INV003

Non-Confidential public version

INV 003- Importation of Slaughter cattle in Mauritius

Final report

14th September 2011

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1. Summary

1.1 By the power conferred upon the Executive Director of the Competition Commission of Mauritius (CCM) under section 51 of the Competition Act 2007 (thereinafter 'the Act'), the CCM[1] launched an investigation into the importation of live cattle in Mauritius (INV 003), on the 21st December 2009.

1.2 This report is in pursuance of Section 51(2) of the Act, which stipulates that "upon completion of an investigation, the Executive Director shall submit his report on the investigation to the Commission."

1.3 The investigation has focused on the collaboration between Socovia Belle Vue Ltée (Socovia) and four other companies to pool their resources in order to import slaughter cattle into Mauritius.

1.4 In this report, the Executive Director finds that the collaboration between Socovia and the other importers is likely to be a non-collusive horizontal agreement in terms of s44 of the Act, as the CCM considers that this collaboration was essentially a result of the historical development of the beef industry in Mauritius. However, the CCM is concerned that this collaboration might have the object or effect of preventing, restricting or distorting competition.

1.5 As a result of this collaboration, it is understood that Socovia, the only company involved in the importation of slaughter cattle in Mauritius, is in a monopoly situation in the market for the supply of slaughter cattle in Mauritius. The monopoly situation in itself is not a breach of the Act, however the CCM has investigated whether Socovia may be acting to prevent, restrict or distort competition, by limiting access to the cattle carrier which it charters to bring live cattle to Mauritius.

1.6 The Act provides that the Commission may give appropriate directions to enterprises as it considers necessary, reasonable and practicable to remedy, mitigate or prevent the adverse effects on competition that the Commission has identified.

1.7 The Final Report sets out the Executive Director's findings in this case and suggested remedies for the Commission to consider should it determine that there is a breach.

1.8 It is up to the Commissioners to decide whether any breach of the Act has been committed and to determine the remedies, if any. The Commissioners will do this once they receive the Final Report and after a formal hearing, if required, on the matter.

[1] In this report, the CCM refers to the Executive Director and the Investigative Team of the CCM.

2. Background

The Allegation

2.1 Following an enquiry, the CCM launched an investigation into the market for the importation of slaughter cattle in Mauritius. This investigation focused on possible contraventions by Socovia and other entities of both the collusive agreements and monopoly provisions of the Act. The CCM inquired into whether Socovia holds a monopoly position in the market for the supply of slaughter cattle in Mauritius and whether it is acting to restrict, prevent or distort competition. It also investigated whether a market sharing agreement has been entered into by previously competing parties, and/or whether there has been, and continues to be, an agreement between the parties which has the object or effect of preventing, restricting or distorting competition.

The Investigation

2.2 After an initial enquiry into the allegation, the Executive Director launched an investigation, in accordance with Section 51 of the Act, in the beef industry in Mauritius, more specifically, into the importation of live slaughter cattle in Mauritius.

2.3 The investigation was known as CCM/INV/003: Importation of slaughter cattle in Mauritius.

2.4 The main parties to the investigation were informed and a press release was issued. At that stage information gathering were initiated and different parties were interviewed.

2.5 After a preliminary information gathering and interviewing process, the CCM produced a Statement of Issues in March 2010, which was sent to the main parties to the investigation. The parties were given the opportunity to comment on the Statement of Issues and the CCM received substantial comments from Socovia, Cattleco and Agromaster. The CCM continued its information gathering, data compilation and analysis after the production of the Statement of Issues.

2.6 Having taken stock of the comments by the parties to the Statement of Issues, the CCM proceeded to conduct a market survey to confirm the relevant market. The survey was conducted by TNS Analysis.

2.7 On 21 December 2010, the CCM produced a Provisional Findings report and comments were invited from the main parties.

2.8 In light of the comments made by the main parties, the CCM issued an amended Provisional Findings report on 28 March 2011.

2.9 Socovia, Cattleco, Agromaster and Norfarm provided their responses to the amended Provisional Findings report (the responses are annexed to this report).

2.10 Taking into account all the comments from the various parties to the SOI, Provisional Findings and the amended Provisional findings, the CCM is now producing this Final Report.

The beef industry in Mauritius

2.11 Different types of beef meat are marketed in Mauritius[2]: chilled meat, frozen meat and fresh beef meat. According to an in-depth Customer Behaviour Study conducted by TNS Analysis with 700 Mauritian Households managers in August 2009, the market penetration for beef consumption in Mauritius is 48%.

2.12 Fresh beef meat comes from either imported or local slaughter cattle. Imports are generally from South Africa and Kenya, but sometimes from Australia as well. Currently only Socovia imports slaughter cattle. There is a small number of local breeders that supplement the market during peak periods.

2.13 Frozen beef meat is imported from Australia, New Zealand, Brazil and India. The biggest proportion of frozen beef is from India which is buffalo meat.[3] **[✂]** is one of the main importers of frozen meat in Mauritius. According to **[✂]**, 20% of frozen meat that it imports constitute of beef liver, mostly consumed by the general population because it is very cheap compared to beef meat.

2.14 As for chilled beef meat, it is generally imported in cuts from either Australia or South Africa, and considered a luxury product, mainly used by hotels and a small part of the population. Hypermarkets also import a small amount directly.

The importing and selling (or distribution) structure

2.15 As from 1996, importers' activities consisted of importing cattle from South Africa, Kenya and at times from Australia. They dealt directly with the butchers to whom the cattle were sold. The process was as follows:

[2] Source: Customs Department, MRA

[3] Buffalo meat is different from beef meat – it is considered to be an inferior form of beef meat.

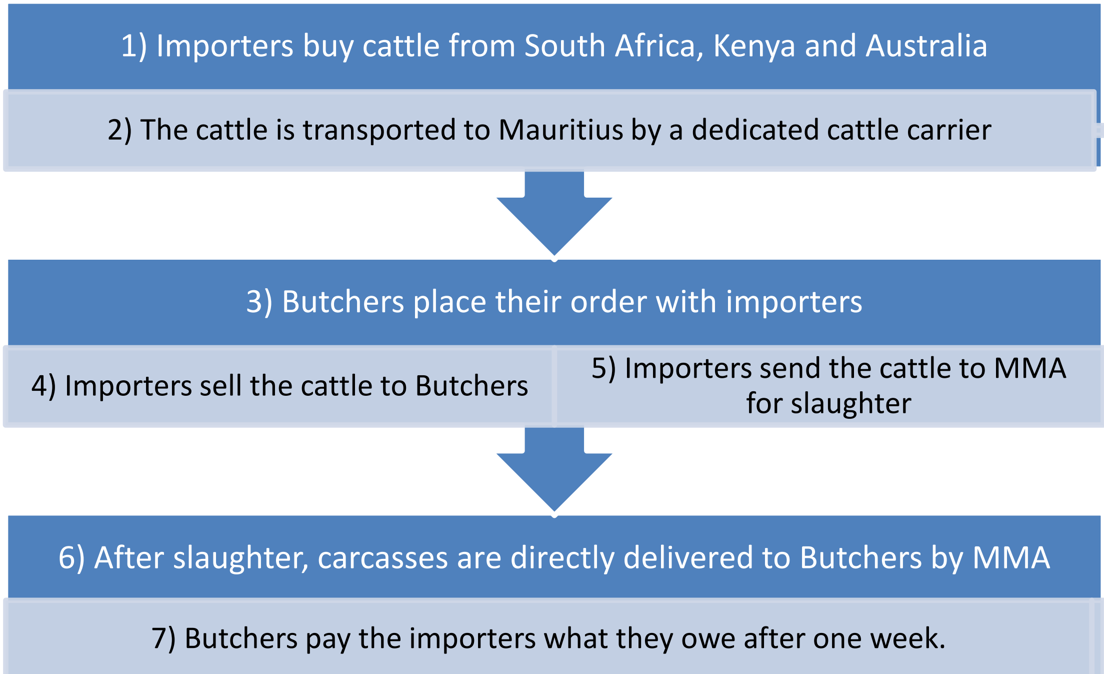

Figure 1: The supply chain

2.16 Therefore, the butchers were dealing directly with the different importers which were on the slaughter cattle market. The CCM understands that this structure still exists, except that now there is a sole importer, Socovia.

The history of beef importation in Mauritius[4]

2.17 Between the years 1986 and 1995, before the import market for slaughter cattle was liberalized in 1996, the Mauritius Meat Authority (MMA) was the sole importer authorized to import cattle for slaughter in Mauritius. The MMA was set up by the *Meat Act* in 1974. Its statutory aims were *inter alia* to import cattle for slaughter. It started importing in 1986 and stopped in 1996 after having suffered significant losses. It appears that the losses occurred because the MMA had agreed on a fixed price with Mauritius Meat Producers Association (MMPA) which was often well below the costs of importation. Other factors, such as the erosion of the Mauritian rupee, and the sudden surge in the import price of cattle contributed. After pressure from the butchers and because of the non-viability of the MMA as an importer, the government liberalized the imports of livestock cattle in September 1996. MMA ceased its loss making commercial activities – namely importing slaughter cattle, purchasing livestock and selling carcasses - and operated solely as an abattoir (slaughter house), processor and distributor. The MMA also acted as a regulatory body to ensure that the newly privatized importing business would run smoothly.

[4] All background and history is collated from information provided from interviews with representatives of the **[✂--Confidential information]**

2.18 From 1996 onwards, companies involved in the business of slaughter cattle like Afrimad, Inter Regional, Beef Butchers, Socovia, Cattleco Ltd and Agromaster Ltd, were set up and started importing slaughter cattle. There is also one company, Sodia Ltée, (Sodia) which was previously involved in the imports of weaners[5] that became involved in the imports of slaughter cattle post-liberalization. Besides these companies, there were a couple of individuals[6] who also imported live cattle.

2.19 The first year was a "transitional year", monitored closely by the MMA and the Ministry of Agriculture, Fisheries & Co-operatives. The initial phase of importation did not go well. Between 1996 and 2002, many importers made losses and some went out of business. This was likely because there was a rush to import, and the small Mauritian market for slaughter cattle was flooded.

2.20 A report from the MMA in 1998[7] shows that mostly it was the local breeders that suffered from this influx of slaughter cattle, as the butchers and importers were generally the same people and would therefore purchase from the importers, rather than local breeders. In addition, because of the flooded market, some importers could not sell their stock and suffered great losses. For example, **[✂]** has told the CCM that it set up an import business in 1997, and by 2002, it had accumulated **[✂]** in losses. After this it entered into the collaboration with Socovia.

The Collaboration

2.21 The CCM understands that the collaboration currently involves the following companies: Socovia, Cattleco Ltd, Agromaster Ltd, Sodia and Norfarm Ltd.

