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Decision of the Commission

DS 0028/3 - UIL

Non-Confidential

Redactions marked as - [REDACTED]

In the Matters of -

**Supply of chemical fertilisers (INV 037 and INV 041)
involving United Investments Ltd**

13 February 2023

**Decision of the Commissioners of the Competition Commission (the 'Commission')
of 13 February 2023**

relating to proceedings before the Commission against United Investments Ltd in the matters referred to as -

- (1) "INV 037: Final Report of the Executive Director on Investigation into the supply of chemical fertilisers", and
- (2) "INV041: 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. United Investments Ltd; and
2. The Mauritius Chemical and Fertilizer Industry Limited

Present at the Hearing of 20th April 2022 before the Commission,

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

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

The Executive Director of the Competition Commission, represented by Messrs Vipin Naugah, Head of Investigations, and Djameel Soreefan, Senior Investigation Officer, and 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 (hereinafter the 'Preliminary Hearing'), 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") on 29th June 2018 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,



United Investments Ltd ("UIL") and The Mauritius Chemical and Fertilizer Industry Limited (now Ingenia) ("MCFI").

- 1.2. 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' in respect of an alleged 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 further allegedly complemented by continuing anticompetitive interactions and information exchanges between the parties, notwithstanding the non-implementation of their Fertco collaboration.
- 1.3. Investigation – INV 041 is premised on the provisions of section 42 of the Act relative to 'Bid rigging' and concerns the parties' participation in respect of five calls for tenders issued by four different sugar estates between 2015 and 2016 in relation to their procurement of fertilisers.
- 1.4. On the facts before him in INV 037 and INV 041 cases respectively, the Executive Director made findings of breach against MCFI and UIL. The Executive Director further made recommendations for the imposition of directions and financial penalty on the concerned parties.
- 1.5. UIL disputes the Executive Director's case against it as well as his ensuing recommendations for imposition of directions and penalty against it in both INV 037 and INV 041 matters UIL is now praying that said proceedings against it be stayed.
- 1.6. MCFI for its part applied for leniency and leniency plus during INV 037 investigation. The Executive Director recommended that a financial penalty, after leniency, be imposed against MCFI in INV 037 case and further recommended the granting of immunity to MCFI in INV 041 matter considering the latter's leniency plus application. MCFI has not disputed the findings of breach made against it in either case. It has also not disputed the directions proposed in the Executive Director's Reports. However, from the INV 037 Report of investigation, it is gathered that MCFI had expressed certain reservations on the method applied by the Executive Director in calculating the financial penalty recommended against it in INV 037. MCFI has since dropped this argument before the Commission and presses instead for adoption of the Executive Director's Report findings and recommendations insofar as it is concerned in both the INV 037 and INV 041 matters.
- 1.7. Between June 2018 and beginning 2022, a number of preliminary issues had to be dealt with by the Commission before a substantive hearing was eventually fixed for 20th April 2022.
- 1.8. At the Hearing of 20th April 2022, UIL applied for a stay of proceedings in the INV 037 and 041 matters before the Commission. UIL essentially motivates its application on grounds of 'grave procedural failings' on the part of the Executive Director both during his investigation and the proceedings before the Commission. The Executive



Director is resisting UIL's motion. MCFI's stand in this regard, as communicated during the Hearing, is that it cannot be part of an application for stay made by another party and with which it is not concerned.

- 1.9. During the Hearing of 20th April 2022 MCFI reiterated its request to the Commission to uphold the recommendations of the Executive Director concerning it in the matters of INV037 and INV041. MCFI rests its motion on the need for finality of proceedings insofar as it is concerned in both matters before the Commission which commenced in June 2018. MCFI moved, in the same breath, that the cases against it be dealt with separately and independently of the cases brought against UIL. UIL has, during the Hearing of 20th April 2022, intimated that it has no qualm that the cases against MCFI be dealt with separately.
- 1.10. Considering firstly, the fact that separate and different recommendations were made by the Executive Director against each party insofar as matters of remedial measures/penalty are concerned and secondly, the common stand of UIL and MCFI that they be dealt with separately and independently of each other, the Commission has accordingly proceeded to determine the case against MCFI and that against UIL separately and independently of each other.
- 1.11. The present decision is in respect of UIL only and deals with its application to stay proceedings before the Commission.

