

General Notice No. 1749 of 2022



Decision of the Commission

CC/DS 0028/2 - MCFI (INV 041)

Non-Confidential

Redactions marked as - 'X'

In the Matter of -

**Bid rigging in the supply of fertilisers (INV 041) and
involving The Mauritius Chemical and Fertilizer
Industry Ltd (now "Ingenia")**

25 August 2022

CC/DS 0028/2 - MCFI (INV 041)

**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 041: Final Report of the Executive Director on Bid rigging in the supply of 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 20th 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 20th April 2022, the Commission convened a hearing, further to a preliminary hearing dated 29th 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 20th April 2022, UIL applied for a stay of proceedings before the Commission. MCFI for its part requested the Commission to uphold the

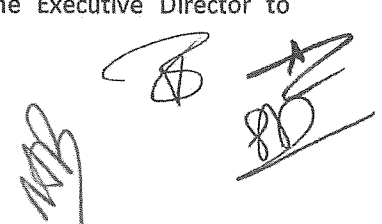
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recommendations of the Executive Director concerning it in the matters of INV037 and INV041. MCFI moved, in the same breath, that the cases against it be dealt with separately and independently of the cases brought against UIL.

- 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 041 is premised on the provisions of section 42 of the Act on 'Bid rigging' whereas investigation – INV 037 is premised on the provisions of section 41 of the Act relative to 'Horizontal (collusive) agreements'. 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 041.

II. Background to the Proceedings before the Commission

- 2.1. By letter dated 30th July 2018, UIL requested to be heard in-camera pursuant to rules 22(1) and 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 29th 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 24th September 2019 whereby UIL formally requested the Executive Director to

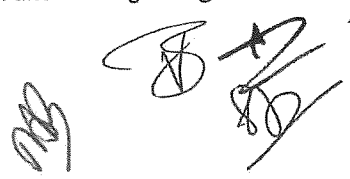


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- exercise his disclosure duties considering specific defences raised by UIL during investigation on substantive issues and on its plea of prosecutorial bias;
- (d) a formal request in the aforesaid notice at the instance of UIL for the Commission to devote the hearing fixed for 29th 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 29th 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 28th 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 20th 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 041– Investigation

- 3.1. On 29th June 2018, the Executive Director submitted his Report of Investigation to the Commission further to his investigation, bearing reference INV 041, *quoad* MCFI and UIL.
- 3.2. The investigation was launched in December 2017 further to a leniency plus application made by MCFI as part of its leniency application in the context of INV 037- Investigation into the supply of fertilisers.
- 3.3. Further to the leniency plus application, the Executive Director initiated an enquiry wherewith he found reasonable grounds to believe that MCFI and UIL may have been involved in bid rigging agreements with respect to their responses to invitations for bids from sugar estates for procurement of fertilisers.
- 3.4. The Executive Director considered the allegation of bid rigging, as identified from the leniency plus application, to be a separate breach of the Act from that being investigated in INV037. Consequently, INV 041 was initiated as a separate investigation with section 42 legal basis on suspected bid rigging.
- 3.5. The parties were notified of the investigation on 07th December 2017.
- 3.6. The Executive Director's bid rigging concerns stem from information tending to demonstrate the existence of communications between MCFI and UIL regarding their



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participation to five calls for tenders made by four sugar estates between 2015 and 2017 (hereinafter the 'Concerned bids'), namely –

- (a) ✕ bid for period 2015/2016,
- (b) ✕ bid of 2016,
- (c) ✕ bid of 2015,
- (d) ✕ bid for period 2015/2016, and
- (e) ✕ bid for period 2016/2017.

3.7. Particulars of each of the five Concerned bids are more fully discussed and assessed below.

IV. The Legal Framework

4.1. The Executive Director's investigation is premised on the provisions of section 42 of the Act, which prohibits bid rigging. 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 one party to the agreement –

(a) agrees not to submit a bid or tender in response to an invitation for bids or tenders; or

(b) agrees upon the price, terms or conditions of a bid or tender to be submitted in response to such a call or request.

(2) Subject to subsection (3), any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.

(3) This section shall not apply to an agreement the terms of which are made known to the person making the invitation for bids or tenders at, or before, the time when any bid or tender is made by a party to the agreement.

