General Notice No. 173 of 2019

Decision of the Competition Commission

CCM/DS/0030/19
Non-Confidential

Application for Immunity made by Shoprite (Mauritius) Limited under the Competition Commission Amnesty Programme for Resale Price Maintenance

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

relating to a proceeding under section 59(7) of the Competition Act 2007 further to a Report of the Executive Director on the matter referred to as 'INV042/RPM/001 – Review of Shoprite (Mauritius) Limited RPM Amnesty applications'

(CCM/DS/0030/19 – Applications for immunity made by Shoprite (Mauritius) Limited under the Competition Commission’s Amnesty Programme for Resale Price Maintenance)

THE COMMISSION

Mr. C. Seebaluck - Commissioner (Chairperson),
Mrs. M. B. Rajabally - Commissioner,
Mrs. V. Bikhoo - Commissioner,

Having regard to the Competition Act 2007,

Having regard to paragraph 5.6A of CCM3 Guidelines on Collusive Agreements regarding the Competition Commission's Amnesty Programme for Resale Price Maintenance,

Having regard to the Competition Commission Rules of Procedure 2009,

Having regard to the undertakings offered by Shoprite (Mauritius) Limited on 6th June 2018,

Having regard to a report of the Executive Director dated 29th June 2018,

Having regard to the Decision of the Commission referenced CCM/DS/0029 dated 24th October 2018,

WHEREAS:

I. Introduction

1.1 The Decision relates to the applications for immunity dated 16th October 2017 made by Shoprite (Mauritius) Limited pursuant to the Competition Commission’s Amnesty Programme for Resale Price Maintenance prescribed under paragraph 5.6A of CCM3 Guidelines on Collusive Agreements (the 'Application'). As part of the conditions set out thereunder, undertakings have been offered to the Commission by Shoprite (Mauritius) Limited on 6th June 2018 ('the Undertakings').
1.2 Having taken cognizance of a report of the Executive Director dated 29th June 2018 on the matter, the Commission has determined the present matter on the basis of the provisions of section 59(7) of the Act, the conditions prescribed under paragraph 5.6A of CCM3 Guidelines on Collusive Agreements and considering in particular, the Undertakings offered pursuant to section 63(3) of the Competition Act 2007 (the 'Act').

II. Background

I. Competition Commission’s RPM Amnesty Programme

1.3 Pursuant to section 59 of the Competition Act 2007 (the 'Act'), the Commission may grant immunity or leniency to any person in such circumstances as may be prescribed. Effective from 05th June 2017 until 20th October 2017 inclusively, the Commission put in place a one-off, time-limited amnesty programme for any enterprise involved in resale price maintenance by waiving the restriction at paragraph 5.3 of CCM3 Guidelines on Collusive Agreements, viz., that only RPM which facilitates a cartel can benefit from leniency and the associated footnote 3 thereof and subject to the applicant-enterprise fulfilling the conditions prescribed under paragraph 5.6A (b) of the said Guidelines (the 'RPM Amnesty Programme').

1.4 The conditions prescribed under the RPM Amnesty Programme for providing immunity from financial penalties to any enterprise applying for RPM Amnesty are that the applicant -

I. admits its participation in an agreement involving RPM,

II. provides the Competition Commission (CCM) with all the information, documents and evidence available to it regarding the RPM, and as required by the CCM,

III. maintains continuous and complete co-operation until the conclusion of any action by the CCM in relation to the matter, and

IV. offers undertakings that satisfactorily address the competition concerns of the CCM.

II. The Applicant and the Application

1.5 Shoprite (Mauritius) Limited is a private limited liability company incorporated under the laws of Mauritius with Business Registration Number C07027716 and having its registered office at Intercontinental Secretarial Services Ltd Level 3, Alexander House 35 Cybercity, Ebene.

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2 The Commission had extended the validity of the RPM Amnesty (CCM 3 Guidelines - Amended 3rd October 2017) from 05th October 2017 to 20th October 2017.
1.6 Shoprite (Mauritius) Limited has made an application, in its capacity as reseller trading under the name Shoprite, in writing, to the COM, through its authorised signatory on the 16th October 2017.

