

*General Notice No. 1748 of 2022*



## Decision of the Commission

**CC/DS 0028/1 - MCFI (INV 037)**

Non-Confidential

**In the Matter of -**

**Supply of chemical fertilisers (INV 037) and involving  
The Mauritius Chemical and Fertilizer Industry Limited  
(now "Ingenia")**

**25 August 2022**

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**Decision of the Commissioners of the Competition Commission (the 'Commission')  
of 25 August 2022**

**relating to proceedings before the Commission against The Mauritius Chemical and Fertilizer Industry Limited (now "Ingenia") in the matter referred to as "INV 037: Final Report of the Executive Director on Investigation into the supply of chemical fertilisers"**

**THE COMMISSION –**

Mr. M. Bocus	-	Chairperson,
Mr. A. Mariette	-	Vice-Chairperson,
Mrs. V. Bikhoo	-	Commissioner,
Mrs. S. Dindoyal	-	Commissioner,

**THE PARTIES SUBJECT TO INVESTIGATION (the 'PARTIES') –**

1. The Mauritius Chemical and Fertilizer Industry Limited; and
2. United Investments Ltd

**Present at the Hearing of 20<sup>th</sup> April 2022 convened before the Commission,**

**The Mauritius Chemical and Fertilizer Industry Limited** – was virtually represented by Mr Mark Brealey, QC, of counsel;

**United Investments Ltd** – was represented by Messrs Paul Ozin, QC, Herve Duval, SC, and Karvi Arian, of counsel;

**The Executive Director of the Competition Commission**, represented by Messrs Vipin Naugah, Head of Investigations, and Djameel Soreefan, Senior Investigation Officer, was assisted by Mr Nitish Hurnaum, of counsel.

**I. Introduction**

1.1. On 20<sup>th</sup> April 2022, the Commission convened a hearing, further to a preliminary hearing dated 29<sup>th</sup> October 2019, relating to proceedings in matters referred to as INV 037 and INV 041., respectively *viz.*, Reports of investigation submitted by the Executive Director of the Competition Commission (the "Executive Director") to the Commission pursuant to section 51(2) of the Competition Act 2007 (the "Act"). Both investigations (INV 037 and 041) were in relation to the supply of chemical fertilisers *quoad* the afore-parties namely, The Mauritius Chemical and Fertilizer Industry Limited (now Ingenia) ("MCFI") and United Investments Ltd ("UIL").

1.2. During the Hearing of 20<sup>th</sup> April 2022, UIL applied for a stay of proceedings before the Commission. MCFI for its part requested the Commission to uphold the recommendations of the Executive Director concerning it in the matters of INV037

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and INV041. MCFI moved, in the same breath, that the cases against it be dealt with separately and independently of the cases brought against UIL.

- 1.3. MCFI rests its motion on the need for finality of proceedings insofar as it is concerned in both aforesaid matters before the Commission which commenced in June 2018 when the Executive Director submitted his Reports of investigation to the Commission.
- 1.4. The Commission also notes that the Executive Director's investigations in INV 037 and INV 041 are premised on distinct provisions of the law. The investigation – INV 037 is premised on the provisions of section 41 of the Act on 'Horizontal (collusive) agreements' whereas investigation – INV 041 is premised on the provisions of section 42 of the Act relative to 'Bid rigging'. Further, separate and different recommendations have been made against each party insofar as matters of remedial measures/penalty are concerned.
- 1.5. UIL has intimated that it has no qualm that the cases against MCFI be dealt with separately.
- 1.6. The Commission is of the considered view that in the above premises, the request of MCFI that the two cases against it be dealt with separately is justified; all the more so as MCFI, unlike UIL, does not dispute the Executive Director's findings and recommendations.
- 1.7. The present decision is therefore in respect of MCFI only and it is in regard to the matter of INV 037.

