Investigation into the supply of coolers to retailers by Phoenix Beverages Limited and Quality Beverages Limited
CCM/INV/019

Report of Undertakings

Non – Confidential Version

19/03/2013
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I. Summary

1.1 On 18th May 2012, the Executive Director of the Competition Commission (hereinafter “Executive Director”) launched an Investigation, INV019, under Section 51 of the Competition Act 2007 (hereinafter “the Act”), into the supply of coolers to retail shops by Phoenix Beverages Limited and Quality Beverages Limited.

1.2 This investigation was initiated following observations by the Competition Commission (hereinafter “CCM”), to the effect that when either Phoenix Beverages Limited or Quality Beverages Limited grants a cooler to a retailer to stock the drinks produced or distributed by that particular company, the retailer does not stock any other competitor products in the cooler. An enquiry under Rule 5 of the Competition Commission Rules of Procedure 2009 (hereinafter “Rules of Procedure”) preceded this investigation.

1.3 In the course of this Investigation and as part of its information gathering process, the CCM conducted a series of information gathering meetings with representatives of both Phoenix Beverages Limited and Quality Beverages Limited – the main parties\(^1\) to the investigation as well as with auxiliary parties\(^2\) directly or indirectly involved with this investigation: competitor companies producing or distributing drinks in Mauritius as well as retailers. The CCM also obtained voluntary submission of information from Phoenix Beverages Limited during an information gathering meeting.

1.4 The Executive Director issued the Statement of Issues report to both Phoenix Beverages Ltd and Quality Beverages Ltd sets out the preliminary concerns that the Executive Director has in relation to the investigation relating to the supply of coolers to retail shops by Phoenix Beverages Limited and Quality Beverages Limited on 10th December 2012 in which in light of the information gathered, the Executive Director concluded that:

(a) both Phoenix Beverages Limited and Quality Beverages Limited are in a monopoly situation as defined under Section 46 (1) (b) of the Act in the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less;

(b) Phoenix Beverages Limited is in a monopoly situation as defined under Section 46 (1) (a) of the Act in the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less; and

1.5 The Executive Director invited the comments of both Phoenix Beverages Ltd and Quality Beverages Ltd on the Statement of Issues report. Together with its comments, Phoenix

\(^1\) Rule 2 of the Rules of Procedure defines ‘main party as being the party who is subject of an investigation’.

\(^2\) Rule 2 of the Rules of Procedure defines an auxiliary party as ‘a party who has an interest in the matter and has provided evidence to the Commission or to the Executive Director and includes a complainant’.
Beverages Ltd provided to the CCM Undertakings under Section 63 of the Act and Rules 28 of the Competition Commission Rules of Procedure 2009 on 19th March 2013. The Executive Director considered the Undertakings provided and two subsequent meetings were held with Phoenix Beverages Ltd to discuss the terms of the Undertakings. Furthermore, the Executive Director issued a Press Communique together with a Media Release on 11th March 2013 setting out the main provisions of the Undertakings provided by Phoenix Beverages Ltd, inviting the comments of any party which might be affected by the Undertakings proposed.

1.6 This report is being issued by the Executive Director under Section 63 of the Act to the Commissioners and relates only to Phoenix Beverages Ltd; that is, only one of the parties to the Investigation. Section 63 of the Act provides that the Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has about any prevention, restriction distortion or substantial lessening of competition. Therefore, should the Commissioners decide that the Undertakings offered by Phoenix Beverages Ltd resolves the competition concerns identified by the Investigation; they may accept them and publish them in the form of a decision of the Commission, which shall be binding on Phoenix Beverages Ltd.

1.7 This report lays down the Executive Director’s concerns which have arisen during the Investigation and subsequently assesses the Undertakings offered in light of those concerns. The concerns were in substance that by providing coolers to retailers on exclusionary policy, Phoenix Beverages Ltd might be abusing of its monopoly position in the market for both the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less and in the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less in that this conduct might lead to the potential foreclosure of those competitor companies which for reasons related to costs or space constraints are unable to provide coolers to retailers.

1.8 The Executive Director is of the opinion that the Undertakings offered by Phoenix Beverages Ltd satisfactorily address the competition concerns raised by the conduct of Phoenix Beverages Ltd which was being investigated.

1.9 Without prejudice to the continuance of the Investigation and any other assessment, findings and/or report in respect of the other party, Quality Beverages Ltd, the Executive Director recommends that the Commissioners accept the Undertakings offered by Phoenix Beverages Ltd.

1.10 This Report does not, in any way, however prevent the CCM from launching future investigations in the drinks sector; in relation to Phoenix Beverages Ltd and in relation to the products which were under scrutiny in this Investigation.
2. Background

The Concern

2.1 It was observed by the CCM that only the products of the particular company which has granted a cooler are stored in the cooler. Whilst the CCM understands that it is the common practice of companies to grant coolers with exclusive policy or exclusive agreement attached in the industry, this conduct can nonetheless have foreclosing effects on those competitor companies producing or marketing drinks such as carbonated soft drinks, still water, Malt-based non-alcoholic energy drink and beer and which are unable to provide coolers to retailers due to reasons associated with costs or space constraints in retail outlets.

2.2 The Executive Director sought therefore to know the rationale of this practice and what are the exclusionary agreements and/or policy of the companies granting the cooler and the likely effect that this conduct may have firstly on the market in general and secondly on competitors; that is, whether the conduct has the object or effect of preventing, restricting or distorting competition or in any other way constitutes exploitation of the monopoly situation.

2.3 The principal concern being investigated relates to whether the main parties to the investigation, Phoenix Beverages Ltd and Quality beverages Ltd, by granting coolers with exclusionary agreements or policy may constitute an abuse of their monopoly position whereby this may lead to foreclosure of those competitor companies which cannot provide coolers for their products due to resource or space constraints in retail shops.

Background information on Phoenix Beverages Ltd

2.4 There exists a wide market for ready-to-drink products and liquid refreshment beverages in Mauritius. By and large, they are carbonated soft drinks, fruit juice, fruit nectar, sparkling fruit juices, milk based drinks, yogurt drinks, water, malt-based energy drinks, beer and alcoholic drinks with varying degree of alcohol content. Both Phoenix Beverages Limited and Quality Beverages Limited are important stakeholders in the drinks market in Mauritius. Whilst Phoenix Beverages Limited is present both in the alcoholic and non-alcoholic drink market, Quality Beverages Limited operates only in the non-alcoholic segment.

Phoenix Beverages Ltd

2.5 Phoenix Beverages Limited started its operation in the year 1963 and is a public company listed on the Stock Exchange of Mauritius. Phoenix Beverages Limited is the authorised bottler of the products of The Coca-Cola Company in Mauritius, namely Coca-Cola, Fanta, Sprite, Schweppes, Dasani and Crystal table water. Phoenix Beverages Limited also produces Phoenix beer, Blue Marlin, Stella Pils, Pearona and Phoenix Cider. The company also
commercialises and sells foreign brands, such as Guinness Foreign extra Stout, Malta Guinness, Guinness Beer, Smirnoff Red Ice and Crystal table water. Appletiser, Grapetiser and Peroni beer are imported by Phoenix Beverages Limited³.

2.6 Phoenix Beverages Limited carries out its distribution through its own distribution network on a weekly basis⁴. Phoenix Beverages Limited has contracted out ten Managed Distribution Centres for additional support distribution⁵.

2.7 Phoenix Beverages Limited has 8,778 customers across all the retail channels of the island, out of which 485 relate to convenience stores and 6,549 relate to over-the-counter outlets⁶.

Grant of coolers

2.8 Phoenix Beverages Limited provides coolers to retailers to enable the latter to sell their respective products chilled⁷. Both Phoenix Beverages Limited and Quality Beverages Limited place coolers in retail shops on the request of the latter. Both Phoenix Beverages Limited and Quality Beverages Limited grant coolers to retailers free of charge whilst retaining the ownership of those coolers. The maintenance of the coolers is therefore the responsibility of the main parties. Phoenix Beverages Limited has granted around 9,000 coolers to date for both its Phoenix Beer products (the cooler bearing the label of Phoenix beer) and the non-alcoholic products (the cooler bearing the label of Coca-Cola).

2.9 The overall objective in supplying coolers is to enhance the quality of the product for the consumer who is purchasing the product for immediate consumption. The supply of coolers therefore represents an instance of non-price competition, a competitive edge that Phoenix Beverages Limited has over its competitors.

2.10 Phoenix Beverages Limited has no set of policies or parameters as to how coolers should be distributed⁸. Decision making for the allocation of a cooler is based either on sales volume, request from customer or customer importance, or a mixture of these⁹.

2.11 The other companies which grant coolers to retailers for their products and which are relevant for this Investigation are Stag Beverages Ltd and Compagnie Industrielle de Pailles Ltée; both 100% owned by Castel Group of Companies. Stag Beverages Ltd is in operation

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³ Information submitted to CCM by Phoenix Beverages Limited on 1st August 2012
⁴ Information submitted to CCM by Phoenix Beverages Limited on 1st August 2012
⁵ Information submitted to CCM by Phoenix Beverages Limited on 1st August 2012
⁶ Information submitted to CCM by Phoenix Beverages Limited on 1st August 2012
⁷ Filenote of Meeting - Factual Meeting held with representatives of Phoenix Beverages Limited on 1st August 2012 (CCMDN0004930) & Filenote of Meeting - Factual Meeting held with representatives of Quality Beverages Limited on 16th August 2012 (CCMDN0005185)
⁸ In response to the Statement of Issues, Phoenix Beverages Ltd reiterated on 8th February 2013 that “PBL has no written agreement confirming cooler exclusivity”.
⁹ Information submitted to CCM by Phoenix Beverages Limited on 1st August 2012
since 2009 with the production and bottling of beer as its main activity. The brand names of the beer produced are Stag beer, 1664, Ti la bière and Castel beer. Stag Beverages Ltd also sells Stag Malta, the only non-alcoholic and energy drinks within their portfolio. The products of Compagnie Industrielle de Pailles Ltée are non-alcoholic drinks: soft drink – Eski (the main product and brandname of the company), Orangina, water (sold under the brand name of loéla), fruit juice (sold under the tradename of Diégo), Ice tea and tonic water.

2.12 Phoenix Beverages Limited has informed the CCM that it does not have any formal agreement which embodies the terms and conditions upon which coolers are given to retailers and comprises also the ensuing obligations incumbent upon both Phoenix Beverages Limited and the retailers after the cooler has been granted. The CCM was however informed that it is the policy of Phoenix Beverages Limited to place in its cooler products manufactured and imported by Phoenix Beverages Limited only.