4.2. In light of the foregoing, the hereunder main elements need to be established to find that the impugned conduct breaches section 42 of the Act, namely –

- (a) the main parties qualify as enterprises,
- (b) the existence of calls for bids by sugar estates (procurement by way of invitations for bids), and
- (c) the existence of instances of information exchange and communication between the main parties tending to show agreement or concerted practice to the effect that one of the main parties has agreed –
 - i. not to submit a bid or tender in response to the invitation for bids by sugar estates; and/or
 - ii. upon the price, terms or conditions to be offered to the sugar estates in response to their calls for bids.

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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".¹

Qualification as 'enterprise'

- 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.

The terms of the (bid rigging) agreement

- 4.7. From the provisions of section 42 of the Act, a bid rigging scheme may either involve parties agreeing over whether any one or more parties will submit a bid and/or the price, terms, or conditions upon which their bid will be submitted.
- 4.8. The forms of bid rigging are mentioned at paragraphs 3.4 - 3.8 of CC 3 Guidelines on Collusive agreements. "Bid rigging can take many forms, such as bid suppression, complementary bidding, bid rotation or subcontracting. The CCM will not necessarily always classify any bid-rigging scheme it finds into these forms, but describes them

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

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briefly in order to explain what form of evidence it might seek when investigating bid-rigging."

- 4.9. One of the forms of bid rigging considered in the CC 3 Guidelines of relevance to the present matter is 'complementary/cover bidding' which consists of bidders agreeing to submit token bids that are intentionally too high, in order to ensure that a pre-selected bidder is successful. What transpires from the UK case law on the matter is that it is *"an unlawful practice which at the very least may deceive the customer about the source and extent of the competition which exists for the work in question, and which is capable of having anti-competitive effects on the particular tendering exercise and on future exercises."*²

V. The Executive Director's Findings and Proposed Recommendations

Supply to and Procurement of Fertilisers by Sugar Estates

- 5.1. Chemical fertilisers may be categorised into solid (also referred to as 'granular' fertilisers) or liquid form. The main differences between solid and liquid fertilisers are the formulation of the product and the mode of application in the fields.
- 5.2. There are various suppliers of solid fertilisers in Mauritius, including amongst others; MCFI, Desbro Trading Ltd ('Desbro'), Agrex Ltee, Fertchem Ltd, Kirsh Co Ltd, Narain and Sons and COROI Maurice Ltée ('COROI').
- 5.3. The main type of liquid fertiliser produced and commercialised in Mauritius is the Concentrated Molasses Stillage ('CMS organo mineral'). UIL, through its wholly owned subsidiary Island Renewable Fertiliser Ltd ('IRFL'), is the only supplier of liquid fertiliser (CMS organo mineral) in Mauritius.
- 5.4. 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. MCFI supplies its fertiliser products to wholesale distributors of fertilisers and to direct end users, specifically to large/small planters as well as sugar estates.
- 5.5. Some 30 sugar estates exist in Mauritius. The Report notes that other than direct orders from suppliers, sugar estates also procure their fertiliser needs through calls for bids mostly on an annual basis.
- 5.6. The Report further notes that sugar estates tend to purchase from several suppliers of fertilisers even if there appears to be a supplier which is the cheapest on the market. Thus, a sugar estate would contract with more than one supplier for its yearly fertiliser needs. Factors considered by sugar estates in deciding which fertiliser to use are: forecast price of fertilisers, expected price of sugar, cost of harvesting and transport, and fertiliser needs based on the type of sugarcane grown on sugar estates.

² Kier Group PLC and others v Office of Fair Trading [2011] CAT 3, para. 99. Similarly view adopted in Makers UK Ltd v Office of Fair Trading [2007] CAT 11. at para 14.

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5.7. Sugar estates have different approaches to their tender system. For instance, ✂ and ✂ issue requests for quotes for their fertiliser requirements via emails. Such types of tendering exercises tend to be flexible where the companies negotiate with suppliers on prices, terms and conditions prior to finalising purchase orders. ✂ requests for quotes via formal letters, then sets round of meetings with all the bidders as part of its negotiation process; further to which, it allocates the annual purchase quantities or orders. Other sugar estates issue formal tenders based on very specific procurement procedures/rules.

