

IBL CONSUMER GOODS' SALES CONTRACTS WITH RETAIL STORES INVESTIGATION

CCM/INV/001

FINAL REPORT

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I.0 Summary

1.1 This is the report of the Executive Director to the Commission; made under Section 51 of the Competition Act (The Act) that sets out the findings of the investigation into sales contracts for Kraft-branded products offered by IBL Consumer Goods (IBL) to retail outlets, including hypermarkets, supermarkets, and independent retail stores.

1.2 The content of this report is exclusively the opinion and findings of the Executive Director of the Competition Commission of Mauritius (CCM). However, as provided in Part V and Part VI of the The Act, it is up to the Commission (i.e. the Commissioners) to determine whether it believes that the investigation discloses a breach of the Act and whether any penalties or directions should be imposed.

1.3 The investigation has found that Kraft-branded block processed cheese distributed by IBL is in a monopoly situation in the cheese and processed cheese markets. IBL has been entering into agreements which have triggered a review of this monopoly situation under section 46 (s46) of the Act. These agreements offer discounts on Kraft cheese subject to meeting sales targets and in exchange for primary shelf positioning for Kraft-branded cheese, chocolates, biscuits and powdered juice that IBL distributes (Kraft-branded chocolates and biscuits do not enjoy a monopoly position in their respective markets).

1.4 This report is structured as follows: Section 2 provides a background of the distribution chain of Fast Moving Consumer Goods (FMCGs) as well as the market for cheese, biscuits, chocolates and powdered juice. Section 3 covers the economic rationale behind the effect on competition of volume or growth discounts and buying shelf space. Section 4 sets out the relevant sections of the Act and CCM Guidelines on Monopoly that apply to this particular case and sets out the experiences of other Competition Agencies in similar cases. Sections 5, 6 and 7 cover the assessments of facts, findings and possible remedies, respectively. Finally, section 8 presents and discusses the comments of IBL on the provisional findings of the investigation.

2.0 Background

2.1 The Concern

2.1.1 IBL Consumer Goods, through a specific sales program- the Top Store Program (TSP) launched around June 2009, and still continuing today, is offering volume-related discounts ranging from 2% to 4% on Kraft cheese, a product with significant market power, to incentivise increased sales of block Kraft Cheese, subject to specified shelf placement for Kraft cheese and for other Kraft-branded products where it does not have dominance, including other types of cheese (cream cheese spread, slice, cans and Philadelphia), chocolates (Milka, Toblerone, Cote D’Or), biscuits (Oreo and Chips Ahoy) and powdered juice (Tang).

2.1.2 The Executive Director investigated whether the conduct of IBL through the TSP could have the object or effect of preventing, restricting or distorting competition in terms of:

(i) protecting its market power for Kraft’s block processed cheese or reducing the market share of its competitors in the processed cheese market by offering volume-related rebates;

(ii) protecting its market power for Kraft’s block processed cheese or reducing the market share of its competitors in the processed cheese market by requiring a certain percentage of shelf space and premium positioning in shelf space;

(iii) leveraging its market power arising from its dominant position in the processed cheese market into the confectionary market (biscuits and chocolates), where it currently has lower market share, by requiring a certain percentage of shelf space and premium positioning in shelf space for these products in return for volume-related discounts on processed cheese; and

(iv) leveraging its market power arising from its dominant position in the processed cheese market to the powdered juice market thereby restricting or eliminating the effective access of actual or potential competitors.

2.1.3 The Executive Director has concluded that IBL's conduct through the TSP is likely to distort competition in the market for cheese as well as chocolates, biscuits and powdered juice and therefore subject to review under s46 of the Act.

2.2 The Products

2.2.1 IBL, the agent for a number of brands; imports, distributes and markets FMCGs in Mauritius. Bic, Colgate, Palmolive, Johnson & Johnson, L'Oreal for non-foods; Chupa Chups, Heinz, Imperial, Kraft, Regilait, Tropical Tuna for foodstuff are the main international brands within its portfolio.

Cheese

2.2.2 Kraft block processed cheese, which is imported from Australia, is a non-refrigerated long lasting cheese present in Mauritius for more than 50 years.

2.2.3 Chesdale is also in the market for processed block cheese and a substitute to Kraft block processed cheese. Chesdale is imported from New Zealand and is distributed by Edendale, which is mainly in the business of importing, distributing and marketing of dairy products, including powdered milk - Red Cow, a well established brand on the local market.

2.2.4 La Vache Qui Rit is a smooth processed cheese imported from Egypt. It is available on the market as dry cheese as well as chilled cheese. The 'soft' cheeses (in jars, sliced) from the Kraft brand are the direct competitors to La Vache Qui Rit. We understand that La Vache Qui Rit is the leader in the soft cheese market.

2.2.5 Other types of cheese, including fresh cheese like Camembert and Parmesan, are more expensive and their sales are much lower compared to processed cheese.

Biscuits

2.2.6 There is a wide variety of biscuits on the market. Kraft-branded biscuits distributed by IBL include Oreo and Chips Ahoy. Competing products in this segment of the market include amongst many others LU, Devon and Bakers. Based on interviews with the different

wholesalers/retailers, it would appear that LU-made biscuits, which is also Kraft-branded but distributed by Tea Blenders Ltd, is the market leader.

Chocolates

2.2.7 Kraft-branded chocolates distributed by IBL are Cote D’Or, Toblerone and Milka. The latter is in the form of slabs; Cote D’Or is available both in the form of slabs and bars and Toblerone is in the form of bars. International brands competing against Kraft-branded chocolates include among others Cadbury, Nestle, Mars, Beacon and Poulain. We understand that Cadbury and Nestle are the market leaders in the chocolate slabs and bars category, respectively.

Powdered Juice

2.2.8 There are two powdered juice brands - Tang and Amila on the local market. Tang is Kraft-branded and distributed by IBL while Amila is distributed by Topodom Ltd. The Managing Director of Topodom Ltd informed us¹ that in the years 2005 and 2006 there were around five brands but the three other brands could not survive; primarily because of their inferior quality. Powdered juice is sold at around Rs 10 a packet for one litre. It is bought mainly by low income earners. According to the Managing Director of Topodom Ltd², the market share of Amila would be around 30% and that of Tang, 70%.

2.3 Supply /Distribution Chain and Retail Competition Issues

2.3.1 In Mauritius, both the traditional and modern distribution channels are equally important. The traditional retail trade consists of a large number of small shops and convenience stores. Around 60% of sales of FMCGs take place through this system. The other remaining 40% sales of FMCGs is through the modern channel, which consists of 4 hypermarkets (2 outlets for Jumbo and one each for Shoprite and Lolo) and around 70 medium-sized supermarkets, including 17 outlets for IBL-owned Winner’s, 6 outlets for Spar, 4 outlets for Kaddy Plus, 2 outlets for Super U , 6 outlets for Seven & Seven Co. Ltd, 16 GSR outlets and

¹ Factual meeting held with Topodom Ltd on 5th of March, 2010.

² At the above referred factual meeting.

14 outlets for Way (which are individually owned and managed but regrouped under Way Guild; their buying agent).

2.3.2 We understand that there are no contractual arrangements relating to shelf space between the retailers in the traditional channel and distributors, given the limited space in relation to the wide number of competing brands. The individual retailers themselves decide upon shelf arrangements.

2.3.3 In bigger stores - supermarkets and hypermarkets - shelf space is allocated on a variety of criteria. Primarily, facings (amount of shelf space given to a particular product to promote its visibility) are proportional to market share but some retailers will also consider different factors such as margin and rate of turnover. Some retailers reserve favoured shelf space for their in-house brands. Distributors will generally prefer that all their brands in a product category to be placed together (e.g all breakfast cereals belonging to brand x). Most retailers follow this approach, although some prefer to locate specific product types from different brands together (e.g all bran-based cereals, regardless of brand).

