

General Notice No. 164 of 2019

CCM/DS/0030/10



Decision of the Competition Commission

CCM/DS/0030/10

NON-CONFIDENTIAL

**Application for Immunity made by TANG WAI AND 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/008/04 – Review of TANG WAI AND CO LTD RPM Amnesty
application'**

**(CCM/DS/0030/10 – Application for Immunity made by TANG WAI AND 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 TANG WAI AND CO LTD on 15th June 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 15th October 2017 made by TANG WAI AND 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 TANG WAI AND CO LTD on 15th 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

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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 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 TANG WAI AND CO LTD operates as an independent retailer under the Way Franchise, as Tangs Way, in the retail sector for both food and non-food items and bears the following Business Registration Number C07017403.

1.6 TANG WAI AND CO LTD has made an application, in its capacity as reseller, in writing, to the CCM, through its authorised signatory on the 15th October 2017. The reported RPM conduct, as submitted in the application, makes reference to the acceptance of price lists without the mention of

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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'recommended price', price determinations in contractual agreements, undertaken through WAY GUILD (MTIUS) LTD and acceptance of products with price labelling without the mention of 'recommended price'.

iii. The Investigation

- 1.7 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.
- 1.8 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').
- 1.9 The Executive Director's findings are that the application satisfies the conditions i, ii and iii set out under paragraph 5.6A(b) of CCM3 Guidelines for RPM amnesty. The Executive Director is satisfied that TANG WAI AND CO LTD has admitted its participation in conduct falling within the ambit of RPM under section 43 of the Act, as supported by the documentary evidence submitted and has maintained continuous and complete co-operation from the time of its Application to the issuance of the Executive Director's Report.
- 1.10 Further to his assessment of Application, the Executive Director, in his Report, takes the view that TANG WAI AND CO LTD in its capacity as reseller of food and non-food items, has engaged in a conduct that raises competition concerns under section 43 of the Act.
- 1.11 The Executive Director views that:
 - (a) The price list, establishing the minimum promotional resale prices, without the mention of 'Recommended Price', may be construed as a minimum pricing policy in relation to promotional offers from the suppliers. The price list may thus constitute an agreement, taking into consideration the tacit or implicit acquiescence of TANG WAI AND CO LTD to accept a pricing policy, even if the pricing policy has been imposed unilaterally by the suppliers. The price list, therefore demonstrate the concurrence of wills between TANG WAI AND CO LTD and the suppliers to adopt RPM with respect to the supply of the specific food and non-food items provided by the suppliers.
 - (b) The acceptance of pre-determined prices on the products by TANG WAI AND CO LTD as retailer, without the words 'recommended price' may

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constitute an acquiescence on their part to the policy of the suppliers to affix the resale prices of the products as determined by themselves, which may in turn amount to an agreement.

- (c) The contractual agreements which are binding in nature, contain explicit clauses with clear mention of the obligations to be adhered to by TANG WAI AND CO LTD as well as provide for direct and indirect price determinations. These trade agreements qualify as an agreement demonstrating concurrence of wills between parties to adopt RPM with respect to the supply of food and non-food items provided by the suppliers.

1.12 The Executive Director has further assessed the Undertakings offered by TANG WAI AND CO LTD pursuant to condition iv paragraph 5.6A (b) of CCM 3 Guidelines. The Executive Director takes the view that the proposed Undertakings satisfactorily addresses the concerns identified in the Report for the following reasons –

- a. TANG WAI AND CO LTD has undertaken to inform the suppliers that it is no longer party to the restrictive clause constituting RPM and shall either modify the agreement or enter into a new agreement which does not contain RPM clauses with the suppliers;
- b. TANG WAI AND CO LTD has undertaken not to, 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;
- c. TANG WAI AND CO LTD has undertaken to inform the suppliers concerned that any resale price on the price lists by the suppliers will be considered to be recommended prices and that TANG WAI AND CO LTD shall be free to determine its own resale price.
- d. TANG WAI AND CO LTD has undertaken, where any of the above-mentioned suppliers and/or any other supplier has recommended a minimum resale price for its goods and the resale price appears on the goods, inform the supplier, in writing, that it shall make sure that the words 'recommended price' appear next to the resale price, and shall not accept/offer for sales such products
- e. The behavioural measures undertaken by TANG WAI AND CO LTD shall be disseminated to its internal management and commercial employees engaged in the purchase and/or resale of the suppliers' products, thereby minimizing risks of RPM conduct

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being promoted by employees and ensuring that commercial dealings with the suppliers are in compliance with the Act.

1.13 The Executive Director recommends that the Commission accepts the Undertakings and grants immunity from fines to the Applicant for its participation in the reported RPM conduct.

III. Legal Framework

1.14 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'.

1.15 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.

1.16 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.