The Executive Director's Information gathering on the Concerned bids

✂ bid for period 2015/2016

5.8.

✂ procures its fertiliser needs from both liquid and granular fertilisers.

5.9. During each yearly budget preparation exercise, ✂ sends its request to suppliers of fertilisers stating the quantity of chemical fertilisers needed and the closing date for submission of bids.

5.10. The Executive Director reports that ✂ invited separately MCFI, UIL, and COROI to submit their best quote on 07th August 2015 for its fertiliser needs for 2015-2016 concerning CMS liquid and granular fertiliser. All three suppliers responded to the call with UIL submitting its offer on 19th August 2015 followed by MCFI on 21st August 2015.

5.11. The Report has adduced information tending to show that between 19th and 20th August 2015, emails were exchanged between UIL and MCFI representatives disclosing UIL's pricing offer to ✂ while suggesting that higher prices be quoted by MCFI for its liquid fertiliser products. MCFI, in reply, expressed concerns with the suggested higher prices and intimated the need to 'keep liquid and solid margins credible and close to each other (...) to remain credible and consistent in the eyes of customers' and a meeting was thus suggested between the parties for further discussion.

✂ bid of 2016

5.12

5.13. It is reported that ✂ has a centralised procurement arm through which its process for procurement has been established. ✂ procurement department has, as principle objective, to procure goods and services for the

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✕ Group at the best possible cost and in the right quality for the direct benefit of its companies.

5.14. By letter of 03rd May 2016, the Chief Procurement Officer of ✕ sent a request for quotation for fertilisers (both liquid and granular) for 2016 simultaneously addressed to four suppliers of fertilisers namely, MCFI, IRFL (UIL), COROI and Desbro.

5.15. MCFI, UIL, and COROI respectively submitted their bids on 25th May 2016 while Desbro submitted its quotation in response to the ✕ bid on 23rd May 2016.

5.16. The Executive Director has adduced information tending to show that mails were exchanged between UIL and MCFI prior to their bid submission wherein UIL was requesting a meeting *"to go through prices"* and further stated that *"I will also prepare prices for ✕ so that we could discuss same with granular prices."* MCFI responded affirmatively to attending the meeting.

5.17. The Report further demonstrates that the submissions of both MCFI and UIL to the ✕ bid carried a similar note to the effect that *"all invoicing will be carried out by a new company FERTCO Ltd, responsible for the marketing and distribution, a further communication in that effect will be sent in due course"*.

✕

bid of 2015

5.18. ✕ was incorporated in 1921 and its main activity is that of growing sugarcane.

5.19. It is reported that ✕ procures fertilisers from a mix of three different suppliers by requesting proposals for tenders with the aim of preserving competition in the market.

5.20. ✕ reached out to MCFI, UIL and COROI regarding its need for fertiliser by separate emails sent on 20th June 2015 and requested the suppliers to provide their best price. Whereas MCFI and COROI were requested to quote for granular fertilisers, UIL was requested prices for both liquid and granular fertilisers.

5.21. All three suppliers responded to ✕'s call for bids. MCFI responded to the call for bid and submitted its quotation by email on 09 July 2015. UIL submitted its quotations by email of 07 July 2015.

5.22. The Executive Director gathered that MCFI and UIL communicated with each other regarding their intended submissions to the ✕ bid. By email dated 30 June 2015 with subject line 'offer for ✕', MCFI communicated the 'workings for ✕ to UIL.

5.23. Emails between representatives of MCFI and UIL of Friday 03rd July 2015 evidence the fact that a meeting between the parties was confirmed in view of finalising the ✕ offer.

✕ *bid for period 2015/2016*

5.24.

