

**INV021 - Investigation into an alleged
contravention of Section 41 of the
Competition Act involving a collusive
agreement which has the object or effect of
fixing the prices or quantity of chicken**

**Executive Summary – Final Report of
Investigation**



Introduction

1. An investigation was launched on 5th June 2012 upon the Executive Director of the Competition Commission (the Executive Director) having reasonable ground to believe, that a collusive agreement may exist in relation to the supply of chicken which has the object or effect of fixing the selling prices or quantity of chicken, in breach of Section 41 of the Competition Act 2007 (the Act).
2. The main parties to the investigation were Avipro Co Ltd, Innodis Ltd and Panagora Marketing Co Ltd. Panagora Marketing Co Ltd, Avipro Co Ltd and Innodis Ltd all supply chicken products. Both Avipro Co Ltd and Panagora Marketing Co Ltd share a horizontal relationship with Innodis Ltd. They supply goods of the same description and are active in the same markets at various levels of the supply chain.
3. The Final Report of Investigation was submitted by the Executive Director to the Commission under Section 41 of the Act on 15th April 2016.
4. The Executive Director was concerned that there were various contacts and communications between the parties which may their object or effect fix prices or quantity of chicken supplied. However, most of the contacts and communications occurred prior to the coming into force of the Act, and such contacts and communications were not breaches of the Act at that time. However, the Executive Director was concerned that these contacts and communications may have led to an understanding between the parties in the form of an agreement and that the effects of such agreements may have continued after the coming into force of the Act. Therefore, the Executive Director assessed whether the agreement continued to exist after the Act came into force by its object or effect.
5. The Executive Director was also concerned that there has been contacts and communications which happened between the parties after the Act came into force which related to price or supply of chicken. Therefore, the Executive Director assessed whether the said contacts and communications which occurred after the promulgation of the Act may amount to an agreement in breach of Section 41 of the Act.
6. In brief, the Executive Director has assessed the potential existence of three sets of collusive agreements between the parties, namely:
 - (a) Agreement to increase price of chilled chicken relative to price of frozen chicken;

- (b) Agreement on parallel pricing¹; and
 - (c) Agreements after the Act came into force and facilitating practices.
7. The Executive Director concluded after his assessment that there is no sufficient evidence of collusive agreements within the meaning of Section 41 of the Act between Avipro Co Ltd, Panagora Marketing Co Ltd and Innodis Ltd.

Background information

8. This investigation related to the supply of chicken meat in its various forms including but not limited to chilled and frozen chicken meat, sold whole or in cuts.
9. Production and distribution of chicken involves various stages and given the nature of the industry, for the purposes of the investigation, the supply chain was separated in different stages. The different stages form different levels of potential interaction of demand and supply. At the upstream level, there is chicken production and processing. This stage involves chicken farming (including sales of live birds for slaughtering and processing), slaughtering and processing. At the midstream level there is the wholesale distribution; that is the producer and processor of chicken sells the chicken to wholesalers who in turn sell the chicken to retail outlets. At the downstream level, there is sale of chicken to the end consumers through retail outlets.
10. The main parties to the investigation, as stated are Avipro Co Ltd, Innodis Ltd and Panagora Marketing Co Ltd.
11. The major large scale producers of chicken in Mauritius are Innodis Ltd, Avipro Co Ltd, Poulet Arc-en-Ciel Ltée (which is a subsidiary of Innodis Ltd and jointly owned by Innodis Ltd and Livestock Feeds Limited, a member of the Food and Allied Group) and Mont Ida Poultry.
12. Innodis Ltd forms part of the Innodis Group. Innodis Ltd is active in the agro-industry, manufacturing, import, distribution and retailing among others. Some of the main subsidiaries of Innodis Ltd are Poulet Arc-En-Ciel Ltd, Meaders Feeds Ltd, Peninsula Rice Milling Co Ltd and Supercash Ltd. Innodis Ltd also holds the franchise Point Frais. Poulet Arc-En-Ciel Ltd is a company involved in poultry farming and distribution. Meaders Feeds Ltd is a manufacturer and distributor of animal feeds including feeds for poultry. Supercash Ltd is a retail outlet that sells

¹ Price parallelization or parallelism for the purpose of this report does not mean perfect price matching or constant proportionality with price of competitor but rather similar movements in price of competitors to an appreciable extent.

various products. Point Frais is a franchise in the form of specialized retail outlet that sells chicken products.

