

General Notice No. 175 of 2019

CCM/DS/0030/21



Decision of the Competition Commission

CCM/DS/0030/21
Non-Confidential

**Application for Immunity made by All Good Ltd under
the Competition Commission Amnesty Programme for
Resale Price Maintenance**

12 December 2018

CCM/DS/0030/21

**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/003 – Review of All Good Ltd RPM Amnesty application'**

**(CCM/DS/0030/21 – Application for Immunity made by All Good Ltd under the
Competition Commission's Amnesty Programme for Resale Price
Maintenance)**

THE COMMISSION

Mr. D. P. A. Mariette - Vice-Chairperson,
Mr. C. Seebaluck - Commissioner,
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 All Good Ltd on 24th April 2018,

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

WHEREAS:

I. Introduction

- 1.1 This Decision relates to an application for immunity dated 16th October 2017 made by All Good Ltd 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 All Good Ltd on 24th April 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

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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 inclusively¹, 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 Incorporated on 21st September 2016, All Good Ltd is a private limited liability company with Business Registration Number C16141743 and registered address, Morcellement Senneville, Lees Street, Curepipe. All Good Ltd deals in para-pharmaceutical products, para-medical and other products namely Ayurvedic cosmetics, orthopaedic supports, glucometers, glucose testing strips, bandages, and food supplements.

1.6 All Good Ltd has made an application, in its capacity supplier, in writing, to the CCM, through its authorised signatory on the 16th October 2017.

¹ 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.

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1.7 All Good Ltd applied for RPM Amnesty for the following conducts:

- (i) Having sold products to dealers with resale prices, as determined by itself, pre-labelled on the products without the words "recommended price" appearing next to the resale prices;
- (ii) Having issued price lists which made mention of 'Retail Price' of the products without making it clear that such prices are only a recommendation, and the acceptance of which by resellers, may amount to RPM.

iii. *The Investigation*

1.8 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.

1.9 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').

1.10 The Executive Director's findings are that:

- i. The first conduct relates to the practice of the applicant to sell its products with resale prices (as determined by itself) affixed on the respective products with no mention made on the product that the price determined and affixed on the product is a 'recommended price'. It may be a policy of All Good Ltd, as supplier, to affix on its products a resale price as determined by itself. By accepting the products of the supplier with such a resale price pre-affixed on the products, the reseller/dealer may have acquiesced to the policy of the supplier to pre-affix a resale price on the product (as determined by the supplier itself), amounting to an agreement. In turn, that agreement, unless the price as affixed is changed by the reseller/dealer, will establish the resale price of the reseller/dealer, amounting to RPM.
- ii. With respect to the second conduct, the Executive Director found that the invoice contains, amongst others, a column entitled 'RP-unit', which may be construed to be the Retail Price to be practiced by the resellers at the retail level. This acceptance and payment of the invoice may constitute an agreement between All Good Ltd and its resellers/dealers on the resale price of the mentioned products. This agreement may have the object of establishing a fixed price to be observed by the dealers

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when reselling the mentioned product. Through such conduct, the applicant therefore might have been party to a conduct which may amount to a RPM by object and as such may infringe the provisions of section 43 of the Act.

- iii. 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
- iv. The applicant has maintained a continuous and complete collaboration with the CCM throughout the whole amnesty process.

1.11 The Executive Director has further assessed the Undertakings offered by All Good Ltd. The Executive Director takes the view that the proposed Undertakings satisfactorily address the concerns identified in the Report for the following reasons –

- a. The applicant will amend its conduct with relation to affixation of prices and where it affixes a resale price as determined by itself on the product, it will affix the words 'recommended price' next to the price. This will eliminate the possibility of creating an understanding that the price as affixed is the final (fixed) resale price and it will be therefore clear to both resellers and consumers that the price as affixed is merely a price recommendation.
- b. All Good Ltd has undertaken that where it issues a price list to dealers which contain a resale price (recommended) as determined by All Good Ltd, it shall state clearly that the resale price is a recommended price; and shall include a clause clearly stating that the recommended price is not binding on resellers and resellers are free to determine their own resale price. By so doing, it will be made clear to resellers that the retail price in the invoice is just a price recommendation and they are free to deviate from that price. This will be further reinforced by the clause in the invoice making clear that the retail price is not binding and that resellers are free to determine their own resale prices

1.12 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

1.13 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

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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'.

1.14 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.

1.15 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.

1.16 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

1.17 Having regard to the Application submitted by All Good Ltd, the concerns which have been identified by the Executive Director in his Report, and the Undertakings offered by the Applicant, the Commission determines that –

1.18 All Good Ltd has, in its Application, admitted its participation in one or more RPM agreement(s) viz

(i) Having sold products to dealers with resale prices as determined by itself and pre-labelled on the products without the words "recommended price" appearing next to the resale prices;

(ii) Having issued price lists which make mention of 'Retail Price' of the products, without making it clear that such prices are only a recommendation, and the acceptance of which by resellers, may amount to RPM.

1.19 All Good Ltd has complied with requirements (ii) and (iii) of paragraph 5.6A(b) of the CCM 3 Guidelines, as stated in the Report;

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1.20 The Undertakings submitted by All Good Ltd satisfactorily address the Commission's concerns in so far as –

- a. It will ensure that All Good Ltd ceases its participation in all reported RPM agreements to which it was a party;
- b. The undertakings will ensure that the reported conducts are modified such that where the supplier recommends a resale price it is made clear to the reseller that such price is simply a price recommendation.

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 All Good Ltd 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 All Good Ltd, which are being published as per section 63(4) of the Act (see Annex);
- 3) The Undertakings shall be effective as from the date of this Decision.
- 4) We grant immunity from financial penalty to All Good Ltd pursuant to section 59(7) of the Act for the Reported RPM conduct.