✕

- ✕
- ✕ uses both liquid and granular fertilisers in its crops.
- 5.25. By letter of 09th June 2015, ✕ requested MCFI, UIL, COROI and Agrex Ltd to "Quote for Annual Fertilizer Requirement for 2015/2016".
- 5.26. MCFI responded to the call for bid and submitted its quotation by letter of 25th June 2015. UIL responded by letter of 30th June 2015. Both however submitted their revised offers on 22nd July 2015 to ✕.
- 5.27. The Executive Director has reported that an email was sent by UIL on 01st July 2015 to MCFI, communicating the 'summary of ✕ costing_2015-2016'. This email included the price quoted to ✕ by IRFL and also information on profitability. Although the latter communication occurred after the parties had submitted their respective quotations to ✕, it is noteworthy that further discussions ensued between the parties and ✕ regarding their respective submissions. Subsequent to this, MCFI and UIL followed through with revised offers (with lower prices) to ✕ on 22nd July 2015.
- ✕ *bid for period 2016/2017*
- 5.28. Similar to the previous year, ✕ sent letters dated 21 April 2016 to MCFI, UIL, COROI and Agrex Ltd requesting for "Quote for Annual Fertilizer Requirement for 2016/2017." The parties were given a deadline until 05th May 2016 to make their submissions.
- 5.29. MCFI and UIL individually responded to the call for bid and submitted their respective quotations by letters of 09th June 2016. Agrex Ltd and COROI submitted their independent quotations on 31st May 2016.
- 5.30. The Executive Director has come across the existence of an email of 02 May 2016 circulated internally at MCFI level and bearing subject line 'FERTCO Meeting 1 May 2016'. The email referred to draft minutes of a meeting held with IFL of same date and calling for relevant staff to submit their comments before same was transmitted to a representative of UIL. Attached to the email were the referred draft minutes.
- 5.31. From the said minutes, the Executive Director has gathered that MCFI and UIL had discussed the ✕ bid 2016/2017 and decided that each will send a letter to ✕ to request for an extension of 1 week. The Executive Director also notes that both MCFI and UIL had submitted their response to ✕'s 2016 call for bids on the same day of 09th June 2016.
- 5.32. The Executive Director has also adduced evidence of the existence of an email of 04th May 2016 from UIL communicating a letter to ✕ informing that UIL is "actually finalising a new sales and distribution company presently known as FERTCO Ltd which is expected to be operational during the month of May". According to the Executive Director, the letter does not disclose that Fertco, as the sales and distribution vehicle, would involve another competitor namely MCFI. It was further observed that the contents of the letter were agreed between MCFI and UIL before being sent to ✕



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as evidenced by earlier email exchanges between the two parties dated 04th May 2016.

The Findings of investigation

- 5.33. On the basis of the facts before him, the Executive Director found that each of the five Concerned bids possesses the characteristics of a call for bid wherein procuring sugar estates sought to gather competitive prices from market operators they considered as potential supplier(s) in view of allocating the supply contract to any one or more of them. To this effect, each of the Concerned bids amount to an 'invitation to bid' falling within the ambit of section 42 of the Act.
- 5.34. The Executive Director has further found that MCFI and UIL have participated in bid rigging agreement, in breach of the section 42 prohibition in the Act, in respect of each of the five Concerned bids for the hereunder reasons.
- 5.35. In respect of the parties' participation to the ✕ *bid for period 2015/2016*, the Executive Director has found firstly, a strategy to have been put in place between the main parties as to the prices of both liquid and solid and secondly, the presence of direct communication between them regarding the prices to be offered by MCFI. Thus, the information gathered shows a concurrence of wills between the main parties to adopt a given line of conduct on the market, namely that of fixing the prices to be submitted in response to the ✕ .
- 5.36. As far as the ✕ *bid of 2016 is concerned*, the Executive Director has found that the contacts and meeting between the parties and discussion on prices evidence a common intention to set product prices in concertation with one another before bid submission to ✕ .
- 5.37. That the parties' submissions were individually submitted without disclosing that said bids had been prepared in concertation was further found to have the aim of concealing the parties' cooperation from the buyer and instead giving the impression that MCFI and UIL had submitted competitive prices. The Executive Director accordingly concluded on the existence of a concurrence of wills between the main parties to adopt a given line of conduct on the market, namely that of fixing the price in response to the ✕ bid.
- 5.38. Considering the facts surrounding the parties' participation to the ✕ *bid of 2015*, the Executive Director has found the parties' communication to intimate cooperation in setting the prices to be quoted for liquid and granular fertilisers. By exchanging information on price workings and organising a meeting to finalise their offers, both of which took place before they have submitted their bid, the parties' conduct attest of concertation on price prior to bid submission. Notwithstanding these exchanges and concertations, the parties' bids were individually submitted to ✕ without mention made to the latter of the prior cooperation between the parties.