II. Background to INV 037 and INV 041 Investigations

Parties subject to investigation

- 2.1. **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. MCFI manufactures different types of fertiliser products and operates a complex fertiliser plant as well as a blending fertiliser plant. 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.
- 2.2. **UIL**, incorporated on 18 June 1984, is an investment company with a diversified portfolio of investments in a variety of sectors in Mauritius. UIL has been dealing in fertiliser business through the commercial activities of its two subsidiaries, namely Island Fertilisers Ltd ("IFL") since 2004 and Island Renewable Fertilisers Ltd ("IRFL") since 2005. UIL and its subsidiaries, IFL and IRFL, entered the liquid fertiliser business in or around 2009.
- 2.3. IFL ceased production of granular fertilisers in December 2015 and exited that segment of the market. IRFL is the sole supplier of liquid fertiliser (referred to as 'CMS Organo mineral') in Mauritius, which it offers alongside a complementary service of spraying/application.

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A. INV 037 proceedings

- 2.4. The Executive Director initiated INV 037 investigation further to an enquiry into information from the press in relation to a potential merger between MCFI and IFL, 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.
- 2.5. Both parties were notified of the launch of INV 037 investigation on 07 November 2016.
- 2.6. From the investigation, the Executive Director was of the opinion that negotiations had been ongoing between MCFI and UIL since 2013 for MCFI to package for and supply UIL with granular fertilisers. Although the latter project was eventually abandoned, discussions ensued in relation to the setting up of a marketing and distribution company, named Fertco Ltd ("Fertco"), to be equally owned by MCFI and UIL. The parties' discussions were formalised through several agreements. The Executive Director further considered that contacts and communications of a competitively sensitive nature had occurred between the parties during the period May 2015 to June 2016 which involved the parties' past and forecast sales figures, operational costs and customer lists, among others; and this, notwithstanding the parties' claim that Fertco was never implemented.
- 2.7. 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 a single and continuous collusive agreement, in breach of section 41 of the Act, from the year 2014 to 2016.
- 2.8. From the Executive Director's findings, it is gathered that the said collusive agreement results from the parties' decision to set up a commercialisation agreement – Fertco – having the objects of fixing the selling prices of the fertilisers produced by MCFI and UIL and sharing the market for the supply of chemical fertilisers, by product type, leading to customer allocation. The Executive Director further found that although Fertco was not implemented as a running business entity, the main parties collaborated further in the supply of fertilisers. These collaborations and information exchanges gave effect to the intended Fertco agreement, as they evidence the actual implementation of the essence of the joint-commercialisation vehicle (Fertco) project. The Executive Director concluded that the impugned agreement involved the two largest suppliers of fertilisers in Mauritius with very high share of the market, and their agreement, which had the objects of fixing the price of their products and sharing and allocating sales between them, is, by its very nature, deemed to prevent, restrict, and distort competition significantly in the supply of fertilisers in Mauritius.