1.17 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

1.18 Having regard to the Application submitted by TANG WAI AND 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) TANG WAI AND CO LTD has, in its Application, admitted its participation in one or more RPM agreement(s) *viz*

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- (i) the acceptance of price list without the mention of 'Recommended Price';
 - (ii) the acceptance of vertical price restriction in suppliers' contracts, undertaken through WAY GUILD (MTIUS) LTD, that includes price determination of the products; and
 - (iii) the acceptance of price labelling on products without the words 'Recommended Price';
- 2) TANG WAI AND CO LTD 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 TANG WAI AND CO LTD satisfactorily address the Commission's concerns in so far as –
 - a. TANG WAI AND CO LTD has ceased its participation in/terminated all RPM agreements to which it was a party, as reported in its Application;
 - b. TANG WAI AND CO LTD has undertaken to put in place other measures as stated in section 1.12 of this document that would guarantee compliance with 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 TANG WAI AND 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 TANG WAI AND 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 TANG WAI AND CO LTD pursuant to section 59(7) of the Act for the Reported RPM conduct.


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Done at Port-Louis this 12 December 2018.


Mr. C. Seebaluck
(Commissioner)


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Mrs. M. B. Rajabally
(Commissioner)


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Mrs. V. Bikhoo
(Commissioner)


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Undertakings to the CCM

Undertakings provided by **TANG WAI AND CO LTD** to the Competition Commission
Pursuant to an Application for Amnesty dated 15th October 2017
In connection with the Competition Commission's Amnesty Programme for Resale Price
Maintenance

15 JUNE 2018



1. Definitions:

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

TANG WAI AND CO LTD (herein 'Tangs Way'): Tangs Way and includes its branches, subsidiaries, or affiliates;

Affiliate: any enterprise directly or indirectly controlled by Tangs Way;

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 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:

Tangs Way is a retailer operating under the 'WAY' franchise in Mauritius in the retail sector for fast-moving consumer goods for both food and non-food items.

By its letter dated 15th October 2017 addressed to the Competition Commission and pursuant to paragraph 5.6A of the 'CCM 3 Guidelines – Collusive Agreements' (amended June 2017), Tangs Way has made an application for amnesty under the CCM Amnesty Programme for Resale Price Maintenance (RPM) (the 'Application').

The reported activity involves three practices whereby Tangs Way has:

- (i) accepted products with resale prices pre-determined in price lists by its suppliers without the words "recommended price"; (the "Practice I"); and
- (ii) accepted products with resale prices pre-determined and pre-labelled on the products by its suppliers without the words "recommended price" appearing next to the resale prices; (the "Practice II"); and
- (iii) In its own name or through WAY GUILD (MTIUS) LTD (herein 'Way Guild'), entered into contractual agreements with suppliers, which contain clauses on the resale prices of products (the "Practice III").

Practice I is in relation to the following suppliers:

[REDACTED]

Practice II is in relation to the following suppliers:

[REDACTED]

The agreement with respect to Practice III is in relation to the following suppliers:

[REDACTED]

The identified suppliers for Practice I, II and III shall altogether herein after be referred to as 'the Suppliers'.

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.'

With reference to Practices I, II and III, Tangs Way is given to understand that those may be in contravention of Section 43 of the Competition Act 2007 and may therefore pose as concerns which have arisen during an investigation in respect to the application.

Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017), for the purpose of obtaining RPM Amnesty, Tangs Way 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 any possible concerns of the Competition Commission in relation thereto and obtaining the requested amnesty.

3. Measures proposed as Undertakings

Pursuant to section 63 of the Act, Tangs Way 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

Tangs Way shall inform the above-mentioned suppliers that it is no longer party to the restrictive clause constituting RPM and shall either modify the agreement or enter into a new agreement which does not contain RPM clauses with the suppliers;

Tangs Way 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;

Tangs Way shall inform the suppliers concerned that any resale price on the price lists by the suppliers will be considered to be recommended prices and that Tangs Way shall be free to determine its own resale price.

Tangs Way shall, where any of the above-mentioned suppliers and/or any other supplier has recommended a minimum resale price for its goods and the resale price appears on the goods, inform the supplier, in writing, that it shall make sure that the words 'recommended price' appear next to the resale price, and shall not accept/offer for sales such products.

3.2. Information Dissemination

Tangs Way 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 Tangs Way pricing policy, in line with the provisions of the Act.

3.3. Reporting

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

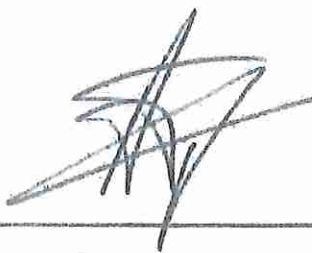

Tangs Way shall provide the Commission with a copy of any amended agreement governing its commercial relationship with each of the above-mentioned suppliers as proof that Tangs Way has irrevocably ceased the impugned resale price maintenance;

Tangs Way 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 compliance with the present undertakings when reselling the above-mentioned suppliers' goods;

Tangs Way 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.

Name: Alain M. TANG WAI

Position: Director

Duly authorised for and on behalf of:
TANG WAI AND CO LTD