2.3.4 There are frequent negotiations between distributors and retailers over shelf space and positioning: distributors naturally seeking more and better shelf space for their products. This has been characterised by several retailers and distributors as a ‘conversation’, it is not a matter for contracting (unlike, for example, specific marketing activities such as gondola ends and inserts). IBL’s Top Store Program is the only agreement we are aware of which specifies shelf space as part of an overall commercial agreement.

2.3.5 IBL believes that its competitor [REDACTED]³ may have paid for shelf space earlier in 2009, as a competitive challenge [REDACTED]. Through conversations with retailers and suppliers, we did not find instances of buying shelf space other than that for the promotion of new products. [REDACTED]

2.3.6 Traditional retailers (convenience stores) usually receive their supplies from local distributors who often do not have written exclusive distribution rights over well established

³ Commercially sensitive information

brands but are generally the sole distributor of those brands. The modern retailers (supermarkets) equally rely on local distributors but they also have the possibility of getting their supplies on a global logistics platform. This means that these modern retailers can buy their products directly from international suppliers rather than just relying on the local distributor.

2.3.7 Unlike buying shelf space, sales targets and growth rebates are common practice in the industry. Such rebates apply to both the traditional retail outlets as well as modern shops.

3.0 Economic Rationale

3.1 Introduction

3.1.1 This section provides a discussion on the economic rationale underlying the concern about the anticompetitive effects of volume discounts and buying shelf space, especially when the conduct is by a firm with market power.

3.2 Discount Schemes

3.2.1 Volume discounts or rebates are incentive schemes offered by a supplier to retailers, distributors, or agents to promote their purchases or sales of their products. Generally, discount schemes are considered to be effective competitive tools and may give rise to efficiency gains. For instance, discounts result in a reduction in the price level. Lower prices normally attract more consumers and hence increase demand. To meet the increased demand, production has to increase, unless there are available stocks. As discounts give incentive to buy more and hence increase in production, they can help reduce unit costs through economies of scale. Discounts may therefore benefit consumers in terms of the resulting lower prices and encouraging product innovation.

3.2.2 However, volume discounts, especially when applied retroactively (growth and target rebates), may have anti-competitive effects and therefore ultimately harm consumers. Volume discounts can have exclusionary effects and can even lead to complete foreclosure in extreme cases.

3.3 The Exclusionary Effect of Volume Discounts

3.3.1 Volume discounts represent a classical form of nonlinear pricing i.e., buyers purchasing different volumes will pay different unit prices. When applied retroactively to the entire amount of purchases realised by a buyer during a certain reference period (so-called all-units discounts – for example a discount based on total sales over a year subject to meeting the sales target), volume discounts may lock buyers in. If buyers decided to buy from different sources

and therefore failed to achieve the thresholds set by the supplier, they would lose discounts or rebates calculated retroactively on the products that they had already purchased during the reference period, as well as on any additional units that they would buy from the supplier.

3.3.2 When buyers' total purchase volume is just below the threshold, a small increase in purchases would trigger the discount or rebate for all of the units purchased from the dominant firm in the reference period. As a consequence, the incremental price of the units necessary to achieve the threshold may be substantially lower than both the list price and the discounted price. Thus, volume discounts may have anti-competitive effects because of the incentives they create on retailers. Similarly, retailers face strong incentives not to allow sales to fall below the threshold, as they would lose the entirety of the discount if they do.

3.3.3 For example, suppose a retailer purchases product X at a price of Rs70 per unit from supplier X and sells it at a 10% markup for Rs77. Suppose the retailer sells 1100 units per year, and receives an incentive discount of 2% on total sales for reaching or exceeding a target of 1000 units per year. Thus, the retailer makes a total profit from selling product X of $[(77 - (70 * 0.98)) * 1100]$ Rs9240.

3.3.4 Suppose a rival supplier, Y, was to enter this market, and achieve a 10% market share (110 units). Sales of X drop to 990 and so the retailer would lose the incentive discount. Thus, the profit the retailer receives from supplier X becomes: $[(77-70)*990]$ Rs6930. To be no worse off, the retailer would need to obtain a profit of Rs2310 on the 110 units of product Y sold. This would require supplier Y to provide the retailer with a margin of Rs21 per unit. Assuming the same costs and retail price, this would represent a 20% discount on the unit cost.

3.3.5 Thus, this retroactive rebate has the effect of protecting the market share of product X. Retailers benefiting retroactive discounts will have very strong incentives not to allow sales to drop below the threshold. Rival suppliers would have to offer very high unit discounts to be as attractive to retailers as the market leaders, and may therefore find it hard to enter the market. This may be true even if the rival's products are cheaper to produce or in any other way more competitive than those of the incumbent.

3.3.6 In the example above, the new entrant Y was assumed to be able to capture only a small portion of the market, initially at least. Had the entrant been able to capture a larger share, the required discount for his product to be competitive against X would be much lower. For example, had Y captured 50% of the market, the retailer would have needed only a 4% discount from Y on the unit cost, to compensate for the lost discounts from X. This illustrates the point that for a discount system to have serious exclusionary effects, it is necessary that the dominant enterprise holds substantial market power over a significant part of the buyer's demand (the so-called assured base of sales), so that rivals cannot effectively compete for the entire requirements of individual buyers. This assured base might result from, for example, strong brand image or consumer preference for the product.

3.4 Further Anticompetitive Effects of Volume Discounts

3.4.1 Besides causing potential foreclosure of competitors, volume discount schemes may have further anticompetitive effects. First, given that purchasers do not know for certain whether they will benefit from the discount until the end of the reference period, the practice may generate uncertainty about the level of final prices, thus hampering the comparison between competing offers and weakening competition. Second, by creating incentives for total or partial exclusivity in relationships with distributors, the practice may reduce the number of competing brands in stores and hence the level of competition. This situation may favour an increase in the price level. Finally, the grant of discounts may be accompanied by an increase in the initial price (so-called penalty prices). In such a situation, the system would give rise to ambiguous effects on allocative efficiency and consumer welfare, as it would penalise buyers unable to achieve the thresholds, without necessarily benefiting buyers that meet the thresholds.

3.5 Buying Shelf Space

3.5.1 In the grocery market, shelf space is important since it can significantly affect sales. Promotional shelf space provided by retailers can be thought of as inducing incremental impulse sales of a manufacturer's product. Even if the product may be a known brand that is normally stocked by the retailer, once the product is more prominently displayed on the retailer's shelves (say, in eye-level shelf space, end-of-aisle displays, or near the checkout

registers), more people buy it. Alternatively, the product may not be generally known and stocked, but once the retailer devotes some shelf space to the product, some marginal consumers who see it will similarly decide to purchase.

3.5.2 Since retailer shelf space is a form of promotion that consumers are not willing to pay for but which induces incremental sales that are profitable to the manufacturer, manufacturers will want greater retailer promotional shelf space supplied for their products than retailers will choose to supply on their own.

3.6 The Exclusionary Effect of buying shelf space

3.6.1 There is extensive debate over the issue of buying shelf space, particularly when practiced by a monopoly firm. Payment for exclusive or preferential access to shelf space is to the disadvantage of rivals. An extreme example of this would be an exclusive-dealing contract providing that a particular firm will be the only supplier of its product class in the retailer's store.