2.13 Even though Phoenix Beverages Ltd does not have any agreement embodying the terms and conditions upon which the cooler is being granted to retailers, it does have a planogram which it affixes on certain of its coolers granted for Carbonated Soft Drinks (Coca-Cola coolers) recommending the placement of products.

2.14 Below are reproductions of the planograms stickers:

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10 Filenote of Meeting - Factual Meeting held with representatives of Stag Beverages Ltd and Compagnie Industrielle de Pailles Ltée on 3rd August 2012 (CCMDN0004917)
11 Filenote of Meeting - Factual Meeting held with representatives of Phoenix Beverages Limited on 1st August 2012 (CCMDN0004930)
12 Filenote of Meeting - Factual Meeting held with representatives of Phoenix Beverages Limited on 1st August 2012 (CCMDN0004930)
13 In response to the Statement of Issues, Phoenix Beverages Ltd informed us on 8th February 2013 that “PBL does have a planogram sticker for recommended placement of certain of its products, but no Tabagie is under any obligation to by one or any of the products in the Planogram for sale. Purchase of any PBL products or range of products is fully discretionary on the Tabagie owner absolutely.”
14 Information submitted by Mr. Sanjeev Ghurburrun, legal representative of Phoenix Beverages Limited, by e-mail on 6th August 2012.
2.15 While drinks are sold through all the retail channels of the country, the focus of this investigation is only convenience stores (more commonly known as boutiques du coin or tabagies).

**Space constraints in retail outlets**

2.16 Given limited space in retail outlets, the retailer needs to decide how he chooses to maximize his floor space area and how to arrange and display the products intended for sales. In a typical retail shop the items which compete for floor space area are the shelves, the counter and cooler(s). The retailer is sovereign to decide how he will use the floor space area, in other words, whether the floor space area is used to accommodate more coolers or to display more products which do not require a cooler.

2.17 It has been observed that there is no hard and fast rule as to the size of retail outlets, nor is there any classification made by local authorities with respect to the size of shops\(^{15}\). The only criteria regarding size is in the Planning Policy Guidance issued by the Ministry of Housing and Land which provides that corner shops outside commercial areas should not exceed 60

\(^{15}\)Filenote of Meeting – Factual Meeting held with the Head Planner of the Municipality of [\(\times\)-Commercially Sensitive/Confidential Information]
Corner shops can be convenience shop, *tabagie* or *boutiques du coin*\(^{16}\). Albeit this classification, the CCM has observed that most of the corner shops in the country have a floor space area of 20\(m^2\) or less.

### Information gathered

2.18 As part of the information gathering process of the CCM, meetings were held with various stakeholder companies operating in the drinks market in Mauritius. The meetings were held to assess the degree of demand substitutability between the products of those companies and the products of the main parties and also to know whether those stakeholder companies do provide coolers; and if so, on what terms and conditions and if not, what are the main reasons accounting for them not doing so.

2.19 By virtue of the powers conferred upon the Executive Director under Section 30(d) of the Act, the CCM also gathered information from a sample list of retailers across the country. The CCM met eighteen (“18”) retailers around the island. Retailers with whom the meetings were held holding the following licences: general retailer of foodstuff and non-foodstuff, retail sale of food, beverages and tobacco, retailer of beer and alcoholic beverages.

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\(^{16}\)Filenote of Meeting – Factual Meeting held with the Head Planner of the Municipality of [\(<\text{-Commercially Sensitive/Confidential Information}>\)
3. The Competition Act and Guidelines

**The Act and the Guidelines**

3.1 The Act provides for monopoly situations at Section 46 of Sub-Part III of Part III of the Act. This section sets specific thresholds for market shares\(^{17}\) below which enterprises are presumed not to be in a monopoly situation and consequently, any specific conduct of theirs may not be investigated by the CCM.

3.2 The relevant provisions of Section 46 of the Act reads:

\[
\text{(1) A monopoly situation shall exist in relation to the supply of goods or services of any description where –}
\]

\[
\begin{align*}
(a) & \quad 30 \text{ per cent or more of those goods or services are supplied, or acquired on the market, by one enterprise; or} \\
(b) & \quad 70 \text{ per cent or more of those goods or services are supplied, or acquired on the market, by 3 or fewer enterprises. [Emphasis added]}
\end{align*}
\]

3.3 Although the Act does provide for the review of monopoly situations under particular circumstances, it is not in itself any breach of the law for an enterprise to be in a monopoly situation as defined above\(^{18}\). The Act conditions any review of a monopoly situation upon the Commission having “reasonable grounds to believe that [the] enterprise in a monopoly situation is engaging in conduct that

\[
\begin{align*}
(a) & \quad \text{has the object or effect of preventing, restricting or distorting competition; or} \\
(b) & \quad \text{in any other way constitutes exploitation of the monopoly situation}^{19}.
\end{align*}
\]

3.4 These two forms of conduct are referred to as ‘abuse of monopoly’ which can be abusive in their effects, even if such effects were not intended by any of the enterprises in question. Paragraph (a) of Section 46(2) is often referred to as ‘exclusionary conduct’\(^{20}\) whereas paragraph (b) of Section 46(2) provides for ‘exploitative conduct’\(^{21}\).

\(^{17}\) Market shares will depend on the market definition adopted by the CCM and may differ from the market in which parties to the investigation perceive themselves to be in. Guidance as to how the CCM proceeds in defining ‘relevant market(s)’ may be sought from *CCM2: Market Definition and the Calculation of Market Shares*

\(^{18}\) Paragraph 2.9 of CCM 4: Competition Commission of Mauritius Guidelines: Monopoly Situations And Non-Collusive Agreements (hereinafter “CCM Guidelines 4”)

\(^{19}\) Section 46(2) of the Act

\(^{20}\) Paragraph 3.1 of CCM Guidelines 4

\(^{21}\) Paragraph 4.1 of CCM Guidelines 4
3.5 Additionally, Section 46(3) of the Act stipulates a number of factors which the Commission must take into account in reviewing the monopoly situation for any abuse, namely:

   a) ‘the extent to which an enterprise enjoys or a group of enterprises 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 or potential competitors;

   b) the availability or non-availability of substitutable goods or services to consumers in the short term;

   c) the availability or non-availability of nearby competitors to whom consumers could turn in the short term; and

   d) evidence of actions or behaviour by an enterprise that is, or a group of enterprises that are, a party to the monopoly situation where such actions or behaviour that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers.’

3.6 It is to be noted however that any action taken by the CCM cannot result in the levying of a financial penalty for abuse of monopoly situation under the Act but the CCM may remedy any abuse of monopoly that may be established after formal investigation.

**Exclusionary abuse**

3.7 The monopoly provisions of the Act do not provide a comprehensive list of particular forms of conduct that will be considered anticompetitive business practices but rather lay emphasis on ‘the object or effect’ of such conduct that is ‘preventing, restricting or distorting competition […]’. However, guidance may be sought from the CCM Guidelines namely, CCM 4: Competition Commission of Mauritius Guidelines: Monopoly Situations And Non-Collusive Agreements (hereinafter “CCM Guidelines 4”) which provide a broad outline of particular forms of exclusionary conduct, including conduct involving ‘exclusive restrictive conduct’ and ‘anti-competitive foreclosure’.

**Anticompetitive Foreclosure**

3.8 Another concern about exclusionary abuse is that a monopolist firm is able to behave in a manner that is anti-competitive because it forecloses competitors. Anti-competitive

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22 The only form of restrictive practice that can result in a financial penalty under the Competition Act 2007 is a collusive agreement: price-fixing agreements, bid-rigging, market sharing or resale price maintenance.

23 Paragraph 1.4 of CCM Guidelines 4
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”

According to CCM Guidelines 4, ‘anticompetitive foreclosure will only be held to occur if consumers or the economy more generally are harmed as a result of the effect on competition – not simply because competitors are harmed’. CCM Guidelines 4 further state that ‘in assessing foreclosure, the CCM will normally consider whether the conduct is likely to result in increased profits for the monopoly enterprise, as a result of reduced competition’

3.9 Section 63 of the Act provides enterprises the opportunity to offer the CCM undertakings and stipulates that:

(1) An enterprise may offer a written undertaking to the Commission to address any concern that has arisen, or is likely to arise, during an investigation in respect of a restrictive agreement subject to investigation, a monopoly situation or a merger situation.

(2) The undertaking may be offered before the start of the investigation or at any stage during the investigation.

(3) The Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has about any prevention, restriction distortion or substantial lessening of competition.

(4) An undertaking accepted by the Commission shall be published by the Commission in the form of a decision of the Commission.

(5) An undertaking accepted by the Commission shall have effect as if it were a direction under section 60.

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24 Paragraph 3.5 of CCM Guidelines 4
25 Paragraph 3.6 of CCM Guidelines 4
26 Paragraph 3.11 of CCM Guidelines 4
Exclusive Restrictive Conduct

3.10 Even though not provided for specifically in CCM Guidelines 4, one form of exclusive restrictive conduct is contractual exclusivity. Applied to the facts of the case here, the contractual exclusivity is embodied in the fact that when Phoenix Beverages Limited grants coolers, retailers can stock only the products of Phoenix Beverages Ltd in the coolers. Contractual exclusivity has to be contrasted with exclusive agreements or exclusive dealings. Phoenix Beverages Ltd does not prohibit retailers from selling the products of its competitors but prohibits the use of their coolers to stock products of competitor companies.

Experience of other Competition Authorities

3.11 The concept of contractual exclusivity can under certain circumstances, be a form of monopoly abuse under the Act and can have anticompetitive effects. The concept of contractual exclusivity has been used by the other established competition authorities and the European Court of Justice for the purposes of applying competition law.

3.12 Under EU competition law, the relevant Articles on monopoly situations are Article 102 of the Treaty on the Functioning of the European Union, which were formerly Articles 81 and 82 of the EC Treaty prior to the ratification of the Lisbon Treaty and previously Articles 85 and 86 of the EC Treaty. Whereas Article 101 TFEU is concerned with agreements, decisions and concerted practices which are harmful to competition, Article 82 is directed towards the unilateral conduct of dominant firms which use their market power in an exploitative or in an exclusionary manner.