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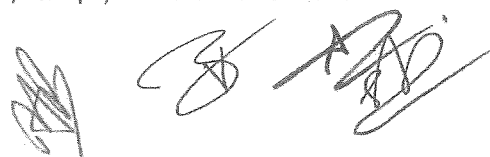
- 5.39. Having regard to the ~~X~~ bids, the Executive Director has found that MCFI and UIL have not submitted independent and competitive bids in response to either the 2015 ~~X~~ bid or the 2016 ~~X~~ bid. Though MCFI and UIL were regarded as competitors by ~~X~~ the parties nevertheless initiated contact, discussed the contracts, shared information on price thereby evidencing that the parties had common intention to set the prices of both liquid and granular fertilisers in concertation with each other before submitting same to ~~X~~ in both bid exercises.
- 5.40. Regarding the ~~X~~ 2015 bid particularly, the communication and exchange of information by email of 01st July 2015 by which UIL transmitted the 'summary of ~~X~~ costing_2015-2016' to UIL is considered to be material to the prices offered by MCFI and UIL in their revised offers to ~~X~~. The view of the Executive Director is that the said email is evidence of the transparency created between MCFI and UIL on price, which is the most important element of a bid exercise. This transparency on price occurred before submitting their revised offers to ~~X~~ on 22 July 2015. The parties' submission of 22 July 2015 cannot be regarded as independent bids and the presumption prevails that the main parties have taken the information exchanged on price into consideration when they submitted their revised offers. Considering the above, the Executive Director concluded that the email of 01st July 2015 is evidence that MCFI and UIL were party to an agreement on price to be submitted in response to the 2015 ~~X~~ bid, in the form of a concerted practice.
- 5.41. As far as the ~~X~~ bid is specifically concerned, the Executive Director rests his finding of section 42 breach on inference based on indicia of circumstances.
- 5.42. The fact that a meeting involving the Managing Director of MCFI and other representatives of UIL took place on 02 May 2016 in relation to the 2016 ~~X~~ bid; that during the said meeting discussions on price relating to a request for price by another sugar estate namely ~~X~~ took place and the fact that the main parties have for the previous 2015 ~~X~~ bid exchanged information on the price to be quoted; the Executive Director inferred therefrom that the main parties have also colluded in the 2016 ~~X~~ bid. Further, the Executive Director does not regard UIL's email and letter of 04 May 2016 to ~~X~~ on IRFL distribution through Fertco Ltd as proper disclosure by UIL of its involvement with MCFI. Similarly, MCFI's response to ~~X~~ appears to have refrained from mentioning IRFL.
- 5.43. The Executive Director's view therefore is that the illegal cooperation and agreement between MCFI and UIL was therefore not communicated and disclosed to ~~X~~, the more so as each main party submitted separate bids.
- 5.44. On the facts before him therefore, the Executive Director has concluded that MCFI and UIL have participated in bid rigging agreements whereby they agreed with each other on the prices to be submitted in response to the ~~X~~ concerned procurement exercises of 2015 and 2016.



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The Proposed Recommendations