[5] Weaners are calves for breeding purposes
[6] **[✂--Confidential information]**

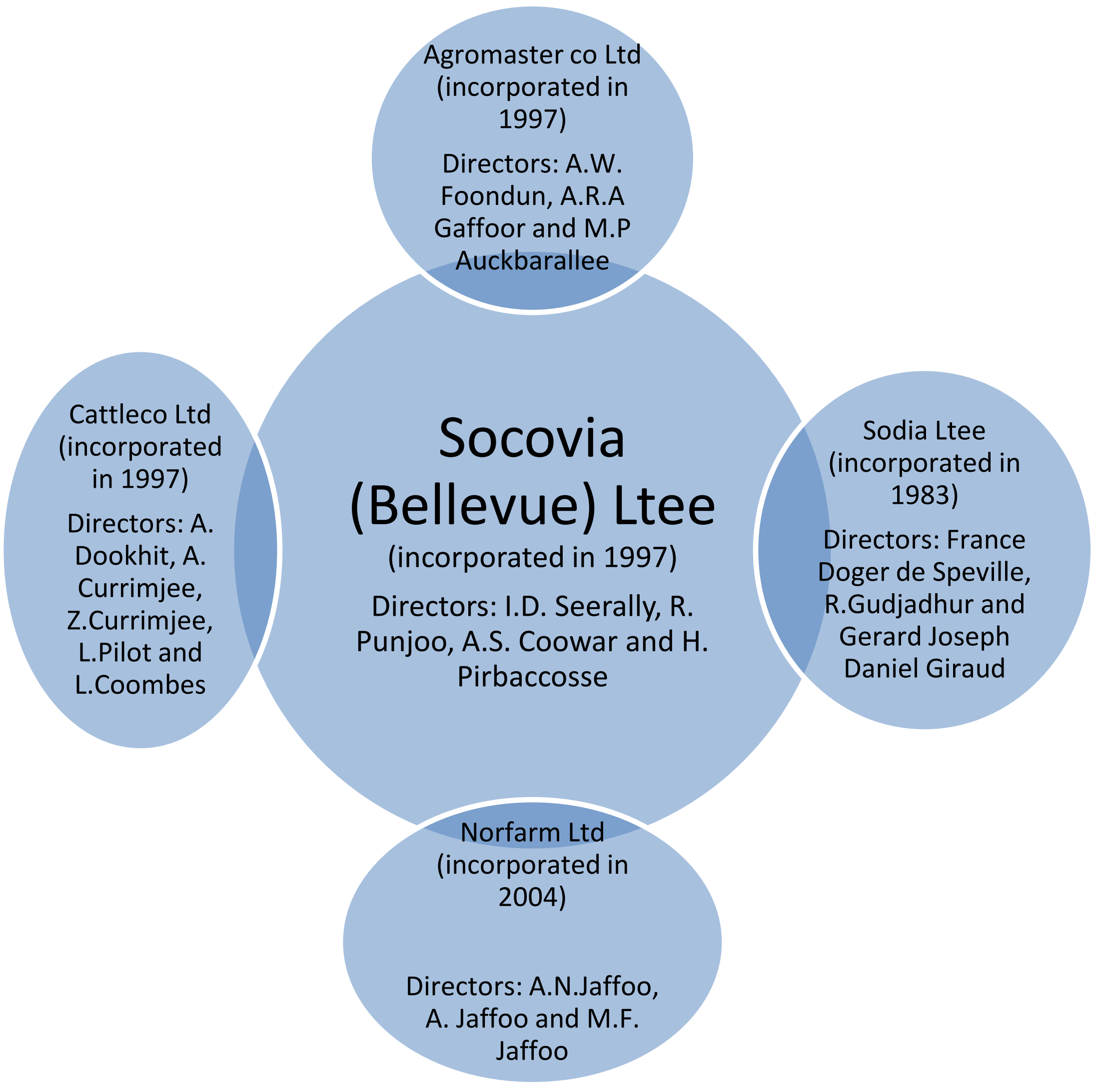

Figure 2: The parties to the collaboration

2.22 Cattleco Ltd put in a deposit of [✂][8] which was later increased to [✂]and it takes care of all the chartering of the vessel, insurance and compliance with veterinary conditions in South Africa and also to look for new supply sources e.g. in Brazil, Mozambique.

2.23 Agromaster Ltd has put in [✂][9] and is responsible for the marketing[10] of cattle – in other words provides the butchers to buy the meat.

2.24 Sodia Ltée provided [✂][11] and provided the quarantine station.

[8] [✂--Confidential information]
[9] [✂--Confidential information]
[10] The marketing of slaughter cattle simply means selling cattle to the butchers
[11] [✂--Confidential information]

2.25 NorFarm Ltd has put in **[✂]**[12] and is also responsible for the marketing of cattle to the butchers.

2.26 As for Socovia, its capital share in the business is unknown to us so far. It is responsible for the selection of cattle in South Africa and its marketing in Mauritius. The Livestock Carrier is also chartered in the name of Socovia.

2.27 During the various factual meetings held with the main parties, the latter have told us that such a scheme was necessary for the survival of the business.

2.28 The current arrangement is understood to be as follows: Socovia is the only importer of live cattle for slaughter. These imports are primarily from South Africa and Kenya. Once Socovia imports slaughter cattle, the cattle is sold to the butchers (on credit terms), and slaughtered at the slaughter house and the carcasses are delivered to the butchers by the MMA. Once butchers sell the fresh beef meat, they pay Socovia all the proceeds on the week after[13]. Socovia also imports goats for other companies and sells the stock to the butchers who trade in goats' meat. Socovia also sells some of its stock of live cattle to other resellers of live cattle.

Written Agreement Between [✂] and Socovia

2.29 As above, the collaboration began as written agreements between some of the parties, but is essentially a course of conduct that has carried on after the written agreements became outdated.

2.30 **[✂]** was a former importer of cattle for slaughtering and had to stop importation as a result of losses and problems with butchers[14]. After ceasing to import around 2001, **[✂]** entered into an arrangement with Socovia in 2002[15] **[✂]**.[16]

2.31 It entered into an agreement with Socovia termed as a *"Memorandum of Understanding"* dated **[✂]** 2002 **[✂]** whereby according to Clause 1 *"imports of cattle and goats will be done by Socovia ltd"*. Clause 3 of the same document stated that *"***[✂]** *will refer all its clients to Socovia. They will buy and pay directly to Socovia"* whereas Clause 7 related to the sharing of profits between four companies including **[✂]** and **[✂].**

2.32 **[✂]** claimed that the document is no longer valid. **[✂]** further stated that the MoU was a starting point for its working arrangement with Socovia until a trust relationship could be established between them. **[✂]** also told us that now their working relationship is based on trust. It also told us that since entering an agreement with Socovia, **[✂]** has always received its share of the profits. This is deemed to be a de facto partnership**.**

[12] **[✂--Confidential information]**
[13] **[✂---Confidential information]**
[14] **[✂-Confidential information]**
[15] **[✂]**'s Response to the CCM's Statement of Issues,document submitted on the 23rd June 2010
[16] **[✂]**'s Response to the CCM's Statement of Issues,document submitted on the 23rd June 2010

2.33 From the above, it is the CCM's understanding that there is an ongoing working relationship between **[✂]** and Socovia although not based on any written document, subsequent to the original memorandum of understanding.

Agreement between [✂] and Socovia

2.34 **[✂]** stated that the business of importing slaughter cattle was a loss making one and had to stop operations as the latter had made heavy losses. In 2000, **[✂]** decided to stop its business of supply of slaughter cattle (including importation) and finally in 2004 **[✂]** [17] stopped completely when all its cattle were disposed of. Subsequently in 2004, **[✂]** was approached by Socovia, and they decided to "put their minds together" in order to make such business viable.[18]

2.35 It was in that context that **[✂]** entered into an agreement with Socovia whereby the former would undertake not to be directly involved in "importing/breeding/fattening of cattle". **[✂]** would also provide its infrastructure such as its grounds and cattle parking infrastructure [19] to Socovia to be used as quarantine[20]and in return **[✂]** would get a **[✂%]** of the gross profit[21] realized on the seven consignments under the agreement**.**

2.36 According to **[✂]**, a *"societe de fait[22]"* was created. Since then the two parties have been working together in the same way. In addition, according to the Annual Balance Sheet of **[✂]**, a transfer reflecting a **[✂%]** share of profit was received from Socovia[23] for 2006, 2007, 2008 and 2009**.**

2.37 Socovia told us that the document in relation to **[✂]** was obsolete and was related to only these 7 consignments but it appears that their *"collaboration"* has survived several years since that agreement and still continues today. It is the view of Socovia that the working relationship that has emerged when the companies joined together has been built on trust and no more relates to the written agreement.

2.38 It appears that **[✂]** and Socovia have since then been working together on the same terms as previously agreed, as **[✂]** has not imported any cattle while Socovia has continued importing and using **[✂]**'s infrastructure for the keeping of imported animals. Furthermore, Clause 9 of the agreement states that the two parties intended to continue their collaboration beyond these

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[17] **[✂--Confidential information]**
[18] **[✂--Confidential information]**
[19] **[✂]**'s Response to the CCM's Statement of Issues, document submitted on the 23rd June 2010
[20] **[✂--Confidential information]**
[21] **[✂---Confidential information]**
[22] Groupement de deux ou plusieurs personnes qui présente les éléments spécifiques du contrat de société, sans remplir toutes les conditions requises pour la formation ou validité de ce contrat – Gerard Cornu: *Vocabulaire Juridique-Association Henri Capitant,* Editions PUF
[23] Annual Balance Sheet of **[✂]** Jul 2006-Jun 2007, Jul 2007-Jun 2008 and 2009

seven consignments mentioned in that agreement and that both were looking at a long term "*Partnership*".[24]

Other Parties

2.39 As far as the other parties involved in this investigation, namely **[✂]** and **[✂]**, no document has been provided in respect of their working arrangement but they had all stated that their working arrangement had been built on trust in view of making the business viable**.**

2.40 Agromaster started importing live cattle in February 1998 from South Africa and Madagascar. It however stopped importing live cattle since the 29th May 1998 up to the present day.[25]

2.41 An agreement was reached with Socovia Ltee in 1998 such that Socovia will be the only company responsible for the importation of live cattle. According to the agreement, **[✂]**receives **[✂%]** of the Gross Profits in the form of dividends after deduction of the cost of the cattle, slaughter fees, feed and labour cost and quarantine, in return for advice as well as marketing facilities offered to Socovia Ltee.[26]

The Livestock Carrier

2.42 Between 1996 and 2002, when there were different importers of cattle, different vessels were being used for the transport of livestock. The CCM has come to understand that other vessels such as Dania, Meva, Shearwater as well as Chady I [27]were used. One company involved in the import of slaughter cattle undertook to modify a vessel through the use of special containers adapted for the transport of slaughter cattle.

2.43 From 2002 only one cattle carrier has been used by Socovia, on an exclusive basis to bring slaughter cattle into Mauritius – namely the Murray Express. Details and photos of the Murray Express are provided at **Annex 1.** A competitor of Socovia used another carrier, for a period of time, until it went out of business.

2.44 In **[✂]** and **[✂]** 2011, after the issuance of the Provisional Findings, at the minimum, Socovia used an alternative carrier- the **[✂]** to bring cattle, once from **[✂]** and once from **[✂]**. Evidence shows that at that point in time, there was a ban on exportation of live/slaughter cattle from South Africa in view of the foot and mouth disease, and hence alternative supply and means of supply were warranted.

2.45 After investigation, it appears that the reasons for the reduction in cattle carriers used, are twofold:

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[24] **[✂--Confidential information]**
[25] **[✂---Confidential information]**

[26] **[✂--Confidential information]**
[27] **[✂---Confidential information]**

(a) NSPCA regulations over which type of livestock carrier may be used from South Africa

(b) Limited size of the Mauritian market

2.46 Around 2001-2002, the National Council of Society for the Prevention of Cruelty to Animals-NSPCA in South Africa - after seeing the conditions in which the livestock travelled – became more stringent and devised certain conditions that had to be met by the vessels transporting the livestock. The *Framework For the Export of Livestock by Sea*, paragraph 5.1 provides that:

Any vessels intended for the sea transport of livestock must be approved and registered for this purpose by the South African Department of National Agriculture in consultation with the South African Maritime Safety Authority (SAMSA). Prior to any vessel being used to transport livestock qualified and authorized animal welfare inspector together with a suitable Master Mariner appointed by SAMSA must be employed by the exporter to approve the vessel and loading prior to the first voyage and on subsequent voyages as necessary.