## II. Background to the Proceedings before the Commission

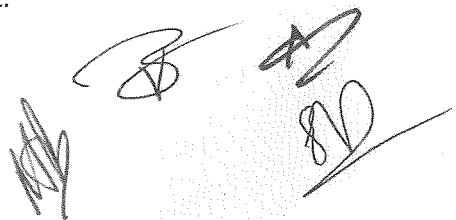
- 2.1. By letter dated 30<sup>th</sup> July 2018, UIL requested to be heard in-camera pursuant to rules 22(1) & 24 of the Competition Commission Rules of Procedure 2009. MCFI had, in correspondences exchanged with the Commission regarding the convening of a hearing, indicated its intention to attend the hearing.
- 2.2. Between 2018 and October 2019, a number of preliminary issues had to be dealt with before a hearing was eventually fixed for 29<sup>th</sup> October 2019. The said issues were, *inter alia*, in relation to -
  - (a) the parties' respective requests to be represented by foreign counsels for the purposes of the hearing before the Commission and the need to coordinate and facilitate such requests;
  - (b) UIL's request to cross-examine the Executive Director and representative(s) of MCFI during the hearing to be able to contest the evidence relied upon in the Investigation reports;
  - (c) a "mise en demeure" served on the Commission and the Executive Director on 24<sup>th</sup> September 2019 whereby UIL formally requested the Executive Director to exercise his disclosure duties considering specific defences raised by UIL during investigation on substantive issues and on its plea of prosecutorial bias;



- (d) a formal request in the aforesaid notice at the instance of UIL for the Commission to devote the hearing fixed for 29<sup>th</sup> October 2019 to preliminary issues relating to disclosure of information and the conduct of the substantial hearing of UIL;
- (e) a motion raised before the Commission by the Executive Director pursuant to section 290(2) of the Criminal Code Act whereby he was seeking to reserve his right to proceed against any person privy to what he considered to be offensive and unwarranted allegations against his person.
- 2.3. Further to UIL's request and in the interest of effective case management, the hearing of 29<sup>th</sup> October 2019 was devoted to entertaining procedural issues raised by UIL. The Commission agreed that it would proceed to hear the matter on the merits after having addressed and ruled on the preliminary issues raised by UIL. The Commission delivered its ruling on the preliminary issues in question on 28<sup>th</sup> April 2020.
- 2.4. Subsequently, and as a result of the Covid-19 pandemic and sanitary crisis that hit the world, a substantive hearing could be conveniently convened on 20<sup>th</sup> April 2022 only, with UIL attending physically while MCFI attended virtually. It is during the said proceedings that, as stated earlier on, UIL moved for a stay of proceedings against it whilst MCFI, for its part, pressed for adoption of the recommendations of the Executive Director concerning it in the Reports of investigation submitted by the latter in the matters of INV037 and INV041 respectively.

### III. Background to the INV 037 – Investigation

- 3.1. On 29<sup>th</sup> June 2018, the Executive Director submitted his Report of Investigation to the Commission further to his investigation, bearing reference INV 037, *quoad* MCFI and UIL. The investigation was initiated further to an enquiry into information from the press in relation to a potential merger between MCFI and Island Fertilisers Ltd ("IFL", a subsidiary of UIL), to strengthen their operations in the production and supply of chemical fertilisers. The enquiry did not disclose ground for concern as such with regard to the merger provisions of the Act but found reasonable grounds, according to the Executive Director, to believe that a restrictive business practice in the form of collusive agreement(s), as prohibited under section 41 of the Act had occurred and continued to occur between MCFI and UIL with respect to the supply of fertilisers in Mauritius. The parties were notified of the investigation on 07<sup>th</sup> November 2016.
- 3.2. The Executive Director's main concerns stem from a decision of MCFI and UIL to set up a common distribution company (referred to as "Fertco Ltd" / "Fertco") for the sale of fertilisers, sourced from production by MCFI and UIL separately and which was complemented by the conduct of the parties in their continuing interactions, notwithstanding the non-implementation of their Fertco collaboration.
- 3.3. MCFI was incorporated in 1975 and its ultimate holding company is Harel Mallac Co Ltd. Its main business operations are in the Fertilisers segment, Contracting and Trading. MCFI manufactures different types of fertiliser products and operates a complex fertiliser plant as well as a blending fertiliser plant.



