compliance with the Act.

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

### **III. Legal Framework**

1.14 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'.

1.15 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.

1.16 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 CCM on the matter, including by securing the cooperation of its directors, officers and employees in view of effectively and expeditiously concluding the assessment process.

1.17 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**

1.18 Having regard to the Application submitted by SHAH JAHAN Co Ltd, 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) SHAH JAHAN Co Ltd has, in its Application, admitted its participation in one or more RPM agreement(s) viz affixing the retail price on its products, sold to its resellers, without the terms "recommended price".
- 2) SHAH JAHAN Co Ltd has complied with requirements (ii) and (iii) of paragraph 5.6A(b) of the CCM 3 Guidelines, as stated in the Report;

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- 3) The Undertakings submitted by SHAH JAHAN Co Ltd satisfactorily address the Commission's concerns in so far as –
- a. SHAH JAHAN Co Ltd has ceased its participation in/terminated all RPM agreements to which it was a party, as reported and evidenced in its undertakings; and
  - b. SHAH JAHAN Co Ltd has undertaken to put in place other measures as stated in section 1.12 of this document that would guarantee compliance with the Act.

#### 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 SHAH JAHAN Co Ltd satisfies the conditions prescribed under the RPM Amnesty Programme as set out in paragraph 5.6A of the CCM3 Guidelines on Collusive Agreements;
- 2) We accept the Undertakings offered by SHAH JAHAN Co Ltd, which are being published as per section 63(4) of the Act (see Annex);
- 3) The Undertakings shall be effective as from the date of this decision;
- 4) We grant immunity from financial penalty to SHAH JAHAN Co Ltd pursuant to section 59(7) of the Act for the Reported RPM conduct.

Done at Port-Louis this 12 December 2018.

Mr. D. P. A. Mariette  
(Vice-Chairperson)

Mr. C. Seebaluck  
(Commissioner)

Mrs. M. B. Rajabally  
(Commissioner)

Mrs. V. Bikhoo  
(Commissioner)

The image shows four handwritten signatures, each written over a horizontal dotted line. The signatures are: 1) A large, stylized signature with a star-like symbol at the top left. 2) A signature that appears to be 'Seebaluck'. 3) A signature that appears to be 'Rajabally'. 4) A signature that appears to be 'Bikhoo'.

Undertakings to the CCM

Undertakings provided by SHAH JAHAN Co Ltd to the Competition Commission

Pursuant to an Application for Amnesty dated 2<sup>nd</sup> October 2017

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

05<sup>th</sup> February 2018





1. Background:

By its letter dated 2<sup>nd</sup> October 2017 made pursuant to paragraph 5.6A of the 'CCM 3 Guidelines – Collusive Agreements' (amended June 2017), SHAH JAHAN Co 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 14<sup>th</sup> April 2015, is in relation to the supply of spices and condiments of the brand "Aisha" by SHAH JAHAN Co Ltd to its dealers, whereby SHAH JAHAN Co Ltd determined and affixed the retail price on the product packaging without the terms "Recommended Price."

Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017) for the purpose of obtaining Immunity, SHAH JAHAN Co 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:

**SJCL:** SHAH JAHAN Co 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 SJCL;

**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 SJCL's goods or services in Mauritius;

3. Measures proposed as Undertakings

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

3.1. Behavioural Undertakings

SJCL 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 SJCL;

SJCL shall clearly and unequivocally inform all dealers, in writing, that prices affixed on products supplied to them, including past stock of unsold products, and/or prices or price levels communicated to them by SJCL are 'recommended' prices and that dealers remain

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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 SJCL;

SJCL undertakes that it has, since October 2017, ceased the impugned conduct by conspicuously affixing the terms 'recommended price' and 'prix recommandé' on all products supplied to dealers, in accordance with the product packaging template annexed to the present Undertakings;

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

SJCL 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 SJCL;

### 3.2. Information Dissemination

SJCL shall take all appropriate measures to ensure that its internal management, all directors, and employees engaged in the sales and marketing of SJCL'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 SJCL vis-à-vis dealers, in line with the provisions of the Act;

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

### 3.3. Reporting

SJCL 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 SJCL'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 SJCL's products;

SJCL 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* -

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



4. Scope of Application

SJCL 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.



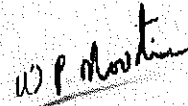
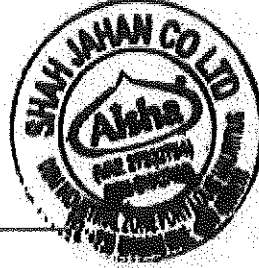
[Signature of Director No 1]

*Mr Krishna Mootien*

*Director*

Duly authorised for and on behalf of:

SHAH JAHAN Co Ltd



[Signature of Director No 2]

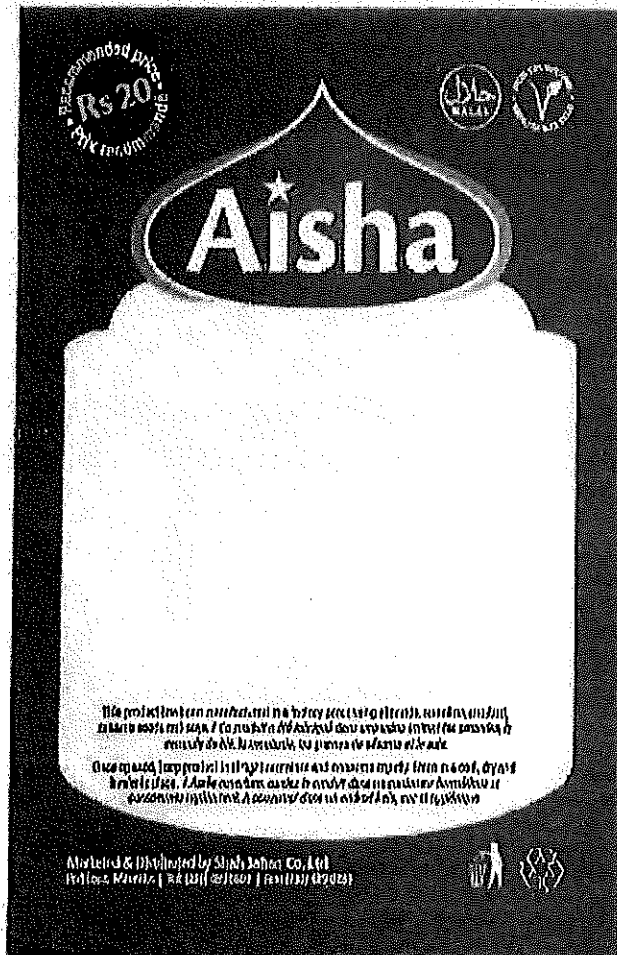
*Mrs Naraynamah Mootien*

*Director*

Duly authorised for and on behalf of:

SHAH JAHAN Co Ltd

Annex



*(Handwritten signature)* AIR