2.47 A classified livestock carrier is not *per se* a condition imposed by the NSPCA however in practice only NSPCA classified livestock carriers are considered suitable for the transport of livestock from South Africa, the origin of most slaughter cattle imports. Although there are imports from Kenya and Australia, this requirement from South Africa means that only the Murray Express may be used, as the South African suppliers will not sell to importers if the carrier is not approved.

2.48 According to the World Shipping Register there are 95 livestock carriers which are specialized in transporting livestock worldwide. Despite this, it is understood by the CCM that it is difficult to charter a livestock carrier for any route to the Mauritius route without incurring repositioning costs.

2.49 In addition, while there are many carriers available, most would be far beyond capacity requirements given the small demand for fresh beef in the Mauritian market. The ideal livestock carrier for the Mauritian market would cater for a tonnage to carry between 800 and 1000 heads of cattle. The tonnage of the Murray Express, the current livestock carrier being used to import live cattle is 320,000 kilograms and is appropriate for 800-1000 head of cattle. However, in the light of the figures[28] relating to the demand of fresh beef meat, it is possible that a bigger carrier would not be financially viable for the Mauritian market in the long run. As it has been submitted to us by several different parties[29], importing more than the 800/1000 heads per month would result in a flooding of the market with excess cattle, requiring substantial feed costs, and the import business will not be financially sustainable.[30]

2.50 Most of the parties we have met have stated that the carrier was the main barrier to importing cattle, as it did not make economic sense for each importer to charter a livestock carrier as this

[28] **[✂--Confidential information]**
[29] **[✂--Confidential information]**
[30] **[✂--Confidential and commercially sensitive information]**

would inundate the slaughter cattle market.[31] The CCM was informed that, in order to deal with this difficulty, around 2002, the major companies involved in the import of live cattle decided to collaborate, whereby each company makes a contribution towards Socovia and receives a set percentage return in profit. Under this agreement, Socovia is the only entity responsible for the importation of slaughter cattle while the other companies which have joined it are not directly involved in importation. However, it is to be underlined that the latter companies deal with other issues related to the import of slaughter cattle such as quarantine facilities, insurance and marketing.[32]

The local production of cattle

2.51 After meeting with the **[✂]** and **[✂]**[33], it is clear that the liberalization of imports of live cattle in Mauritius has had a very big impact on local production of cattle over the years. According to the *Digest of Agricultural Statistics*[34], from 2005 to 2008 there were only 805 heads of locally[35] produced cattle slaughtered compared to 38,334 heads of imported cattle slaughtered during the same period.

2.52 In order to boost local production of cattle, in 2008, the Government decided to set up a scheme known as the *Food Security Fund (FSF)* under the aegis of the Ministry of Agriculture Food Technology and Natural Resources for which a budget of Rs 1 billion was initially granted for production of livestock and crops. In relation to livestock, the FSF will fund local breeders of slaughter cattle in terms of grants and/or loans for the purchase of improved breeding animals, loans for the construction/renovation of buildings for the housing of the animals, loans for the purchase of equipments and grants for pasture development. The aim of the scheme is to reduce the country's dependence on food imports and increase its resilience against future food crises.[36]

2.53 Initially, the **[✂]** told local breeders to import a small number of weaners for breeding. The local farmers reportedly had great difficulty accessing a carrier. The major problem encountered by the breeders was the fact that they do not have any contact in South Africa, nor any transport facilities. Following such issues, a solution had to be found and it was decided that the Ministry of Agro Industry would act as facilitator, i.e. the Ministry will import on behalf of the breeders.

2.54 **[✂-Confidential information].**The **[✂]** noted that cattle carriers in the Indian Ocean region are very scarce and that it is not easy to secure one due to the high cost involved.[37]

[31] **[✂---Confidential information]**
[32] **[✂---Confidential information]**
[33] **[✂--Confidential information]**
[34] Published by the Central Statistics Office (CSO)[34] in July 2009
[35] 'Locally produced cattle' refers only to cattle produced in the island of Mauritius.
[36]**[✂--Confidential information]**
[37] **[✂-Confidential information]**

3. Market Definition and Market Share Analysis

3.1 The relevant market is a defined set of products which could compete with other products and a defined geographical area within which competition occurs[38].

3.2 The product market is defined after taking into account the substitutes of the product from both the demand and supply sides. Demand-side substitution is the ability of consumers rapidly to switch to alternative products, in the face of a small but significant price rise. Supply-side substitution is the ability of alternative suppliers rapidly to switch into supply of the product in question, in the face of a small but significant price rise. In line with standard international practice, "the CCM will take as its relevant market the narrowest candidate market for which a monopolist of all the products in the candidate market would be able profitably to increase the price of the product being *investigated by a small but significant amount (typically 5-10%) over a sustained period*".[39]

3.3 Assessing the effects of a 5-10% price increase is termed the SSNIP (Small but Significant Non Transitory Increase in Price)[40] test. The SSNIP test looks at what would happen to demand for other likely competing products if the price of a product increases by 5-10%. If there is sufficient decrease in the demand for the product under investigation, because of consumers switching to competing products, to make the price rise unprofitable then the likely competing products are considered as substitutes and the market is wider. The CCM will thus start with the narrowest market definition in its analysis (the market for the supply of slaughter cattle), and consider whether there are reasons to believe the market is wider than this.

3.4 In practice for demand side substitution, the CCM can look at evidence of consumer preferences, for example gathered from surveys.

3.5 For supply side substitution, the CCM will look at whether suppliers of other likely competing products would be able to switch into the market in response to a small but significant relative price increase of 5-10% within a year.

3.6 As background, slaughter cattle are supplied in Mauritius through imports from South Africa, Kenya and Australia. Imports of cattle serve to supply cattle for slaughtering. Local producers of cattle would also supply slaughter cattle for slaughtering purposes. Local producers sell the cattle on a live weight basis to the butchers and the prices are negotiated based on the quality and weight. Cattle are sent to the MMA for slaughter and the slaughtering fees due are paid by the

[38] See CCM 2 'Market Definition and the calculation of market share-Paragraph 2.18
[39] See CCM 2 'Market Definition and the calculation of market share'
[40] See CCM 2 Market Definition and the calculation of market share-Paragraph 2.16-2.21

butchers to the MMA.[41] The process for imported slaughter cattle differs somewhat from that of the locally produced slaughter cattle. The supply chain is described in Figure 1 above.

Product market

3.7 This investigation is concerned with the upstream market. The 'upstream market' relates to the imports of slaughter cattle whereas the 'downstream market' relates to the market for the distribution and sale of the product of slaughter cattle which is fresh beef. The CCM had in its "Statement of Issues" focused only on the upstream market and had defined the relevant market as the "market for the supply of slaughter cattle in Mauritius".

3.8 Socovia's response[42] to the Statement of Issues argued that the market was wider than this, the "market for beef". Socovia based its arguments on its belief that the "available substitutes for beef are fresh beef meat, frozen beef and chilled beef". The above mentioned are considered to be "close substitutes as in the event of a price increase customers will shift from one to another".

3.9 In the light of this, the CCM decided that it was important to consider whether there are any competitive constraints downstream which may affect the demand for slaughter cattle upstream. If fresh beef and frozen beef are in the same downstream market, then frozen beef imports could act as a competitive constraint on the imports of slaughter cattle in the upstream market. The relevant market definition would thus have to be broader and incorporate the effect of imports of frozen beef meat on demand for slaughter cattle.

3.10 The CCM initially assessed this question through interviews with market participants. The evidence gathered was inconclusive. For instance, one of the other parties interviewed maintained that frozen beef could potentially be a competing product for fresh beef meat.[43] Another party believed that the market for beef meat could be further segmented into separate unrelated markets for fresh beef meat, frozen beef meat and chilled beef meat. For instance he believed that given a price rise, consumers who consume fresh beef meat would not switch to the consumption of frozen beef meat or chilled beef meat.[44] He also mentioned that the shortage of fresh beef meat will not affect the demand for frozen beef meat.[45]

3.11 To provide independent advice on this question of consumer substitution, the CCM commissioned a survey[46] to be conducted by an external company, TNS Analysis (TNS), a leading market research and insight company, whose findings are discussed below.

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41 **[✂--Confidential information]**

42 Paragraph 8 from Section C, Socovia's response to the CCM's Statement of Issues, dated the 23rd June 2010

43 **[✂--Confidential information]**

44 **[✂--Confidential information]**

45 **[✂---Confidential information]**

46 Survey on Consumption of beef meat in Mauritius, TNS Analysis, December 2010 [Annex 2]

Demand-Side substitution

Survey Methodology

3.12 The aim of the survey was to identify consumers' usages and preferences regarding the three categories of beef meat namely fresh (unpacked), frozen and chilled (i.e. fresh beef which is packed), identify the purchase behavior as well as measure the substitutability of the products and price sensitivity of Mauritian households consumers vis-à-vis fresh beef meat. The survey report is annexed in Annex 2.

3.13 500 face- to- face interviews were conducted with household managers who are responsible for the purchase of beef meat. The interviews were carried out in 6 central locations, ensuring that urban and rural areas were both covered. The respondents were chosen by TNS roughly to represent proportions of beef consumers. The profile of the consumers after having been reweighed according to actual national demographics is as follows: 44% of them live in urban areas while 56% live in rural areas. 10% of the consumers interviewed are Hindus, 33% are Muslims, 54% are from the General Population and 3% are Chinese. 45% of the respondents are from the higher socio economic class while 55% are from the lower socio- economic class.

3.14 Price sensitivity and consumer preferences were assessed through a conjoint analysis exercise. Conjoint analysis aims to identify the motivation factors which drive the choice of the type of beef. Four attributes were considered: type of beef, price, country of origin and place of purchase. Purchase scenarios were determined based on the following attributes and their levels:

- Type of beef: Fresh beef (unpacked),Fresh beef(packed i.e chilled),Frozen beef
- Price: Rs 75,Rs 90, Rs 105, Rs 120,Rs 135,Rs 150,Rs 165 and Rs 180
- Country of Origin: South Africa, Australia, India and unmarked-No country specified
- Place of purchase: Cold Storage, Market/ 'Bazar'/'La Foire', Super/Hypermarket, Butcher's Place.

Respondents were shown "concepts" (that is packages of these attributes and their levels) and were asked for their preference for these "concepts".

3.15 The price elasticity of demand (PED)[47] and cross price elasticity of demand (CPEoD) were calculated from these findings. The PED is a measure which is used to assess the responsiveness of the quantity demanded in response to a change in its price. In other words, it expresses the percentage change in demand for a product given a one percent change in its price.[48] CPEoD

[47] E_d=% Change in qty demanded/% Change in price=$(\Delta Q_d/Q_d)/\left(\frac{\Delta P}{P}\right)$

[48] If Price elasticity of demand is <1, then demand is price inelastic (the percentage change in quantity demanded is smaller than that in price. Hence, when the price is raised, the total revenue rises, and vice versa); if price elasticity of demand is >1, then demand is price elastic (the percentage change in quantity demanded is greater than that in

refers to the percentage change in the quantity demanded of a given product due to the percentage change in the price of another "related" product.[49]

3.16 The conjoint analysis provides an appropriate framework through which the Small but Significant Non-transitory Increase in Price (SSNIP) test can be applied to define the relevant market.