3.6.2 Most economic analysis in this area has focused on powerful retailers requiring payments for shelf space as opposed to suppliers initiating a payment for shelf space, as in this case. There have been concerns in other jurisdictions including EU and the USA that this can have anti-competitive effects in terms of excluding certain suppliers and thereby impairing competition that otherwise would take place. In some jurisdictions, such as France, buying shelf space is restricted by law (the Galland Act of 1996, as reformed in 2005⁴). Other jurisdictions have assessed the matter on a case by case basis, determining in each case whether the practice is restricting competition in the particular market. For example, the UK Competition Commission in 2000⁵ established a code of practice for supermarkets limiting the ability of large retailers to demand payments for shelf space. This, like most precedents in this area, focused on dominant buyers requiring payments for shelf space, rather than large suppliers offering them, as here.

⁴ There is a discussion of the issues involved in, for example, Rey, Thal and Verge (2006) <http://else.econ.ucl.ac.uk/conferences/supermarket/rey.pdf>

⁵ http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full

4.0 Legal Background

4.1 Mauritian Competition Act 2007

4.1.1 The Competition Act 2007 (the Act) provides at s46 (1) (a) that a monopoly situation exists in relation to the supply of goods or services of any description where 30 per cent or more of those goods or services are supplied, or acquired on the market, by one enterprise.

4.1.2 s46 (2) (a) of the Act further provides that such monopoly situations shall be subject to review by the Commission, where the latter has reasonable grounds to believe that an enterprise in a monopoly situation is engaging in conduct that has the object or effect of preventing, restricting or distorting competition. CCM Guidelines 4: Monopoly Situation and Non Collusive agreements⁶ states that this provision deals with exclusionary abuses.

4.2 CCM Guidelines 4: Monopoly Situation and Non Collusive agreements (CCM 4)

4.2.1 The Guidelines make it clear at paragraph 1.3 that being in a monopoly situation is not *per se* a breach of the law. However if a monopolist abuses its position, then this becomes an issue which may be examined by the Commission with a view to remedying the situation.

4.2.2 The test as laid down in the Act is whether the company is engaged in conduct which restricts, prevents or distorts competition or otherwise exploits the monopoly situation (s 46 (1) (a)).

4.2.3 s46 (3)(d) of the Act states that in reviewing a monopoly situation, the CCM will take into account whether the conduct was or is “likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius” or is “likely to be detrimental to the interests of consumers”.

⁶ Paragraph 2.12 of CCM 4

Foreclosure

4.2.4 As stated in paragraph 3.5 of CCM 4 , anti-competitive foreclosure occurs 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.

4.2.5 Paragraph 3.6 of CCM 4 further states that anticompetitive foreclosure will only be held to occur if consumers or the economy more generally are harmed as a result of the effect on competition – not simply because competitors are harmed.

4.2.6 The assessment of anticompetitive foreclosure is described in paragraph 3.11 of the CCM 4. The Commission will normally consider whether the conduct is likely to result in increased profits for the monopoly enterprise, as a result of reduced competition.

Volume related discounts

4.2.7 CCM 4 states that rebates only on additional volumes above a threshold are generally not anticompetitive. However, “(b) Retrospective rebates, such as a rebate on all purchases over a year if the sales exceed a target threshold, may have foreclosure effects because they can result in very powerful incentives for a customer just below the threshold to increase purchases” (Paragraph 3.16 (b)). If a discount scheme depends for its profitability on reducing or eliminating competitors’ market shares it is more likely to be found to be anticompetitive [Paragraph 3.18].

Shelf- Space Requirements

4.2.8 The guidelines do not discuss any specific example of buying or giving discounts or rebates for premium shelf space. The assessment of this practice should therefore be considered within the general category of exclusionary conduct, as minimum shelf space percentages might limit the expansion of rivals or squeeze their availability and sales.

4.3 Experience of Other Competition Authorities

4.3.1 This section lists a few cases decided in the European Union, considering firms under investigation for abusing their monopoly situations by offering target and growth rebates, and in one particular case: tying, bundling and buying shelf space.

4.3.2 The CCM is not in any way bound by precedents set by the European Commission or any other overseas jurisdiction. However, in the absence of any precedent in Mauritius, these cases are summarised as illustrations to allow better understanding of the context for this investigation and generally prevailing attitudes to these practices in longer-established competition authorities.

European Commission

The Coca Cola Company Case⁷

4.3.3 In September 2004, the Director-General for Competition of the European Commission (EC) launched an investigation to determine whether The Coca Cola Company and its bottlers in the supply of Carbonated Soft Drinks (CSDs) had abused its dominant position⁸ in the EU member states.

4.3.4 The investigated practices amongst others, were:

- “growth and target rebates, individually set for customers and most of which are calculated on a quarterly basis and separately set for colas and non-colas;
- tying arrangements and arrangements requiring the customers to carry for sale a range of cola stock keeping units (“SKUs”) and/or non-cola SKUs; and

⁷ http://ec.europa.eu/competition/antitrust/cases/decisions/39116/commitments_fr.pdf

⁸ A ‘dominant position’ in EU competition law is a position of substantial market power. It is broadly equivalent to the concept of a monopoly situation in the Competition Act 2007, and Article 102 (formerly Article 82) prohibition of abuse of a dominant position has been applied to practices that in Mauritius might be considered to breach s46 of the Act. However, there are differences between the two approaches, particularly as regards penalties.

- certain exclusivity-related restrictions to the installation of technical sales equipments such as beverage coolers, fountain dispensers or vending machines.”⁹

4.3.5 The EC found that since target and growth rebates were calculated on the overall purchases of the customer, such rebates were considered to be inducing additional purchases just to meet the threshold. Thus, growth and target rebates were held to increase the consumer’s loyalty.

4.3.6 Coca-Cola also made the supply of its strongest brands conditional upon the purchase of the less well-selling soft drinks (carbonated and non-carbonated) within its portfolio. In other words, Coca-Cola was leveraging the monopoly it had in the market of its well selling soft drinks to the market for its less famous brands. The EC held that this could lead to foreclosure of competitor suppliers of soft drinks (carbonated and non-carbonated).

4.3.7 Also, through its shelf space requirements, Coca-Cola required retailers to reserve a part of their total soft drink shelf space to Coca-Cola branded products in proportion to Coca-Cola’s sales share. The high turnover of the three major brands namely Coca-Cola Regular, Coca-Cola Light and Fanta Orange, reserved a major proportion of the shelf space for Coca-Cola’s products. Within that shelf space, Coca-Cola displayed favourably its less-selling products, whilst such space would otherwise have been allocated in function of the sales of the other brands.

4.3.8 The EC found that this further deteriorates conditions for access to shops for rival suppliers of CSDs, especially those competing with Coca-Cola’s less well-selling CSDs.

4.3.9 In June 2005, the EC accepted undertakings by The Coca-Cola Company which will remain in force until 31 December 2010 and which were amongst others:

- Coca-Cola will no longer offer target or volume related rebates which reward consumers upon purchase of the same amount or more of Coca Cola products than previously.

⁹ http://ec.europa.eu/competition/antitrust/cases/decisions/39116/commitments_fr.pdf-page 3

- Coca-Cola will not tie the sales of its less selling brands to that of its well-selling ones.
- Coca-Cola will also no longer offer rebates to customers if the customers commit to buy its less famous products together with its best-selling products or to reserve shelf space for the entire group of products.
- When Coca-Cola provides a free cooler (which can be used for competitor products) to a retailer and there are no refrigerators in the outlet to which the consumer has direct access, the retailer will be free to use at least 20% of the cooler provided by Coca-Cola for a soft drink of any other brand.

Michelin cases

4.3.10 In the first case against Michelin¹⁰, the EC held the rebates payable to customers for replacement tyres in the Netherlands that reached annual sales targets to be anti-competitive. The targets were set for each customer individually, and were usually higher than that for the previous year. The European Court of Justice (ECJ)¹¹ upheld the EC's findings and held that: "any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the loss for the entire period."