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- 2.9. While the INV 037 investigation was ongoing and pursuant to the Competition Commission's Leniency Policy (as prescribed in Section 5 of CC 3 Guidelines – Collusive agreements), MCFI applied for a marker which it perfected through submission of a leniency application on 16th March 2017 and further filed a leniency plus application on same date. MCFI's leniency plus application provided information, which according to the Executive Director, alleged the existence of a separate cartel activity involving MCFI and UIL in their supply of chemical fertilisers to certain sugar estates' when the latter launched procurement exercises for fertilisers.
- 2.10. At the time MCFI filed its leniency/leniency plus application, the Competition Commission had introduced a temporary Amnesty Programme for cartel initiators which lasted from 01st March 2017 to 31st August 2017. The said amnesty programme waived condition (iv) at paragraph 5.5(b) of the Leniency policy for all leniency applications made during the amnesty programme's validity period. Paragraph 5.5(b)(iv) of the Leniency policy, requires as a condition for granting leniency/immunity, that the '*enterprise did not initiate the cartel or take steps to coerce other enterprises into participating in the cartel (...)*'. With the amnesty programme waiving the latter condition, the Competition Commission would have been in a position to grant immunity and leniency even to the initiators of cartels upon application for leniency made, during the amnesty's validity period, in relation to prohibitions of the kind mentioned in sections 41, 42 and 43 of the Competition Act 2007.
- 2.11. UIL's main arguments against the Executive Director's INV 037 case are essentially as follows –
- 2.11.1. UIL has raised a plea of prosecutorial bias regarding particularised aspects of the Executive Director's investigative actions and decision-making. On this point, UIL argues that the Executive Director has ignored CC Guidelines 3 – Collusive agreements (relative to leniency) and went to the extent of procuring that said Guidelines be amended to accommodate MCFI. It further argued that MCFI's application for a marker was entertained when the latter party was not eligible to participate in any leniency programme;
- 2.11.2. UIL disputes the collusive object ascribed in the Report to the Fertco agreement with MCFI. According to it, Fertco served the purpose of enabling IRFL and MCFI to streamline their fertiliser by reducing operational costs. Fertco would have offered a broader range of products (MCFI's solid and IRFL's liquid fertilisers) at a common counter as well as field application services for the whole range;
- 2.11.3. UIL argues in favour of the objective necessity of Fertco to allow MCFI to enter the liquid market considering the shrinking local demand for solid fertilisers. According to UIL, Fertco could not have been a financially viable project on the long-run unless it would gradually shift its activities to concentrate on its viable component — the liquid fertiliser business;

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2.11.4. UIL further argues that the impugned information exchanges did not go beyond what was necessary for the assessment and implementation of the Fertco project which had the same object as the intended merger project between the two, and which however did not raise competition concerns; and

2.11.5. UIL granular fertiliser supplied by MCFl is a commodity whereas UIL offers a service not a commodity, such that these two are non-substitutable. UIL has further criticised the fact that the investigation has neither considered nor followed the CC 2 Guidelines (Market Definition) when forming conclusions about the central issue of substitutability.

B. INV 041 proceedings

2.12. The Executive Director launched INV 041 – investigation in December 2017 further to a leniency plus application made by MCFl as part of its leniency application in the context of INV 037-Investigation into the supply of fertilisers.

2.13. The Executive Director initiated an enquiry into same wherewith he found reasonable grounds to believe that MCFl 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.

2.14. 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.

2.15. The parties were notified of the investigation on 07th December 2017.

2.16. The Executive Director's bid rigging concerns stem from information tending to demonstrate the existence of communications between MCFl and UIL regarding their participation to five calls for tenders made by four sugar estates between 2015 and 2017 (hereinafter the 'Concerned bids'), namely –

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

2.17. The investigation has gathered that in respect of each of the Concerned bids, the parties had been communicating between themselves prior to submission of their final or revised bids to the sugar estates, through meetings or exchange of pricing or other commercially sensitive information pertaining to their solid and liquid fertiliser products. These were found to artificially increase transparency on pricing conduct between the parties, to disclose a common intention to set product prices in concertation with one another before bid submission without proper disclosure made to the estate inviting for bids, such that the parties could not have been

considered to have submitted independent and competitive bids. On occasions where any one party had informed the procuring estate of the involvement of Fertco, as its sales and distribution arm, such communication failed to mention the involvement of the other party, as collaborating partner, in the Fertco venture.