3.13 There is therefore an already established body of economic analysis and examples from the European Commission having used and applied the contractual exclusivity concept, and from which principles the CCM can draw in making its assessment, although it may not regard any such examples as binding ‘precedent’.


3.14 On 22 June 2005, the Commission of the European Communities through a commitment decision made the commitments offered by The Coca-Cola Company binding upon it. During its preliminary assessment, the Commission of the European Communities concluded that The Coca Cola Company and its respective bottlers were in a dominant position in the carbonated soft drink market. The Commission of the European Communities believed that some of the practices of The Coca – Cola Company in the supply of carbonated soft drinks,

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28 http://ec.europa.eu/competition/antitrust/cases/dec_docs/39116/39116_5_6.pdf
including *inter alia* practices relating to the exclusive supply might be in breach of Article 82 of the EC Treaty and Article 54 of the EEA Agreement, the relevant provisions prohibiting abuses of dominance.

3.15 The exclusivity restrictions which were embodied in technical sales equipment arrangements related to technical sales equipment including coolers, which is of relevance to this Investigation. Beverage coolers were provided by The Coca Cola Company on a rent-free basis to a customer, who on his part agreed to stock only the products of The Coca Cola Company in the cooler.

3.16 The Commission for the European Communities believed as part of its preliminary assessment that the strong market share of The Coca Cola Company together with the rent free cooler will not induce a customer to have a second cooler in his outlet. Furthermore, the exclusive cooler might in some instances, reduce the amount of competitor products available in the outlet.

3.17 With respect to this identified practice, The Coca – Cola Company undertook to maintain the following policy when it provides a rent-free cooler:

(a) where the customer has another cooler in his outlet, the customer can use the cooler provided by The Coca – Cola Company to stock its products exclusively;

(b) where the customer does not have any other cooler in his outlet, this customer shall be entitled to use 20% of that cooler to place any other product.

*Case C-552/03 P - Unilever Bestfoods (Ireland) Ltd (formerly Van Den Bergh Foods Ltd, previously named HB Ice Cream Ltd) v Commission of the European Communities (Masterfoods Ltd and Another, intervening) – Order of the Court of Justice of the European Communities* 29

3.18 Unilever Bestfoods (Ireland) Ltd 30 (hereinafter “the appellant”) the leading producer of impulse ice-cream in Ireland supplied to retailers while retaining ownership, freezer cabinets either free of charge or on small rent. The retailers were however bound to stock only the products of the appellant in the freezer. The appellant also maintains the freezers granted to retailers free of cost. Masterfoods Ltd subsequently entered the market and retailers started stocking its products in the coolers provided by the Appellant. This led the appellant to enforce the exclusivity agreement with retailers. Masterfoods initiated a complaint with the Commission of the European Communities to the effect that the exclusivity agreements were in breach of Articles 85 and 86. The Commission of the European Communities (hereinafter “the Commission”) formed the initial view that the Appellant’s exclusivity agreements with retailers breached Articles 85 and 86 of the EC Treaty.

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29 [2006] 5 C.M.L.R 27
30 Formerly named Van den Bergh Foods Ltd and previously named HB Ice Cream Ltd
3.19 The Commission observed that the appellant’s agreements relating to freezer cabinets installed in outlets have the effect of restricting the ability of retailers who are parties to those agreements to stock and offer for sale in their outlets impulse products from competing suppliers, in circumstances where the only freezer cabinet or cabinets for the storage of impulse ice cream in place in their outlets have been provided by the appellant, where that cabinet is unlikely to be replaced by a cabinet owned by the retailer or supplied by a competitor, and where it is not economically viable to allocate space to the installation of an additional cabinet. It considers that the effect of this restriction is that the competing suppliers are precluded from selling their products to those outlets, thereby restricting competition between suppliers in the relevant market.

3.20 The Commission found that ‘newcomers to the outlet are foreclosed’ from them and that ‘although this foreclosure is not absolute, in the sense that the retailer is not contractually precluded from selling other suppliers’ products, the outlet can be said to be foreclosed in so far as entry thereto by competing suppliers is rendered very difficult’.

3.21 The Commission concluded that the appellant had ‘abused its dominant position in the relevant market … in that it induce[d] retailers … who d[id] not have a freezer cabinet for the storage of impulse ice cream either procured by themselves or provided by another ice cream supplier than [the appellant] to enter into freezer-cabinet agreements subject to a condition of exclusivity’ and that ‘the inducement [took] the form of an offer to supply the freezer cabinets to retailers, and to maintain them, at no direct charge to the retailer’.

3.22 The Commission further held, having regard to the specific features of the product in question and the economic context of this case, that the network of the appellant’s distribution agreements together with the supply of freezer cabinets ‘without charge’ subject to the condition of exclusivity, have a considerable dissuasive effect on retailers with regard to the installation of their own cabinet or that of another manufacturer. The Commission also concluded that despite the fact that it is theoretically possible for retailers who have only freezer cabinet from the appellant to sell the ice creams of other manufacturers, the effect of the exclusivity clause in practice is to restrict the commercial freedom of retailers to choose the products they wish to sell in their sales outlets.

3.23 The Commission’s decision was upheld by the Court of First Instance and the Court of Justice of the European Communities.
4. The Market Definition

4.1 The relevant market is a defined set of products which could compete with other products and a defined geographical area within which competition occurs\(^{31}\).

4.2 The product market is defined after taking into account the substitutes of the product from both the demand side and supply side. 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”\(^{32}\).

4.3 This section identifies the relevant market or markets within which the main parties to the investigation operate in view of determining their respective market share in accordance with the CCM Guidelines CCM 2- Market Definition and Calculation of Market Shares.

4.4 The markets defined in this section do not reflect the CCM’s final views on the appropriate markets for the analysis of the conduct. They provide a framework for assessing the evidence and submissions at this stage of the investigation and may be revised in the light of additional evidence as the investigation continues.

4.5 The nature of the conduct of the main parties assessed so far is focused on the market for:

(a) the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less;

(b) the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less; and

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\(^{31}\)Paragraph 2.1 of CCM 2: Competition Commission of Mauritius Guidelines: Guidelines on market definition and the calculation of market shares (hereinafter” CCM Guidelines 2”)

\(^{32}\)Paragraph 2.16 of CCM Guidelines 2
The Product Market

Demand side substitution

4.6 The extent to which the supply of the products mentioned in paragraph 4.5 above, constitutes the relevant market(s) depends on the existence of competitive constraints on the behaviour of the producers concerned.

4.7 In this context, the list of potential relevant products has been itemised and assessed below:

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<thead>
<tr>
<th>Potential Relevant Products</th>
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<tr>
<td>Products displayed by retailers in coolers of Phoenix Beverages Ltd</td>
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<tr>
<td>Non-alcoholic</td>
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<tr>
<td>Carbonated Soft Drinks</td>
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<tr>
<td>Still Water</td>
</tr>
<tr>
<td>Malt-Based Energy Drinks</td>
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<tr>
<td>Alcoholic</td>
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<tr>
<td>Beer, Smirnoff Ice</td>
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<tr>
<td>Products that may be displayed in a cooler bought by retail shops</td>
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<tr>
<td>Non-alcoholic</td>
</tr>
<tr>
<td>Carbonated Soft Drinks</td>
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<tr>
<td>Still Water</td>
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<tr>
<td>Malt-Based Energy Drinks</td>
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<tr>
<td>Liquid Refreshment Beverages</td>
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<tr>
<td>Yoghurt drinks</td>
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<tr>
<td>Fruit juices</td>
</tr>
<tr>
<td>Other dairy products</td>
</tr>
<tr>
<td>Alcoholic</td>
</tr>
<tr>
<td>Beer</td>
</tr>
</tbody>
</table>

Figure 2: List of potential relevant products

4.8 All the products which are directly substitutable to the supplier’s products are likely to act as competitive constraints to the concerned producers. In order to understand whether the monopoly suppliers would foreclose competitors in competing markets (listed in figure 2 above), it would be crucial to identify the competing markets first. The likely affected
competing markets which would be displayed in a retailer’s own cooler due to the alleged behaviours of the producers concerned can be identified as the Carbonated Soft Drinks, Still Water, Malt-Based Energy Drinks and Beer.

**Carbonated Soft Drinks**

4.9 A carbonated soft drink is a carbonated beverage that typically contains water, a sweetener, and a flavoring agent. The sweetener may be sugar, high-fructose corn syrup, fruit juice, sugar substitutes (in the case of diet drinks) or a combination of these\(^\text{33}\). It is either sold at normal room temperature or chilled.

4.10 A determining factor for the demand of chilled carbonated soft drinks is customer preference. A customer might prefer a chilled drink over a non-chilled one for immediate consumption. The chilled beverage costs on average around 50 cents more than the non-chilled counterpart. It is generally observed that a customer would likely revert to buy a chilled beverage of another brand rather than buying a preferred brand of beverage non-chilled, given that the preferred or desired brand is not available at the store\(^\text{34}\). Information gathering meetings with retailers revealed that, customers who intend to buy a particular carbonated soft drink chilled are likely to stick to purchase any closest chilled carbonated soft drink as a substitute, if the former drink is not available chilled at that point in the retail outlet. Therefore, the likelihood of a customer asking a non-chilled drink as a substitute to the chilled counterpart seems to be very low.

4.11 The chilled carbonated soft drinks are sold at a temperature lower than normal room temperature and are mostly bought for immediate consumption, that is, to consume while the drink is still cold. A chilled drink’s nature is likely to change to a normal room temperature drink if it is consumed at a later stage and is not kept in a cooler until the consumption time. It is therefore unlikely that a customer will buy a chilled drink if the consumption is meant for a later point in time. Hence, a relevant criterion to consider when defining the relevant market, is the fact that the customer intends to consume the drinks immediately after purchase.

4.12 From a demand side perspective, chilled carbonated soft drinks might be each other’s substitute. When considering the demand side substitution of chilled carbonated soft drinks in relation to the other beverages, a price rise of 5-10% in a particular chilled carbonated soft drink would unlikely cause a shift in demand to chilled juice, if a customer desired that particular chilled carbonated soft drink for immediate consumption. Assuming all other prices constant and given the price change in the consumer’s desired carbonated soft drink, if he shifts his consumption to any of the chilled beverages other than a different brand of chilled carbonated soft drink, then carbonated soft drinks and that other beverage would likely be


\(^{34}\)Information gathered during meetings with retailers
close substitutes to the initially desired carbonated soft drink. From information gathered, it seems that customers are likely to switch within the carbonated soft drinks rather than opting out\(^{35}\). For instance, if the price rises for chilled Sprite, then the next best alternative might be a chilled Seven-Up. The relevant product market in this case is likely to regroup all the carbonated soft drinks in the same basket of substitutes.