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- 3.4. In addition to its exports business, MCFI supplies locally to different market segments namely, sugar estates and large planters, wholesale distributors, and to end-customers such as small planters and the general public.
- 3.5. During investigation and upon perfecting its marker, MCFI applied for leniency on 16<sup>th</sup> March 2017 pursuant to CC 3 Guidelines – Collusive agreements, which prescribe the circumstances pursuant to which the Commission may grant leniency/immunity to an enterprise (hereinafter “Leniency Policy”). MCFI had filed its leniency application during the period that the Competition Commission put in place a ‘Temporary Amnesty programme for cartel initiators’, which lasted from 01<sup>st</sup> March 2017 to 31<sup>st</sup> August 2017.
- 3.6. MCFI also applied for Leniency plus, pursuant to the Leniency Policy. It accordingly provided documentary evidence tending to disclose a separate cartel activity involving MCFI and UIL that was not being investigated by the Executive Director at the time of INV 037. Further to MCFI’s leniency plus application, the Executive Director opened and concluded a separate investigation, INV 041, into alleged bid rigging agreement(s) between MCFI and UIL, with findings of breach under section 42 of the Act.

#### IV. The Legal Framework

- 4.1. The Executive Director’s investigation is premised on the provisions of section 41 of the Act, which prohibits horizontal agreements that are collusive. The said provisions read as follows –

*(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 purchase prices of the 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.*

- 4.2. Premised on the foregoing, the hereunder main elements need to be established to find that the impugned conduct breaches section 41 of the Act, namely –

- (a) the existence of an agreement,
- (b) that the agreement is between enterprises that supply ... goods / services of the same description,
- (c) the collusive object or effect of the agreement per elements listed at sub-provisos (i), (ii), or (iii) of section 41(1)(b) of the Act, and
- (d) the agreement significantly prevents, restricts or distorts competition.

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### Agreement

- 4.3. Section 2 of the Act defines 'agreement' as "any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Mauritius or in a part of Mauritius, and includes an oral agreement, a decision by an association of enterprises, and any concerted practice".
- 4.4. Section 1.9 of CC 3 Guidelines – Collusive agreements adds that "*[a]greement' has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral; it includes so-called gentlemen's agreements. An agreement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls or any other means. All that is required is that parties arrive at a consensus, an understanding, on the actions each party will, or will not take.*"
- 4.5. The section 2 definition of agreement also embodies the concept of 'concerted practice' which captures any "*practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them*". The principle emanating from settled European Union case law on concerted practice is that the concept is intended to bring within the cartel prohibition, "*a form of coordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, knowingly substitutes practical co-operation between them for the risks of competition*".<sup>1</sup>

### Qualification of 'enterprise supplying goods of same description'

- 4.6. For an agreement to be captured under section 41, such an agreement has to firstly, be between entities qualifying as 'enterprise', that is, between "*person, firm, partnership corporation, company, association or other juridical person, engaged in commercial activities for gain or reward, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them*". Thus, two conditions have to be met to qualify as 'enterprise'. The entity in question has to be endowed with juridical personality (legal or natural) and has to be engaged in commercial activities for gain or reward.
- 4.7. Secondly, the enterprises that are party to the agreement have to be 'supplying....goods or services of the same description'.

### Collusive Object or effect

- 4.8. The anti-competitive 'object or effect' of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in section 41 of the Act. It is trite law that if an agreement has the object to restrict competition, then it is not necessary to examine the effect of the agreement to establish a breach of section 41 of the Act<sup>2</sup>.