1.7 Shoprite (Mauritius) Limited was owned 100% by Shophold (Mauritius) Ltd, which is a domestic company limited by shares, Shophold (Mauritius) Ltd is in turn held 100% by Shoprite Checkers (Pty) Ltd.

1.8 Shoprite (Mauritius) Limited informed the Competition Commission that it has resolved to exit from its retail activities in Mauritius and its activities will be acquired by Pick and Buy Ltd.

1.9 Applications for RPM Amnesty were made by Shoprite (Mauritius) Limited in relation to two (2) conducts namely:

i. for having entered into contractual agreements with certain of its suppliers, which agreements may contain clauses on the resale prices of the products of the respective suppliers, which may amount to RPM (Conduct I).

ii. In relation to its internal documents, namely which were in use and may be parcelled as having constituted an agreement between Shoprite and its suppliers whereby final selling prices were agreed. The document required its suppliers, at the request of Shoprite itself, to input the wholesale price and the resale price of the product. The document and the are signed by both the supplier and Shoprite (Conduct II).

III. The Investigation

1.10 Upon receipt of the Application and pursuant to section 51 of the Act, the Executive Director proceeded to investigate whether the reported conduct may amount to an RPM within the ambit of section 43 of the Act.

1.11 Upon completion of his investigation, the Executive Director submitted a report on the matter to the Commission on 29th June 2018. The Report contains the findings of the Executive Director, his assessment of whether the proposed Undertakings address all the concerns identified by him, and his recommendations in respect of the Application (the ‘Report’).

1.12 The Executive Director’s findings are that
a. the reported conducts may constitute four sets of agreements amounting to RPM, namely:

i. The first agreement relates to the commercial agreement between Shoprite (Mauritius) Limited and [REDACTED], which contained clauses that might have established a fixed and minimum price to be practiced by Shoprite while selling certain products of [REDACTED] on promotion.

ii. The second set of agreement relates to the respective [REDACTED] between Shoprite (Mauritius) Limited and [REDACTED], which contained clauses which might have established a minimum price to be practiced by Shoprite (Mauritius) Limited while selling the products of [REDACTED].

iii. The third set of agreement relates to the commercial agreement between [REDACTED] and Shoprite (Mauritius) Limited as contained in [REDACTED] which contain clauses which might have established fixed and minimum prices to be practiced by Shoprite while selling the products of [REDACTED].

iv. The fourth set of conducts which may amount to an agreement under the Act relates to the practice of Shoprite (Mauritius) Limited, prevalent until [REDACTED], to issue a [REDACTED] which contain a column [REDACTED] which has to be filled in by the supplier at the request of Shoprite (Mauritius) Limited. The [REDACTED] and [REDACTED] may be construed to be an agreement between the suppliers and Shoprite (Mauritius) Limited, including an agreement on the resale price as by signing the form both parties agree to the form including the resale price, albeit the price has been provided by the supplier at the request of Shoprite itself.

b. The applicant has provided the CCM with all the information, documents, and evidence available to it regarding the RPM, and as required by the CCM; and

c. The applicant has maintained a continuous and complete collaboration with the CCM throughout the whole amnesty process.
1.13 The Executive Director has further assessed the Undertakings offered by Shoprite (Mauritius) Limited. The Executive Director takes the view that the proposed Undertakings satisfactorily addresses the concerns identified in the Report for the following reasons –

a. The implementation of the undertakings will ensure that Shoprite (Mauritius) Limited is not party to an agreement with its suppliers which may involve RPM; and

b. In relation to conduct II, by formally undertaking to never request selling prices from suppliers, the possibility of any RPM conduct where selling prices might be agreed between Shoprite (Mauritius) Limited and its suppliers is eliminated.

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

III. Legal Framework

1.15 Section 43 of the Act prohibits and renders void ‘any vertical agreement between enterprises to the extent that it involves resale price maintenance’. RPM is in turn defined at under section 2 of the Act as ‘an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers’.

1.16 Having regard to the conditions prescribed under the RPM Amnesty Programme, an enterprise will benefit from immunity from financial penalty if it is involved in a conduct(s) that falls within the scope of section 43 of the Act and satisfies the conditions of the said programme.

