

General Notice No. 177 of 2019

CCM/DS/0030/23



Decision of the Competition Commission

CCM/DS/0030/23

Non-Confidential

**Application for Immunity made by M. Bachoo & Co Ltd
under the Competition Commission Amnesty
Programme for Resale Price Maintenance**

12 December 2018

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**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/005 – Review of M. Bachoo & Co Ltd RPM Amnesty application'**

**(CCM/DS/0030/23 – Application for Immunity made by M. Bachoo & Co Ltd
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 M. Bachoo & Co Ltd on 08 May 2018,

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

WHEREAS:

I. Introduction

1.1 This Decision relates to an application for immunity dated 20 October 2017 made by M. Bachoo & Co 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 M. Bachoo & Co Ltd on 08 May 2018 (the Undertakings').

1.2 Having taken cognizance of a report of the Executive Director dated 29 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

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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 thereat 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 M. Bachoo & Co Ltd is a private company limited by shares incorporated under the laws of Mauritius with Business Registration Number C07010566 and having its registered office at Royal Road, Rivière du Rempart².

1.6 It operates a supermarket and is a reseller of consumer goods to end consumers.

1.7 M. Bachoo & Co Ltd made an application for RPM Amnesty for having:

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.

² Information gathered from the website of the Registrar of Companies

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- (a) Entered into written agreements with [REDACTED], namely, the "Protocole D'accord pour l'année 2014" which contains a clause restricting the ability of M Bachoo & Co Ltd to price the products Sunquick and Devaaya below the purchase price and a clause relating to other products of the supplier on promotions whereby the reseller will abide by the recommended price; and
- (b) Entered into written agreements with [REDACTED], for the years 2014-2017, which contain clauses requiring the reseller to abide by the recommended selling price.

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 29 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 findings of the Executive Director are that –

- (a) the reported conducts are likely to amount to RPM conducts in as much as:
 - (i) The written agreement between M. Bachoo & Co Ltd and [REDACTED] contains a clause which sets out minimum and fixed prices to be observed by M. Bachoo & Co Ltd when reselling the products of [REDACTED] on promotion, therefore likely to amount to RPM;
 - (ii) The written agreement between M. Bachoo & Co Ltd and [REDACTED] sets out a price restriction in as much as the applicant seems to be under an obligation not to sell the products of [REDACTED] below the resale price recommended by [REDACTED] in its price list or at a price agreed upon by both the applicant and the supplier;
 - (iii) M. Bachoo & Co Ltd has provided the CCM with all the information, documents, and evidence available to it regarding the RPM, and as required by the CCM; and

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- (iv) M. Bachoo & Co Ltd 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 M. Bachoo & Co Ltd. The Executive Director takes the view that the proposed Undertakings satisfactorily addresses the concerns identified in the Report for the following reasons –

- (a) The applicant has undertaken that it will inform the suppliers concerned that it is no longer party to the price restriction imposed by the agreements to which they are party. This will ensure that the RPM conducts under these agreements and the understanding on those agreements cease. Further, the applicant will either modify or enter into new agreements which do not contain RPM clauses thus ensuring that the applicant as a reseller will be free to determine its own resale prices or promotional prices. The applicant will no longer have to abide by a fixed or minimum price or price level during and outside promotions.
- (b) The implementation of these undertakings will therefore ensure that the applicant is no longer party to the RPM clauses contained in the "Protocole D'accord pour l'année 2014" between the applicant and [REDACTED] and in the "Commercial deals" concluded with [REDACTED] in the years 2014, 2015, 2016 and 2017.
- (c) The behavioural measures undertaken by M. Bachoo & Co Ltd shall be disseminated to its internal management and commercial employees engaged in the sales and marketing of M. Bachoo & Co Ltd's products, thereby minimizing risks of RPM conduct being promoted by employees and ensuring that commercial dealings with the resellers are in compliance with the Act.

1.12 The Executive Director recommends that the Commission accepts the Undertakings and grant immunity from fines to M. Bachoo & Co Ltd 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 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'.

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- 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 M. Bachoo & Co 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) M. Bachoo & Co Ltd has, in its Application, admitted its participation in one or more RPM agreement(s), as stated below:
 - i. Entered into written agreements with [REDACTED], namely the "Protocole D'accord pour l'année 2014" which contains a clause restricting the ability of M Bachoo & Co Ltd to price the products Sunquick and Devaaya below the purchase price and a clause relating to other products of the supplier on promotions whereby the reseller will abide to the recommended price.
 - ii. Entered into written agreements with [REDACTED], for the years 2014-2017, with contain clauses requiring the reseller to abide to the recommended selling price.
 - 2) M. Bachoo & Co Ltd has complied with requirements (ii) and (iii) of paragraph 5.6A(b) of the CCM 3 Guidelines, as stated in the Report; and
 - 3) The Undertakings submitted by M. Bachoo & Co Ltd satisfactorily address the Commission's concerns in so far as the undertakings will

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ensure that M. Bachoo & Co Ltd ceases its participation in/terminates all RPM agreements to which it was a party.