<sup>1</sup> Case 48-69, Imperial Chemical Industries Ltd. v Commission of the EC, at para 64.

<sup>2</sup> Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, at pages 342-343.

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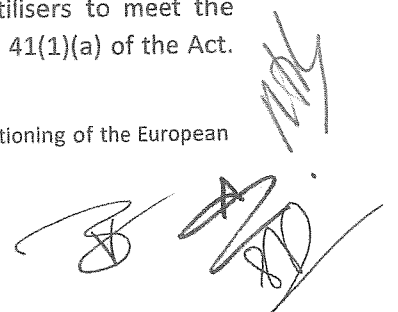
- 4.9. The CC 3 Guidelines (section 2.14) espouses a similar view namely that “[c]ertain types of restrictive agreements are regarded as having an object which is so manifestly anticompetitive that consideration of their effects is unnecessary. These include horizontal restrictions to fix prices, share markets (territories or customers), quotas or limitation on production or sale, minimum RPM and vertical customer allocation clauses.”
- 4.10. A horizontal agreement will be found to be collusive if exhibiting any one or more of the three conditions at section 41(b) of the Act that is, fixing the selling or purchase prices of the goods or services; sharing markets or sources of the supply of the goods or services; or restricting the supply of the goods or services to, or the acquisition of them from, any person.
- 4.11. One category of agreement that may fall within the purview of section 41 of the Act is ‘joint commercialisation or joint selling’ agreement between rival or potentially rival enterprises. Such agreements generally involve two or more competitors cooperating in any manner to sell, distribute, or promote their respective products. This type of agreement can have widely varying scope, depending on the commercialisation functions which are covered by the co-operation.
- 4.12. Agreements limited to joint selling generally have the object of coordinating the pricing policy of competing manufacturers or service providers. Such agreements may not only eliminate price competition between the parties for goods/service supplied by them but may also restrict the total volume of products to be delivered by the parties within the framework of a system for allocating orders. Such agreements are therefore likely to restrict competition by object.<sup>3</sup>

## V. The Executive Director’s Findings and Proposed Recommendations

### The facts of the case

- 5.1. MCFI started off as the first manufacturer of chemical fertilisers in Mauritius in 1975 and since 2009, its focus shifted to solid (granular) fertiliser business. UIL for its part has been dealing in fertiliser business through the commercial activities of its two subsidiaries, namely IFL (since 2004) and Island Renewable Fertiliser Ltd (“IRFL”, since 2005). UIL and its subsidiaries, IFL and IRFL, entered the liquid fertiliser business in or around 2009.
- 5.2. IFL ceased production of granular fertilisers in December 2015 and exited that segment of the market. IRFL is the sole supplier of liquid fertiliser (CMS Organo mineral) in Mauritius, which it offers alongside a complementary service of spraying/application.
- 5.3. Considering such factors as product functional use, customer needs, cost/yield ratio, the Executive Director regards liquid and granular (solid) fertilisers to meet the element of ‘goods of the same description’ pursuant to section 41(1)(a) of the Act.


<sup>3</sup> Section 6.3.2, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01).



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The market under consideration for the purposes of his investigation is the sale and distribution of chemical fertilisers in and from Mauritius, both solid (granular) and liquid forms.