1.17 In addition to admitting having participated in one or more RPM agreement(s), the applicant-enterprise is required to provide full and complete disclosure of all information, evidence and records available to it that relate to the reported RPM conduct. The enterprise is also required to maintain continuous and complete co-operation from the time of its application until the conclusion of any action by the CCM on the matter, including by securing the cooperation of its directors, officers and employees in view of effectively and expeditiously concluding the assessment process.

1.18 Pursuant to section 63(3) of the Act, the threshold for the acceptance of undertakings under section 63(3) is that the Commission must be satisfied that the undertakings address “all the concerns it has about any prevention,
restriction [or] distortion (...) of competition which may arise from the matter at hand.

IV. Determination under sections 59(7) and 63 of the Act

1.19 Having regard to the Applications submitted by Shoprite (Mauritius) Limited, the concerns which have been identified by the Executive Director in his Report, and the Undertakings offered by the Applicant, the Commission determines that –

1) Shoprite (Mauritius) Limited has, in its Applications, admitted its participation in one or more RPM agreement(s) viz:

   a. for having entered into contractual agreements with certain of its suppliers, which agreements may contain clauses on the resale prices of the products of the respective suppliers, which may amount to RPM (Conduct I).

   b. in relation to its internal documents, namely, which were in use and may be perceived as having constituted an agreement between Shoprite (Mauritius) Limited and its suppliers whereby final selling prices were agreed. The document required its suppliers, at the request of Shoprite (Mauritius) Limited itself, to input the wholesale price and the resale price of the product. The are signed by both the supplier and Shoprite (Mauritius) Limited.

2) Shoprite (Mauritius) Limited has complied with requirements (ii) and (iii) of paragraph 5.6A(b) of the CCM 3 Guidelines, as stated in the Report;

3) The Undertakings submitted by the Shoprite (Mauritius) Limited satisfactorily address the Commission’s concerns in so far as Shoprite (Mauritius) Limited has ceased its participation in terminated all RPM agreements to which it was a party, as reported in its applications, and will ensure that its conduct is compliant with the RPM provision of the Act.
V. Decision

NOW THEREFORE,

For the reasons set out in this Decision, the Commission decides as follows:

1) We accept that the Application made by Shoprite (Mauritius) Limited satisfies the conditions prescribed under the RPM Amnesty Programme as set out in paragraph 5.6A of the CCM 3 Guidelines on Collusive Agreements;

2) We accept the Undertakings offered by Shoprite (Mauritius) Limited, which are being published as per section 83(4) of the Act (see Annex);

3) The Undertakings shall be effective as from the date of this decision, and

4) We grant immunity from financial penalty to Shoprite (Mauritius) Limited pursuant to section 59(7) of the Act for the Reported RPM conduct.

Done at Port-Louis this 12 December 2018.

Mr. C. Seebaluck  
(Commissioner)

Mrs. M. B. Rajabally  
(Commissioner)

Mrs. V. Bikhoo  
(Commissioner)
Undertakings to CCM under the CCM RPM Amnesty (Resellers)

Undertakings provided by Shoprite (Mauritius) Limited to the Competition Commission pursuant to an Application for Amnesty dated 16 October 2017 in connection with the Competition Commission's Amnesty Programme for Resale Price Maintenance

Date of Undertakings: 04th May 2018

1. Background:
   By its letter dated 16 October 2017 made pursuant to paragraph 5.6A of the 'CCM 3 Guidelines – Collusive Agreements' (amended June 2017), Shoprite (Mauritius) Limited has notified the Executive Director of the Competition Commission of its application for immunity under the CCM Amnesty Programme for Resale Price Maintenance (the 'Application').

   Shoprite (Mauritius) Ltd has made two applications for RPM Amnesty.

   The Amnesty application No. 1 dated 16 October 2017, is in relation to clauses in contracts with the following of its suppliers: [redacted] which contracts contain clauses in the form of minimum or fixed resale price restrictions.

   The Application No. 2 dated 16 October 2017, relates to internal documents of Shoprite (Mauritius) Limited, namely, [redacted] and [redacted] which were in use and may be perceived as having constituted an agreement between Shoprite and its suppliers whereby final selling prices were agreed.

Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017) for the purpose of obtaining immunity, Shoprite (Mauritius) Limited is, by the presents, providing undertakings related specifically to the impugned agreement and any restrictive effects it has had on competition under section 63 of the Competition Act 2007 with a
view to allaying the concerns of the Competition Commission in relation thereto and obtaining the requested immunity.