13. Innodis Ltd is a vertically integrated company in the chicken industry. Innodis Ltd is active in the production of feeds and chicks which are the input required to grow chicken. Innodis Ltd is also active in chicken growing, chicken processing, wholesale sales of chicken and retail sales of chicken. Innodis Ltd produces and markets chicken under the brand name of 'Prodigal' and 'Carmen'. It also markets chicken branded 'Le Poulet Fermier' and 'Label'.
14. Avipro Co Ltd and Panagora Marketing Co Ltd forms part of the Food and Allied Group (now known as the Eclovia Group). Avipro Co Ltd and Panagora Marketing Co Ltd respectively produces and markets Chantecler branded chicken
15. Avipro Co Ltd is one of the holding companies of the Food & Allied Group. Avipro Co Ltd 'covers all stages of livestock from grand- parent stock imported from Europe'². Avipro Co Ltd produces part of its chicken and outsources part of the chicken farming to contract growers.
16. Panagora Marketing Co Ltd markets and distributes various products including chicken meat.

Framework of Assessment

17. The Act prohibits horizontal agreements which are collusive at Section 41 of the Act, as part of collusive agreements at Sub Part I of Part III.
18. The provisions of Section 41 of the Act read:
 - (1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if
 - (a) it exists between enterprises that supply goods or services of the same description, or acquire goods or services of the same description;
 - (b) it has the object or effect of, in any way -
 - (i) fixing the selling or purchase prices of the goods or services;
 - (ii) sharing markets or sources of the supply of the goods or services; or
 - (iii) restricting the supply of the goods or services to, or the acquisition of them from, any person; and
 - (c) significantly prevents, restricts or distorts competition.

² www.eclosia.com/en/activity/avipro Accessed 26th May 2017

(2) Any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void. (Emphasis added)

Assessment of Facts

19. It was concluded that Avipro Co Ltd, Panagora Marketing Co Ltd and Innodis Ltd all qualify as enterprises within the definition of the Act in that they are companies which are engaged in commercial activities for gain or reward.
20. Panagora Marketing Co Ltd, Avipro Co Ltd and Innodis Ltd supply chicken products. They are active at various stages of the supply chain. Innodis Ltd is active at the upstream, midstream and downstream level; Avipro Co Ltd is active at the upstream and downstream level; Panagora Marketing Co Ltd is active at the midstream level.
21. It was concluded that Avipro Co Ltd and Innodis Ltd supply goods of same description and are active in the same market in so far as it relates to the supply of chicken at the upstream and downstream level, that is the supply of chicken to wholesale distributors (from the farming and processing to wholesale distribution level) and sales of chicken to public through franchise units. Panagora Marketing Co Ltd and Innodis Ltd supply goods of the same description and are active in the same market in so far as it relates to the supply of chicken at the midstream level, which is the supply to retail outlets, hotels and restaurants.
22. From the information which was gathered during the investigation, the chicken products sold by Avipro Co Ltd, Panagora Marketing Co Ltd and Innodis Ltd are part of the same market. It is highlighted that both Avipro Co Ltd and Panagora Marketing Co Ltd concede that their products do compete with those supplied by Innodis Ltd. It is therefore concluded that the chicken of Avipro Co Ltd, Panagora Marketing Co Ltd and Innodis Ltd constitute products within the same market.
23. During the course of the investigation, the Executive Director has come across various documents which demonstrate that there existed various agreements between the parties to this investigation prior to the coming into force of the Act. However, those agreements were not breaches of the Act at that time. Nevertheless, if the agreements which were entered prior to the coming into force of the Act continued to exist, by object or effect after the coming into force of the Act, they may amount to breaches of the Act. Therefore, it was assessed whether the agreements as entered prior to the Act coming into force may have continued to exist after the Act came into force.

Agreement to increase price of chilled chicken relative to price of frozen chicken