- 5.45. In light of his findings, the Executive Director has recommended that the Commission makes a finding of breach of section 42 of the Act against UIL and MCFI in INV041.
- 5.46. 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.
- 5.47. The proposed directions require the main parties to -
 - i. terminate any relationship extant between the main parties regarding the supply of fertilisers to sugar estates in Mauritius;
 - ii. report to the Commission for the next two years on any other relationship between the main parties regarding the supply of fertilisers to sugar estates in Mauritius, and
 - iii. disclose all such information that may be requested by the Commission relating to the supply of fertilisers to sugar estates in Mauritius, in view of monitoring the market for the next two years.
- 5.48. On the imposition of financial penalty and pursuant to section 59(2) of the Act, the Executive Director has recommended the imposition of financial penalty upon UIL only. As far as MCFI is concerned, the Executive Director has adopted the view that MCFI is entitled to total immunity from financial penalties within the context of INV 041 in view of its leniency plus application made pursuant to CC 3 Guidelines – Collusive Agreements, which in turn prescribes the circumstances in which the Commission may grant immunity or leniency to an enterprise (the 'Leniency Policy').
- 5.49. Considering the conditions set out in the Commission's Leniency Policy, the Executive Director has found that MCFI qualifies for leniency plus insofar as –
 - i. the evidence provided by MCFI as part of its leniency plus application relates to a separate cartel activity involving the supply of fertilisers to sugar estates by the parties, potentially in breach of section 42 of the Act, and which was not subject to investigation in INV037;
 - ii. MCFI is the first to provide evidence of cartel activity relating to bid rigging in the supply of fertilisers to sugar estates;
 - iii. Such information was submitted before the commencement of the INV041 - investigation; and
 - iv. The CCM did not already have sufficient information to establish the existence of the alleged bid rigging agreements being scrutinised in said investigation.
- 5.50. Considering further the requirements of paragraph 5.5 (b) of the Leniency Policy, the Executive Director was further satisfied that MCFI had (i) provided the Competition Commission with all the information, documents and evidence available to it regarding the alleged bid rigging agreements; (ii) maintained continuous and complete co-operation throughout the investigation; and (iii) refrained from further



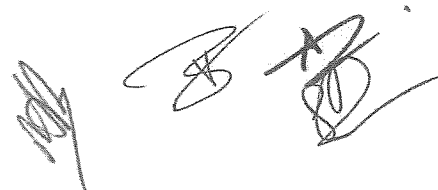
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participation in the bid rigging agreements with UIL from the time of disclosure of the cartel activity to the Competition Commission.

- 5.51. The Executive Director has also considered the last condition of paragraph 5.5(b) *viz.*, (iv) *that the leniency applicant did not initiate the cartel or take steps to coerce other enterprises into participating in the cartel.* The Executive Director is of the view that the latter condition does not apply to MCFI because its leniency plus application was made during the validity period of the Competition Commission's temporary amnesty for cartel initiators which lasted from 01st March 2017 until 31st August 2017. The latter amnesty programme had effectively waived the afore-referred last condition (iv) of paragraph 5.5 of the Leniency Policy. In light of the Executive Director's finding, no assessment of fine was warranted for MCFI.

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 20th April 2022 and requesting the Commission to consider adopting *inter alia* the INV 041 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 20th 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 20th 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 INV041 matter, insofar as it is concerned.
- 6.4. MCFI reiterated its afore-stand by way of written correspondence dated 06th 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



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legal action and obtained annulment thereof? The Court quoted, as established principle, the following –

*"... 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."*³

- 6.6. UIL, for its part (pg. 14 of the Transcript of the hearing of 20th 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 20th April 2022, as reiterated in its subsequent correspondence of 06th June 2022. The Commission finds merit in the reasons advanced by MCFI to support its application to have the INV 041-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 041 matter, the evidence adduced in the Report in support of his findings of section 42-breach against MCFI, the assessment of MCFI's leniency plus application and the proposed recommendations for imposition of directions against it.
- 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 MCFI's motion. The Commission, therefore, finds no reason to depart from the Executive Director's findings and conclusions as to breach under section 42 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 prohibited bid rigging agreements, in breach of section 42 of the Act, in respect of the five Concerned bids. The Commission's assessment of said facts and supporting evidence reveals that –
- 7.4.1. The process through which the different sugar estates procure their fertiliser requirements across the Concerned bids had the aim of obtaining independent and competitive offers from identified suppliers, which in turn is characteristic of a bidding/tendering process and is squarely captured within the spirit and ambit of section 42 of the Act;