Purchase behaviour

3.17 From the sample interviewed, 91% of all will mostly buy fresh beef while 86% of all the General population buy mostly frozen beef. 20% of all General Population will buy mostly chilled beef (fresh beef packed).

3.18 54% of respondents across all segments stated that they preferred fresh beef (unpacked), while 40% stated they preferred frozen beef and the remaining 6% preferred chilled beef. Fresh beef consumers stated that their preference for fresh beef (unpacked) was due to the meat having a "good taste" and being of a "better quality". Frozen beef was preferred mainly because it was "cheaper than other categories" and "readily available". Chilled beef (fresh beef packed) was preferred because of "availability, hygiene and good taste".

3.19 There was some evidence of cross purchasing; 31% of the total sample purchase both fresh and frozen beef. However, it was also found that 75% of the fresh meat consumers are likely to be loyal to their category, in that they would either go somewhere else to buy fresh meat or not buy anything else if fresh beef was not available. 59% of the frozen beef consumers are loyal to their category should frozen beef be unavailable compared to 44% for the chilled (fresh beef packed) category.

3.20 The market shares based on the total quantity of meat bought by respondents in the last four weeks across all categories show that fresh beef and frozen beef dominate the market. Fresh beef accounted for 50% of beef purchases while frozen beef accounted for 46% of beef purchases.

Conjoint analysis

3.21 The conjoint analysis has revealed that "price" is the main factor accounting for 47% of factors driving consumers' choice of type of beef while "country of origin" and "type of beef" account for 27% and 21% respectively.

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price. Hence, when the price is raised, the total revenue falls, and vice versa); if price elasticity of demand =1, then demand is unit elastic.

[49] CPEoD=(% Change in Quantity demanded for Good X)/(% Change in Price for Good Y). If an increase in the price of product Y (e,g here, fresh beef) results in an increase in the quantity demanded of X e.g frozen beef (While the price of X is held constant),then products X and Y are viewed as being substitutes. Products are weak substitutes when the CPEoD<1 and are strong substitutes when CPEoD>1.

3.22 A base scenario was then taken to test for price sensitivity. The market shares for the different types of beef were computed as per the base scenario. The market share for fresh beef (unpacked) with country of origin unspecified costing Rs 150 per pound and bought at the butcher is 47%. The market share for frozen beef costing Rs 105 per pound and bought at the Hypermarket/Supermarket with country of origin unspecified is 34%. The market share for fresh beef (packed) costing Rs 180 per pound and bought from a Hypermarket/Supermarket with country of origin unspecified is 19%.

3.23 Price increases of 5-10% and 15-20% were applied to the base scenario to assess the resulting effect on market shares of the three categories of beef. In response to a 5% increase in the price of fresh beef (unpacked), its market share will decrease slightly from 47% to 46%, while that of frozen beef will increase from 34% to 35%.The market shares for chilled beef (fresh beef packed) remained unchanged.

3.24 For a 10% price increase in the price of fresh beef (unpacked), the market share of fresh beef (unpacked) drops from 47% to 45% whilst the market share of frozen beef increases from 34% to 35%. The market share of chilled beef (fresh beef packed) increased from 19% to 20% in response to a 10% price increase of fresh beef (unpacked).

3.25 For a 15% price increase in the price of fresh beef (unpacked) the market share of fresh beef (unpacked) drops from 47% to 43% while that of frozen beef and chilled beef (fresh beef packed) increases to 37% and 20% respectively. For a 20% price increase, the market share for fresh beef (unpacked) will drop from 47% to 40% while the market share for frozen beef increased from 34% to 39%. The increase in the market share of chilled beef (fresh beef packed) in the event of a price increase of 20% in fresh beef (unpacked) is larger; from 19% to 21%.

3.26 The degree of substitution is captured by the PED. For a 5% change in the price of fresh beef (unpacked), demand for fresh beef (unpacked) will decrease by about 2.5%, as the price elasticity of demand is -0.51. For a 10 % change in the price of fresh beef (unpacked), demand for fresh beef (unpacked) will decrease by about 5%, as the price elasticity of demand is -0.51. The absolute value of the PED coefficient is less than 1, so demand for fresh beef (unpacked) is inelastic in the event of price increases of 5 -10%. This implies that price changes of 5-10% have little impact on the demand for fresh beef.

3.27 The PED is 0.66 and 0.80 for a price change of 15% and 20% respectively. This shows that demand for fresh beef (unpacked) is still inelastic but is more elastic than for a 5-10% price increase.

3.28 For a 5-10% price increase in the price of fresh beef, the CPEoD coefficient for frozen beef is 0.46 (less than one) and that of chilled beef (fresh beef packed) is 0.46 (less than one). They are both weak substitutes for fresh beef as a 5-10% increase in the price of fresh beef would lead to a 2.3% change in the quantity demanded for both frozen beef and chilled beef.

3.29 For a 15-20% price increase in fresh beef, the CPEoD coefficients for frozen and chilled beef are therefore 0.59 and 0.72 respectively. Consumers may substitute more to frozen and chilled beef (packed) in the event of 15-20% price increases but these two products will still be weak substitutes to fresh beef.

3.30 As per paragraph 2.16 of CCM Guidelines 2, the CCM will look at the "*narrowest market for which a monopolist of all the products in that market would be able to profitably increase the price of the product being investigated by a small amount (5-10%) over a sustained period*". The survey results have shown that the PED is 0.51 which would result in increases in the company's revenue of around 2.3% and 4.4%[50] in the event of price increases of 5% and 10% respectively. Since the net impact on revenue is positive, implying that the increase in revenue from a higher price outweighs the decline in revenue from a drop in quantity demanded, it appears that it would be profitable for a hypothetical monopolist of fresh beef to increase its prices by 5-10%. Competition from frozen and chilled beef therefore does not seem to provide a constraint on fresh beef pricing sufficient to consider all three products to be in the same market.

Conclusion on demand side substitution

3.31 The CCM will consider the range of 5% to 10% price increases and its subsequent effects on demand side substitution, in line with the international practice in the field of Competition Economics and the CCM Guidelines on market definition and the calculation of market shares (CCM Guidelines 2), in particular Sections 2.15 – 2.21.

3.32 The survey shows that consumers of fresh beef may substitute to frozen and/or chilled beef in the event of a price increase of 5-10% in fresh beef, but only to a limited extent as evidenced by the PED coefficients of less than one. The extent of substitution is not sufficient to make a rise in the price of fresh beef unprofitable. The CCM can thus infer that the downstream market for fresh beef can thus be defined as: <u>The market for the supply of fresh beef in Mauritius.</u>

Supply- side substitution

3.33 In the event of a small but significant price increase in the price of fresh beef, other suppliers may not be able to enter the market within a year. Local production of slaughter cattle cannot be increased sufficiently in a short time period due to constraints on breeding. The CCM notes that from its various information gathering interviews that there are certain barriers to entry in the market for the supply of slaughter cattle in Mauritius. These are described below:

a) <u>Securing access to a cattle carrier</u>

The CCM has been informed that gaining access to a cattle carrier is a difficult process. The costs involved are substantial and a cattle carrier viable for the Mauritian market would be one which can carry about 1,000 heads of cattle (equivalent to a tonnage of around 320,000 kilograms),

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[50] To assess change in revenue= (1+% increase in price)* (% decrease in quantity demanded)+(% increase in price)

given the limited demand in Mauritius. The CCM has come to understand that it is difficult to charter a cattle carrier with this capacity and which meets the NSPCA requirements available for the Mauritius route, given the repositioning costs. The CCM understands from the statements of related parties[51] to the investigation that the costs of transporting live cattle by air are far more expensive than the costs of transporting by sea. Hence, the only viable means of importing slaughter cattle in Mauritius is by chartering a cattle carrier. This will be further discussed in the *Assessment of Facts* section.

b) <u>Limited demand</u>

The local market can only accommodate 800 to 1,000 cattle heads per month. Any new entrant who would succeed in chartering a second specialized cattle carrier would do so at the risk of inundating the market for live slaughter cattle in Mauritius and hence incur substantial capital and financial losses.[52]

Conclusion on supply side substitution

3.34 Consequently, there is no apparent supply substitutability to the importation of slaughter cattle.

Conclusion on the product market

3.35 Importers of slaughter cattle do not face competitive constraints from frozen beef imports. Fresh beef and frozen beef are in two different markets on the demand side and there are high barriers to entry on the supply side. The upstream market will only include the imports of slaughter cattle.

3.36 The CCM therefore concludes that the relevant <u>product</u> market is: The market for the supply of slaughter cattle.

Geographic Market

3.37 The suppliers of slaughter cattle sell cattle to butchers nationwide. In that context the geographic market is Mauritius.

Conclusion on the Relevant Market

3.38 The Executive Director has come to the conclusion from the above that the relevant market for this investigation is:

<u>The market for the supply of slaughter cattle in Mauritius.</u>

[51] **[✂--Confidential information]**
[52] **[✂--Confidential information]**

Market share and concentration level of the market

3.39 Once the CCM has defined the relevant market, market shares of the company under investigation can be assessed. The CCM has for this purpose used volume-related measures to calculate market shares because revenue-related figures are unavailable.[53]

3.40 For analytical purposes the CCM has focused on market shares and indices based on market shares such as the Herfindahl-Hirschman Index (HHI)[54] which is used to assess the concentration level of the market.

3.41 Based on data obtained during the course of its investigation from the MMA and the *Digest of Agricultural Statistics* published by the Central Statistics Office (CSO)[55], the CCM has determined market shares and the Herfindahl-Hirschman Index. Table 1[56] illustrates the data on supply of slaughter cattle and Table 2 illustrates the market shares as well as the HHI figures over the period 2005 to 2009.

3.42 The market share for imported slaughter cattle (as shown in Table 2) in the market for the supply of slaughter cattle in 2009 was approximately 98%.The HHI for the year 2009 (as at Dec 2009) is above 9,500 which signifies that the market for the supply of slaughter cattle is highly concentrated.[57]

3.43 Data on imported slaughter cattle have also been analyzed and the result is shown in Tables 3 and 4. The market shares show that Socovia is the leading importer for the past 6 years and in 2009 and 2010. Socovia's share of imports is 100% and its market share is 98%.

3.44 Based on the thresholds defined in the Competition Act 2007 which state that "A monopoly situation shall exist in relation to the supply of goods and services of any description where 30% or more of those goods and services are supplied, or acquired on the market by one enterprise"[58], the CCM can infer from its analysis that Socovia as the sole importer of slaughter cattle is in a monopoly situation in the market for the supply of slaughter cattle in Mauritius.

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[53] See CCM 2 Market Definition and the calculation of market share

[54] The HHI is a standard index of concentration and it is most often used in anti-trust analysis. The Herfindahl-Hirschman Index is calculated as follows: It is the sum of the squares of the market shares of all suppliers to a market, where their shares are expressed as percentages. It can vary between 0, when the market is entirely fragmented (each firm has a market share close to 0) and 10, 000, when there is only one firm in the industry which has 100% of the market. See also CCM 5 Guidelines.

[55] Ministry of Finance & Economic Empowerment, Central Statistics Office, Digest of Agricultural Statistics 2008

[56] Source: MMA and the CSO

[57] Market concentration will be low if HHI is below 1,000; moderate when HHI is between 1,000 and 1,800 and high if the HHI is above 1,800.

[58] Competition Act 2007: Section 46.