24. In 2003, there were contacts and communications (by emails, exchange of price lists, physical discussions) between Innodis Ltd and Panagora Marketing Co Ltd which may amount to an agreement within the meaning of the Act. The agreement was to increase the price of chilled chicken while to maintain the price of frozen chicken in the 'long term', that is, to increase the price of chilled chicken relative to the price of frozen chicken.
25. The agreement would limit price competition in so far that the ability of the supplier to reduce price of chilled below price of frozen will be limited by the agreement. Further to that, the agreement would set referral points for price alignment by maintenance of the price gap between price of chilled and price of frozen. The agreement would also limit price competition by limiting competition between chilled and frozen chicken. Therefore, the above-mentioned agreement may amount to an agreement fixing the selling price of chicken products.
26. The agreement was however entered into in the year 2003, which is well before the Act came into force, and was not a breach of the Act at that time. However, the agreement was of 'long term' and therefore the Executive Director assessed whether it may have continued to exist after the Act came into force.
27. The information gathered demonstrated that there was an uncertainty as to what long term means. Additionally, although both Innodis Ltd and Panagora Marketing Co Ltd, monitor the prices of each other, there is no evidence to suggest that they were monitoring the implementation of the agreement as such.
28. There have been further contacts and communications between Panagora Marketing Co Ltd and Innodis Ltd after the said email, but there is no evidence that there has been contacts and communications to monitor, to enforce or to further promulgate the above-mentioned agreement.
29. In normal circumstances (where such agreements are entered after the Act came into force), such agreements would be considered to be a breach of the Act irrespective of its form and effects. However, given that the agreement was entered much prior to the Act came into force and it was deemed inappropriate to consider the agreement to be forthright breach of the Act.
30. The possibility that given the time interval between the time the agreement was entered into and the time at which the Act came into force (about 6 years), the agreement ceased to exist due to market dynamics coupled with the fact that no other measures were taken to sustain the agreement was considered by the Executive Director during the investigation.

31. Therefore, the Executive Director considered the effects of the agreement to determine whether it existed at the time of the investigation. Logically, if the agreement continued to exist by its effect, it was reasonable to expect that the price of chilled chicken would continue to increase relative to the price of frozen chicken or that the price of chilled chicken was maintained above the price of frozen chicken in a rather consistent manner.
32. Analysis of the effects of the agreement did not conclusively demonstrate that the agreement continued to exist. There were deviations from the pricing mechanism agreed. Therefore, there was no evidence to conclude that the effects of the agreement continued after the promulgation of the Act.
33. Given that:
- I. the agreement was entered much before the Act came into force,
 - II. the agreement was entered at such a time that it was not a breach of the Act,
 - III. the agreement was not clear in terms of its time horizon,
 - IV. there was an element of uncertainty with regards to the agreement,
 - V. there was no evidence of further contacts and communications with respect to the monitoring, promulgation or enforcement of the agreement, and
 - VI. the effects are not conclusive,

the Executive Director was of the view that there is no sufficient evidence to demonstrate that the agreement continued to exist after the Act was promulgated and thus did not recommend a finding of a breach of Section 41 of the Act.

Agreement on parallel pricing

34. The Executive Director had come across various documents that demonstrate that there were various contacts and communications between Panagora Marketing Co Ltd, Avipro Co Ltd and Innodis Ltd which may relate to price alignment, prior to the Act coming into force. Most of those contacts and communications were not agreements properly called but rather concerted practices and they related to specific events rather than long term policies. Those contacts and communications, considered individually, were however unlikely to amount to breaches of the Act given that they occurred prior to the coming into force of the Act and that they may have lapsed prior to the coming into force of the Act by new conducts of the parties.

35. However, given the frequency of such communications, the possibility that these may have led to an understanding on price parallelism between Innodis Ltd on the one hand and Panagora Marketing Co Ltd and Avipro Co Ltd on the other hand could not be discarded. Therefore, the Executive Director analysed the pricing behavior of the parties to assess whether there was an understanding on price alignment.
36. Nevertheless, based on analysis conducted in respect of the potential agreement on price parallelism, the Executive Director opined that although in general there exists an appreciable degree of price parallelism between Innodis Ltd and Panagora Marketing Co Ltd, there have been instances where their prices have appreciably deviated from price parallelism. There were periods and products in relation to which price parallelism was not apparent. Therefore, the pricing patterns were not enough to conclude that there was an agreement on parallel pricing.
37. Taking into account that:
- I. the contacts and communications between the parties happened prior to the coming into force of the Act,
 - II. most of the contacts and communications were in the form of concerted practices rather than agreements properly so called,
 - III. most of the contacts and communications related to periodic events rather than long term policies and that they may have lapsed prior to the Act coming into force, if considered individually,
 - IV. there is no evidence of further contacts and communications in relation to the above-mentioned potential agreement, and
 - V. analysis on prices, albeit showing an appreciable degree of price parallelism, is not conclusive on price parallelism as a result of the contacts and communications,
- the Executive Director was of the view that there was no sufficient evidence for a finding of a breach of Section 41 of the Act.

Agreements after the Act came into force and facilitating practices

38. With respect to the third set of potential agreements, the Executive Director has found evidence indicating that there have been contacts and communications between Innodis Ltd and Panagora Marketing Co Ltd and Avipro Co Ltd, after the Act came into force.