2. Definitions:
For the purpose of the present undertakings, the following terms shall have the following meaning:

Shoprite (Mauritius) Limited: Shoprite (Mauritius) Limited and includes its branches, subsidiaries, or affiliates.

Affiliate: any enterprise directly or indirectly controlled by Shoprite (Mauritius) Limited.


Effective Date: means the date on which the Commission delivers its decision to accept these Undertakings.

Full Implementation date: means a maximum period of three (3) months as from the effective date.

3. Measures proposed as Undertakings

Shoprite (Mauritius) Limited hereby undertakes to apply by full implementation date the following measures in its commercial dealings with the above-mentioned suppliers and any other supplier, in the resale of their respective goods or services in Mauritius;

3.1. Behavioural Undertakings

Shoprite (Mauritius) Limited shall, in relation to the first application, inform the corresponding suppliers that it is no longer party to the restrictive clause constituting RPM and shall either modify the agreement or enter into a new agreements which does not contain RPM clauses with the suppliers;

Shoprite (Mauritius) Limited shall not, in any manner whatsoever, enter into or otherwise facilitate, either explicitly or implicitly, the implementation of any agreement with the above-mentioned suppliers and/or any other supplier that involves resale price maintenance;
Shoprite (Mauritius) Limited shall not accept any offer - whether periodic, promotional or otherwise - from the above-mentioned suppliers or any other supplier that involves resale price maintenance or is otherwise made conditional upon Shoprite (Mauritius) Limited's observance of resale price maintenance;

In relation to the Application No. 2, Shoprite (Mauritius) Limited informs the CCM that it amended its template with effect from January 1, 2023, and from then onwards, no longer recorded any selling price information; and the document was amended specifically to refer to "Shoprite Admin Use Only" and it states specifically that the selling price is not agreed with the Supplier and that Shoprite does not undertake to sell products at the Supplier recommended selling prices and lastly reiterates Shoprite (Mauritius) Limited's policy that selling prices are set in Shoprite's own discretion. Shoprite (Mauritius) Limited undertakes to continue such policy in relation to the aforementioned documents.

3.2. Information Dissemination

Shoprite (Mauritius) Limited shall take all appropriate measures to ensure that all its internal management, directors, and employees engaged in the purchase and/or resale of goods and/or services are fully aware of and actively implement the present undertakings when implementing Shoprite (Mauritius) Limited's pricing policy, in line with the provisions of the Act;

3.3. Reporting

Shoprite (Mauritius) Limited shall immediately inform the Commission, in writing, of any attempt on the part of the above-mentioned suppliers to implement or otherwise cause or induce the implementation of resale price maintenance to be observed by Shoprite (Mauritius) Limited in reselling the supplier's goods and/or services and shall provide the Commission with all documents, information, and evidence available to it in support thereof;

Shoprite (Mauritius) Limited shall provide the Commission with a copy of any amended agreement governing its commercial relationship with each of the above-mentioned suppliers as proof that Shoprite (Mauritius) Limited has irrevocably ceased the impugned resale price maintenance;

Shoprite (Mauritius) Limited shall, as from the date of acceptance of this undertaking, take all reasonable steps to ensure that all communications, negotiations, arrangements with the above-mentioned suppliers are properly documented and archived to demonstrate Shoprite (Mauritius) Limited's
compliance with the present undertakings when reselling the above-mentioned suppliers' goods or services;

Shoprite (Mauritius) Limited shall, by the full implementation date, submit a written report to the Commission that inter alia,

1. describes the steps taken by Shoprite (Mauritius) Limited to comply with the present undertakings and in particular, setting out all the appropriate measures taken by Shoprite (Mauritius) Limited to deter on the one hand and detect and correct any deviation by Shoprite (Mauritius) Limited' management, directors, or commercial employees from the present undertakings;

2. documents all amendments brought to agreements put in place with each of the above-mentioned suppliers in relation to the commercialisation of their respective goods or services.

4. Entry into force
These undertakings will be fully implemented by full implementation date.

L P MERVEN
Director
Duly authorised for and on behalf of:
Shoprite (Mauritius) Ltd

P BORHA
Director
Duly authorised for and on behalf of:
Shoprite (Mauritius) Ltd