- 5.4. Since 2013, discussions had reportedly been ongoing between MCFI and UIL for MCFI to package for and supply UIL with granular fertilisers. This was formalised into a 'Toll manufacturing agreement', whereby MCFI was to manufacture and supply granular fertiliser to IFL for the latter to sell to its customers. The said agreement could eventually not be implemented on account of certain regulatory requirements on fertiliser product packaging and the project was eventually abandoned.
- 5.5. Then ensued sets of negotiations between the said parties which envisaged the setting up of a marketing and distribution company (named Fertco Ltd / Fertco), to be equally owned by MCFI and UIL. This is evidenced by the signing of a memorandum of understanding dated 22<sup>nd</sup> July 2014 ("MoU"). The Report establishes other agreements between the parties tending to further document and consolidate their negotiations viz., an addendum to the MoU, distribution agreements, a shareholders' agreement with respect to Fertco, an updated shareholders' agreement and a side letter to the MoU.
- 5.6. From the Report findings, the terms of the collaboration between the parties tended to suggest that -
- (a) although Fertco was designated to set the price for products that it distributes; such price setting resulted from the indirect setting of the price(s) jointly by UIL and MCFI by virtue of the common control resulting from equal 50% ownership that each main party agreed to have in Fertco;
  - (b) Fertco would be the only marketing and distribution outlet for the products manufactured by MCFI and UIL respectively while the latter would no longer be involved in the distribution and marketing of their respective products;
  - (c) MCFI and UIL would maintain their market shares post formation of the common distribution arm since manufacturing would remain with them. In fact, evidence adduced tended to demonstrate that parties had agreed to share the market by causing the exit of IFL from the granular segment of the market whereby MCFI would become the only manufacturer of granular fertilisers in Mauritius;
  - (d) the prices were set above market levels and MCFI had agreed to price in such a way as to favour sales of liquid fertiliser by UIL, its rival; and
  - (e) the parties had further agreed on the quantity of fertiliser to be supplied by each of them by setting target sales volume in concertation. This market sharing objective was reached on the basis of their price fixing scheme.
- 5.7. The parties under investigation have submitted that Fertco has never been operational since the common distribution project was never implemented. However, the Executive Director's investigation has adduced a history of email exchanges/meetings between MCFI and UIL between May 2015 to June 2016



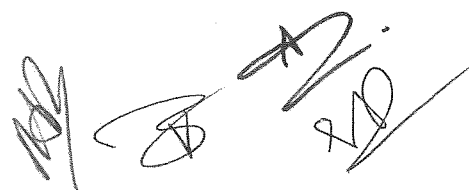
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regarding the parties' past and forecast sales figures, operational costs, customer lists, among others, to demonstrate the existence of market transparency and coordinated action influencing their market operations and competition being substituted by cooperation between the parties. Considering the information before him, the Executive Director found therefore that the Fertco project was indeed being given effect to by the main parties, and exchanges of sensitive commercial information took place without any ring fencing.

The Findings of investigation

5.8. On the basis of the facts before him, the Executive Director found that MCFI and UIL, being competitors in the supply of chemical fertilisers in Mauritius, have participated in collusive agreements from the year 2014 to 2016, insofar as -

- 5.8.1. the decision of the main parties in 2014 to set up a common distribution vehicle namely, the setting up of Fertco, amounts to a commercialisation agreement having the object of fixing the selling price of fertilisers produced and supplied by UIL and MCFI by virtue of their joint ownership and joint direct control over Fertco, so that the pricing decisions would effectively be a common decision taken jointly by the main parties. This deprives the customers of the opportunity to get independent and individual prices from MCFI and UIL for their respective products, which would have been the case, had the main parties not agreed to collaborate and distribute their products jointly through Fertco;
- 5.8.2. the commercialisation agreement resulting from the Fertco agreement has the object of fixing the selling prices of the fertilisers produced by MCFI and UIL in breach of section 41 (1) (b) (i) of the Act;
- 5.8.3. although the joint distribution vehicle was not implemented as a running business entity, the main parties collaborated further in the supply of fertilisers. These collaborations and information exchanges give effect to the intended Fertco agreement, as they evidence the actual implementation of the essence of the joint-commercialisation vehicle (Fertco) project;
- 5.8.4. the collaborations between MCFI and UIL, amount to collusive agreements which have as their object the fixing of the selling prices of fertilisers and the sharing of the market for the supply of chemical fertilisers by product type leading to customer allocation and are thus in breach of section 41 (1) (b) (i) & (ii) of the Act; and
- 5.8.5. the requirement of section 41 (1) (c) of the Act is satisfied on the basis that MCFI and UIL are two of the largest suppliers of fertilisers in Mauritius with very high share of the market, and their agreement, which by object fix the price of their products and share and allocate sales between them the agreements, are, by their very nature, deemed to prevent, restrict and distort competition significantly in the supply of fertilisers in Mauritius.