Table 1: Data on supply of slaughter cattle (Source: [✂] (Jan 2009- Dec 2009) and [✂])

Slaughtered Cattle (No.)	2005	2006	2007	2008	2009
Local	431	578	560	165	198
Imports	10,621	10,421	7,251	8,307	8,687

Table 2: Market shares and the HHI for the market for the supply of slaughter cattle

Market Share (%) Herfindahl-Hirschman Index (HHI)	2005	2006	2007	2008	2009
Local	4%	5%	7%	2%	2%
Imports	96%	95%	93%	98%	98%
HHI	9,250	9,003	8,669	9,618	9,564

Table 3. Data on imported slaughter cattle [59](Source: [✂])

Slaughter Cattle Imports by Company (tons)	2005	2006	2007	2008	2009	2010
Socovia	4,000-5,000	4,000-5,000	3,000-4,000	4,000-5,000	3,000-4,000	1,000-2,000
Beef & Goats Ltd	-		-	-	-	-
Soreefarm Ltd	[✂]	-	-	-	-	-
[✂-Commercially sensitive information]	-	-	-	[✂]	-	-
[✂-Commercially sensitive information]	-	-	-	[✂]	-	-
Total imports	4,000-5,000	4,000-5,000	3,000-4,000	4,000-5,000	3,000-4,000	1,000-2,000

59 The figures for the year 2010 are not for the full year. They are up to June 2010.

Table 4. Market share of importers and HHI for imported slaughter cattle [60](Source: [✂])

Market Share (%) Herfindahl-Hirschman Index (HHI)	2005	2006	2007	2008	2009	2010
Socovia	**80-100%**	**90-100%**	**90-100%**	**90-100%**	**90-100%**	**90-100%**
Beef & Goats Ltd	[✂]	-	-	-	-	-
Soreefarm Ltd	[✂]	-	-	-	-	-
[✂-Commercially sensitive information]	-	-	-	[✂]	-	-
[✂-Commercially sensitive information]	-	-	-	[✂]	-	-
HHI	7,870	10,000	10,000	8,936	10,000	10,000

[60] The figures for the year 2010 are not for the full year. They are up to June 2010

4. Possible restrictive practices – legal background

Collusive Agreement

4.1 Sections 41 to 43 of the Act prohibit collusive agreements between enterprises.

4.2 In this section, we will focus on Section 41 of the Act pertaining to "Horizontal Agreements" under Part III – Restrictive Business Practices.

4.3 Section 41 of the Act prohibits "agreements or a provision of such agreement between enterprises that supply goods or services of the same description, or acquire goods or services of the same description, which have the object or effect of significantly preventing, restricting or distorting competition."

4.4 The definition of 'agreement'[61] is a wide one and includes concerted practice which is defined as "a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them."[62]

4.5 According to Section 2 of the Act, "agreement" means any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Mauritius or in part of Mauritius, and includes an oral agreement, a decision by an association of enterprises, and any concerted practice."

4.6 As per CCM Guideline 3 pertaining to "Collusive Agreements" at paragraph 1.2, "… The CCM will expect businesses to have their practices reviewed to ensure compliance with the law in this regard." Thus, it expects businesses involved in collusive agreements reached before the date the Act came into effect, to take steps to terminate such agreements from that date.

4.7 For the CCM to be able to impose financial penalties remedying collusive agreements, the agreement has to be "intentional" or "negligent." *A priori*, as has been argued by the main parties, the latter entered into a scheme for economic reasons pertaining to inter alia, economies of scale. In the light of this, Section 41(1)(b) is relevant because the effect of such an agreement or concerted practice may be anti-competitive. Section 41(1)(c) provides that the agreement needs to "significantly prevents, restricts or distorts competition."

Non- Collusive Horizontal Agreement

4.8 Section 44 of the Act deals with Non-collusive horizontal agreements. It provides for horizontal agreements that are not collusive under Section 41 of the Act to be reviewed, where:

[61] See Sec 2 of the Act
[62] See Sec 2 of the Act

(a) The parties to the agreement together supply 30 percent or more, or acquire 30 percent or more, of goods and services of any description on the market; and

(b) The Commission has reasonable grounds to believe that the agreement has the object or effect of preventing, restricting or distorting competition.

4.9 As set out in CCM 4: Guidelines on Monopoly situations and non-collusive agreements, at paragraph 6.3, Section 44(a) of the Act effectively translates the monopoly situation thresholds into a collective setting and the CCM will interpret this section accordingly. The CCM will investigate agreements under this provision and take action if necessary, if they have the object or effect of promoting behavior among the participating enterprises, or achieving outcomes, that the CCM would find to be an abuse of monopoly if the participating enterprises were a single enterprise.

4.10 Only agreements found to be non-collusive will be treated this way. An agreement to fix prices at a high level might be equivalent to an exploitative abuse of monopoly, but as collusive agreement it would be dealt with under Section 41 and fines may be levied.[63]

The Monopoly Situation

4.11 As per Section 46 of the Act, for a monopoly situation to exist, the Act sets a threshold of 30% of market share. It is to be highlighted that such a threshold of 30% does not constitute a breach of the Act.[64]

4.12 The CCM will review such a monopoly situation where it has reasonable grounds to believe that the monopolist is "engaging in conduct that has the object or effect of preventing, restricting or distorting competition[65] or constitutes exploitation of the monopoly situation.

4.13 The CCM will also take into account the factors listed in s46 (3) (a)-(d) when reviewing a monopoly situation.

4.14 Section 3 of the CCM Guidelines 4 is relevant in this case since it deals with "exclusionary abuse". As per paragraph 3.5, "'Anti-competitive foreclosure' is said to occur 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."

4.15 Furthermore, as per paragraph 3.23 CCM Guideline 4, " (…) A refusal to supply is most likely to be anti-competitive only where it concerns an essential upstream input, over which a supplier exerts significant market power, without which competitors to that supplier's downstream

[63] See CCM Guideline 4 para. 6.5
[64] See CCM Guideline 4 para. 2.9
[65] See Sec 46(2) of the Act

businesses are at a serious disadvantage. Similarly, a refusal to provide access to an essential facility (such as a dock) might have the effect of anti-competitive exclusion downstream, and thereby constitute an abuse of monopoly."

4.16 Following paragraph 3.5 CCM 4, when assessing whether competition is foreclosed, the CCM must take into account whether the anticompetitive conduct is "to the detriment of consumers or the economy in general."

Experience of other Competition Authorities

4.17 The "essential facilities doctrine" (EFD), was discussed in the Statement of Issues on this case. This approach is not explicitly referred to in the 2007 Competition Act in Mauritius, but is a form of monopoly abuse. As noted above, the Act is framed in terms of the effects of behaviour, rather than any specific situations being per se infringements (unlike competition law in some other jurisdictions). However, the 'essential facilities doctrine' is the term under which some other competition authorities have assessed situations that we think to be similar to the one under assessment here.

4.18 We therefore provide an overview of the doctrine and briefly review some judgments where it has been said to have been applied by the Courts.

4.19 The EFD has been applied in the United States and the EU, among other jurisdictions.

4.20 Essential facilities cases usually involve a monopolist operating in two vertically related markets. Generally the monopoly power exists in the upstream market, where the essential facility is controlled and this allows the monopolist to firstly maintain its control over the upstream market, as well as exclude others from both the upstream and the downstream markets.

4.21 An early example is *Otter Tail Power Co. v United States.*[66] In this case Otter Tail was in a monopoly position at both the wholesale and retail levels in the electricity market. Three towns, that had been previously purchasing electricity *from Otter Tail, joined together in* order to create their own municipally owned utility. Otter Tail retaliated by refusing to sell the group wholesale, and refusing to "wheel" or transmit electric power from other sources to these entities using its own power lines. This refusal to deal was deemed anti-competitive in terms of the Sherman Act. The Supreme Court required Otter Tail to provide access to its power lines, at reasonable rates and terms.

4.22 In *Aspen Skiing Co v Aspen Highlands Skiing Corp*[67], the Supreme Court noted that while the monopolist generally has no duty to deal with potential competitors it would be liable under

[66] 410 U.S. 366 (1973)
[67] 472 U.S. 585 (1985).

section 2 of the Sherman Act if it lacks a legitimate business purpose for its refusal to deal in those circumstances.

4.23 The most cited US case regarding the EFD is *MCI Communications Corp v AT&T*[68] in which the Seventh Circuit (Appellate Court at Federal Level) applied the doctrine explicitly and enunciated the principles as:

(a) Control of the essential facility by a monopolist;

(b) A competitor's inability practically or reasonably to duplicate the essential facility;

(c) The denial of the use of the facility to a competitor; and

(d) The feasibility of providing the facility to competitors

4.24 The US Courts have agreed that "essential" need not mean indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."[69]

4.25 In Europe, the doctrine has been widely applied and appears to be firmly rooted in EC cases. *Oskar Bronner v. Mediaprint*[70] is considered to be the leading case in Europe on the essential facilities doctrine. In *Bronner* the Court determined that it was *not* an abuse of monopoly for Media print, which owned the only newspaper distribution system in Austria and was excluding competition newspaper publishers in that it would not let them even pay to use its distribution system. While the Court applied the doctrine, it determined that there was no abuse of monopoly on the particular facts of the case, this was because it believed that there was no "technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home delivery scheme."

4.26 In *Bronner* it was relevant, in order to assess whether the refusal to grant access to a product or a service indispensable for carrying on a particular activity was an abuse, to distinguish an upstream market and a (secondary) downstream market."

4.27 In *Attheraces Ltd v. British Horseracing Board Ltd*[71], the plaintiff, Attheraces (ATR), supplied bookmakers with information relating to horseracing. To do so, ATR had to obtain pre-race data from the British Horseracing Board (BHB) concerning such matters as the name and time of the race, the names and ages of the horses, and so on. Relations between the parties broke down, however, and ATR took an action against BHB for abuse of monopoly claiming that the database

[68] 708 F.2d 1081, 1132-33 (7th Cir. 1983)
[69] See *Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 992 (D.C. Cir. 1977); *Jamsports & Enter. LLC v. Paradama Prods., Inc*., No. 02 C 2298, 2003 WL 1873563, at *11 (N.D. Ill. Apr. 15, 2003)
[70] Case C-7/97, [1998] ECR I-7791.
[71] [2007] EWCA Civ 38 (Ct. App.).

was an essential facility. The Court of Appeal accepted the broader view of the EFD, ruling that it would be a monopoly abuse if a seller refuses to grant access to an essential facility without a legitimate business justification and that this could apply *even* in cases where the upstream seller and downstream purchaser are not in competition with each other in the downstream market.

4.28 In *Microsoft v European Commission* [72] the EC Court of First instance held that Microsoft was required to grant competitors access to its trade secrets over which it had intellectual property rights (namely interoperability information), as on the facts, this information was indispensable to competition in the market for a downstream market (work group server operating systems) and that a refusal to licence involved a risk that competition in the downstream market would be eliminated. Microsoft's refusal to licence was therefore considered an abuse of monopoly.

4.29 In conclusion, case law from both the US and EU shows the Courts applying the doctrine where the upstream monopolist will not give access to an essential facility, be it a licence to IP rights, or use of a network or facility, if that facility is indispensable for competition to exist in the market. In addition it must be a facility that is not capable of being duplicated in an economically feasible way.

4.30 The refusal to allow access can therefore be considered an abuse of the monopoly power over the upstream essential facility, which could protect the monopolists power in the upstream, as well as restricting competition in both the upstream and downstream markets. These cases seem to the CCM also to be useful in assessing whether an infringement of the monopoly provisions of the Competition Act 2007 has occurred.