4.3.11 In the second case against Michelin¹², the Commission again held individualized annual volume targets granted by Michelin in the French replacement tyre market to be anti-competitive. The Commission went further and stated that rebates operated by reference to a period of more than three months will always be unlawful.

4.3.12 The Court of First Instance (CFI) upheld the EC's findings of abuse of dominance in the case¹³. In the Judgment, the Court rejects the use of pure quantity discounts since they induce

¹⁰ Official Journal (1981) L 353/33

¹¹ NV Nederlandse Banden-Industrie Michelin v Commission (1983) ECR 3461

¹² (2002) Official Journal L58/25

¹³ (2003) ECR II-4071

loyalty as the rebates were calculated on the overall turnover and are abusive because they are not justified by cost savings:

“...a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article 82¹⁴ unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of loyalty and target rebate, to prevent customers from obtaining their supplies from competitors (...)” (paragraph 59 of the Judgment)

“If a discount is granted for purchases made during a reference period, the loyalty-inducing effect is less significant where the additional discount applies only to the quantities exceeding a certain threshold than where the discount applies to total turnover achieved during the reference period.” (Paragraph 85 of the Judgment)

British Airways (BA) case¹⁵

4.3.13 BA, which was in a dominant position in the UK airline industry, had agreements concluded for a one year period with travel agents established in the United Kingdom which gave them bonuses for the sale of its tickets. Those bonuses were calculated based on some predetermined sales thresholds and were applied retrospectively to all the tickets sold during a reference period.

4.3.14 The EC held that the conduct of BA was an abuse of dominance, i.e. infringed Article 82 of the EC Treaty¹⁶. It had the effect of encouraging agents to maintain or increase their sales of BA tickets rather than selling their services to BA's competitors. The EC was of the view that BA's conduct had the effect of distorting competition between BA and other airlines in the United Kingdom markets for air transport services.

¹⁴ Now Article 102, following ratification of the Lisbon Treaty.

¹⁵ British Airways PLC v Commission of European Communities supported by Virgin Atlantic Airways Ltd <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999A0219:EN:HTML>

¹⁶ Now Article 102 following ratification of the Lisbon Treaty.

4.3.15 On appeal, the CFI in 2003 held that it should be known whether in providing an advantage not based on any economic justification, BA intended to remove or restrict the agents' freedom to sell their services to the airlines of their choice.

4.3.16 The CFI held that the scheme of granting retrospective bonuses based on thresholds had a loyalty-inducing effect. There was evidence that the number of BA tickets sold by agents during successive reference periods progressed. In the same line, it was held that the five competitors of BA (because of their low market share) were not in the same position as BA to operate such schemes with travel agent to counteract the exclusionary effect of BA's scheme.

4.3.17 The CFI held that in applying its reward schemes, BA had no other objective than ousting rival airlines; thereby affecting competition in the United Kingdom market for air travel agency services. The CFI also stated that the market shares of those competitors would have been able to grow more significantly had BA's scheme not been in place.

Intel Case¹⁷

4.3.18 Intel was in a dominant position in the worldwide market for CPUs from October 2002 to December 2007. The EC held that Intel had abused its monopoly position in the market for computer chips; i.e. had breached Article 82¹⁸.

4.3.19 The EC found that Intel engaged in specific anti-competitive conducts which were designed to foreclose the relevant market for specific computer chips (x86 central processing units-CPU) to its main competitors.

4.3.20 Intel offered rebates and other incentives, to computer manufacturer customers when they purchased most or all of their computer chips from Intel. The Commission held that this prevented customers from choosing the alternative products.

4.3.21 Given Intel's dominance in that market, only a limited part of the relevant market for CPUs was contestable at any one time due to the dependence of computer manufacturers on

¹⁷ COMP/C-3/37990 13th May 2009 ec.europa.eu/competition/sectors/.../intel_summary_decision_en.pdf

¹⁸ Now Article 102 following ratification of the Lisbon Treaty

Intel for a majority of their CPU supplies. The EC held that Intel designed its pricing policy to ensure that a computer manufacturer which purchased CPUs from a rival supplier in the contestable segment of the market lost its right to a discount or rebate from Intel, or a significant part thereof. A computer manufacturer which purchased CPU supplies from both Intel and a competing supplier therefore has to pay a higher price per unit for CPUs supplied by Intel and would be compelled, over time, to buy all of its supplies from Intel to obtain the volume discounts and rebates available.

United States

3M case¹⁹

4.3.22 This case was entered by Le Page against Minnesota Mining and Manufacturing Company (3M) in the United States asserting that the latter had leveraged the monopoly position it had over its Scotch tape brand to the market of the private label tape portion of the transparent tape market thereby breaching Section 2 of the Sherman Act.

4.3.23 3M, which manufactures Scotch brand tape, is a conceded monopolist in the transparent tape market. 3M's share of the tape market decreased with the advent of office superstores and mass merchandisers, which preferred lower-priced private label tape. 3M's main competitor, LePage, had then nearly 88 percent of the private label segment of transparent tape, but only about 14 percent of the overall tape market.

4.3.24 To protect its market share, 3M introduced its own private label product as well as offered a second less expensive brand to compete with LePage's cheaper private label tape.

4.3.25 It also devised pricing strategies, including a bundled rebate program, for large superstores. The rebate program offered higher discounts when customers purchased products

¹⁹ LEPAGE'S INCORPORATED; LePage's Management Company, L.L.C., v. 3M (MINNESOTA MINING AND MANUFACTURING COMPANY); Kroll Associates, Inc. Minnesota Mining and Manufacturing Company (2003) <http://ftp.resource.org/courts.gov/c/F3/324/324.F3d.141.00-1473.00-1368.html>

across a number of 3M's different product lines and set customer-specific target growth rates in each product line.

4.3.26 The Third Circuit en Banc Court (the court) on appeal from the District Court held that the conduct of 3M breached Section 2 of the Sherman Act. 3M offered many of LePage's major customers substantial rebates to induce them to eliminate or reduce their purchases of tape from LePage's. 3M's rebate programs equally set target growth rates in each product line. The size of the rebate was linked to the number of product lines in which targets were met, and the number of targets met by the buyer determined the rebate it would receive on all of its purchases. If a customer failed to meet the target for any one product, its failure would cause it to lose the rebate across the line. Thus this created a substantial incentive for each customer to meet the targets across all product lines to maximize its rebates.

4.3.27 The Court stated that the principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist, it may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.

4.3.28 Before 3M instituted its rebate program, LePage had begun to enjoy a small but rapidly expanding toehold in the transparent tape market. 3M's incentive was to preserve the market position of Scotch-brand tape by discouraging widespread acceptance of the cheaper, but substantially similar, tape produced by LePage.

4.3.29 3M bundled its rebates for Scotch-brand tape with other products it sold. The bundled rebates reflected an exploitation of the seller's monopoly power.

4.3.30 The Court held that there was ample evidence that 3M used its market power over transparent tape, backed by its range of products, to entrench its monopoly to the detriment of LePage, its competitor, thereby breaching Section 2 of the Sherman Act.

5.0 Assessment of Facts

5.1 Introduction

5.1.1 In this section of the report, the facts gathered in this investigation are summarised and analysed.

5.2 The Relevant Market and market Power

5.2.1 Kraft Cheese enjoys an extremely strong market position as a result of its strong brand image in Mauritius. This strong position is derived in part from its long history in the country, and also from marketing activities by IBL and Kraft to promote the brand.