V. Decision

NOW THEREFORE,

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

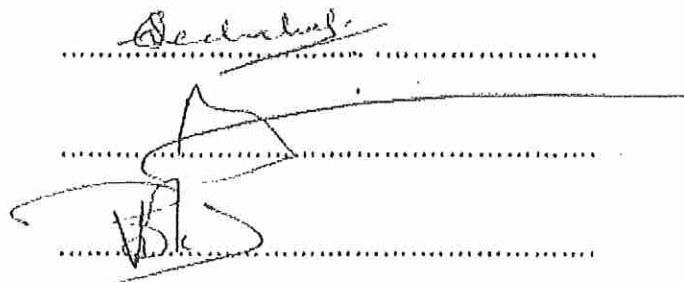
- 1) We accept that the Application made by M. Bachoo & Co Ltd satisfies the conditions prescribed under the RPM Amnesty Programme as set out in paragraph 5.6A of the CCM 3 Guidelines on Collusive Agreements;
- 2) We accept the Undertakings offered by M. Bachoo & Co Ltd, which are being published as per section 63(4) of the Act (see Annex);
- 3) The Undertakings shall be effective as from the date of this decision; and
- 4) We grant immunity from financial penalty to M. Bachoo & Co Ltd 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)



The image shows three handwritten signatures, each written over a horizontal dotted line. The top signature is in cursive and appears to be 'C. Seebaluck'. The middle signature is a stylized, blocky signature. The bottom signature is also stylized and appears to be 'V. Bikhoo'.

Undertakings to the CCM

Undertakings provided by M. Bachoo & Co Ltd to the Competition Commission

Pursuant to an Application for Amnesty dated 20/10/2017

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

[Date of Undertakings]

1. Definition

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

M. Bachoo: M. Bachoo & Co Ltd and includes its branches, subsidiaries, or affiliates;

Affiliate: any enterprise directly or indirectly controlled by M. Bachoo & Co Ltd;

Act: The Competition Act 2007;

Commission: The Competition Commission established under section 4 of the Competition Act 2007;

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.

2. Background

M. Bachoo is a business operating in the retail sector. It operates as a supermarket in the northern part of Mauritius.

By way of its letter dated 20 October 2017 addressed to the Competition Commission and pursuant to paragraph 5.6A of the 'CCM 3 Guidelines – Collusive Agreements' (amended June 2017), M. Bachoo has made an application for immunity under the CCM Amnesty Programme for Resale Price Maintenance (RPM) (the 'Application').

The conduct/agreements, in relation to which the application has been made concerns the following suppliers:

1. [REDACTED]
2. [REDACTED]

in respect of consumer goods supplied by the above-mentioned suppliers.

Section 43 of the Competition Act 2007 (the Act) prohibits and renders void 'any vertical agreement between enterprises to the extent that it involves resale price maintenance'.

M. Bachoo has entered into contractual agreements with [REDACTED] agreements which contained a clause stating "a ne pa vendre en dessous du prix d'achat les Produit mis en promotion". M. Bachoo has also entered into contractual agreement with [REDACTED], agreements which contained clause stating "we would be most grateful if you could comply with our recommended selling price (including VAT) stated in our price list or at a price agreed by both parties." Such clauses establish a fixed or minimum price to be observed by M. Bachoo for the sales of the goods supplied, thus constituting an RPM.

Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017) for the purpose of obtaining immunity, M. Bachoo is, by the present, 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.

3 Measures proposed as Undertakings

Pursuant to section 63 of the Act, M. Bachoo hereby undertakes to apply by the full implementation date, the following measures in its commercial dealings with the above-mentioned suppliers, in the resale of their respective goods or services in Mauritius:

3.1 Behavioural Undertakings

M. Bachoo shall take the necessary steps required to cease the agreement and in particular it shall inform [REDACTED] and [REDACTED] that it is no longer party to the price restriction imposed by the agreement and shall enter into new agreements or modify the agreements to remove the RPM clauses;

M. Bachoo shall not, in any manner whatsoever, enter into or likewise facilitate, either explicitly or implicitly, the implementation of any agreement or part of agreements with the above-mentioned suppliers and/or any other supplier that involves resale price maintenance.

3.2 Information Dissemination

M. Bachoo 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 M. Bachoo's pricing policy, in line with the provisions of the Act;

3.3 Reporting

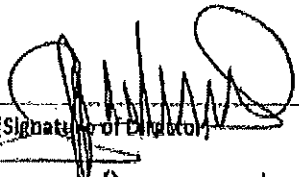
M. Bachoo shall provide the Commission with a copy of any amended agreement governing its commercial relationship with each of the above-mentioned suppliers as proof that M. Bachoo has irrevocably ceased the impugned resale price maintenance;

M. Bachoo shall, as from the effective date, take all reasonable steps to ensure that all communications, negotiations, arrangements with the above-mentioned suppliers are properly documented and archived to demonstrate M. Bachoo's compliance with the present undertakings when reselling the above-mentioned suppliers' goods;

M. Bachoo 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.



(Signature of Director)

Name: Navin Kumar Baidya

Position: Director

Duly authorised for and on behalf of:

M Bachoo & Co Ltd