**Still water**

4.13 Chilled still water is also likely to be part a relevant market to this investigation. A price rise in a particular brand of chilled bottled water is likely to cause demand to shift to another brand of chilled bottled water available on the market. Therefore as part of the market assessment, chilled bottled water will be one of the relevant markets defined.

**Beer**

4.14 Beer has been defined under the Excise Act 1994 as

\[ (a) \text{ a product having an alcoholic strength of not more than 9 per cent of alcohol by volume obtained from the fermentation of malt or any other saccharine substance and flavoured with hops or other bitters; and} \]

\[ (b) \text{ includes ale, porter, lager, stout or any other similar product manufactured and sold as beer} \]

4.15 The main characteristic of beer remains therefore that it is a drink with a minimal alcoholic content and this distinguishes the chilled beer from all the other types of chilled drinks listed in the figure above. From preliminary assessments, chilled beer represents a distinct relevant market to this investigation.

4.16 From a demand side perspective, if there is an increase in the price by 5–10% of Phoenix Beer, for instance, consumers are likely to shift to the next closest substitute, which could be Stag Beer in this case. The composition and the alcoholic level of the beer might make it less likely for a customer to shift from beer to other alcoholic beverages. A distant substitute could be flavoured alcoholic drinks (also known as alcopops) such as Smirnoff Ice.

4.17 A chilled beer is usually preferred to a non-chilled one. If a customer intends to consume the beer immediately after purchase, he would likely prefer to purchase a chilled beer rather than buying a preferred brand of beer non-chilled. Therefore, at this stage, the CCM is of the view that the relevant market in this case would be canned and bottled beer, stored chilled for immediate consumption.

\(^{35}\) Information gathered from meeting with retailers
4.18 Most of the retailers met by the CCM, had a floor space area of 20 m² or less. Consequently, limited floor space area acts as a constraint for stocking and displaying chilled products. A preliminary analysis from information gathered demonstrated that retail outlets of 20 m² or less face cost and space constraints and that these shops are likely to be harmed from the nature of behaviour under investigation. Supermarkets, hotels and restaurants are unlikely to face issues regarding the display and stocking of drinks chilled. The space available to place coolers and products on display in these places are relatively more than a retail outlets of 20 m² or less. Therefore, from preliminary assessments, the effect of the conduct will be assessed on these retail shops. However, if these effects are also found to be affecting retail shops of sizes more than 20m², then it will be considered at a later stage of the investigation.

4.19 From the supply side perspective, the different categories of chilled drink would not fall in the same market. If a producer is producing carbonated soft drink, the ability to switch production at short notice might be limited or constrained by huge conversion costs due to the added production lines. For instance, if the market for chilled juice becomes more profitable, a carbonated soft drink producer will not necessarily enter the juice market as the product has an altogether different composition and requires additional costs to be involved in the production processes. Similarly, if the market for any of the dairy drinks seems to be more profitable, that is in case of a 5-10% in the price increase of a particular dairy drink, a carbonated soft drink producer would not shift easily to the production of that specific dairy drink.

4.20 The effect of the alleged behaviours of the main parties would mostly affect retailers of sizes 20m² or less in Mauritius as a whole. Therefore the geographic dimension would be Mauritius for the relevant markets defined would be Mauritius.

4.21 From the above preliminary assessments, the potential relevant market(s) would therefore remain as:

(a) The provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less;
(b) The provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m$^2$ or less; and
5. Assessment of facts

The market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less

5.1.1 Phoenix Beverages Limited estimates its market share to be [✓-Commercially Sensitive/Confidential Information] in the non-alcoholic drinks market.

5.2 The Executive Director is of the view that Phoenix Beverages Limited and Quality Beverages Limited together have more than 70% of the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less. The competitor company which produces a product portfolio similar to Phoenix Beverages Limited and Quality Beverages Limited is Compagnie Industrielle de Pailles Ltée.

5.3 The market share of Compagnie Industrielle de Pailles Ltée for carbonated soft drinks is estimated to be [✓-Commercially Sensitive/Confidential Information] whilst for still water; it is estimated to be [✓-Commercially Sensitive/Confidential Information]. The market share of Compagnie Industrielle de Pailles Ltée in the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less.

5.4 The current monopoly power and the high market share in the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less of the main parties to the investigation can be attributed to a large number of factors, including the strong international brand recognition associated with Coca-Cola products and Pepsi-Cola products, the range of products within their portfolio, the long existence of Phoenix Beverages Limited and Quality Beverages Limited on the Mauritian market and the ability to supply coolers to retailers for their respective products, which as stated earlier, represents a form of non-price competition.

The effects of the exclusivity policy or agreement attached to the cooler in the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less

5.5 A cooler represents a cost and is an investment by the company which has granted the cooler. It is an investment into a non-price competition meant to enhance the quality of the product and simultaneously, its sales. As mentioned, in the relevant market(s) under investigation, a cooler is mandatory.

36 Information submitted to CCM by PBL on 1st August 2012
5.6 Given that a cooler usually costs between Rs 15,000 to Rs 30,000, retailers instead of spending their own resources for the purchase of a cooler, will rather request a cooler from their suppliers of carbonated soft drinks and water. Each of the 18 retailers met with during the information gathering exercise of this Investigation have at least one cooler from either of the main parties to the investigation. However, despite the cost of a cooler to their business and because of the exclusivity agreement or policy applying to the coolers granted by the main parties, some retailers still prefer and actually do have their own coolers in their outlet whereby they are free to put any products that they so wish when the space available so allows which and this cooler happens to be the second cooler in the outlet.

5.7 As mentioned, the grant of the cooler to retailers by the main parties to the investigation is subject to exclusivity policy and/or agreement. The issue is therefore what is the effect of this exclusivity on competitor companies?

**Information gathered from retailers**

5.8 The retailers met by the CCM were mainly general retailers of foodstuffs, beverages and tobacco whilst some were retailers of beer and alcoholic beverages, retailers of liquor and alcoholic products – off and retailer of liquor and alcoholic products on and off. These retailers stated that they generated monthly revenues of below Rs 20,000, to the exception of three who generated over Rs 20,000 and another three which chose not to disclose their monthly revenue.

5.9 The retailers informed the CCM that their suppliers of carbonated soft drinks and water are Phoenix Beverages Limited, Quality Beverages Limited and Compagnie Industrielle de Pailles Ltée. Whilst the number of coolers in the retail outlet differ according to the size of the retail outlet, on average, the retailers met have at least two coolers. The retailers have affirmed that space remains a constraint for them and 12 retailers affirmed that they cannot accommodate any more coolers.

5.10 Most of the retailers met by the CCM stated that the demand for a particular drink chilled is higher than the demand for the non-chilled counterpart.

**Compliance with the exclusivity policy or agreement**

5.11 Retailers that the CCM met informed the CCM that the frequency of visits of the representatives of Phoenix Beverages Limited mainly has been noted to be mostly on a fortnightly basis which can be extended to a monthly basis. They stated that the representatives will check the arrangement of products in the cooler and will arrange them in accordance with the planogram. On the other hand, if competitor products have been stocked in the cooler, the representatives will either ask the retailers to remove them or the representatives themselves will remove the competitor products or the representatives can
give the retailer a verbal warning asking them not to put competitor products again in the cooler.\textsuperscript{37}

5.12 The responses of the eighteen retailers met with have been illustrated in the diagram below:

![Diagram showing percentage responses from retailers]

**Figure 3: Percentage responses from retailers**

5.13 It could be noted that 61\% of responses showed that they received warnings while 33\% are either asked to remove the products or the competitor products are removed instantly by the representatives. The remaining 6\% showed that these retailers encountered no problems from their suppliers.

*Effect of the exclusivity policy or agreement on competitor in the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less*

5.14 Compagnie Industrielle de Pailles Ltée has informed the CCM that both Phoenix Beverages Limited and Quality Beverages Limited, will not allow that the products of Compagnie

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\textsuperscript{37} In response to the Statement of Issues, Phoenix Beverages Ltd informed us on 8th February 2013 that: “PBL has never withdrawn any cooler from a Tabagie in retaliation for any owner thereof putting third party products in the cooler; and that no financial penalty as enforcement: PBL has never imposed any financial penalty to any Tabagie where the owner would place third party products in a PBL cooler”.

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Industrielle de Pailles Ltd in their coolers and they even remove the products. It further informed that if a retailer its products of Compagnie Industrielle de Pailles Ltd is chilled, then it is very likely that the retailer will stop selling the products all together.\footnote{Filenote of Meeting - Factual Meeting held with representatives of Stag Beverages Ltd and Compagnie Industrielle de Pailles Ltd on 3rd August 2012 (CCMDN0004917)}

**Conclusion**

5.15 Taking into account case precedents in other jurisdictions, and the information gathered from retailers and other market players, the Executive Director preliminarily believes that the behavior of the main parties to the investigation, that is, granting coolers with attached exclusionary policy or agreement to retailers having an outlet of a floor space area of floor space area of 20 m\(^2\) or less in the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by those retail outlets might be in breach of the monopoly provisions of the Act in that it might be foreclosing the competitor supplier in those shops whose products cannot be supplied chilled by the retailer due to that exclusionary practice and that retailer does not have any other to stock competitors’ products.

**The provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less**

5.16 The Executive Director is of the view that Phoenix Beverages Limited has a market share of over 30% in the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less. The other producer of beer in the country is Stag Beverages Ltd. Stag Beverages Ltd estimates its market share in the wide market for beer in the country to be around [\*Commercially Sensitive/Confidential Information]. It estimates its market share in the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less to be less than [\*Commercially Sensitive/Confidential Information].

5.17 The current monopoly power and the high market share in the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m\(^2\) or less of Phoenix Beverages Limited can be attributed to a large number of factors, including the strong brand recognition associated with the product, the long existence of the product on the Mauritian market and the ability to supply coolers to retailers for the products, which as stated earlier, represents a form of non-price competition.
The effects of the exclusivity policy or agreement attached to the cooler in the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less

5.18 Retailers should have the required licence granted by the Mauritius Revenue Authority if they intend to sell beer and the CCM understands that there is no predetermined criterion with respect to the size of a retail outlet if it intends to sell beer and other alcoholic drinks.