[72] Case T-201/04, *available at* http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79929082T19040201&doc=T&ouvert=T&seance=ARRET.

5. Assessment of Facts

Horizontal Agreement

Collusive Agreement

5.1 The nature of the agreement[73] between the parties has been set out in full above; it involves essentially collaboration between those parties to share elements of the business of importation of cattle. The parties are all involved whether directly or indirectly in the importation – all parties contribute in some way to the scheme and all receive profits in return.

5.2 There have been two written agreements, one between Socovia and **[✂]** and the other one between Socovia and **[✂]**. These agreements were made prior to the commencement of the Act. However, they clearly continue to have effect.

5.3 As for the other parties, i.e. **[✂]** and **[✂]**, there is no written agreement reflecting the agreement between the different companies in the scheme. According to CCM Guidelines 3 Paragraph 1.9, "…All that is required is that parties arrive at a consensus, an understanding, on the actions each party will, or will not take." On the basis of the evidence from the parties, it seems clear that such a consensus did indeed emerge. The parties are 'in agreement' just as are those with written agreements, in that they are recognizably part of the scheme.

5.4 As above, the reason for the collaboration is said to be the difficulty in catering to the low level of demand for beef in Mauritius. As a result of this issue, the parties have told us that they joined together, hoping to use the economies of scale created by collaboration to make the import of slaughter cattle financially viable.

5.5 Whilst there is clearly an agreement[74] between the parties, the CCM has seen little or no evidence to the effect that the agreement has the object or effect of

(a) Fixing the selling or purchase prices of slaughter cattle;

(b) Sharing markets or sources of supply of slaughter cattle;

(c) Restricting the supply of slaughter cattle, or the acquisition of them from any person

5.6 Therefore, absent these elements, the horizontal agreement between the parties cannot be said to be a collusive agreement.

[73] Reference is made to the collaboration under paragraph 2.21
[74] *Ibid.*

Non-collusive Agreement

5.7 Even though the agreement is not collusive under s41 of the Act, it can still be reviewed by the Commission under s44 of the Act.

5.8 Socovia is the sole importer of live slaughter cattle in Mauritius, therefore it can safely be said that the parties to the agreement together supply 30 percent or more of live slaughter cattle in Mauritius.

5.9 Further, by ceasing to be competitors, the parties are clearly restricting competition. Before the agreement, most of the collaborating parties were competing against each other in the importation of slaughter cattle, but after the collaboration, competition ceased. Therefore this would appear to be an agreement that restricts if not completely prevents competition. As stated earlier, the CCM will investigate agreements under this provision and take action if necessary, if they have the object or effect of promoting anti-competitive behavior among the participating enterprises, or achieve outcomes that the CCM would find to be an abuse of monopoly if the participating enterprises were a single enterprise. In effect, the investigation has not focused solely on the horizontal agreement between the parties, but the main concern of the CCM is the resulting monopoly, which we now consider below.

The Monopoly Situation

The relevant market

5.10 As above, the relevant market is the market for the supply of slaughter cattle in Mauritius.

5.11 As a result of the collaboration, and based on the analysis of market shares above, Socovia holds a monopoly position in the market for imported slaughter cattle (100% market share) or a wider market for the supply of slaughter cattle (90-100% market share) in Mauritius. As the TNS survey demonstrated, consumers' demand for fresh beef is inelastic. A monopolist of the supply of fresh beef can profitably raise prices, without competition from frozen and chilled beef rendering such a price rise uneconomic. With a 90-100% market share, Socovia is such a monopolist, particularly since local supply is constrained. Given the survey findings, Socovia does clearly "enjoy such a position of dominance in the market as to make it possible for that enterprise or those enterprises to operate in that market and to adjust prices or output, without effective constraint from competitors".

5.12 As stated above, the legal threshold above which an enterprise will be considered as having a monopoly position does not trigger a review under s46 of the Competition Act, rather the question is whether the monopolist's actions restrict, prevent or distort competition or exploit the monopoly situation.

5.13 The following analysis firstly sets out the facts which the CCM has gathered in order to determine whether or not Socovia is restricting or has restricted access to its cattle carrier.

5.14 Secondly, it will discuss whether its cattle carrier could be considered an "essential facility" that is, whether the current barriers to entry in the slaughter cattle import market are so insurmountable that access to the cattle carrier becomes essential in order for any potential importers to compete with Socovia.

5.15 When considering the Essential Facilities doctrine, the CCM will follow the tests laid down by the EU and US courts, in particular, whether:

(a) The monopolist has effective control of the essential facility

(b) Competitors or potential competitors do not have the ability to duplicate the essential facility

(c) There was a refusal of use of the facility to competitors or refusal on reasonable terms

(d) There is any feasibility of providing the facility to competitors.

5.16 If it is found that the cattle carrier is an essential facility and that Socovia has restricted or is restricting access to potential competitors, then it may be concluded that Socovia is restricting competition in breach of s46.

Is Socovia restricting access to potential competitors to the the cattle carrier it charters?

5.17 The CCM staff interviewed several industry participants in order to determine how easy it would be to access the cattle carrier chartered by Socovia for importation of slaughter cattle.

5.18 As set out above at para. 2.53, the **[✂]** told local breeders to import a small number of weaners for breeding. According to the **[✂]**, the local farmers had difficulty accessing a carrier and in the end, the **[✂]**was forced to organize the importation itself, as the local breeders had not been successful in chartering any carrier, and is now looking at chartering an aircraft.

5.19 One potential importer stated that he had been attempting to import cattle for the last two years, he researched the market by contacting farmers in South Africa and looking at Socovia's prices and reached the conclusion that importing slaughter cattle would be quite a profitable business, therefore decided to do so. He contacted the owner of Murray Express but was told that it had been contracted for 10 years and that Murray Express would not give space on the carrier unless Socovia gives permission. He stated that he had never approached Socovia for the purpose of asking whether it could provide them with space on the carrier.[75]

[75] **[✂--Confidential information]**

5.20 **[✂--Commercially sensitive information]**.[76]

5.21 When the CCM asked Socovia whether it would share the space on the carrier with other potential competitors, it stated that it sells cattle, not space on the carrier.[77]

5.22 In response to our Provisional Findings, Socovia states that ' *Murray Express has not been used by Socovia since* **[✂]***2010. It will next be in Mauritius for Socovia towards the* **[✂]** *2011. Throughout these seven months, access to the Murray Express was absolutely open and any potential competitor could have easily chartered the ship. Hence concluding that Socovia is restricting access to potential competitors to the Murray Express is just irrational and nonsensical.*[78]

5.23 Socovia also states in the Response to CCM's Amended Provisional Findings Report dated **[✂]** 2011, at Para. 34 that *' Socovia reiterates that as at present, it is not using the Murray Express anymore. The Murray Express is free and available to any importer who would like to charter it. The issue of space sharing on board the Murray Express no longer arises. The whole of the vessel is available for charter to any person and/or entity who wishes to use it for importation.'*

5.24 The CCM has contacted Vroon BV, in May 2011 to confirm whether the Murray express is available for charter to any interested party. Vroon BV stated that because South Africa has imposed an export ban for live cattle earlier this year as a result of foot-and-mouth-disease in South Africa, no export of live cattle was being carried out. Hence, the vessel was deployed in other markets for 7 months and was therefore not available during that period.

5.25 In conclusion, on the facts above it appears that access to an alternate carrier was as a consequence of a force majeur, in view of the ban on exportation of live cattle from South Africa, and non-availability of Murray Express, which was already redeployed in other market. As stated previously, based on information gathered, it appears that Socovia may have restricted access to Murray Express.

5.26 Although one importer was successful eventually at accessing the carrier, it is noted that it was not a competitor to Socovia (because the importation of cattle was for the production of milk) and that the voyage was only one off. Overall it does appear that Socovia is not willing to grant access to its chartered cattle carrier to competitors.

Can the cattle carrier chartered by Socovia be deemed to be an essential facility to supply the market for slaughter cattle in Mauritius?

[76] **[✂--Confidential information]**
[77] **[✂--Confidential information]**

5.27 As Socovia is presently the only entity involved in the importation of slaughter cattle into Mauritius, the question is whether use of its chartered cattle carrier is the only way to get into the market. If there are other ways for competition to arise in this market, then the exclusive use of its chartered cattle carrier by Socovia should not be restrictive to competition.

5.28 From the many fact-gathering interviews the CCM carried out, the following issues with entering the market for importation of slaughter cattle have been identified, these are noted in the market definition section as barriers to entry:

a) Access to an appropriate cattle carrier for importing slaughter cattle is difficult;

b) Costs of transport by air are prohibitive, at around USD$488 per head[79] (more than three times more expensive than by sea) and only a smaller number may be imported on each voyage.

c) Demand in the downstream market for beef is relatively low– only around 10,000 head per year therefore there is a risk of flooding the market.

Alternatives to using Socovia's Cattle Carrier

5.29 In order to confirm whether the cattle carrier is an "essential facility", the CCM has looked into whether there are any economically viable alternatives to using the cattle carrier chartered by Socovia.

Other cattle carriers

5.30 According to Socovia the maximum carrying capacity of the Murray Express vessel, the cattle carrier usually used by Socovia to import cattle, is 320,000 kgs which they always try to fill whenever they are importing, either with cattle or goats. This represents about 800 to 1000 heads of cattle. There was a consensus from the parties interviewed that demand in the Mauritian market for beef was limited to approximately 800-1000 heads a month. Therefore any carrier that was bigger than 320,000 kgs would be too large for the needs of the Mauritian market. While there are reportedly 93 livestock carriers available worldwide, there are only 12 carriers of this size or smaller according to the World Shipping Register.[80]

5.31 In addition the NSPCA requirements which are specific to South Africa mean that even those carriers may not be suitable for the Mauritian market, without significant modifications.

5.32 The CCM has interviewed some parties who have attempted to import by sea. The consensus amongst those parties is that due to the size of the market and NSPCA requirements for carrying cattle, it is not economically viable to charter a second cattle carrier to import by sea.

[79] Based on an average weight of 400 kg per head and on figures given by Air Mauritius in 2007.
[80] See http://e-ships.net/

5.33 One party told us that he has been trying to import[81] using another carrier for the last year or so with no success. He was interviewed earlier in the year and said that he intended to import cattle by another carrier, however when the CCM contacted him recently[82] he stated that he could not get a cattle carrier as the person responsible for the carrier refused to come to Mauritius.

5.34 Socovia intimated to the CCM after the Provisional Findings were issued for comment, that it has chartered another cattle carrier, **[✂]**, which on the **[✂]** 2011, unloaded **[✂]** heads of live cattle and **[✂]** heads of live sheep from **[✂]**.

5.35 The **[✂]** also unloaded a cargo **[✂]** heads from **[✂]** on **[✂]** 2011.

5.36 **[✂--Confidential information]**[83]

5.37 By chartering another cattle carrier, Socovia has demonstrated that it is possible to charter another cattle carrier other than the Murray Express to serve the Mauritian market for live slaughter cattle. Economic operation requires a reasonably steady supply. Others have sought to start their own import operations, judging that it would be economically viable to introduce a second carrier.

5.38 The CCM cannot conclude that it would be economically unviable for another enterprise to duplicate the facility, admittedly on smaller scale. If another enterprise arranged for a way to carry cattle by sea, Socovia may reasonably respond to long-term entry by reducing its own supply to avoid flooding the market.