5.2.2 CCM Guidelines 2: Market Definition and the Calculation of Market Shares (paragraph 2.14) states that “where questions of market definition make no difference to the assessment of market shares or market power, then the CCM will not address those questions.”

5.2.3 In the present case, the market share of Kraft Cheese seems to be very high²⁰ whatever the precise definition of the market in which it is sold. The product has a market share (based on interviews with retailers and suppliers) of around 90% in the category of processed cheese and 70% or more in the total market of cheese.

5.2.4 Our investigation has also revealed that processed cheese, as Kraft 250 g block cheese, possibly together with other formats such as cans, is likely to be a different market²¹ from chilled cheeses, in terms of taste, softness, packaging, price and shelf life. The closest substitute available on the market for Kraft 250g block cheese is Chesdale with around 10% of the processed cheese market. Softer processed cheeses such as La Vache Qui Rit, may or may not be in the same market: its texture (spreadable) and price point may put it in a different market (together with Kraft’s Philadelphia).

²⁰ Factual meetings held with IBL on 10th February 2010 (Filenote CCM/INV/001/008), retailers (Kaddy Plus on 12th January 2010-; Shoprite on 14th January 2010; Way on 15th January 2010); competitors of IBL- (Edendale on 28th January 2010; Innodis on 26th February 2010)

²¹ Factual meeting held with the representatives of Way supermarkets on 15th January 2010

5.2.5 For the chocolate, biscuit and powdered juice markets, market share and market power do not need to be assessed (as these are secondary markets, not markets within which market power arises, in this investigation).

5.2.6 Nevertheless, market participants agreed that Cadbury and Nestle are the leading brands in the market for chocolate slabs and bars²² respectively. Kraft's brands Toblerone, Milka and Cote D'Or have low brand awareness and market share²³.

5.2.7 Similarly, Kraft-branded biscuits, Oreo and Chips Ahoy also have low brand awareness and market share²⁴. Discussions we had with the different retailers and distributors revealed that the biscuit market is highly fragmented, without the same dependence on market leaders. Also, there is a wide variety of brands of biscuits on the market.

5.3 The Top Store Programme (TSP)

5.3.1 IBL informed us that promotional activities for Kraft products, including shelf space, gondola ends, inserts and rebates are sponsored by the brand owner (Kraft Foods)²⁵. Kraft Foods does not participate in the trade or commercial negotiations with retailers for their products. IBL has a commercial agreement with Kraft Foods for marketing (importing, storing and distributing) its products, which clearly indicates the pricing structure of Kraft products, including predetermined sales margin for IBL. This margin is not linked to sales volume.

5.3.2 TSP, like other marketing activities for Kraft products, resulted from a discussion between IBL and Kraft Foods. It was launched around June 2009 (an unsigned copy is at Annex I). The agreement encompasses a number of different terms which vary in detail for retailers (Annex II). Of these, the most notable for the purposes of this investigation are:

- Shelf space (and other promotional) requirements for Kraft Cheese, in some cases expressed as a percentage.

²² Factual meeting held with the representative of Li Wan Po & Co. Ltd on 29th March 2010

²³ Factual meeting held with the representatives of IBL on 10th February 2010

²⁴ Factual meeting held with the representatives of IBL on 10th February 2010

²⁵ Factual meeting held with the representatives of IBL on 10th February 2010

- Volume-related discounts for Kraft Cheese, taking the form of higher end-of-year rebates if certain sales targets have been met.
- Shelf space and promotional requirements for chocolate and biscuits, in some cases expressed as a percentage.
- Specifying that promotional requirements and shelf space equal those of market leader Cadbury for chocolates and linking those to retroactive rebates on volume.
- In one case²⁶, specifying that a particular competitor brand could not be stocked, in return for a retroactive rebate on volume.

5.3.3 The main features of the TSP are volume discounts subject to sales targets and preferential shelf space for Kraft-branded products. However, detailed terms and conditions vary across retailers. For comparison purposes, we have examined a sample of five TSP contracts, namely that with Stores A, B, C, D and E (Annex II).

5.3.4 The TSP with Store A offers the latter a x% discounts on all Kraft Products. Stores B, C and D are also entitled to x% discounts but on Kraft block processed cheese 250g only. Store E is entitled to only y% discounts on Kraft block processed cheese 250g. These discounts are subject to minimum monthly purchases and specified primary shelf space for Kraft-branded cheese, biscuits, chocolates and powdered juice.

5.3.5 Primary shelf space requirements in these five TSP for Kraft 250g block cheese are x% and for spread cream cheese (same category as as La Vache Qui Rit) y%. For chocolates, TSP signed with Stores A and D specify, inter alia, that Milka should have the same eye level primary shelf space as Cadbury and should be placed adjacent to the latter. For biscuits (Oreo and Chip Ahoy), the TSP requires minimum facings or complete vertical block of shelf space. For instance, for Kaddy Plus, a minimum of x facings on y shelves is required for each Kraft-branded biscuit brand (Oreo and Chips Ahoy). For Stores E and C, the space requirement is one vertical block of z m². For Tang powdered juice, the shelf space required is expressed in terms of facings or

²⁶ In the agreement with Store A it is mentioned that Amila should not be listed

shelves. As noted earlier, in the contract with Store A, TSP requires that Amila, the competing brand, should not be listed. This condition does not appear in any other retailer's TSP.

5.4 Implementation of TSP

5.4.1 From the information submitted by IBL and retailers, we understand that some 30 supermarket organizations, including Stores A, F and G Supermarkets signed the TSP. A few others (e.g Store K), though not party to TSP, have an implicit arrangement for providing additional space to Kraft branded products (chocolates and biscuits) and gaining discounts on Kraft cheese.²⁷ It is also understood that some large retailers, like H and I which have not signed the TSP, are also receiving volume-related discounts on Kraft Cheese.

5.4.2 The TSP contracts formally ceased at the end of 2009. As at date, IBL has only two signed TSP agreements with Stores A and G for the year 2010. Generally, new contracts for 2010 have not been signed yet with retailers, perhaps in part because of this investigation. However, we understand²⁸ from IBL that it regards the TSP agreements as remaining in force, in that it would expect retailers who have (for example) committed to certain marketing activities such as shelf space to maintain those activities, in the expectation that a contract will be signed for 2010 that formalises the TSP principles for another year.

5.4.3 On this basis, we regard the TSP as in force, and continuing to be effective in about 30 supermarket organizations.

²⁷ Information submitted by IBL on 15th January 2010

²⁸ Factual meeting held with the representatives of IBL on 10th February 2010

5.5 The Stated Object of TSP

5.5.1 The following reasons were put to the Executive Director by IBL for introducing TSP:

1. existing volume-related discounts for Kraft, based on the volumes bought in each order, were unsatisfactory (as they provided retailers with an incentive to order infrequently in bulk), and IBL wanted to replace them with a volume discount on total purchases over a period;
2. Kraft cheese sales had been stagnant for some years, and IBL sought to increase them, primarily through a large marketing campaign (TSP was a relatively minor element in this);
3. Kraft's confectionary and biscuit products had very low brand awareness and market share and IBL (a) sought to promote them and (b) was concerned that volume-related discounts on these less-known products would be risky, as sales growth was highly unpredictable; and
4. IBL believed that a competitor, [X], was engaged in an aggressive marketing campaign directed against Kraft cheese products, possibly including the purchase of shelf space.

5.5.2 IBL informed²⁹ us that granting the rebate schemes to retailers is to increase sales and become more profitable. According to IBL, TSP does not intend to reduce or eliminate competition but to gain market share only through increased sales. IBL believes that it is not uncommon to bind strongest brands with less popular products and noted that Sunquick juices were marketed jointly with Deevaya basmati rice in December 2009/January 2010.