5.19 Out of the 18 retailers met with by the CCM, 6 do sell beer and have a cooler which has been granted by Phoenix Beverages Limited.

5.20 A cooler represents a cost and is an investment by the company which has granted the cooler. It is an investment into a non-price competition meant to enhance the quality of the product and simultaneously, its sales. As mentioned, in the relevant market under investigation, a cooler is mandatory.

5.21 Given that a cooler usually costs between Rs 15 000 to Rs 30 000, retailers instead of spending their own resources for the purchase of a cooler, have a great incentive to rather request a cooler from their suppliers of carbonated soft drinks and water or beer. Each of the 6 retailers met with during the information gathering exercise of this Investigation have their cooler from Phoenix Beverages Limited for stocking of beer.

5.22 However, as mentioned, the grant of the cooler to retailers by Phoenix Beverages Limited to the investigation is subject to exclusivity policy and/or agreement. The issue therefore is the effect of this exclusivity on competitor companies.

Information gathered from retailers

5.23 The retailers informed the CCM that their suppliers of beer are Phoenix Beverages Limited and Stag Beverages Ltd.

5.24 Retailers having their own cooler stock the products of Stag Beverages Ltd in their own cooler whilst those who do not have their own cooler are unable to sell the products of Stag Beverages Ltd chilled.

Compliance with the exclusivity policy or agreement

5.25 The responses of the retailers met are the same as that described above since the retailer sells the other non-alcoholic drinks of Phoenix Beverages Limited along with beer.

Effect of the exclusivity policy or agreement on competitor in the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less
5.26 Stag Beverages Ltd has informed the CCM that Phoenix Beverages Limited will not allow that its products are stocked in their coolers and they even remove the products. It further informed that if a retailer wants its products of Stag Beverages Ltd chilled, then it is very likely that the retailer will stop selling the products all together.

Conclusion

5.27 Following the Statement of Issues Report, no further analyses were made due to the proposal of Undertakings by Phoenix Beverages Limited. Considering case precedents in other jurisdictions, and the information gathered from retailers and other market players, the Executive Director believes that the behavior of the main parties to the investigation, that is, granting coolers with attached exclusionary policy or agreement to retailers having an outlet of a floor space area of floor space area of 20 m² or less in the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by those retail outlets might be in breach of the monopoly provisions of the Act in that it might be foreclosing the competitor supplier in those shops whose products cannot be supplied chilled by the retailer due to that exclusionary practice and that retailer does not have any other to stock competitors’ products.

39 Filenote of Meeting - Factual Meeting held with representatives of Stag Beverages Ltd and Compagnie Industrielle de Pailles Ltée on 3rd August 2012 (CCMDN0004917)
6. Undertakings offered by Phoenix Beverages Ltd

6.1 In reply to the Statement of Issues Report issued to Phoenix Beverages Ltd by the Executive Director on 10th December 2012 and pursuant to Section 63 of the Act and Rule 28 of the Competition Commission Rules of Procedure 2009, on 19th March 2013 Phoenix Beverages Ltd offered Undertakings to the CCM to address the competition concerns identified by its conduct (i.e. granting coolers to retailers with exclusionary policy) in both the market:

(i) for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less and

(ii) the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less.

6.2 Two meetings were held between the Executive Director and the representatives of Phoenix Beverages Ltd to discuss the content of the Undertakings.

6.3 The Undertakings for the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less and the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less have been reproduced at Annex II and III respectively of this report.

6.4 Together with the Undertakings, Phoenix Beverages Ltd also provided comments on the Statement of Issues Report, which comments have been incorporated, where relevant, in this report. The written submissions of Phoenix Beverages Ltd on the Statement of Issues Report have been reproduced at Annex I of this report.

6.5 Both Undertakings, if accepted by the Commission, will remain in force for a period of five (5) years.

Main provisions of Undertakings offered for the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less

6.6 The main provisions of the Undertakings for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less include:

6.6.1 “Rent-Free Placement. Where PBL provides a Beverage Cooler on a rent-free basis, a customer may be required to stock that Beverage Cooler only with beverages distributed by PBL placing the equipment, provided the customer has other installed chilled beverage capacity in the outlet. Where a Beverage Cooler is provided on a
rent-free basis and the customer does not have other installed chilled beverage capacity in the outlet, the customer will be free to use 20% of that Beverage Cooler’s capacity for any products of its choosing. For the purposes of this provision, a cooler which is not on view, namely, for example, one kept in the back room or associated home of a customer annexed to a Tabagie (collectively “back room cooler”) but used for keeping products to be sold in a Tabagie shall be considered as constituting of an existing installed chilled beverage capacity in the outlet.”

6.6.2 “The Obligations under paragraph [6.5.1] does not apply to:

i. CSD products of competitors with a CSD flavour segment share of more than or equal to 30% or where this share is higher than that of the relevant equivalent PBL Branded CSD flavour; or

ii. Competitors of newly launched PBL Branded CSD products for a period for a period of 2 years from the launch of the said PBL Branded Product.”

Main provisions of Undertakings offered for the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less

6.7 The Undertakings for the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less relate to retail outlets of sizes 20m² having both off and on licences. The main provisions include:

6.7.1 “Rent-Free Placement. Where PBL provides a Beer Cooler on a rent-free basis, a customer may be required to stock that Beer Cooler only with Beer distributed by PBL placing the equipment, provided the customer has other installed chilled beverage capacity in the outlet. Where a Beer Cooler is provided on a rent-free basis by PBL and the customer does not have other installed chilled beverage capacity in the outlet, the customer will be free to use 20% of that Beer Cooler’s capacity for any products of its choosing. For the purposes of this provision, a cooler which is not on view, namely, for example, one which is in the back room or associated home of a customer annexed to a Tabagie (collectively ‘back room cooler’) but used for keeping stocks of products to be sold in the Tabagie shall be considered as constituting of an existing installed chilled beverage capacity in the Tabagie”.

6.7.2 “The Obligations under paragraph [6.6.1] does not apply to:

i. Beer products of competitors with a Beer flavour segment share of more than or equal to 30% or where this share is higher than that of the relevant equivalent PBL Branded Beer; or
ii. Competitors of newly launched PBL Branded Beer products for a period for a period of 2 years from the launch of the said PBL Branded Product.

iii. Any Off Licence Tabagie, if in the vicinity of 200m (two hundred metres) of the said Off Licence Tabagie, there is another retail outlet having a cooler sponsored by a competitor selling beer, or having a private cooler belonging to the retailer which is not a back room cooler.”

6.7.3 The Executive Director issued a Press Communique and a Media Release on 11th March 2013 launching a public consultation to gather the views and comments of any affected party on the proposed Undertakings, to determine whether the Undertakings as they have been provided, satisfactorily addresses the competition concerns raised during the investigation.
7. Assessment of the efficacy of the Undertakings

7.1 This section assesses to what extent the Undertakings provided by Phoenix Beverages Ltd resolve the competition concerns that would have arisen absent the Undertakings.

7.2 Given that the competition concerns identified in the Statement of Issues report and the Undertakings offered are more or less the same for both markets, the concerns are laid down below along with the arguments on whether the Undertakings address those concerns.

7.3 It is to be noted at the outset that both Undertakings, if accepted, will be valid for a period of five years.

7.4 It should further be highlighted that the gist of both Undertakings is same as that was offered by The Coca Cola Company to the EU Commission and which was accepted by the later.\textsuperscript{40}

7.5 The concerns of the Executive Director with respect to both markets are whether the exclusionary policy adopted by Phoenix Beverages Ltd would entrench its monopoly position in the market; prevents or excludes competitor companies from entering or remaining in the market and whether existing competitors or new competitors are able to offer coolers without charge and service it to retailers. It has to be noted that the concerns identified in the Statement of Issues report are not the definitive and final. Therefore, the Undertakings offered by Phoenix Beverages Ltd seek to address the concerns of the CCM as identified in the Statement of Issues Report and on the potential market definition as proposed by the CCM in therein.

7.6 The main Undertakings offered by Phoenix Beverages Ltd in both markets relate to the provision of 20% of the capacity of a rent free cooler which it provides to retailers so that the latter may store in it any products of their choosing. According to the planogram stickers, at figure 1 above, the size of the coolers which Phoenix Beverages grant for its Carbonated Soft Drinks are of 300 litres, 400 litres, 650 litres and 1000 litres. The Undertakings, therefore, allow retailers to use 60, 80, 130 and 200 litres respectively in the Coca – Cola coolers to stock any product of its choosing. The Executive Director is of the view that 20% of shelf space represents a fair amount of cooler space which will be given to competitors’ products and during the five years during which the Undertakings will remain in force, it can reasonably be expected that the Undertakings will allow retailers to propose to end consumers, competitor Carbonated Soft Drink, still water and beer products, chilled and thereby fostering a level playing field for the other competitors of Phoenix Beverages Ltd.

7.7 The granting of the 20% of cooler space is however conditional upon certain exceptions which are assessed below.

\textsuperscript{40} Paragraphs 3.13 – 3.16 above
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7.8 The first exception is that the undertakings will not be applicable to a competitor product having a market share of 30% or equal to that of Phoenix Beverages Ltd’s related product market share and Phoenix Beverages Ltd has undertook to appoint an independent market research expert to determine the market share of that competitor product.

7.9 On this point, the Executive Director is of the view that if a competitor product has a market share of 30% or equal to that of PBL related product, then such product would already have enough leverage on the market to constitute a competitive constraint on the products of Phoenix Beverages Ltd which stored in the coolers. The manufacturer of those products may find it easier to negotiate floor space with a retailer on par with Phoenix Beverages Ltd as opposed to a smaller competitor manufacturer of Carbonated Soft Drink where the retailer might not be willing to stock those products chilled if the retailers do not have cooler which has been given by those smaller competitors. The aim of this Investigation is not to make Phoenix Beverages Ltd lose market share, but rather work towards removing entry and expansion barriers, thus allowing other competitor products, which by space constraints cannot propose a cooler to the shop or have budgetary constraints due to its small size, to expose their products in the shop to be sold to end customers by allowing retailers to stock them chilled in the first place. Furthermore, the Executive Director is of the view that Phoenix Beverages Ltd has proposed pragmatic solutions as to how the 30% will be determined and the Executive Director believes that the appointment of an independent market research expert would indeed give a fair assessment of whether a competitor product has 30% so that they may be excluded from the purview of the Undertakings.