5.39 There are of course other livestock carriers available which may be used. Some people allege that it is not financially viable to do so – the cost of chartering a carrier is approximately **[✂--Commercially sensitive]** per voyage (or approx. **[✂--Commercially sensitive]** per head), notwithstanding a one-off deposit of **[✂--Commercially sensitive]**. According to the parties, there would also be substantial repositioning costs of moving the carrier on to the Mauritian route.[84]

5.40 We note that cattle carriers using a sea-borne route are ships and inherently mobile. At least one potential importer has sought separate sea-borne carriers. Moreover, construction and adaptation of ships for different uses is commonly performed. From this assessment we cannot exclude the possibility that it is economically viable to introduce a second cattle carrier into the supply of cattle to Mauritius.

Imports by air

[81] October 2010
[82] December 2010
[83] 'Addendum to the Response of **[✂]** to the CCM's Provisional Findings Report', dated 19th March 2011.
[84] **[✂--Confidential information]**

5.41 An alternative to importing slaughter cattle by sea is by air. It has come to the CCM's knowledge that **[✂]**, Socovia and **[✂]** have imported slaughter cattle by air in the past.[85] Therefore, the CCM explored whether such an avenue is economically viable for importing slaughter cattle in Mauritius.

5.42 The CCM contacted South African Airways which stated that it is not involved in such operations. As for Air Mauritius, it stopped the air transportation of slaughter cattle on its passenger flights since 14th December 2007 for operational reasons. As for imports by cargo flights, Air Mauritius does not operate such flights anymore. There are currently no other airlines available to bring cattle into Mauritius.

5.43 Some interviewees said that importing by air was overly costly because of the weight of the cattle, and the high costs of air transportation generally. It was not considered to be a long term economically viable option.[86] The cost of chartering an aircraft to import weaners is very high-as at December 2007, the average rate charged was USD 1.22/kg[87] and it is likely that this can be carried out in this case only because of the financial backing from the Government.[88] Therefore importation by air appears to cost more than three times than importation by sea.

5.44 In conclusion, although air imports were carried out in the past, it seems that the only economically viable means to import slaughter cattle in Mauritius currently is by sea. In addition, potential importers state they are unwilling to import in this manner and no airlines currently offer the service.

Essential Facility

5.45 There is now pre-existing 'duty' on monopolists in Mauritius to provide access, which in our system is a matter for remedial decisions by the Commission. Mauritian competition law is different from that in the US and EU, as monopoly abuse is treated as a problem to be remedied for the future, rather than an 'offence' committed in the past[89]. Consequently, the emphasis other systems place on whether refusal to supply has happened in the past is not very relevant to our assessment. However, the E.U. and U.S. cases outlined above which applied the Essential Facility doctrine (EFD) do provide useful illustrations of when market power over an essential upstream input have the effect of restricting, preventing or distorting competition. The facts here are very similar to the facts in those cases – there is an upstream monopolist, Socovia, who has control over a facility, in this case, the cattle carrier it charters to carry slaughter cattle, access to which is essential for competition in the market for supply of slaughter cattle. The one difference is that the facility in question is a ship and ships are by their nature relatively easily moved and

[85] In the years 1999, 2000, 2004 and 2007

[86] **[✂--Confidential information]**

[87] **[✂---Confidential information]**

[88] **[✂---Confidential information]**

[89] This difference is discussed in the CCM's Guidelines on Monopoly Situations

transferred from one route to another, at different sizes and capacities so we cannot be sure that duplication of the facility is economically unviable.

5.46 We repeat here the criteria set out in the EFD cases:

(a) The monopolist has effective control of the essential facility

(b) Competitors or potential competitors do not have the ability to duplicate the essential facility

(c) There was a refusal of use of the facility to competitors or refusal on reasonable terms[90]

(d) There is any feasibility of providing the facility to competitors.

5.47 Applying the above to the facts, this case appears to be quite similar to those in the US / EU where the Essential Facilities doctrine was applied. Although the owner of this facility is Vroon BV, access to it appears to be effectively under the control of Socovia, a monopolist in the relevant market with a 90-100% market share. Therefore (a) is satisfied.

5.48 It is possible that the cattle carrier chartered by Socovia is an "essential facility". There are significant barriers to entry in the importation market. The costs of purchasing or chartering another carrier or importing by air are prohibitive. Despite there being potential competitors willing to enter the market, none have yet been successful. Nonetheless, the facility itself is a long-lived capital asset that is can be transported and moved from one route to another at relatively modest cost, compared to the long-run cost of an ongoing charter. (b) is likely not satisfied. However, point (b) would likely be satisfied if it were established that rental of carriers to potential competitors of Socovia alternative carriers were deterred as a result of interventions by Socovia, its affiliates or its agents.

5.49 From talking to industry participants and by its own admission, Socovia has not been and is not willing to give access to the carrier to potential competitors. Therefore (c) is satisfied. This is significant not because it indicates any offence having been committed, but rather as evidence that, now and in the future, Socovia's attitude to sharing space on the carrier is likely to deter entrants from importing by this route.

5.50 Providing access to the facility to competitors would be feasible. The investigative staff visited the Murray Express during the investigation. This visit was significant to help us determine whether it is feasible for Socovia to provide access to the carrier. The cattle carrier consists of different pens where a number of animals can be kept.[91] Therefore, it is reasonable to propose that different importers can import on the same cattle carrier, separated by pen. In addition, the

[90] But as noted above, this is more relevant to a system in which past behaviour is being assessed as an offence, rather than here being taken merely as evidence as to whether a situation exists that requires remedy.
[91] See Annex 1

animals have a tag in their ears, which drives out the practical problem of animals getting mixed together.

Final Findings

5.51 Therefore the CCM finds that:

(a) The relevant market in this case: "The market for supply of slaughter cattle in Mauritius".

(b) By collaborating on the imports of slaughter cattle Socovia, SODIA, Norfarm, Agromaster and Cattleco ("the parties") are involved in a non-collusive horizontal agreement in terms of Section 44 of the Act.

(c) That as a result of the non-collusive horizontal agreement between the parties, Socovia has become the sole importer in the relevant market and as a result is in a monopoly situation in terms of the s 46 of the Act, with 98%-100% market share.

(d) That it appears that Socovia has been refusing to grant potential competitors and even non-competitors access to the carrier.

(e) That Socovia's refusal to allow access to the cattle carrier it charters, is exclusionary but potentially legitimate denial of access by a commercial enterprise.

(f) This absence of competition is likely to result in detriments to consumers, who will not benefit from the normal advantages provided in a competitive market – lower prices and better quality.

6. Potential Remedies and Penalties

6.1 The CCM has found that by collaborating on the imports of slaughter cattle, Socovia, SODIA, Norfarm, Agromaster and Cattleco (the parties) are involved in a non-collusive horizontal agreement in terms of Section 44 of the Act. The CCM has also found that as a result of the agreement between the parties, Socovia has become the sole importer in the relevant market. The CCM has been unable to establish clear and convincing proof that Socovia's refusal of access to the cattle carrier it charters, is exclusionary behavior as per Sec. 46 of the Act.

Non-collusive horizontal agreement in terms of Section 44 of the Act

A review under Section 44 of the Act does not attract any financial penalties. However, under Section 60 of the Act, if the CCM finds that an enterprise is a party to a restrictive agreement falling within the terms of Section 44 of the Act, and that the agreement has the object or effect of preventing, restricting or distorting competition, the CCM may provide such directions to the enterprises as it considers necessary, reasonable and practicable to remedy, mitigate or prevent the adverse effects on competition that the CCM has identified.

Breach of the Act.

6.2 If the Commission decides that any or all of the concerns expressed in the final report constitute a breach of the Act, it has the power independently to remedy the conduct or take action to mitigate the effects of that conduct. Some potential remedies available to the Commission are set out below. At this stage, these should be regarded merely as a list of options. It is the Commission who decides on the remedies and/or penalties to be applied.

6.3 The CCM is empowered by the Act independently to remedy competition problems that it finds in its investigations. When deciding upon the remedies, the CCM shall have regards to: effectiveness, timeliness and proportionality.[92]

6.4 The purpose of the remedies will be to remove or mitigate the effects of anti- competitive behavior identified by the CCM.

6.5 It is stipulated in Section 60 of the Act that in relation to a restrictive business practice, or a monopoly situation, any conduct of the enterprise – (i) has the object or effect of preventing, restricting or distorting competition, or (ii) in any other way, constitutes exploitation of the monopoly situation, the Commission may give such directions as it deems necessary, reasonable and practicable to (A) remedy, mitigate or prevent the adverse effects on competition that the Commission has identified; or (B) remedy, mitigate or prevent any detrimental effects on users and consumers so far as they have resulted from, or are likely to result from, the adverse effects on, or the absence of, competition.

[92] CCM Guidelines 6

6.6 Further, Section 60 (3) of the Act stipulates that subject to subsections (1) and (2), a direction under this section may include, but is not limited to, a requirement that the enterprise to which it is given shall –

(a) terminate or amend an agreement;
(b) cease or amend a practice or course of conduct, including conduct in relation to prices;
(c) supply goods or services, or grant access to facilities;
(d) separate or divest itself of any enterprise or assets;
(e) provide the Commission with specified information on a continuing basis

6.7 Financial penalties are not applied to breaches of Sections 44 of the Act. Financial penalties can only be imposed in cases where an intentional or negligent breach of s41-43 occurs.

6.8 As pointed out in CCM6 - Guidelines on Remedies, remedies should not be seen as penalties. By imposing remedies, the CCM aims to make markets work better than they would otherwise have done, in the future.

6.9 Paragraph 4.1 of CCM6 states that the remedies applied by competition authorities can be divided into structural remedies, which aim to restore or enhance competition by changing the market structure, and behavioral remedies, which aim to change the behavior of enterprises.

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

(a) Direct the parties to terminate or amend the agreement[93];

(b) Direct Socovia and Vroon BV not to operate on an exclusive charter basis;

(c) Impose terms and conditions of access to the carrier on Socovia Ltee such as with specific terms and prices or a general requirement that prices for access are fair, reasonable and non-discriminatory and capacity availability that is clear and adequate to supply competitors

(d) Recommend that the importation of cattle be administered by the Government;

(e) Recommend Government to control access to a chartered or purchased cattle carrier;

(f) If none of the above would constitute an effective remedy, take no action.

[93] Reference is made to the collaboration under paragraph 2.21

Assessment of possible remedies

6.11 This section provides an assessment of the proposed remedies at paragraph 6.10 above in light of section 3 of the CCM guidelines 6 namely effectiveness, timeliness and proportionality as well as in terms of section 50 of the Act.

6.12 By virtue of section 50 of the Act, the Commissioners have a duty under Section 50(3) of the Act, to consider any offsetting public benefits, and whether and to what extent the benefits, if they are present, should be taken into account in determining the remedial action to be taken.

6.13 Section 50(4) stipulates that " A benefit shall be considered for the purposes of subsection 3(a) if it is shown that effects of any absence, prevention , restriction or distortion of competition are outweighed by specific gains in respect of –

(a) Safety of goods and services;

(b) The efficiency with which goods are produced, supplied or distributed or services are supplied or made available;

(c) The development and use of new and improved goods and services and in the means of products and distribution; or

(d) The promotion of technological and economic progress,

and the benefits have been or are likely to be shared by consumers and business in general.

6.14 The benefits of the current collaboration include:

(a) A stable supply of live slaughter cattle. In the past, prior to the agreement, shortages did occur and there was an unstable market structure, due to loss-making by firms involved in cattle imports.

(b) Potentially lower transport costs per head of cattle. Total costs of supply may rise from the operation of multiple ships, given that there are economies of scale in ship size for the cost of transport per head of cattle.