2.18. On the basis of facts before him, the Executive Director has 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

2.19. UIL has raised objections to the Executive Director's findings of breach, which are summarised below –

2.19.1. UIL reiterated its plea of prosecutorial bias on the basis that the section 42 allegation (in INV041) is duplicative of the factual basis of the section 41 allegation (in INV 037) and that the opening of a second investigation is abusive and unfair as it exposes UIL to two different fines for the same conduct;

2.19.2. UIL has, in respect of [REDACTED] 2015/2016, [REDACTED] bid of 2016, [REDACTED] bid of 2015, and [REDACTED] bid 2015/2016, affirmed that the communications between UIL and MCFI were to prepare budget forecasts and assess the financial feasibility of the Fertco project as opposed to rigging the market;

2.19.3. There could not have been any bid rigging agreement between MCFI and UIL on account of the non-substitutability of their product/service; and

2.19.4. UIL relies on a correspondence dated 12th June 2018 from the [REDACTED] [REDACTED] to support its argument that clients had been informed of the overall aim of Fertco; that IRFL and MCFI and IRFL were working out numbers to assess the economic feasibility and cost-reducing potential of Fertco; and that IRFL and MCFI would be submitting separate bids (as opposed to jointly under Fertco) so long as Fertco was not fully implemented. However, by the time any bid would be accepted, Fertco would be ready to issue the invoicing.

2.20. The Executive Director completed both investigations and accordingly, submitted his Reports to the Commission in June 2018, maintaining findings of breach and recommending the imposition of financial penalties against UIL in both matters.

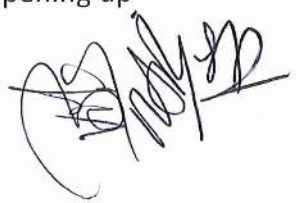
III. Background to the Proceedings before the Commission

3.1. 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.

3.2. Between 2018 and October 2019, a number of preliminary/procedural issues had to be dealt with before a hearing was eventually fixed for 29th October 2019. These are chronologically set out below.

3.3. 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) ascertaining from UIL the reason(s) motivating its request for an in-camera hearing for purposes of determining upon said request;
- (c) UIL's requests, via letters of 15th January 2019 and 05th April 2019, to the Commission for a reasonable opportunity to present its case before the Commission. To this effect, UIL urged the Commission to be afforded the opportunity to contest the evidence relied upon by the Executive Director including without limitation the ability to confront and cross-examine its accusers, namely the Executive Director as well as a representative of MCFI. Secondly, UIL noted that it expected the Executive Director to give evidence as to the issue of procedural bias raised by it during investigation wherewith UIL wished to be afforded the opportunity to contest such evidence;
- (d) a "*mise en demeure*" served on the Commission and the Executive Director at the instance of UIL on 24th September 2019 (hereinafter 'UIL Notice') wherewith UIL formally requested *inter alia*:
 - i. 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;
 - ii. 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 letter dated 21st October 2019 from the Executive Director to UIL in reply to the latter's *mise en demeure*, in particular UIL' request for disclosure. In his letter, the Executive Director has –
 - i. informed that UIL's request for disclosure/access to file was only made to the Executive Director via UIL's Notice and not previously formulated at investigation stage,
 - ii. considered as baseless and flatly denied what he considered to be '*very serious allegations and accusations upon the Executive Director's integrity*' with regards the prosecutorial bias issue,
 - iii. considered that the purport of UIL's request for disclosure of the investigation file appears to embark on a fishing expedition in view of cross examining the Executive Director in the hope that he would incriminate himself, as opposed to UIL being given the opportunity to fairly present its defence to the Commission,
 - iv. informed UIL that should UIL and its legal advisers withdraw all of their accusations and allegations, the Executive Director will consider opening up



the investigation file so that the hearing may be centred on factual issues in the Report and the merits of the case; failing which the Executive Director shall be constrained to move the Commission to reserve his legal right to proceed against all those who are privy to such allegations of misfeasance, falsely levelled against the Executive Director,

- v. urged UIL to reconsider its position and inform the Executive Director of its stand so that the way forward on procedural modalities for disclosure could be considered in a *'fair, serene and dispassionate manner conducive to a fair hearing'*.
- (f) a motion raised, pursuant to section 290(2) of the Criminal Code Act, before the Commission by the Executive Director during the Preliminary Hearing 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.

3.4. Further to UIL's request and in the interest of effective case management, the Preliminary 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.