Done at Port-Louis this 12 December 2018.

Mr. D. P. A. Mariette
(Vice-Chairperson)

Mr. C. Seebaluck
(Commissioner)

Mrs. M. B. Rajabally
(Commissioner)

Mrs. V. Bikhoo
(Commissioner)

The image shows four handwritten signatures, each written over a horizontal dotted line. From top to bottom, the signatures correspond to Mr. D. P. A. Mariette, Mr. C. Seebaluck, Mrs. M. B. Rajabally, and Mrs. V. Bikhoo. The signatures are in black ink and vary in style, with some being more stylized or cursive than others.



Undertakings to the CCM

Undertakings provided by All Good Ltd to the Competition Commission

Pursuant to an Application for Amnesty dated 16th October 2017

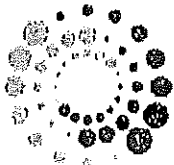
In connection with the Competition Commission's Amnesty Programme for Resale Price Maintenance

24th April 2018



Morcellement Senneville
Lees Street
Curepipe
Mauritius

Tel +230 52581373
Email allgoodtd@hotmail.com



All Good Ltd

1.

2. Definitions:

For the purpose of the present undertakings, the following terms shall have the following meanings:

All Good: All Good Ltd and includes its branches, subsidiaries, or affiliates;

Affiliate: any enterprise directly or indirectly controlled by All Good Ltd;

Act: the Competition Act 2007;

Commission: the Competition Commission established under section 4 of the Act;

Dealer: any distributor, reseller, retailer, or other entity involved in the resale of All Good Ltd's goods or services in Mauritius;

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

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

Resale price maintenance: means 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;

RPM: resale price maintenance

1. Background:

Incorporated on 21st September 2016, All Good is a company dealing in para-pharmaceutical products, para-medical and other products such as Ayurvedic cosmetics, orthopaedic supports, Glucometers, Glucose testing strips, bandages and food supplements.

By its letter dated 16th October 2017 addressed to the Competition Commission and pursuant to paragraph 5.6A of the CCM 3 Guidelines-Collusive Agreements (amended June 2017), All Good has made an application for amnesty under the CCM Amnesty Programme for Resale Price Maintenance (the 'Application').

The conduct for which RPM Amnesty has been sought is in relation to the supply of para pharmaceutical and para medical products and is in connection with retail prices shown on invoices and price labels affixed on para-pharmaceutical/para medical and other products sold to the trade with no mention of the words Recommended Selling Price, which may amount to RPM, in breach of the Act.

Section 43 of the Act prohibits resale price maintenance and section 43(3) of the Act provides that 'where a supplier or producer has recommended a minimum resale price to a reseller of goods and the resale price appears on the goods, the words 'recommended price' shall appear next to the resale price.'

3.

Morcellement Sennecville
Lees Street
Curepipe
Mauritius

Tel +230 52581373
Email allgoodltd@hotmail.com



Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017) for the purpose of obtaining amnesty, All Good is, by the present, providing undertakings related specifically to the impugned agreement and a 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 amnesty.

1. Measures proposed as Undertakings

Pursuant to section 63 of the Act, All Good hereby undertakes to apply the following measures by the implementation date in its commercial dealings with all existing dealers involved in the resale of All Good's products such as pharmaceutical, paramedical products in Mauritius:

3.1. Behavioural Undertakings

- a. Where All Good offers products to dealers for resale and affixes a resale price (recommended minimum or fixed price) as determined by itself on such products, it shall affix the words 'Recommended Price' next to the price of the product in a conspicuous manner and the price shall not be binding on the reseller;
- b. All Good shall offer each reseller the flexibility to determine their own individual resale prices to be affixed on the products or the possibility to purchase the products without a resale price pre-affixed on the products;
- c. Where All Good issues a price list to dealers which contain a resale price (recommended) as determined by All Good, it shall state clearly that the resale price is a recommended price, and shall include a clause clearly stating that the recommended price is not binding on resellers and resellers are free to determine their own resale price.

3.2. Information Dissemination

All Good shall take all appropriate measures to ensure that all its internal management, directors, and employees engaged in the sales and marketing of All Good's products with dealers (hereinafter 'commercial employees') are fully aware of and actively implement the present undertakings when designing and/or implementing the commercial policy of All Good vis-à-vis dealers, in line with the provisions of the Act;

Morcellement Senneville
Lees Street
Curepipe
Mauritius

Tel +230 52581373
Email allgoodltd@hotmail.com



All Good shall use its best efforts to ensure that the present undertaking is made known to and is understood by all dealers.

3.1 Reporting

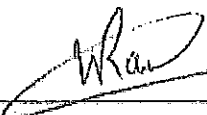
All Good shall provide the Commission with a copy of the amended price tag which is in compliance with the Act and these Undertakings as proof that All Good has irrevocably ceased the resale price maintenance;

All Good shall, as from the date of the present undertakings, take all reasonable steps to ensure that all communications, negotiations, arrangements with dealers are properly documented and archived to demonstrate All Good's compliance with the present undertakings and a general understanding amongst dealers of their freedom and ability to fix or otherwise apply their own prices or price levels when reselling All Good's products;

All Good shall, by the full implementation date, submit a written report to the Commission detailing the implementation of this undertaking.

4. Entry into force

These undertakings shall be effective as from the date it is accepted by the Commission in the form of a decision of the Commission and shall be fully implemented by full implementation date.


24/02/18

Hemant VedKumar Ramdewor
Managing Director

Duly authorised for and on behalf of:
All Good Ltd

Morcellement St. Anneville
Lees Street
Curepipe
Mauritius

tel +230 52581474
Email allgoodltd@hotmail.com