6.15 Below is an analysis of the remedies proposed:

- **Remedy A: Terminate or Amend the Agreement**

6.16 The CCM has determined that the monopoly situation has been created, or at the very least, reinforced when the parties came together under the horizontal agreement (see the collaboration under paragraph 2.21) which binds them. By requiring them to terminate the said agreement, the parties will in future be able to compete among themselves in the market for importation of slaughter cattle in Mauritius. However, as the parties have themselves commented after the provisional findings, this agreement was entered after the parties have sustained losses in their respective business. Requiring a termination of the agreement may result in the parties stopping importation due to their inability of sustaining cost individually.

- **Remedy B:** Direct Socovia and Vroon BV not to operate on an exclusive charter basis

6.17 Mandating access to a facility is not a step which should be taken lightly. Therefore, before deciding whether to mandate access to the chartered cattle carrier of Socovia, the Commission needs to be confident that the carrier can indeed be termed an essential facility. In Para. 4.23 of this report, the CCM puts forward the criteria as enunciated in the *MCI Communications Corp & AT&T.* Further the CCM found that Socovia may have control over the Murray Express, but that there is no conclusive evidence to that effect.

6.18 Should the Commissioners find that the Murray Express is an essential facility, the Commissioners will need to determine whether by granting access to the facility to competitors, it will effectively address the competition problem. The CCM recognizes that any company, even if dominant, has the right to compete in the market by methods that would normally be permitted. Therefore, the Commissioners should be careful not to stop a firm, even a dominant one, from keeping and using to the maximum, any competitive advantage that it has acquired legitimately, even if its competitors do not have any similar advantages and may not realistically be able to obtain them. However, the Article 82 Guidance (now Art. 102), at paragraph 81, the EU Commission states that a refusal to supply raises concerns when all three of the following conditions hold:

(a) The refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;

(b) The refusal is likely to lead to the elimination of effective competition on the downstream market and,

(c) The refusal is likely to lead to consumer harm.

- Remedy C: Impose terms and conditions of access to the carrier on Socovia Ltee such as with specific terms and prices or a general requirement that prices for access are fair, reasonable and non-discriminatory and capacity availability that is clear and adequate to supply competitors

6.19 As stated earlier, the owner of the facility is Vroon BV, but Socovia Ltee has chartered the carrier for a determined amount of trips, therefore Socovia Ltee may have effective control over the Murray Express.

6.20 By directing Vroon BV not to operate an exclusive contract with Socovia Ltee, the aim is to allow other importers to use the carrier to import slaughter cattle to Mauritius. However, the CCM believes that such a remedy might not be effective, mainly because Vroon BV is not a company which is registered in Mauritius. Therefore there might be enforcement issues through jurisdictional constraints. Further, it is the policy of Vroon to charter carriers on an exclusivity basis. Imposing any direction on it might only discourage it from dealing with Mauritian enterprises in the future.

Price Regulation

6.21 Should the Commissioners decide that mandating access to the carrier is a feasible option, other issues might crop up, for example, on what terms should access be granted. Indeed, mandating access necessarily involves detailed price regulation because an obligation on Socovia Ltee to supply the downstream firm with access will be meaningless unless the price it charges for access is specified. Firms can engage in constructive refusal to supply that has the same effect as an outright refusal to supply, that is to say, they can charge a price for the input that is so high that it makes it uneconomic for a downstream firm to purchase the input.

6.22 Therefore, price regulation becomes necessary should the CCM mandate access on the cattle carrier. As stipulated in CCM Guideline 6 at para. 4.24, the Act allows the CCM to issue directions to control prices. Competition authorities usually require the price to be reasonable and non-discriminatory, that is to say Socovia Ltee should provide access to third parties at the same price that it charges to its own downstream unit. However, it may be very difficult in practice to impute such a price. There are many drawbacks to imposing price regulation. First of all, it is considered to be highly interventionist. Secondly, calculating a reasonable price would involve complex calculations of costs, and the CCM might not have the resources to do so. Thirdly, mandating access at a 'reasonable price' might lessen the incentive for monopolists to invest in economically beneficial facilities.

6.23 As set out in CCM guideline 6, at para. 4.25, the CCM is not a price regulator, with the ability simply to intervene to reduce prices upon complaint. Any price control can only be imposed on a case by case basis following breaches of the Act. At Paragraph 4.26, the guideline states that price regulation is a powerful tool for the CCM, but it is one which should be used with caution.

Allocation of Scarce Capacity

6.24 The Commission could direct Socovia Ltee to allocate capacity on the cattle carrier fairly. If the decision to allocate scarce capacity was left to Socovia Ltee, there might be concern that it would discriminate against competitors. The CCM might need to intervene to decide how scarce supplies are allocated between potential customers. As stated in Par 5.50, the cattle carrier consists of different pens where a number of animals can be kept.[94] Therefore, it is reasonable to propose that different importers can import on the same cattle carrier. In addition, the animals have a tag in their ears, which drives out the practical problem of animals getting mixed together.

[94] Refer to Annex 1

6.25 Allocating scarce resources in this manner seems manageable, timely and proportional, as it would encourage more competitors to enter the market without much problem. However, other issues of economies of scale might crop up. If more competitors are allowed to import on the same carrier, this would imply that each importer will be able to import only a small quantity of animals. We would need to assess whether the loss of any economies of scale (increasing supply costs) would outweigh the benefits resulting from greater competition in supply.

- **Remedy D & E**: **Potential recommendations to Government**

6.26 CCM guideline 6 stipulates at Paragraphs 4.29- 4.31 that the Commission may make non-binding recommendations to Government. Such recommendations would be appropriate in two general circumstances. Firstly, when the Commission has concluded that certain Government policies or regulations contribute to the competition problem it has found, or secondly, if as a result of the CCM's investigation, it seems necessary to create permanent regulation over some matter, where it may be better for the Government to legislate or otherwise introduce regulation than for the CCM to do so through behavioural changes.

6.27 As a result, the Commission may recommend that the importation of cattle be administered by the Government. Local butchers and distributors can then buy the live animals from the government at a given price or on auction. This will solve the problem of exclusivity over the cattle carrier. By this measure, Socovia Ltee will no longer be involved in the upstream market, and it will compete in the downstream market.

6.28 The Commission may recommend that the government, through a competent authority or parastatal body, controls access to the cattle carrier. In this way, potential importers will be allocated space on the carrier, depending on the number of pens it wishes to rent on board the carrier. The government would not be involved in the importation of slaughter cattle as such, but rather it would rent space on the cattle carrier for importers to import cattle. At present, in the context of the Food Security Fund scheme, the local farmers wishing to make use of this scheme face a main barrier: getting access a cattle carrier. Possibilities of importing by air are currently being explored by the Ministry of Agro-Industry which is acting as facilitator between the local farmers and suppliers.

6.29 Coupled to the above, the Commission could recommend that the government purchases a cattle carrier of a size, which would cater for the Mauritian market. Under the Food Security Fund, the government has voted a budget of around Rs. 1 billion to encourage local production of cattle. Part of the fund could be used to purchase a cattle carrier and the carrier will make shuttle voyages between countries and potential importers could rent space on the carrier to bring cattle and other animals to Mauritius.

6.30 It must be noted that previously the government was involved with this market and lost money. Past experience on government operation of the market is not positive.

6.31 Governmental intervention could make the downstream market more competitive, such intervention might have significant impact on the business of Socovia Ltee, which is mainly in the upstream market. The Commission should consider carefully the costs imposed on businesses, when assessing the proportionality of its remedies. Further, the cost of the carrier will be significant and for the government to recoup that investment, the price it charges for space on the carrier will have to reflect the cost of the carrier. This measure might bring in more competitors in the market, but prices might not necessarily go down.

- **Remedy F: The Null Option**

6.32 Imposing an obligation on an upstream firm to supply downstream customers is not straightforward. It is likely that the CCM will need to specify the prices and some terms and conditions on which supplies must be made available. In a case like the present one, with the lack of a regulator in the market, the CCM may find itself becoming the regulator of access to the cattle carrier. This type of regulation will certainly require significant resources. In addition, mistakes in regulation can have significant implications for economic efficiency and consumer welfare. Having regards to the proportionality, effectiveness and timeliness of the above remedies and also the complexity of regulating access to the carrier and having regards also to Section 50(3) & (4) of the Act, the Commission may recommend that the status quo be maintained. That is, even if the Commission concludes that the Act has been breached, if the Commission sees that costs and benefits of the remedies proposed above do not resolve the primary problems, it might be preferable not to implement any of the above recommendations at all.

Overview of Potential Remedies

6.33 As set out above, there are many separate elements that the Commission could adopt as remedies. However, they effectively form three types of package:

(a) A 'private sector' solution, in which the Commission requires Socovia to adopt a package of measures to remedy the restriction, prevention or distortion of competition;

(b) A 'public sector' solution, in which the Commission recommends to Government that it adopt measures to remedy the restriction, prevention or distortion of competition; or

(c) The null option, in which no remedies are imposed, if none of the options above seem likely to be effective and proportionate.

6.34 The 'private sector' option is potentially administratively complex. As set out above, price controls and other details might be required. Such complex sets of behavioural remedies can be effective, but it is difficult for a competition agency to get all the details right, in an industry in which it has no direct involvement. The Executive Director believes that this package of remedies would be likely to be effective and proportionate <u>only</u> if Socovia actively co-operates in designing and implementing the remedies through undertakings that it itself draws up. To attempt to regulate this economic activity entirely from 'outside', by drawing up directions that would be imposed on Socovia without such active engagement is unlikely to be effective, and could result in very heavy costs being imposed upon Socovia and others.

6.35 The 'public sector' option involves recommending the Government to take over, or provide a parallel channel, for cattle imports. This could substantially affect Socovia's business, and may not result in as effective and proportionate a remedy as a private sector solution. <u>Consequently, this option is recommended only if Socovia does not actively engage with the CCM to propose details for a private sector option.</u>

6.36 The null option should be considered if there seems to be no realistic possibilities of either of the options above being effective and proportionate. As the 'public sector option' is merely a recommendation, and it would ultimately be for Government to decide whether to accept it, it is hard to see that it should be rejected at this stage.

7. Next Steps

7.1 This report will be sent to the Commissioners, the main parties and a non-confidential, excised version may be issued for the public.

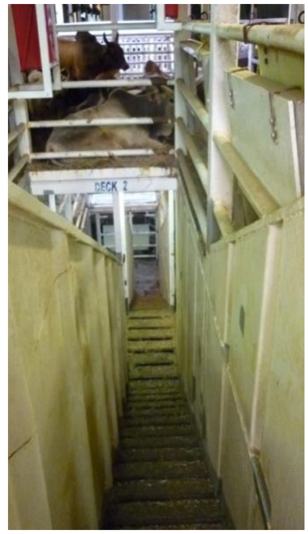
7.2 As per Part V, Section 55 of the Act, the Commission shall entertain requests for a hearing from the main parties, should the latter wish to have a hearing upon receipt of the report.

7.3 Finally, as provided under Part VI of the Act, the Commission must determine the case and associated directions.

7.4 After the issue of any directions by the Commission, the Executive Director may continue to monitor the market under review to see if the restrictive practice has ceased to continue.

8. Annexes

Annex 1: Pictures of Murray Express



Annex 2: Survey Report by TNS Analysis ([✂])

Annex 3: Comments by Parties to Provisional Findings ([✂])

Annex 4: Addendum to Provisional Findings by Socovia ([✂])

Annex 5: Comments by Parties to Amended Provisional Findings ([✂])

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