3.5. In the course of the Preliminary Hearing, UIL submitted on the following points, viz.,

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- (a) its application to be heard in-camera during its discretionary hearing to keep the submissions out of the public eye, although UIL has not disputed the presence of the Executive Director or any officer at said hearing;
- (b) an examination of the Executive Director's compliance with his disclosure duties and praying that the Commission considers making appropriate directions in relation to those duties by the Commission;
- (c) inviting the Commission to make appropriate directions for service by UIL of expert evidence insofar as UIL could not finalise its expert evidence until it was assured that its expert witness would have had the opportunity to consider all material (from the investigation file) upon which the Executive Director's recommendations were formed;
- (d) the need for the Executive Director to be present at the substantive discretionary hearing to give oral evidence and to be cross-examined on the various matters that have been raised, in particular on the allegation of bias or apparent bias;
- (e) UIL no longer pursued its request for disclosure from MCFI or to cross-examine MCFI's representative after having taken cognisance of MCFI's position through its submissions although it disputed MCFI's presence at UIL's discretionary (substantive hearing);
- (f) its reading of the provisions in the Act relative to the conduct of hearings (sections 55 and 56 of the Act) to be couched as a three-staged process moving from a

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discretionary hearing followed by a notice being issued under rule 22(3) of the Rules of Procedure 2009, as may be required, before a mandatory hearing is convened.

3.6. The Commission delivered its Ruling¹ on the following procedural matters on 28th April 2020 as follows-

- (a) UIL's request for in-camera discretionary hearing was granted by the Commission;
- (b) the motion raised by the Executive Director under section 290(2) of the Criminal Code Act was deferred for determination on the merits in due course after the whole of the evidence and submissions would have unfolded before the Commission];
- (c) UIL's motion to cross-examine the Executive Director was disallowed; and
- (d) UIL's prayer for a relevant order/direction from the Commission for disclosure by the Executive Director in UIL's favour was not entertained for want of jurisdiction but the Commission nevertheless urged the Executive Director, on the basis of the principles of natural justice, to consider his disclosure duties and any data room procedure that could be applied in this matter.

3.7. By letter of 25th June 2020, UIL responded to the Commission's Ruling. It informed the Commission that it was reserving its position and made certain observations on three points from the Commission's Ruling on firstly, the Executive Director's motion under Sec 290(2) of Criminal Code Act; secondly, UIL's motion for cross-examination of the Executive Director; and thirdly, the stand adopted by the Commission regarding disclosure. In its submissions during the Hearing, UIL advanced that it 'will of course respect the [Commission]'s determination and not seek to go behind it².

3.8. Further to the Preliminary Hearing, and as a result of the Covid-19 pandemic and sanitary crisis that hit the world, a substantive hearing could only be conveniently convened on 20th April 2022, with UIL attending physically while MCPI attended virtually.

3.9. At the outset of the hearing, counsel appearing for the Executive Director, whose services had only recently been retained in this matter, raised the following points before the Commission.

3.10. Firstly, counsel for the Executive Director informed the Commission that the Executive Director, as now advised, was not insisting on his motion made before the Commission to formally reserve his right under section 290(2) of the Criminal Code Act and moved to withdraw the said motion. In the absence of any objection from either UIL or MCPI, the Commission allowed the motion for withdrawal.

3.11. Secondly, the Commission was further informed that the Executive Director was now agreeable to granting access to the investigation file subject to his

¹ Ruling of the Competition Commission CC/RL/0001 of 28 April 2020.

² Outline of UIL Submissions for Hearing of 20 April 2022, para. 53.

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legal/confidentiality obligations *'so as to give more resonance to the part of the Commission's Ruling relating to disclosure'*.³

3.12. UIL moved for a stay of proceedings against it on ground of abuse of process for failure to disclose in proper time. 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.

3.13. The Executive Director resists UIL's motion made for stay and accordingly sought and was granted leave to file written submissions on the issue of stay of proceedings for abuse of process (hereinafter 'Executive Director's Reply submissions'). These followed on 20th May 2022. UIL, in turn, filed its rebuttal submissions on 18th June 2022.