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The Proposed Recommendations

- 5.9. In light of his findings, the Executive Director has recommended that the Commission makes a finding of breach of section 41 of the Act against UIL and MCFI in INV037.
- 5.10. Considering the provisions of the Act as to remedial measures and penalty in light of the facts of the case, the Executive Director has further recommended that the Commission issues directions upon both parties, pursuant to section 58 of the Act, in addition to making an order imposing financial penalty on each of them under section 59 of the Act.
- 5.11. As far as directions are concerned, the Executive Director has recommended that the parties be directed pursuant to section 58 of the Act to -
- i. terminate any relationship extant between them regarding the supply of fertilisers in Mauritius;
  - ii. report to the Commission for the next two years on any other relationship between the main parties such as the supply of raw materials, and
  - iii. disclose all such information that may be requested by the Commission relating to the supply of fertilisers in Mauritius.
- 5.12. On the imposition of financial penalty and pursuant to section 59(2) of the Act, the Executive Director has considered the parties' breach to have been intentional and deliberate, notwithstanding that the parties had sought a legal opinion and may have relied thereon.
- 5.13. The Executive Director has had further regard to the following circumstances in recommending the quantum of the financial penalty that may be imposed upon MCFI, viz., -
- 5.13.1. the seriousness of the breach insofar as it involved the two largest suppliers, with low prospect of entry in the liquid fertiliser market,
  - 5.13.2. the relevant turnover for MCFI that is, MCFI's sales realised for chemical fertilisers in Mauritius for the last business year 2016 (net of discounts and taxes) and excluding sales from exports and to foreign entities),
  - 5.13.3. the duration of the agreement, which was viewed as being a single and continuous agreement from 2014 to 2016 inclusively,
  - 5.13.4. the presence of mitigating factors residing in uncertainty on the part of the parties as to their conduct amounting to breach, cooperation, termination of conduct even prior to start of the investigation,
  - 5.13.5. the presence of aggravating factors residing in directors' involvement, extensive information sharing, intentional breach, multiplicity of agreements concluded for several types of breaches; and
  - 5.13.6. MCFI's leniency and leniency-plus application, which were considered valid and assessed against the conditions prescribed in the Leniency Policy. It is

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apposite to note that the investigation could not, on the basis of evidence, determine clearly who from UIL or MCFI was the instigator for the impugned agreement.

- 5.14. In light of the above circumstances, the Executive Director has recommended that a discounted financial penalty of Rs 5,404,676.98 be imposed upon MCFI, after granting MCFI a proposed leniency of 75% supplemented by a further reduction of 15% as leniency plus, which led to the successful completion of INV041 investigation into a separate cartel activity between the parties.