³ 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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- 7.4.2. MCFI's respective bid submissions to the ~~the~~ bid, the ~~the~~ bid, the ~~the~~ bid, the 2015 bid and the 2016 bid have not been independently prepared, free from artificial interference or influence from another competing bidder, as is expected and required from a tendering process,
- 7.4.3. The prices for MCFI's granular fertiliser products were decided in concertation with another tenderer,
- 7.4.4. Such concertation has taken place through agreements proper or otherwise punctuated contacts and communications between MCFI and representative/s of another bidder. The agreements and communications revolved around bid submissions/prices, which are not only a sensitive parameter of competition but are outcome determinative in a bidding process, including the ones carried out by the procuring sugar estates,
- 7.4.5. The agreements and communications involving MCFI further occurred in advance of its individual bid submissions to the procuring sugar estates and without disclosure made of the prior existing concertation and collaboration to which it had been a party and serving to fix the prices that *inter alia* MCFI would quote and submit in response to the various sugar estates' bid invitations.
- 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 041 insofar as it is concerned; the Commission is of the view that the Executive Director's recommendations for imposition of directions is reasonable. The Commission finds further that the directions, as proposed, are appropriate to ensure that the enterprise ceases to be a party to impugned conducts, in accordance with the requirements of section 58 of the Act.
- 7.6. As for the Executive Director's assessment of and recommendations on MCFI's leniency plus application, the Commission finds no reason to depart therefrom having regard to the fulfilment of all requisite conditions by MCFI. The Commission accordingly determines in favour of accepting MCFI's Leniency Plus application and granting immunity from financial penalty to it in connection with INV041 investigation.
- 7.7. Pursuant to rule 22 of the Competition Commission Rules of Procedure 2009, the Commission, on 28th July 2022, notified MCFI of its intention to impose certain directions upon it, as stated in the notice, and invited it to provide its written submissions thereon. By correspondence dated 04th August 2022, MCFI responded that it did not wish to make written submissions on the proposed directions, which reiterates the stand adopted by MCFI during proceedings before the Commission.
- 7.8. The Commission accordingly determines that the recommendations, as set out in the Report, be upheld *in toto*.

VIII. Commission's Decision

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Now Therefore,

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

- 1) MCFI has, in respect of five individual calls for bid launched by ~~XXXX~~,
~~XXXX~~, ~~XXXX~~, and ~~XXXX~~ between 2015
and 2016, participated in bid rigging agreements in breach of section 42 of the
Act;
- 2) the bid rigging agreements to which MCFI was party are prohibited and void under
the Act.

8.2. Having determined that MCFI has breached the provisions of section 42 of the Act
and pursuant to section 58 of the Act, We direct MCFI to:

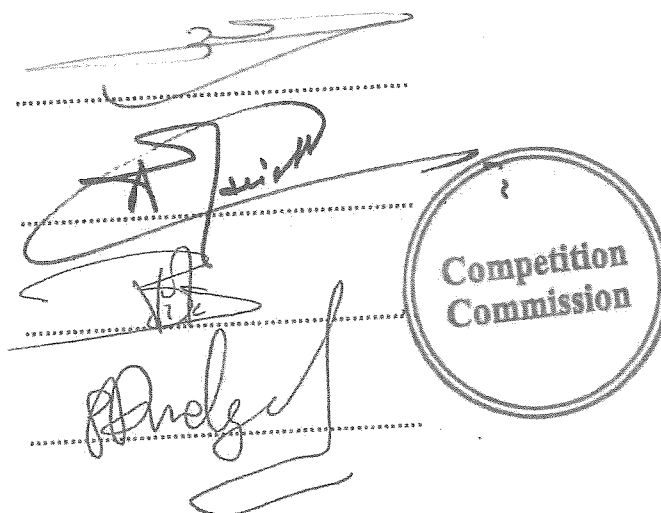
- 1) terminate any relationship extant between itself and UIL regarding the supply of
fertilisers to sugar estates in Mauritius;
- 2) report to the Commission for the next two years on any other relationship
between itself and UIL regarding the supply of fertilisers to sugar estates in
Mauritius, and
- 3) disclose all such information that may be requested by the Commission relating
to the supply of fertilisers to sugar estates in Mauritius, in view of monitoring the
market for the next two years.

Mr. M. Bocus
(Chairperson)

Mr. A. Mariette
(Vice-Chairperson)

Mrs. V. Bikhoo
(Commissioner)

Mrs. S. Dindoyal
(Commissioner)



The block contains four handwritten signatures, each on a dotted line, and a circular stamp on the right. The stamp has a double border and the text "Competition Commission" inside. The signatures are from Mr. M. Bocus, Mr. A. Mariette, Mrs. V. Bikhoo, and Mrs. S. Dindoyal.

Made on 25 August 2022.