IV. The Parties' Submissions

4.1. UIL has canvassed at length its application for stay during its oral submissions before the Commission, which are supplemented by its detailed written submissions filed on the day of the hearing (corrected version thereof submitted on 25th April 2022). Although UIL, in its written submissions, also raised substantive defences against the Executive Director's findings and recommendations, UIL confined its oral submissions to substantiating its stay application on the understanding that should its application be refused; UIL would have the opportunity to be heard on the merits at a subsequent hearing.

4.2. The crux of the present decision accordingly rests on the motion made by UIL before the Commission during the Hearing of 20th April 2022 to stay proceedings against UIL in INV 037 and 041 matters. In this regard, the Commission has addressed its mind to UIL's submissions in support of its application as well as the Executive Director's arguments for resisting UIL's application.

Submissions of UIL

4.3. As intimated previously, UIL objects to the continuation of proceedings against it on ground of abuse of process for failure to disclose information sought in proper time. The Commission has had due regard to UIL's submissions on procedural objections – its averment of 'grave procedural failings' on the part of the Executive Director – as has been raised throughout proceedings.

4.4. UIL's motion is essentially grounded upon the cumulative set of circumstances below- –

4.4.1. UIL had ventilated clear concerns regarding specific aspects of the Executive Director's case *viz.*,

³ Transcript of Hearing of 20 April 2022, at pg. 7 reiterated in Executive Director's Reply submissions, at para. 6.

- (a) the change in MCFI/Harel Mallac's position on substitutability in the course of the investigation;
- (b) the superficial assessment of market definition which allegedly departed from the Commission's own guidelines on the matter (CC 2 Guidelines);
- (c) UIL's contention of prosecutorial bias in relation to firstly, the amendment to CC 3 Guidelines for introducing the temporary amnesty for cartel initiators; secondly, the opening of the INV 041 investigation was abusive and unfair, in particular, because it exposes UIL to two different fines for the same conduct and thirdly, the timing of and level of case details set out in a Media Release published by the Executive Director on 22nd August 2019 (reproduced at *Annex 1* of the present decision) when the matter was yet to be determined by the Commission;

Given the particular defences raised by UIL, UIL argues it was incumbent on the Executive Director to review the material in his possession through the lens of those defences and determine whether any such material fell for disclosure of his own initiative. UIL contends that the defence right to access to potentially exculpatory material is a fundamental free-standing one, not dependent upon requests by the person under investigation.

In any event, the Executive Director had been on clear notice of the nature of disclosure sought by UIL, at a minimum by way of its *mise en demeure* of 24th September 2019, and which UIL avers to being specific, proportionate, and justified since tied to its substantive defenses;

- 4.4.2. the Executive Director, in his reply of 21st October 2019 to UIL's *mise en demeure* calling upon him to grant it access to the files concerning it declined to comply with his disclosure duties. UIL considered this stand of the Executive Director to be 'extraordinary and inappropriate'.

UIL asserts that it was inappropriate for the Executive Director to make his compliance with his basic disclosure duties conditional upon UIL withdrawing a pillar of its defence – prosecutorial bias – which the Executive Director finds personally offensive.

- 4.4.3. UIL submitted that the Executive Director had shown 'contumelious disregard' by ignoring the earlier Ruling of the Commission where the latter *inter alia* urged him, in the interests of natural justice, to consider his disclosure duties.