5.5.3 Regarding shelf space requirements under TSP, IBL stated that they do not exceed their estimated market share of Kraft cheese. According to IBL, in most instances, the shelf space requirement for Kraft cheese is less than its market share. The TSP requirement for a certain percentage of shelf space is to give proportional display for Kraft Cheese on shelves according

²⁹ IBL's response of 23 February, 2010 to Statement of Issues on Kraft and General Rebates

to its market share. As such, IBL views the requirements of TSP as being non-abusive and reasonable.

5.5.4 IBL also informed us that it is not possible to determine the market share for Kraft-branded chocolates (Cote d’Or, Milka and Toblerone) and biscuits (Chips Ahoy and Oreo) because these products have been subject to irregular supplies on the Mauritian market during the past years.

5.6 The Effect of TSP

5.6.1 Where a product is in a monopoly situation, tying and discounting arrangements relating to it are likely to be more distortionary than similar arrangements would be for a product with a weaker market position. The discount scheme offered by TSP creates incentives for retailers which may have the effect of distorting competition, particularly because the market share of Kraft Cheese is very high. In particular, retailers might be reluctant to promote or even stock products that compete with Kraft Cheese as if to do so they would lose the rebate they would otherwise receive under the TSP.

5.6.2 It is hard to determine the short term effects of the TSP program, partly because TSP has not been implemented in all retail outlets. Direct competitors³⁰ in the various markets under investigation (cheese, biscuits, chocolates) have indicated that their sales have been normal. [REDACTED]. As such, rival brands may not at this stage, be fully foreclosed from the Mauritian market, however the investigation has to determine whether the agreements or similar agreements will be anti-competitive in the long term as well.

5.6.3 Some analysis of the trend in sales volume (see Annex III) for the different products related to the investigation (although they have not been used to prove the effects of TSP on competition at this early stage of implementation) do provide some useful indication as to what could possibly be longer term effects. For example, total volume of Kraft Cheese 250g sold by IBL to the various outlets declined by x% in 2008 compared to 2007. However, in 2009 sales

³⁰ At the time of reporting figures for the period January 2007 to November 2009 were not submitted by Edendale.

increased by x% to reach 2007 level (a slight x% increase compared to 2007). The diagram below shows six-monthly sales figures of Kraft 250g block processed cheese by IBL for the period covering January 2007 to December 2009.

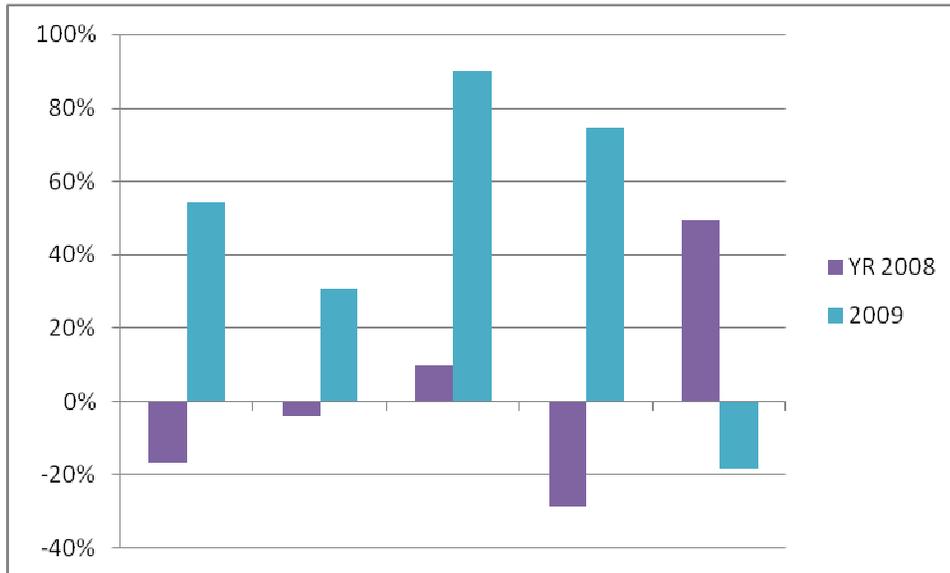
[✂]

5.6.4 From the above diagram, we can see that the cumulative six months sales volume of Kraft 250g block cheese started declining as from the period January to June 2008. Sales Volume continued to decline until the period July to December 2009 when the TSP was introduced. The representative of IBL Consumer Goods noted³¹ that TSP was successful and sales of Kraft Cheese as well other Kraft-branded biscuits and chocolates improved by x% when TSP was implemented. Our further analysis of the figures reveals that compared to earlier positive growth of x% for the period Jan-Jun 2008 compared to Jul-Dec 2007, Kraft 250g had negative growth in sales volume for two consecutive six-month ending periods covering Jul-Dec 2008 (-x%) and Jan-Jun 2009 (-x%). Subsequently, there was a significant improvement in sales figures for period Jul-Dec 2009 when the TSP was introduced. The growth in sales improved from -x% to a positive x%.

5.6.5 The diagrams below illustrate growth in 2009 sales volume for Kraft 250g to retailers which have signed TSP and those who have not signed TSP:

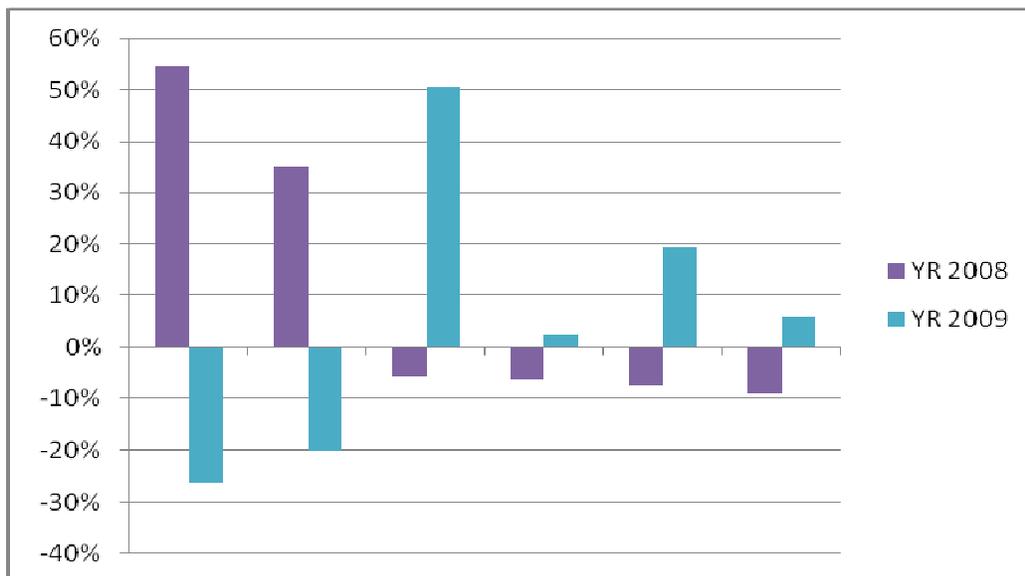
³¹ Factual meeting held with the representatives of IBL on 10th February 2010

Growth (%) in Sales Volume of Kraft 250g Block Cheese to Retail Outlet which signed TSP



Source: IBL Consumer Goods

Growth (%) in Sales Volume of Kraft 250g Block By IBL to Retail Outlets which have not signed TSP



Source: IBL Consumer Goods

5.6.6 With the exception of Store A (-x%), the growth in IBL sales volume for Kraft 250g block cheese for 2009 to retailers which have signed the TSP are higher than for those retail outlets which have not signed TSP. For example, growth in sales volume in 2009 to Stores G, L, B supermarkets were x%, x%, x% and x% respectively compared to -x% and -x% for Store H and I1. IBL sales growth to other stores which did not sign TSP like Store J1, J2 and K were x%, x% and x% respectively. These figures are lower compared to those stores which signed the TSP. However, it is worth noting that IBL 2009 sales growth to Store J2, which did not sign TSP, was x%.

