

Decision of the Competition Commission

CCM/DS/0040

Confidential

**Possible collusive agreements by the Association
of Freight Forwarders**

20 February 2020

Competition Commission

Decision of the Competition Commission (the 'Commission') on the investigation into the potential collusive agreements by the Association of Freight Forwarders.

THE COMMISSION –

Mr A. Mariette	-	Vice-Chairperson
Mrs M. Rajabally	-	Commissioner,
Mr. C. Seebaluck	-	Commissioner,
Mrs. V. Bikhoo	-	Commissioner,

Having regard to the Competition Act 2007,

Having regard to the Competition Commission Rules of Procedure 2009,

Having regard to a report of the Executive Director of the Competition Commission (the 'Executive Director') dated 10 June 2019 on the investigation into the potential collusive agreements by the Association of Freight Forwarders (APT)

We, Commissioners, decide as follows:

Introduction

- 1.0 The Executive Director conducted an enquiry regarding a potential collusive agreement that may exist among certain members of the APT to comply with certain clauses of its Standard Trading Conditions (STC). The STC contains clauses, among others, setting a fixed rate of interest to clients of the members of the APT on overdue amounts and setting a maximum limit on the members of the APT.
- 2.0 The Executive Director of the Commission (the 'Executive Director') on the 29 June 2017 opened an investigation under section 51 of the Competition Act ('the Act') to specifically enquire into a possible restrictive business practice by members of APT.
- 3.0 On 10 June 2019, the Executive Director submitted his report (the 'Report') on the investigation (INV038) to the Commission for its determination.

The law

- 4.0 For an infringement under section 41 of the Act, there must be proved, on a balance of probabilities, that the member of APT has agreed with its members to charge a fix interest rate to their respective clients for late payments, and to set the quantum as to liability of its members for any type of claim. It must also be proved that the agreement between members of APT "*significantly prevents,*

restricts or distorts competition". These are the required elements to establish an infringement under section 41 of the Act which is reproduced below:-

4.1 "Horizontal agreements

- (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 purchasing prices of 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) Any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void".
(underlining is ours)

5.0 Similarly, it is the view of the Executive Director that the elements of an infringement under section 41 of the Act are:-

- 5.1 an agreement between enterprises or a decision by an association of enterprises (underlining is ours);
- 5.2 the enterprises supply services of the same description (the horizontal aspect of the agreement);
- 5.3 whether agreement aims at fixing the selling price of the 'service' offered by members of APT; and
- 5.4 whether the agreement significantly prevents, restricts or distorts competition.

6.0 Under section 59 of the Act, the Commission "may, in relation to a restrictive agreement falling within the scope of section 41, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on the enterprise" but such penalty shall only be imposed if "it is satisfied that the breach of the prohibition was committed intentionally or negligently".

Facts

- 7.0 APT is a registered trade association to the Registrar of Associations since August 1976. Its members (38 at present) are local freight forwarding agents (FFA) who are duly licensed by the Customs Department of the Mauritius Revenue Authority (MRA).
- 8.0 A freight forwarding agent organises and handles the shipment of cargo and ensures that the goods are moved from the point of origin to its final destination at the expected time. He also facilitates the preparation of all relevant documents required by the foreign government, packs and labels all goods to be trans-shipped.
- 9.0 It is the Executive Director's contention that certain conditions set in the STC may be contrary to section 41 of the Act, the more so:-
- 9.1 clause 20(c) of the STC, applicable as from 18 March 2010, amounts to an agreement, in the form of a decision of the APT, on interest rate for credit facilities, having the object of fixing the price of credit facilities offered by members of the APT; and
- 9.2 clause 30 of the STC amounts to an agreement, in the form of a decision of the APT, to limit the liability of members of the APT.
- 10.0 There is another decision of the APT which might, according to the Executive Director, be in breach of section 41 of the Act. The said decision is in regard to the co-loading rates which have the object of fixing the prices of co-loading services. The Executive Director has, however, drawn to our attention that co-loading rates have been applied since prior to the coming into force of the provisions of the Act and up to around March 2010.
- 11.0 The STC has been published on the website of the APT and is accessible to the general public, even as at present.

Investigation and findings

- 12.0 Pursuant to section 51 of the Act, the Executive Director proceeded to investigate (INV038) whether the reported conduct of the APT may amount to an infringement of section 41 of the Act.
- 12.0 The Executive Director submitted his Report on the matter to the Commission on 10th June 2019. The Report contains the findings of the Executive Director and his recommendations.
- 13.0 The Executive Director concluded that section 41 of the Act has been breached as follows:-
- 13.1 clause 20(c) of the STC amounts to an agreement between members of the APT on interest rate for credit facilities, having the object of fixing the price of credit facilities offered by members of the APT, which started on 18 March 2010 and continues as at date of his Report;

- 13.2 assessment of clause 30 of the STC has not been conclusive to make a finding of a breach of section 41 of the Act, but it can hinder competition; and
- 13.3 there has been an agreement between members of the APT on co-loading rates having the object of fixing the prices of co-loading services to freight forwarders and to the public which started prior to the coming into force of the Act but likely to have continued to be in force thereafter, and as such was a breach as from 25 November 2009 and ceased or was significantly weakened in terms of its understanding in March 2010.