7.10 A second exception is that competitor products of newly launched Phoenix Beverages Ltd branded Carbonated Soft Drink products and beer products which will not be kept in the cooler for a period of 2 years.

7.11 The Executive Director believes that it is reasonable for the particular product to enjoy this protection for a period the specified time, as all new products usually need to be promoted and advertised for it to be able to gain market share. Thus on an undertaking lasting five years, a span of two years might be sufficient for it to gain market share and would cause minimal prejudice to competitor products.

7.12 The Undertakings will also not apply if for the purposes of this provision (of 20% shelf space in the cooler), a cooler which is not on view, namely, for example, one which is in the back room or associated home of a customer annexed to a Tabagie (collectively ‘back room cooler’) but used for keeping stocks of products to be sold in the Tabagie shall be considered as constituting of an existing installed chilled beverage capacity in the Tabagie.

7.13 The Executive Director assessed this condition and appreciates the fact that many shops or tabagies do indeed have a backroom cooler which it uses to store products to be sold in the shop or tabagie and as a consequence, many shops may be excluded from the purview of the
undertakings. The rationale behind this proviso seems to be that if a backroom cooler is present, the retailer will already have a means to store competitor Carbonated Soft Drinks, still water and beer products which can be supplied to customers should they wish to buy same chilled. Therefore, if the retailers are able to offer competitors’ products chilled by keeping products in a backroom cooler, the need for 20% space in a Phoenix Beverage Ltd cooler is nullified.

7.14 The only way by which the two Undertakings differ is on the issue of on and off license shops. Whilst Carbonated Soft Drinks and still water can be sold widely, there are restrictions in the way alcoholic drinks can be commercialized. Therefore, the Undertakings concerning Beer coolers provided by Phoenix Beverages Ltd include a particular condition relating to the off-licence shops.

7.15 In relation to the Undertakings offered by Phoenix Beverages Ltd for the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less, whereby the Undertakings will not apply to “any off Licence Tabagie, if in the vicinity of 200m (two hundred metres) of the said off Licence Tabagie, there is another retail outlet having a cooler sponsored by a competitor selling beer, or having a private cooler belonging to the retailer which is not a back room cooler”, the 200 metres represents a walking/driving distance between retail outlets. The rationale behind the non-application of the criterion is if the customer is prepared to walk for some metres around or drive to a maximum of 200 metres in search of the competing chilled beer, then it could be assumed that the competitive product is readily available, thus nullifying the reason and need for the provision of space in PBL’s cooler to competitor’s products.

7.16 It is submitted that the rationale for including the distance of 200 metres from an off-licence unfolds as follows: Customers demanding chilled beer are normally those who require an almost immediate consumption of the product, where the immediate consumption should not be taken to be on the spot consumption. There are legal restrictions prescribed by the Public Heath (prohibition on Advertisement, Sponsorship and Restriction on Sale and Consumption in Public Places, of Alcoholic Drinks Regulation 2008) as to the places where an alcoholic drink, including beer, can be consumed. When considering purchases from off licence retail outlet, therefore, this is possible if the customer intends to consume the chilled beer in a private area found in the vicinity of that particular retail outlet.
8. Assessment of the comments received on the Undertakings proposed by Phoenix Beverages Ltd further to the public consultation launched by the Executive Director

8.1 In assessing the efficacy of Undertakings offered by Phoenix Beverages Ltd, the Executive Director may have regard to the Competition Commission of Mauritius Guidelines 6 on Remedies and Penalties (“CCM Guidelines 6”).

8.2 Paragraph 3.2 of CCM Guidelines 6 provides that: “it is important to distinguish such remedies from penalties applied under Section 59 [of the Act]. Penalties can be applied only for intentional or negligent breach of the prohibitions on collusive agreements. They penalize past actions, to act as a deterrent against such breaches in the future. Remedies, in contrast, should not be seen as penalties. In imposing remedies, the CCM aims to make markets work better than they would otherwise have done, in the future. In particular, the CCM might make directions in order to remove restrictions to competition or otherwise to enhance (or prevent from worsening) the competitive working of the market. Where effective, such remedies will deal with the root cause of the problem. However, both Sections 60 and 61 [of the Act] also specify that the CCM may also remedy adverse effects, dealing with the symptoms of the problem as well as the causes.”

8.3 Paragraph 3.3 of CCM Guidelines 6 further provides that “in selecting a remedy, or package of remedies, the CCM will have regard to:

(a) Effectiveness;
(b) Timeliness; and
(c) Proportionality of implementation costs to the expected benefits of the remedy.”

8.4 Paragraph 3.6 of CCM Guidelines 6 states that: “the sole purpose of remedies is to remove or mitigate the effects of the anticompetitive effects identified by the CCM in its investigation, as published in its report. The CCM will not seek wider ‘remedies’ to promote competition in areas beyond those identified in its report.”

8.5 In seeking an effective and comprehensive solution, the CCM will normally strongly prefer remedies which enhance or protect the process of competition, rather than those which attempt to deal with the adverse effects of a failure of competition. This is because competition between independent enterprises is normally the best guarantor of good outcomes for customers, and for the efficient working of the economy as a whole. Remedies which deal only indirectly with weak competition, for example by restricting the ability of enterprises facing weak competitive constraints to exploit that position, are unlikely to be as
effective as strengthening those competitive constraints. Thus, when considering remedies the CCM will first seek a remedy that removes the problem by strengthening competition, only considering other remedies:

(a) If remedies to strengthen competition are unavailable;
(b) If the costs of implementing remedies to strengthen competition would be disproportionate to the benefits they would produce; or
(c) As an interim measure, if competition is expected to develop over time (possibly as a result of other remedies within the package adopted by the CCM)

8.5.1 On 11th March 2013, the Executive Director issued a Press communiqué and a Media Release, explaining to the public at large the contents of the Undertakings offered by Phoenix Beverages Ltd and inviting any party which has an interest in the outcome of the Undertakings to give their views and comments on the main provisions of the Undertakings. The Executive Director has gratefully received comments from [✓-Commercially Sensitive/Confidential Information]

8.6 This chapter assesses the contents of the comments received and assesses whether any of them should be taken into account when the Executive Director makes any recommendation to the Commission as to whether the Undertakings so proposed should be accepted by the latter.

**Media Release issued by the Executive Director on 11th March 2013**

8.7 For ease of reference, the Media Release issued by the Executive Director on 11th March 2013 has been reproduced below:
The Executive Director of the Competition Commission of Mauritius (CCM) has launched an Investigation (INV019) on 18th May 2012 into the supply of coolers to retail shops by Phoenix Beverages Ltd (‘PBL’) and Quality Beverages Limited (‘QBL’) to stock the respective company’s products under Section 46 of the Competition Act 2007 (the ‘Act’).

The CCM’s main concern related the small retail shops, which due to space constraints can accommodate only one cooler or because of limited budget, they cannot invest money on coolers so they have to rely on sponsored coolers. If the companies providing coolers place restrictions on which products can be stored in their respective coolers, then there is the risk that other competitor drinks which are produced by relatively smaller companies might be foreclosed from the market for chilled drinks for immediate consumption.

On 10th December 2012, following initial information gathering and assessment, the Executive Director produced and made available to both parties under investigation, a Statement of Issues setting out his initial views and likely concerns in relation to the Investigation.

The affected markets of the Investigation are:

1. the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less; and
2. the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less.

On 11th March 2013, PBL offered Undertakings under Section 63 of the Act to address the competition concerns identified in both of the relevant markets of the Investigation as laid down in the Statement of Issues.
Section 63 of the Act gives enterprises the opportunity to offer to the CCM Undertakings which resolve competition issues identified during an investigation and if, after taking cognizance of the report of the Executive Director on the matter, the Commissioners conclude that the Undertakings indeed resolve the competition concerns of the investigation, the Commissioners may accept the Undertakings and publish them in form of a decision of the Commission which will be legally binding on the enterprises.

The Undertakings offered by PBL to the CCM include the following:

In the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less

1. where PBL has provided a cooler to a retailer on a rent-free basis to stock its carbonated soft drinks products, the retailer will be free to use 20% of the cooler to stock any product of its choosing; provided that the retailer does not have any other chilled beverage capacity in his outlet;
2. a cooler which is not installed in the floor area of the retail outlet and kept in the back room or home of the retailer but used to stock products to be sold in the retail outlet is considered to constitute another chilled beverage capacity;
3. the 20% free space of the cooler at 1. above does not apply to competitors of carbonated soft drinks products having a market share of more than or equal to 30% or has a market share higher than the relevant product of PBL;
4. the 20% free space of the cooler at 1. above does not apply to competitors of newly launched PBL branded carbonated soft drinks products for a period of two years from the launch of that new product.

In the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m² or less

1. where PBL has provided a cooler to a retailer on a rent-free basis to stock its beer products, the retailer will be free to use 20% of the cooler to stock any product of its choosing; provided that the retailer does not have any other chilled beverage capacity in his outlet;
2. a cooler which is not installed in the floor area of the retail outlet and kept in the back room or home of the retailer but used to stock products to be sold in the retail outlet is considered to constitute another chilled beverage capacity;
3. the 20% free space of the cooler at 1. above does not apply to competitors of the beer products having a market share of more than or equal to 30% or has a market share higher than the relevant product of PBL;
4. the 20% free space of the cooler at 1. above does not apply to competitors of newly launched PBL branded beer products for a period of two years from the launch of that new product; and
5. the 20% free space of the cooler at 1. shall not apply to a retail outlet holding Off Licences if within a vicinity if 200 metres (200m) from that retail outlet, there is another retail outlet which has a cooler which has been provided by a competitor to PBL selling beer or has a private cooler
within its floor area (not a backroom cooler) which is used to stock products to be sold in the retail outlet.

The Executive Director is currently considering whether the Undertakings proposed by PBL satisfactorily resolve the competition concerns raised by the Investigation. The Executive Director is hereby inviting any person who has any concern with the proposed Undertakings to give his views on the matter. Parties affected by the proposed Undertakings are welcomed to contact the CCM to relay such concerns by latest **Friday 15th March 2013 before 15:00 hrs**. Views and comments can be submitted through written submissions via email, letter or fax, or they may alternatively request for an appointment with the CCM where their views and concerns will be heard.

Dr. Sean Ennis said ‘I welcome such Undertakings from parties subject to Investigations, which will then be forwarded to the Commissioners. If the Commissioners are of the view that the Undertakings resolve the competition concerns that may arise in the affected markets, they may accept the Undertakings. I equally believe that parties that feel affected by the Undertakings must get reasonable opportunities to express their views and concerns. Any person wishing to provide his views and concerns should therefore do so within the deadline provided for.’