39. In the year 2011, the Ministry of Commerce queried on the prices of various products. From evidence gathered, it appears that a phone conversation between [REDACTED]³ of Innodis Ltd and [REDACTED] of the Food & Allied Group (comprising of Avipro Co Ltd and Panagora Marketing Co Ltd) took place in view of responding to the request of the relevant Ministry, during which there were discussions on margin. From the information gathered and analysis conducted, it is unlikely that this communication would in itself amount to a breach of Section 41 of the Act as the evidence gathered does not demonstrate an understanding on the margin practiced or to be practiced by the enterprises but rather on the figure of margin to be given to the relevant Ministry. While the said agreement on the margin to be given to the Ministry is unlikely to have amounted into an agreement to fix the selling price of chicken directly, or indirectly by fixing the margin on chicken to be practiced in setting the selling price of chicken, such agreement may potentially soften competition between the parties and may be against the spirit of the Act.
40. A second instance of facilitating practice is a survey conducted by the Ministry of Agro Industry and Food Security, through the Agricultural Services division, among the various major poultry farmers by the end of each year. The CCM has been informed that the purpose of the survey is to assess whether the local poultry farmers would be able to cater for the end of year chicken requirements and to thereon decide on whether to allow importation of chicken. The CCM has also been informed that this survey is usually done through a meeting during which each player is required to reveal his production plan and stock position for the coming months in the presence of other players.
41. Various documents have demonstrated that stock of competitors can be used as referral to decide on pricing of the products. Such exchange of information may create a transparency on the market. Given that this contact and communication emanated from requests of the Ministry, the Executive Director is of the view that it would not be appropriate to consider this to amount to a breach of Section 41 of the Act. Although the CCM does not have any objection to the Ministry of Agro Industry and Food Security conducting such surveys, the Executive Director is of the view that the manner in which the survey is conducted may create undue transparency.
42. The Executive Director is also concerned that Poulet Arc-En-Ciel Ltd, of which both the FAIL Group (through Livestock Feeds Ltd) and Innodis Group are shareholders, may act as a platform for information exchange and price parallelization. Both FAIL Group and Innodis Group have their representatives on the Board of Directors of Poulet Arc-En-Ciel Ltd.

³ [REDACTED] denotes excised confidential information

43. In an internal email of Innodis Ltd, it appears that Livestock Feeds Ltd (which is a shareholder of Poulet Arc-En-Ciel Ltd and member of the Food & Allied Group) informed Poulet Arc-En-Ciel Ltd of an imminent price increase of feeds, based on which the representative of Poulet Arc-En-Ciel Ltd informed that the price of chicken must be increased. The representative of Innodis Ltd (which is also a shareholder of Poulet Arc-En-Ciel Ltd) was also present in this conversation. Consequently, the representative of Innodis Ltd informed employees of Innodis Ltd that they must also increase the price of chicken. Analysis shows that Innodis Ltd and Panagora Marketing Co Ltd both eventually increased the respective prices of their chicken.
44. However, from the information which has been gathered, it is unlikely that the conduct would qualify as an agreement between Innodis Ltd and Panagora Marketing Co Ltd or Avipro Co Ltd and thus would amount to a breach of Section 41 of Act. The main reasons being that there is no evidence that Avipro Co Ltd or Panagora Marketing Co Ltd was eventually put into the contact loop and that Poulet Arc-En-Ciel Ltd is a subsidiary of Innodis Ltd. However, such exchange of information may be against the spirit of the Act.

Conclusion

45. It was observed that there have been various contacts and communications between Avipro Co Ltd, Panagora Marketing Co Ltd and Innodis Ltd prior to the coming into force of the Act. Although those contacts and communications did not amount to a breach of the Act at that time, it may constitute a breach if its object or effects continued after the Act came into force. However, there was no sufficient evidence to suggest that it continued to exist after the coming into force of the Act and therefore a finding of a breach of Section 41 was not recommended.
46. In so far that the direct or indirect contacts and communications after the coming of the Act are concerned, the Executive Director was of the view that although such practices are against the spirit of the Act, they were unlikely to amount to breach of Section 41 within the context of the alleged conduct.
47. The recommendation of the Executive Director to the Commissioners was that there was no sufficient evidence of collusive agreements within the meaning of Section 41 of the Act between Avipro Co Ltd, Panagora Marketing Co Ltd and Innodis Ltd. Therefore, the Executive Director did not recommend a finding of a breach of Section 41 of the Act.