5.6.7 With some variations, TSP therefore seems to have been successful in its stated objective of increasing sales of Kraft cheese. The question is therefore whether this strategy also has the effect of restricting, preventing or distorting competition.

5.7 Assessment of Conduct Against a Counterfactual

5.7.1 As per CCM Guidelines 4, paragraph 3.3, the CCM will assess the effects of the conduct under investigation against a counterfactual in which the conduct did not occur.

5.7.2 In this particular case, the assessment of the counterfactual will involve deducing what the market would be like if the TSP agreement was not in place.

5.7.3 In the absence of the TSP, there would not have been incentives for retailers to provide additional shelf space to Kraft-branded cheese (in particular Kraft block cheese 250g), chocolates (Toblerone, Milka and Cote D'Or) biscuits (Oreo and Chips Ahoy) and Tang (powdered juice). We assume that equivalent discounts for Kraft Cheese would have been available, but not in the form of retroactive volume-related discounts with the incentive effects described earlier. Thus average prices may have been similar to those actually observed.

5.7.4 We do not necessarily expect that significant direct harm to competitors would have arisen in the short period since the TSP came into force, with the possible exception of the one case of direct foreclosure of powdered drinks. However, there may be a concern with the future evolution of the market. Will competitors find it as easy to challenge Kraft's very strong

market position in processed cheese as they would have done in the absence of the TSP? How are shelf-space requirements likely to affect the future evolution of retail markets for FMCGs?

5.7.5 As discussed at sections 3 and 4, TSP offering rebates on all purchases over a year subject to sales exceeding a target threshold may have foreclosure effects because they can result in very powerful incentives for a retailer just below the threshold to increase purchases or to not decrease purchases from IBL. This effect is likely to be particularly strong given the large market share of Kraft block cheese.

5.7.6 Given this very high market share, the effect on the existing competitor (Chesdale) is not the primary focus of concern (there is relatively little competition to be lost). However, retailers' incentives to promote or even allow new competitors into this market would seem to be significantly reduced or even eliminated by the volume-related discount scheme, if those competitors would reduce Kraft's sales. Consequently, the volume-related discount scheme seems likely to have the effect of preserving and protecting Kraft's very high market share for processed cheese.

5.7.7 The shelf space requirements of the TSP also appear to be anti-competitive, particularly where they are expressed in relative terms (percentages or comparison to competitors) as opposed to absolute terms (facings), as this formulation directly squeezes rivals, or prevents their growth. IBL has stated that shelf space requirements for Kraft cheese are no greater than its market share. However, these requirements can still act defensively to prevent significant inroads being made by a future competitor into this high market share. For chocolates especially, the specification of shelf space equal to one of the market leaders seems likely to squeeze competitors by providing a greater proportion of shelf space for Kraft-branded chocolates than is justified by their market share.

5.7.8 Furthermore, we understand that contractual specification of shelf space is new for Mauritius. Whatever the merits of such practices once established might be, the question is whether they are particularly distortionary in a market which has not experienced such practices to date. Pressure on rival suppliers to respond by also paying for shelf space or be

squeezed on the shelf, could result in a market in which only the larger suppliers and big international brands are displayed prominently in Mauritian supermarkets. Thus, allowing the TSP to continue could encourage other dominant firms to have similar agreements that could lead to exclusive dealings or foreclosure, and a diminution of competition in these markets.

5.7.9 In the case of the exclusive dealing – in relation to Amila powdered juice - this seems clearly anti-competitive. As the incentive to receive discounts on Kraft Cheese will be very large in relation to the powdered drinks market, this would seem to be a clear use of market power in Kraft Cheese to eliminate the sole competitor from another market, even if only in one store.

6.0 Findings

6.1 This section sets out the provisional findings of this investigation, for the Commission to consider. These are:

Monopoly Situation

- a. IBL is in a monopoly situation in the market of processed cheese. Its Kraft-branded processed block cheese 250g has a market share well beyond the 30% threshold defined under s46 of the Act in the market for cheese, and higher in more narrowly-defined markets such as processed cheese.

TSP Agreements

- b. Around June 2009, IBL Consumer Goods entered into a specific sales agreement (“TSP”) with some 30 supermarkets, covering the period ending December 2009 but still in effect today. These agreements offer discounts to those supermarkets on 250g Kraft block processed cheese subject to a specified percentage increases or minimum purchase volumes (growth rebates) and shelf space requirements for both Kraft Block cheese and other Kraft branded products.

Effect of Agreements:

- *In the cheese market*
- c. Such growth rebates, when offered by an enterprise in a monopoly situation are likely to have the effect of preventing, restricting or distorting competition.
 - d. This distortion arises from the strong incentives given by the agreement on retailers to give Kraft block cheese primary shelf space and to increase or maintain sales of Kraft products in order to meet the minimum sales target and receive the volume discount. This results in protection of Kraft’s market share in the cheese market and makes more likely the foreclosure of existing or future competitors.

- *In secondary markets*

- e. The TSP specifies shelf space percentages for other Kraft-branded products, not necessarily enjoying market power, such as chocolates, biscuits and powdered juice. These terms are likely to distort competition in these secondary markets, reducing sales of rivals.
- f. The agreement incentivises retailers to give primary shelf space to Kraft branded products which do not enjoy market power; this conduct leverages Kraft's monopoly position in the cheese market to gain better promotion of its products in other markets. This conduct is likely to distort competition in the markets for biscuits, chocolate and powdered juice in that Kraft products may gain sales not because of their inherent competitive advantages but through the market power IBL enjoys in Kraft cheese.

- *On particular competitors*

- g. In one instance, the TSP contract amounts to exclusive dealing in that it stated that Amila, a competitor to Kraft branded Tang powdered juice, should not be listed at all in that store. This is exclusive dealing and is likely to prevent, restrict or distort competition in the market for powdered juice.
- h. This exclusive dealing if continued may also result in anti-competitive foreclosure of rivals.

7.0 Remedies

7.1 Possible Remedies

7.1.1 If the Commission decides that any or all of the concerns expressed here constitute a breach of the monopoly provisions of the Act, it has the power independently to remedy the conduct or take action to mitigate the effects of that conduct. This section set outs some possible remedies available to the Commission.

7.1.2 The Competition Act does not provide for financial or other penalties to be imposed by the CCM in reviews of monopoly situations, rather the CCM has the role of remedying any conduct that may have “the object or effect of preventing, restricting or distorting competition.”

7.1.3 Section 60 of the Act gives CCM the power to give a wide range of directions to IBL (if the CCM concludes that the TSP and volume-related discount contracts falls within the purview of s 46 of the Act) to remedy the situation and to ensure that the anti-competitive conduct or its effects do not continue in the future.

7.1.4 The aim of the possible remedies is essentially to make the relevant markets here work better; i.e. removing restrictions to competition which might have been created by TSP and the volume-related contracts. Paragraph 3.9 of CCM Guidelines on remedies and penalties (CCM 6) states that “in seeking an effective and comprehensive solution, the CCM will normally strongly prefer remedies which enhance or protect the process of competition, rather than those which attempt to deal with the adverse effects of a failure of competition.”

7.1.5 Paragraph 3.3 of CCM 6 requires the CCM when selecting an appropriate remedy to have regard to (a) effectiveness, (b) timeliness and (c) proportionality of implementation costs to the expected benefits of the remedy.