**[End of media release]**

8.8 [X-Commercially Sensitive/Confidential Information]

8.9 [X-Commercially Sensitive/Confidential Information]

8.10 [X-Commercially Sensitive/Confidential Information]

8.11 [X-Commercially Sensitive/Confidential Information]

8.12 **“Point 3:**

*The above undertaking should apply to all competitors.”* [X-Commercially Sensitive/Confidential Information]
8.13 [•-Commercially Sensitive/Confidential Information]

8.14 [•-Commercially Sensitive/Confidential Information]

8.15 [•-Commercially Sensitive/Confidential Information]

8.16 [•-Commercially Sensitive/Confidential Information]

8.17 [•-Commercially Sensitive/Confidential Information]
8.18 [●-Commercially Sensitive/Confidential Information]

8.19 [●-Commercially Sensitive/Confidential Information]

[●-Commercially Sensitive/Confidential Information]

8.20 [●-Commercially Sensitive/Confidential Information]

[●-Commercially Sensitive/Confidential Information]
Investigation into the supply of coolers to retailers by Phoenix Beverages Limited and Quality Beverages Limited CCM/INV/019

8.21 [X-Commercially Sensitive/Confidential Information]

8.22 [X-Commercially Sensitive/Confidential Information]

8.23 [X-Commercially Sensitive/Confidential Information]
8.24 [X-Commercially Sensitive/Confidential Information]

[X-Commercially Sensitive/Confidential Information]

8.25 [X-Commercially Sensitive/Confidential Information]

[X-Commercially Sensitive/Confidential Information]
9. **Conclusion and recommendation to the Commission**

9.1 Due regard having had to the comments provided by [Commercially Sensitive/Confidential Information], the Executive Director is of the opinion that the Undertakings offered by Phoenix Beverages Ltd seeks to address the competition concerns identified in the Statement of Issues Report.

9.2 At the outset, the Executive Director wishes to point out that Phoenix Beverages Ltd has been very open to discussions in relation to the Undertakings. Their willingness to address the competition concerns which were identified in the Statement of Issues report is commendable.

9.3 The Executive Director is of the view that the Undertakings offered by Phoenix Beverages Ltd for both:

9.3.1 the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m$^2$ or less; and

9.3.2 the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m$^2$ or less,

satisfactorily addresses the competition concerns identified in the Statement of Issues report.

9.4 The Executive Director is of the opinion that the Undertakings offered by Phoenix Beverages Ltd are adequate to prevent any prevention, restriction or distortion of competition in terms of Section 46 of the Act which the exclusionary policy of Phoenix Beverages Ltd might have caused in the relevant markets of the investigation when offering coolers to retailers. Through the assessment detailed above, the Executive Director believes that he concerns identified in the Statement of Issues report and stated at Paragraph 7.5, the behavior of Phoenix Beverages Ltd, that is, granting coolers with attached exclusionary policy to retailers having an outlet of a floor space area of floor space area of 20 m$^2$ or less in the market for the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by those retail and in the market for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes 20m$^2$ or less will be mitigated by the Undertakings offered.

9.5 The Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an Undertaking if it considers that the Undertaking satisfactorily addresses all the concerns it has about any prevention, restriction distortion or substantial lessening of competition.

9.6 Since the Undertakings offered reasonably addresses and resolves all the competition concerns identified in the Statement of Issues Report in the market for:
9.6.1 the provision of carbonated soft drinks and still water in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes $20m^2$ or less; and

9.6.2 for the provision of beer in Mauritius for immediate consumption, supplied chilled by retail outlets of sizes $20m^2$ or less,

the Executive Director therefore recommends that the Commission accepts the Undertakings as per Annex II and Annex III of the report.
10. **Next Steps**

10.1 It is up to the Commissioners to come to a decision pertaining to this matter, after having taken cognizance of the report of the Executive Director on the matter.

10.2 Should the Commissioners find that the Undertakings resolve the competition concerns and shall the Commissioners accept the undertakings; the undertakings shall be published as a decision of the Commission pursuant to section 63(4) of the Act and consequently shall have the effect as if it were a direction under section 60 of the Act.

10.3 The Commission is empowered under Section 64 of the Act to keep under review directions and undertakings. Under Section 65, the Commission is empowered to enforce the directions and undertakings.
ANNEX I - COMMENTS OF PHOENIX BEVERAGES LTD
ON THE STATEMENT OF ISSUES REPORT
Investigation into the supply of coolers to retailers by Phoenix Beverages Limited and Quality Beverages Limited CCM/INV/019

[<Commercially Sensitive/Confidential Information>]
Investigation into the supply of coolers to retailers by Phoenix Beverages Limited and Quality Beverages Limited CCM/INV/019

[Commercially Sensitive/Confidential Information]
[Investigation into the supply of coolers to retailers by Phoenix Beverages Limited and Quality Beverages Limited CCM/INV/019]

[Commerically Sensitive/Confidential Information]
Investigation into the supply of coolers to retailers by Phoenix Beverages Limited and Quality Beverages Limited CCM/INV/019

[Commercially Sensitive/Confidential Information]
[Commerically Sensitive/Confidential Information]
[Commercially Sensitive/Confidential Information]
[Investigation into the supply of coolers to retailers by Phoenix Beverages Limited and Quality Beverages Limited CCM/INV/019]
[Commerially Sensitive/Confidential Information]
ANNEX II – Undertakings offered by Phoenix Beverages Ltd for the Carbonated Soft Drinks Coolers
Phoenix Beverages Ltd

Undertaking for CSD and Water

Restricted Circulation claimed – 18th March 2013
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UNDEARTAKING FOR CSD AND STILL WATER

This undertaking is given under section 63 of the Competition Act 2007 and Rule 28 of the Competition Commission Rule of Procedure.

A. Definitions:

In this Undertaking, the following terms will have the meanings indicated below:

1.1 Beverage Coolers. means installed coolers used for chilling packaged CSDs.

1.2 CCM means the Competition Commission of Mauritius

1.3 CSDs. means Sweetened, non-alcoholic drinks containing carbon dioxide. Excludes carbonated tea-based and coffee-based products (including iced/rtd tea drinks and iced/rtd coffee drinks respectively) and carbonated sports drinks and energy drinks. Includes carbonated juice (eg. Appletiser), carbonated nectars, regardless of juice content. Includes sweetened water-based carbonated flavoured drinks.

1.4 ED means the Executive Director of the Competition Commission of Mauritius

1.5 Effective Date means the date on which PBL is notified of the final decision of the Competition Commission or final determination of any Court to which any appeal is made by any third party.

1.6 Existing Agreement means any agreement, whether oral or written, entered into on or before the Effective Date by PBL in relation to Tabagies.

1.7 Full Implementation Date means six months after the Effective Date.

1.8 PBL means Phoenix Beverages Ltd, a corporation incorporated in Mauritius, with its registered office at Round About, Port Fer, Phoenix and all of its Subsidiaries.

1.9 PBL-Branded means any CSD and Still water brands marketed under trademarks owned by or licensed or commercialised by PBL.

1.10 New Agreement means any agreement, whether oral or written, entered into after the Effective Date by PBL with Tabagie(s).
1.11 Tabagie Channel means Channel of sales consisting of Tabagies.

1.12 Subsidiaries mean an entity in which PBL, directly or indirectly, holds an interest exceeding 50% and which is involved in the distribution or sale of CSDs in Mauritius.

1.13 Tabagie(s) mean(s) a retail outlet known as ‘tabagie’ or ‘boutique du coin’ specifically of outlet floor area of 20 square metres of less.

B. MEASURES PROPOSED AS UNDERTAKING:

2.0 PBL hereby gives the following undertaking concerning their commercial practices in the placement of Beverage Coolers in the Tabagie Channel (as defined above). This undertaking is designed to provide clear, objective and administrable rules governing the said commercial practices of PBL.

3.0 This Undertaking is made without prejudice to PBL’s position should any party decide to open proceedings or commence any legal action against PBL.

F.1 Substantive provisions:

4.0 PBL undertakes to apply the following measures.

The commitments in this section are applicable to all commercial arrangements on Beverage Coolers relating to Tabagies (as defined above) to which PBL sells PBL-Branded CSDs in Mauritius.

5.0 BEVERAGE COOLER PLACEMENT

5.1 The commitments in this section will be applicable to commercial arrangements concerning the installation and use of Beverage Coolers.

5.2 Beverage Coolers

5.2.1 PBL policies for the placement of Beverage Coolers will be based on the following principles:

5.2.1.1 Rent-Free Placement. Where PBL provides a Beverage Cooler on a rent-free basis, a customer may be required to stock that Beverage Cooler only with beverages distributed by PBL placing the equipment, provided the customer has other installed chilled beverage capacity in the outlet. Where a Beverage Cooler is provided on a rent-free basis and the customer does not have other installed chilled beverage capacity in the outlet, the customer will be free to use 20% of that Beverage Cooler’s capacity for any products of its choosing. For the purposes of this provision, a cooler which is
not on view, namely, for example, one kept in the back room or associated home of a customer annexed to a Tabagie (collectively "back room cooler") but used for keeping products to be sold in a Tabagie shall be considered as constituting of an existing installed chilled beverage capacity in the outlet.

5.2.1.2 PBL shall:

5.2.1.2.1 include in its written agreement for the placement of PBL Coolers relevant to this undertaking, a warning to the retailer to consider acting within the laws of Mauritius in its discretion to use the 20% capacity mentioned in paragraph 5.2.1.1 above,

5.2.1.2.2 positively impress on Tabagies not to stock any out of date or expired products within the said discretionary use capacity area

but this without PBL accepting any responsibility or liability or policing the said warning notice.

5.2.1.3 PBL shall include in its written agreement for the placement of PBL Coolers relevant to this undertaking, a clause for any Tabagie to confirm the existence of a back room cooler available at the Tabagie outlet location, and advise of any change in status of the said back room cooler so as to ensure whether the back room cooler is being used for keeping products in the Tabagie.

5.2.2 The Obligations under paragraph 5.2.1.1 does not apply to:

5.2.2.1 CSD products of competitors with a CSD flavour segment share of more than or equal to 30% or where this share is higher than that of the relevant equivalent PBL Branded CSD flavour; or

5.2.2.2 Competitors of newly launched PBL Branded CSD products for a period for a period of 2 years from the launch of the said PBL Branded Product.