#### VI. The Parties' Submissions

- 6.1. The crux of the present decision rests on the motion made by MCFI before the Commission during the hearing of 20<sup>th</sup> April 2022 and requesting the Commission to consider adopting *inter alia* the INV 037 Report of Investigation, in search for finality of proceedings, insofar as it is concerned while proceeding with UIL's case separately.
- 6.2. As part of its oral submissions (pg. 12 – 13 of the Transcript of the hearing of 20<sup>th</sup> April 2022), MCFI argued that it cannot be part of an application for stay made by another party and with which it is not concerned. MCFI further submitted that proceedings before the Commission have been ongoing for around four (4) years now and the Hearing of 20<sup>th</sup> April 2022 was intended to hear parties on whether to adopt the Executive Director's Reports against the parties.
- 6.3. Referring to overseas practice when adjudicating in competition matters, MCFI further added that competition decisions are always addressed individually to the company concerned. MCFI thus reasons that insofar as the Reports contain two sets of recommendations against UIL and MCFI respectively, the Commission has the liberty to adopt the Reports of investigation, including in INV037 matter, insofar as it is concerned.
- 6.4. MCFI reiterated its afore-stand by way of written correspondence dated 06<sup>th</sup> June 2022. MCFI asserts that considering the span of time that has elapsed since the commencement of proceedings, it has a legitimate interest in having the Reports made final as against MCFI. According to it, this is all the truer considering that the Reports before the Commission contain two sets of [recommendations]: one in respect of MCFI and the other in respect of UIL.
- 6.5. In support of its proposition, MCFI relies on the judgment of the United Kingdom's Supreme Court in the appeal case of *Deutsche Bahn AG and others (Respondents) v Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc) (Appellant) [2014] UKSC 24* where the Court addressed its mind *inter alia* to the following issue – what is the effect of a Commission Decision (imposing fines pursuant to a common procedure) on non-appealing addressees when only some addressees have taken legal action and obtained annulment thereof? The Court quoted, as established principle, the following –

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*"... a decision adopted in a competition matter with respect to several undertakings, although drafted and published in the form of a single decision, must be seen as a set of individual decisions finding that each of the addressees is guilty of the infringement or infringements of which they are accused and imposing on them, where appropriate, a fine. It can be annulled only with respect to those addressees which have successfully brought an action before the European Union judicature, and remains binding on those addressees which have not applied for its annulment."<sup>4</sup>*

6.6. UIL, for its part (pg. 14 of the Transcript of the hearing of 20<sup>th</sup> April 2022), has not resisted MCFI's motion, leaving it to the Commission's discretion to decide whether to deal with the parties sequentially.

## VII. Commission's Determination

7.1. The Commission has had due regard to the motion and submissions made by MCFI during the hearing of 20<sup>th</sup> April 2022, as reiterated in its subsequent correspondence of 06<sup>th</sup> June 2022. The Commission finds merit in the reasons advanced by MCFI to support its application to have the INV 037-Final Report adopted insofar as it is concerned in search for finality of proceedings.

7.2. The Commission has given anxious consideration to the Final Report of the Executive Director in the INV 037 matter, the evidence adduced in the Report in support of his findings of section 41-breach against MCFI, the assessment of MCFI's leniency and leniency plus application and the proposed recommendations for imposition of directions and financial penalty against the said party.

7.3. The Commission has further considered the stand adopted by MCFI before the Commission and the absence of objection on the part of UIL against said motion. The Commission, therefore, finds no reason to depart from the Executive Director's findings and conclusions as to breach under section 41 of the Act insofar as MCFI is concerned.

7.4. From the facts of the case and on a balance of probabilities, the Commission indeed finds that MCFI has been party to a prohibited collusive agreement under section 41 of the Act –

7.4.1. by concluding a commercialisation agreement of a collusive nature (Fertco), as evidenced by the MoU and other documents such as Shareholders agreement and distribution agreements, relating to the setting up and implementation of a joint distribution company;

7.4.2. wherewith the said commercialisation agreement –

i. removes the possibility for customers to buy directly from MCFI and to get independent prices from MCFI for its fertiliser products,

<sup>4</sup> Case T-462/07 Galp Energía España SA v European Commission (unreported) 16 September 2013 citing (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschappij v Commission [2002] ECR I-8375, paras 99 and 100

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- ii. has the object of eliminating competition between the parties to the agreement in the supply of their fertiliser products by fixing of the price of fertilisers,

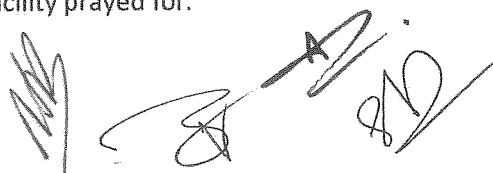
7.4.3. although Fertco was not implemented as a going concern, the essence of the project was nevertheless implemented via anticompetitive information exchanges and further collaborations involving MCFI. In so doing, MCFI has participated in –