Undertakings

14.0 Undertakings have been offered by the APT on 29 January 2019. The APT has undertaken to:-

- 14.1 amend clause 20(c) of the STC so that the amended version will read as-
 - 14.1.1 “on all amounts overdue to the Company, the customer shall pay to the Company the amounts overdue on terms and conditions agreed by the Company”.
- 14.2 amend clause 30(a)(ii) of the STC so that, after amendment, it will read as –
 - 14.2.1 “the liability of the company howsoever arising and notwithstanding that such liability shall have arisen from the neglect or default of the company, shall be determined as per international agreements/conventions to which Mauritius is a party or as determined by the company”.
- 14.3 refrain from engaging in any discussions during its meetings that has the object or effect of fixing prices;
- 14.4 amend its constitution by adding a statement to be known as “APT Competition Compliance Statement” which will be in the following form –
 - 14.4.1 *“The APT strictly prohibits any discussion or other communication among members the purpose or effect of which is to set prices, allocate markets or customers, engage in tying arrangements or refrain from purchasing any goods or services from any particular supplier or vendor. It is mandatory that you familiarize yourself with the Competition Act 2007 of Mauritius available on <http://www.ccm.mu/English/Documents/Legislations/CompetitionAct.pdf>. In case of any doubt, we kindly request you to contact the President of the APT for guidance”.*

- 14.5 refrain from discussing, at any of its meetings, issues relating to fixing or agreeing of prices for services offered by its members; and
- 14.6 ensure that all its members take necessary measures to disseminate these undertakings to their respective officers, employees, agents, *préposés* or any other persons representing them at the Association meetings to ensure that these are understood and complied with by them in their dealings with other Members.

Executive Director's recommendations

- 15.0 The Executive Director has submitted that undertakings offered by the APT on behalf of its members satisfactorily address the competition concerns of the investigation and as such, recommends the Commission to accept the undertakings, determine that clause 20(c) of the STC and the agreement on co-loading rates are prohibited, null and void, but does not warrant financial penalties.

Determination

- 16.0. We have perused the Report of the Executive Director and it is our unanimous view that both Clause 20(c) and Clause 30 of the STC, in their form and tenor, as designed and approved by the APT and applied by its members, amount to a breach of section 41 of the Act. We say so for the following reasons -
 - 16.1 the decision by members of APT to approve and apply the STC amounts to 'a decision of an association of enterprises' and as such, squarely falls under the definition of an 'agreement' under section 2 of the Act.
 - 16.2 We are in agreement with the Executive Director that Clause 20(c) of the STC is a clause for "credit facilities" to customers which imposes on them an interest rate of 1.5% per month for late payment of the amount due for charges. We cannot interpret Clause 20(c) otherwise.
 - 16.3 As regards Clause 30 of the STC, it is a limitation of liability clause of an agreement and/or contract, limiting the quantum of damages payable to a customer for prejudice suffered as a result of the APT member's neglect or default. Since the said quantum has been decided by APT, it is considered to be an act of price fixing and does have the required effect as statutorily provided for under 41(1)(b)(ii) and (iii).
- 17.0 As for co-loading rates which were worked out by the Management Committee of the APT during its meeting of 18 June 2009, we subscribe to the findings of the Executive Director that there has been an agreement to fix the price for co-loading services among members of the APT, which agreement lasted for the period 25 November 2009 to March 2010.

Decision

- 18.0 The Commission therefore decides as follows:

- 18.1 We have considered the various concerns raised by the Executive Director in his Report which also contains his findings and recommendations. In view of the probative value of evidence tendered by the Executive Director, we are of considered view that such evidence is sufficient to establish that members of APT have breached section 41 of the Act.
- 18.2 We have further considered the exceptional circumstances surrounding the breach on the part of APT members, in particular the timing of the STC and the minimum pricing policy; the absence of evidence of active implementation thereof post coming of the Act; and consequently, their less serious effect upon competition and consumers.
- 18.3 We are of considered view that in this particular case, directions instead of an order imposing a financial penalty are more appropriate.
- 18.4 We therefore direct members of the APT, pursuant to section 58 of the Act to terminate the impugned agreements, viz., the restrictive clauses in the STC and minimum price list, with immediate effect.
- 18.5 In our view, the Undertakings voluntarily submitted by the APT on behalf of its members contains measures which serve the purpose of ensuring firstly, that members of the APT cease to be a party to the impugned agreements; and secondly, that the APT itself, as an association of enterprises, does not facilitate restrictive agreement(s) on the part of, or contracts and communications by its members. We therefore further direct members of the APT and Office bearers of the APT, pursuant to section 58(1) of the Act, to implement and give immediate effect to each of the measures stated at Section 3 of their Undertakings dated 17th January 2019.
- 18.6 APT shall, within 3 months of the date of this Decision, submit a report to the Commission as regards remedial actions taken to cure its anti-competitive practices.

Mr A. Mariette
(Vice-Chairperson)

Mr. C. Seebaluck
(Commissioner)

Mrs. M. B. Rajabally
(Commissioner)

Mrs. V. Bikhoo
(Commissioner)


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