5.2.3 An independent market research expert shall be appointed to determine the market share of a competitor product under paragraph 5.2.2.1 and 5.2.2.2 as required.

6.0 IMPLEMENTATION

6.1 ENTIRE AGREEMENT

6.1.1 This Undertaking comprises the entire extent of PBL commitments to or agreements or understandings with CCM.
6.2 SCOPE OF APPLICATION

6.2.1 PBL will be bound by this Undertaking for the territory of Mauritius.

6.2.2 PBL will be responsible for ensuring its compliance with the Undertaking.

6.2.3 New Agreements

6.2.3.1 All New Agreements will comply with this Undertaking.

6.2.4 Existing Agreements

6.2.4.1 All Existing Agreements will be brought into compliance with this Undertaking by the Full Implementation Date.

6.3 CHANGES IN APPLICABILITY

6.3.1 PBL shall be at liberty to approach the CCM at any time during the undertaking period to request the CCM to reconsider this undertaking. PBL shall appoint an independent market research team to compile the CSD and/or water market share information necessary to determine whether this undertaking shall continue to be applicable to Tabagies. PBL shall, for such purpose, provide the CCM with a report describing the process undertaken by PBL to identify the currently available share data for purposes of determining the applicability of the undertaking to the Tabagies Channel and providing the required CSDs and/or water share information.

6.3.2 The Tabagies Channel ceases to be subject to this Undertaking because the applicable thresholds are no longer met, namely

6.3.2.1 Competitor CSDs or water having more or equal to 30% of the CSD flavour segment share in the Tabagies Channel; or

6.3.2.2 Competitor CSDs or water having a higher share than the equivalent PBL Branded CSD Flavour;

6.4 REPORTING

6.4.1 Compliance Certification

6.4.1.1 PBL will provide annually a written report describing steps taken by PBL to comply with this Undertaking. Such statements shall confirm that PBL has implemented a compliance program according to which it has made the Undertaking known to all of its management and commercial employees and that all such employees are familiar with the terms of this Undertaking. Such reports will be delivered to the CCM on or before March 31 of each year.
6.5 PUBLICITY

6.5.1 Scope of Application

6.5.2 PBL will use its best efforts to ensure that this Undertaking is made known to and is understood by its customers and other industry participants.

6.6 DURATION AND REVIEW

6.6.1 Duration

6.6.1.1 This Undertaking will remain in force for a period of five years following the Full Implementation Date.

R.\[Signature\]

Phoenix Beverages Ltd

Richard Wooding, Director.
Annex III - Undertakings offered by Phoenix Beverages Ltd for the Beer Coolers
PHOENIX BEVERAGES LTD

UNDERTAKING – BEER COOLERS

RESTRICTED CIRCULATION CLAIMED – 18th March 2013.
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   H.1 Substantive provisions: .................................................................................................................... 3
Undertaking in relation to Beer Coolers

This undertaking is given under section 63 of the Competition Act 2007 and Rule 28 of the
Competition Commission Rule of Procedure.

A. Definitions:

In this Undertaking, the following terms will have the meanings indicated below:

1.1 Beer Coolers. means installed equipment, other than vending machines and fountain
equipment, used for chilling Beer.

1.2 CCM means the Competition Commission of Mauritius

1.3 Beer means an alcoholic drink as defined by the Excise Act.

1.4 ED means the Executive Director of the Competition Commission of Mauritius

1.5 Effective Date means the date on which PBL is notified of the final decision of the
Competition Commission or final determination of any Court to which any appeal is
made by any third party.

1.6 Existing Agreement means any agreement, whether oral or written, entered into on or
before the Effective Date by PBL in relation to Tabagies.

1.7 Full Implementation Date means six months after the Effective Date.

1.8 Off Licence means a Tabagie which has been issued with an Off Licence permit to sell
alcoholic drinks subject to the conditions of the issuing authority and any other
relevant authority in Mauritius;

1.9 On Licence means a Tabagie which has been issued with an On Licence permit (or an
On Licence together with an Off Licence permit) to sell alcoholic drinks subject to the
conditions of the issuing authority and any other relevant authority in Mauritius.

1.10 PBL means Phoenix Beverages Ltd, a corporation incorporated in Mauritius, with its
registered office at Round About, Pont Fer, Phoenix and all of its Subsidiaries.

1.11 PBL-Branded means any Beer brands marketed under trademarks owned by or
licensed or commercialised by PBL.

1.12 New Agreement means any agreement, whether oral or written, entered into after
the Effective Date by PBL with Tabagie(s).
1.13 **Tabagie Channel** means Channel of sales consisting of Tabagies.

1.14 **Subsidiaries** mean an entity in which PBL, directly or indirectly, holds an interest exceeding 50% and which is involved in the distribution or sale of Beer in Mauritius.

1.15 **Tabagie(s)** mean(s) a retail outlet known as ‘tabagie’ or ‘boutique du coin’ of outlet floor area of 20 square metres of less.

**B. MEASURES PROPOSED AS UNDERTAKING:**

2.0 PBL hereby gives the following undertaking concerning their commercial practices relating to the placement of Beer Coolers in the Tabagie Channel. This undertaking is designed to provide clear, objective and administrable rules governing the said commercial practices of PBL.

3.0 This Undertaking is made without prejudice to PBL’s position should any other party decide to open proceedings or commence any legal action against PBL.

**H.1 Substantive provisions:**

4.0 PBL undertakes to apply the following measures.

| The commitments in this section are applicable to all commercial arrangements on placement of Beer Coolers relating to On Licence and Off Licence Tabagies (as defined above) which PBL sells PBL- Branded Beers in Mauritius. |

**5.0 BEVERAGE COOLER PLACEMENT**

5.1 The commitments in this section will be applicable to commercial arrangements concerning the installation and use of Beer Coolers in Tabagies (as defined above).

**5.2 Beer Coolers**

5.2.1 PBL policies for the placement of Beer Coolers will be based on the following principles:

5.2.1.1 **Rent-Free Placement.** Where PBL provides a Beer Cooler on a rent-free basis, a customer may be required to stock that Beer Cooler.
only with Beer distributed by PBL placing the equipment, provided the customer has other installed chilled beverage capacity in the outlet. Where a Beer Cooler is provided on a rent-free basis by PBL and the customer does not have other installed chilled beverage capacity in the outlet, the customer will be free to use 20% of that Beer Cooler’s capacity for any products of its choosing. For the purposes of this provision, a cooler which is not on view, namely, for example, one which is in the back room or associated home of a customer annexed to a Tabagie (collectively ‘back room cooler’) but used for keeping stocks of products to be sold in the Tabagie shall be considered as constituting of an existing installed chilled beverage capacity in the Tabagie.

5.2.1.2 PBL shall:

5.2.1.2.1 include in its written agreement for the placement of PBL Coolers relevant to this undertaking, a warning to the retailer to consider acting within the laws of Mauritius in its discretion to use the 20% capacity mentioned in paragraph 5.2.1.1 above,

5.2.1.2.2 positively impress on Tabagies not to stock any out of date or expired products within the said discretionary use capacity area

but this without PBL accepting any responsibility or liability or policing the said warning notice.

5.2.1.3 PBL shall include in its written agreement for the placement of PBL Coolers relevant to this undertaking, a clause for any Tabagie to confirm of the existence of a back room cooler available at the Tabagie outlet location, and advise of any change in status of the said back room cooler so as to ensure that the back room cooler is being used for keeping products in the Tabagie.

5.2.2 The Obligations under paragraph 5.2.1.1 does not apply to:

5.2.2.1 Beer products of competitors with a Beer flavour segment share of more than or equal to 30% or where this share is higher than that of the relevant equivalent PBL Branded Beer; or

5.2.2.2 Competitors of newly launched PBL Branded Beer products for a period for a period of 2 years from the launch of the said PBL Branded Product.

5.2.2.3 Any Off Licence Tabagie, if in the vicinity of 200m (two hundred metres) of the said Off Licence Tabagie, there is another retail outlet having a cooler sponsored by a competitor selling beer, or having a
private cooler belonging to the retailer which is not a back room cooler.

5.2.3 An independent market research expert shall be appointed to determine the market share of a competitor product under paragraph paragraphs 5.22. et seq. as required.

6.0 IMPLEMENTATION

6.1 ENTIRE AGREEMENT

6.1.1 This Undertaking comprises the entire extent of PBL commitments to or agreements or understandings with CCM.

6.2 SCOPE OF APPLICATION

6.2.1 PBL will be bound by this Undertaking for the territory of Mauritius.

6.2.2 PBL will be responsible for ensuring its compliance with the Undertaking.

6.2.3 New Agreements

6.2.3.1 All New Agreements will comply with this Undertaking.

6.2.4 Existing Agreements

6.2.4.1 All Existing Agreements will be brought into compliance with this Undertaking by the Full Implementation Date.

6.3 CHANGES IN APPLICABILITY

6.3.1 PBL shall be at liberty to approach the CCM at any time during the undertaking period to request the CCM to reconsider this undertaking. PBL shall appoint an independent market research team to compile the beer market share information necessary to determine whether this undertaking shall continue to be applicable to Tabagies. PBL shall, for such purpose, provide the CCM with a report describing the process undertaken by PBL to identify the currently available share data for purposes of determining the applicability of the undertaking to the Tabagies Channel and providing the required beer share information.

6.3.2 The Tabagie Channel ceases to be subject to this Undertaking because the applicable thresholds are no longer met, namely

6.3.2.1 Competitor products having more or equal to 30% of the Beer flavour segment share; or

6.3.2.2 Competitor products having a higher share that the equivalent PBL Branded Beer Flavour.

6.4 REPORTING
6.4.1 Compliance Certification
6.4.1.1 PBL will provide annually a written report describing steps taken by PBL to comply with this Undertaking. Such statements shall confirm that PBL has implemented a compliance program according to which it has made the Undertaking known to all of its management and commercial employees and that all such employees are familiar with the terms of this Undertaking. Such reports will be delivered to the CCM on or before March 31 of each year.

6.5 PUBLICITY

6.5.1 Scope of Application

PBL will use its best efforts to ensure that this Undertaking is made known to and is understood by its customers and other industry participants.

6.6 DURATION AND REVIEW

6.6.1 Duration
6.6.1.1 This Undertaking will remain in force for a period of five years following the Full Implementation Date.

Phoenix Beverages Ltd

Richard Wooding, director.