7.1.6 CCM 6 differentiates at Paragraph 4 between structural remedies and behavioural remedies. The most appropriate remedy here will be behavioural remedies which will aim to

change the behaviour of IBL through either directions by the CCM or through any contractual undertakings offered by IBL.

7.1.7 Paragraph 4.19 of CCM 6 enables the CCM to impose more complex measures as part of behavioural remedies when it is concluded that large enterprises have been abusing a monopoly situation when it is convinced that such measures are necessary to promote competition in the long run (Paragraph 4.20). These may include restrictions on bundling products, discounts or other marketing and pricing devices.

7.1.8 The possible remedies available to the CCM in this case are to do any or a combination of the following:

- (i) Take no action.
- (ii) Issue a direction to IBL to terminate any existing TSP contract so that it is null and void in toto or in part in relation to all parties signed up to it- (Section 60 (3) (a) of the Act).
- (iii) Issue a direction to IBL to cease its practice of giving retailers retroactive rebates on volume in relation to Kraft block processed cheese 250g, in exchange for any or all of the following:
 - a. A minimum sales threshold of Kraft block processed cheese 250g;
 - b. Premium shelf-space (whether expressed in a percentage or as facings) for Kraft block processed cheese 250g;
 - c. Premium shelf-space, (whether expressed in a percentage or as facings) for Kraft branded chocolates, biscuits and powdered juice (list brands);
 - d. Excluding Amila powdered juice from the retailer's stock listings (Section 60(3)(b) of the Act).
- (iv) Issue a direction to IBL to cease its practice of giving retailers retroactive rebates on volume in relation to *any* of its products which enjoy market power, in exchange for the following:
 - a. A minimum sales threshold for any of its products;
 - b. Premium shelf-space (whether expressed in a percentage or as facings) for any of its products;

- c. Exclusive dealing by the retailer in relation to any of IBL's competitors.
- (v) Issue a direction under Section 60(3)(b) of the Act to IBL to, in relation to any sales contracts with retailers to:
- a. Cease offering retroactive growth or volume discounts or rebates to retailers.
 - b. Cease offering incentives to retailers to give its products premium shelf space.
 - c. Cease offering incentives to retailers to exclude competitors in its products.

7.2 Assessment of Possible Remedies

7.2.1 This section provides an assessment of the proposed remedies at paragraph 7.1.8 above in terms of effectiveness, timeliness and proportionality.

- **Remedy (i)**

7.2.2 Paragraph 6.1.1 states that the TSP and volume-related contracts have some inbuilt features which might be anti-competitive. Doing nothing may lead to an adverse effect on competition in the FMCG sector and possibly in other sectors as well. Therefore, the proposed remedy is not effective, timely or proportional to the conduct of IBL. However, it provides a baseline against which to assess the costs of other options, and is therefore always included.

- **Remedy (ii)**

7.2.3 Terminating any existing TSP contract either in toto or in by excising the anti-competitive parts will possibly remedy the situation in terms of discontinuing the conduct of IBL and retailers will no longer be incentivised to allocate extra and preferential shelf space to Kraft products. The CCM should consider whether there is a need to declare the total contract void, or to merely excise the clauses that are considered inconsistent with the Act.

7.2.4 This remedy is likely to be timely and proportional. However, simply cancelling the contract may not be effective in itself, if there is nothing to stop IBL entering similar arrangements in the future. In addition to this remedy, the CCM may consider an order to ensure that the conduct does not occur in the future. Coupled with a declaration that the

contract is void, this sort of direction will ensure the CCM’s intervention is effective. Such a direction is option (iii) discussed in full below.

- **Remedies (iii)/(iv)/(v)**

7.2.5 In addition or alternatively to cancelling the contract, the CCM may issue a direction that IBL must cease engaging in such anti-competitive conduct in relation to Kraft block processed cheese or perhaps more widely. Remedy (iii), (iv) and (v) set out different versions of this remedy, depending on the degree of specificity that the CCM decides to take.

7.2.6 As CCM 6 suggests, any such order should have a “sunset clause” of perhaps 5 to 10 years.³² The CCM may review and monitor the situation.

7.2.7 This remedy would halt the behaviour, or at least if the behaviour continued, the CCM could enforce the order in Court. While this remedy affects IBL’s business, it would not limit IBL’s ability to contract in any way which is not likely to distort competition. This remedy could also be effected relatively quickly, if the CCM chose to take this option.

7.2.8 At this stage, the Executive Director does not make any strong recommendations to Commissioners on how broadly any prohibition should be applied (i.e. which of (ii), (iv) or (v) should apply).

³² And may be varied or even lifted if circumstances change.

8.0 IBL's Comments on Provisional Findings

8.1 The Executive Director issued the provisional findings of this investigation to IBL on 20th of May 2010, under Paragraph 14 of CCM Guidelines on the Rules of Procedure (CCM 1) and invited comments.

8.2 IBL submitted its comments on 9th June 2010. They are reproduced below along with our comments:

(a) Para 2.3.5 – *“Even though you did not find evidence of [X] buying shelf space, the shelf spaces allocated to it in all supermarkets are disproportionate when compared to Kraft. I invite you to compare the selling out of Kraft cheeses in any supermarket with that of [X] then to measure the shelf spaces granted to both brands. That should reveal that [X] benefit from very favourable exposure”.*

- Our Comment: The CCM has not independently assessed the share of shelf space of [X] which is not at issue in this investigation.

(b) Para 3.3 and 4.2.7 – *“Volume discounts and retroactive rebates are an integral part of all business practices in the retail sector in Mauritius. I welcome a meeting during which you will explain to me the mechanism for granting discounts that will benefit both the supplier and the customer”.*

- Our Comment: The Competition Act 2007 has only recently come into effect, and there may be practices across Mauritian business which need to change. As highlighted at section 3, economics theory and established practice by other authorities have shown that volume and retroactive discounts can harm competition when offered by firms in monopoly situations.

(c) Para 4.2.5 – *“It has nowhere been demonstrated by the CCM that consumers or the economy in general have been harmed by our TSP.”*

- Our Comment: We discussed at section 5 above that it is hard to determine the short term effects of TSP. However, we concluded that TSP is likely to prevent, restrict or distort competition in the long run. The Act, at Section 46(3)(d) speaks of “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 consumers.” **(Emphasis added)**. Thus, it is for the Commission to conclude on the likelihood of harm.

(d) Para 5.3.2, 5th bullet – *“I admit that our TSP should not have requested the delisting of a competitive brand, namely Amila.”*

- No Comment.

(e) Para 5.4.3 – *“For year 2010, agreements on TSP have been reached with [✂] supermarkets only. For the other outlets, we have been waiting for further developments from CCM”.*

- Our comment: The report has been amended accordingly.

(f) Para 5.6.1 – *“With the TSP in place, there has been no evidence of any outlet which has been reluctant to promote or even stock products that compete with Kraft cheese.”*

Our Comment: See comment above on Para 4.2.5.

(g) *“To date, Kraft competitors for cheese, biscuits and chocolates have indicated that their sales have not been adversely affected by the TSP. In the long term, whether that will be the case or not cannot be known. As such, Kraft should not at this stage be pointed at for disrupting competition.”*

- Our Comment: See comment above on para 4.2.5.

ANNEX I: Unsigned Copy of TSP



ANNEX I: Unsigned Copy of TSP



ANNEX II: Highlights of the Terms of Signed TSP

[✂]

ANNEX III: Trends in Sales Volume to Retailers

Processed Cheese



Chocolates



Biscuits



Powdered Juice





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