- i. price fixing agreements within the terms of section 41(1) (b) (i) of the Act through collaboration and the reaching of a common consensus regarding the price to be set for fertilisers being produced by the parties;
- ii. market sharing agreements within the terms of section 41(1) (b) (ii) of the Act. The market sharing rested on the arrangement involving fertiliser product allocation, demarcation of the pricing of solid versus liquid fertilisers in view of promoting liquid fertiliser sales and agreeing on product supply volume and sales target in favour of promoting liquid fertilisers,

7.4.4. the said agreement is deemed to significantly prevent, restrict or distort competition considering its collusive objects, its existence between sizeable operators in the market concerned and the absence of sufficient competitive/entry constraints.

7.5. In the same vein and considering all the circumstances and considerations of the present matter and mindful of MCFI's motion for adoption of the INV 037 insofar as it is concerned; the Commission is of the view that the Executive Director's recommendations for imposition of directions in addition to financial penalty are reasonable. The Commission believes that the directions, as proposed, are appropriate to ensure that the enterprise ceases to be a party to impugned conducts and that financial penalties, though reduced after leniency, are warranted in line with section 59(2) of the Act and the Commission's fining policy as set out in CC 6 Guidelines – Remedies and Penalties.

7.6. Pursuant to rule 22 of the Competition Commission Rules of Procedure 2009, the Commission, on 28<sup>th</sup> July 2022, notified MCFI of its intention to impose certain directions alongside a financial penalty upon it, as stated in the notice, and invited it to provide its written submissions thereon. By correspondence dated 04<sup>th</sup> August 2022, MCFI responded that it did not wish to make written submissions on the proposed directions or the quantum of the financial penalty to be imposed, which reiterates the stand adopted by MCFI during proceedings before the Commission. MCFI on the other hand requested the Commission to consider extending the timeframe within which to fulfil its penalty payment obligation on account of the adverse effects of the global pandemic on its business. The Commission has duly considered MCFI's request in light of the justifications provided and finds merit therein. The Commission accordingly grants the facility prayed for.



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7.7. The Commission accordingly determines that the recommendations, as set out in the Report, be upheld *in toto*.

#### VIII. Commission's Decision

##### Now Therefore,

8.1. For the reasons set out in this Decision, We, the Commission, hold as follows:

- 1) MCFI has, between 2014 and 2016, participated in a collusive agreement in breach of section 41 of the Act;
- 2) the commercialisation agreement to which MCFI was party during such time is prohibited and void under the Act.

8.2. Having determined that MCFI has breached the provisions of section 41 of the Act and pursuant to section 58 of the Act, We direct MCFI to:

- 1) terminate any relationship extant between itself and UIL regarding the supply of fertilisers in Mauritius;
- 2) report to the Commission over the coming two years on any other relationship between itself and UIL relating to the supply of fertilisers in Mauritius including but not limited to any trade of raw materials between each other; and
- 3) disclose all such information that may be requested by the Commission relating to the supply of fertilisers in Mauritius.

8.3. In addition to the afore-directions and pursuant to section 59 of the Act, We further impose a financial penalty upon MCFI and hereby order MCFI to pay a reduced penalty amount of Rs 5,404,676.98, in four equal quarterly instalments of Rs 1,351,169.24 each over a period of one year from the date it is notified of the present Decision.

Mr. M. Bocus  
(Chairperson)

Mr. A. Mariette  
(Vice-Chairperson)

Mrs. V. Bikhoo  
(Commissioner)

Mrs. S. Dindoyal  
(Commissioner)

Made on 25 August 2022.

The image shows four handwritten signatures, each on a dotted line, corresponding to the names listed on the left. To the right of the signatures is a circular official seal of the Competition Commission, containing the text 'Competition Commission'.