It was argued that from the date of said Ruling, the Executive Director has had the best part of two further years to comply with the Commission's expectation but he had still not done anything in this regard;

- 4.4.4. the Executive Director's change in stand 'at the door of the court' on the day of the hearing (which UIL refers to as UIL's discretionary hearing) without any proper justification for said delay nor any engagement at all with UIL during all this time, comes way too late;

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- 4.4.5. the Executive Director's 'deliberate faults' and 'wrongful conduct' have rendered the proceedings before the Commission unfair and unlawful. It is not possible for UIL to have a fair hearing, in compliance with natural justice, unless it is afforded the right to have at its disposal, for the purposes of exonerating itself or of obtaining a reduction in penalty, all relevant elements that have been or could be collected by the Executive Director. However, it is not appropriate at this stage for the matter to be further adjourned to permit the Executive Director to provide what may be voluminous and technical material that would require further detailed and lengthy consideration; and
- 4.4.6. accordingly and per UIL, a stay is necessary to protect the integrity of the judicial system (of which the Commission's statutory functions of a public nature form a part).
- 4.5. UIL has also advanced a number of authorities relating to a party's right of access to file (right to disclosure) in competition cases for purpose of exonerating itself or making submissions that may have a bearing on fines.
- 4.6. UIL, finds as authoritative, the provisions of CC 7 Guidelines – General Provisions (Section 6) on 'Disclosure of Information in proceedings under the Competition Act 2007' (CC 7). Per UIL, CC 7 addresses three fundamental elements. Firstly, it clarifies that section 70 of the Act is no bar to disclosure *'for the purpose of administration or enforcement of the Act and in particular, for the purpose of achieving due process and allowing parties under investigation to effectively exercise their rights of defense'*. Secondly, the guidelines set out that the [Competition Commission] itself is vested with the duty to consider (including, as stated in para. 6.2, "on its own initiative") whether disclosure for that purpose is necessary and it is empowered to make such disclosure, subject to appropriate arrangements. Thirdly, CC 7 concedes that even the granting of access to data of a quantitative nature or of a voluminous amount of confidential information may nevertheless be necessary *'for the purpose of giving a party under investigation adequate information to prepare his defense or submissions either in the course of investigation proceedings (following the issuance of the Provisional Findings to the main party) or before the Commission'*, while balancing the legitimate interests of information givers to protection of their confidential information.
- 4.7. UIL then goes on to cite two further decisions from the UK Competition Appeal Tribunal ('UK CAT') illustrating two principles regarding the necessity and form of disclosure. Firstly, a competition regulatory authority will be ordered to make disclosure where it fails to respond to clearly specified requests for disclosure focusing on an enterprise's substantive claim that the regulator has adopted an inadequate approach and evidential base informing relevant conclusions, because such information is necessary⁴. Secondly, the failure of a competition regulatory authority to provide a fair disclosure room regime constituted, *inter alia*, a breach of natural justice in comprehensively failing to give the party concerned a fair

⁴ *JD Sports Fashion Plc v Competition and Markets Authority* [2020] CAT 20.

opportunity to correct or contradict the Commission's findings or to make worthwhile representations.⁵

- 4.8. On the issue of 'abuse of process', UIL advances that '*courts [in the UK] have recognised a general and inherent power to protect their process from abuse, and that this power includes the power to safeguard an accused person from oppression or prejudice*⁶.
- 4.9. UIL has further submitted that the power to stay is exercised in civil, criminal and regulatory proceedings⁷. UIL further advances that regulatory panels exercising a decision-making function, as is the case in competition proceedings⁸, have a jurisdiction to stay proceedings as an abuse of process, which is subject to the supervisory jurisdiction of the High Court⁹.
- 4.10. Per UIL, a common law abuse of process jurisdiction may be exercised in two situations: (a) where a party to proceedings would not receive a fair trial, and/or (b) where a stay is necessary to protect the integrity of the judicial system (previously formulated as where "*it would otherwise be unfair to try the defendant*").
- 4.11. UIL accordingly argues that the Supreme Court of Mauritius has recognised the existence of such an inherent [jurisdiction]¹⁰. Of mention, the case of *State v Fadhili Mwikalo Salim* 2000 SCJ 192 which summarised the position as follows -

"It is now well settled that the Court has a power – and a discretion to be judiciously exercised in that connection – to stay proceedings for abuse of process, this being an inherent power to protect its process from abuse: See Connelly v D.P.P. (1964) A.C. 1254 H.L. where all their Lordships did seem to agree on that proposition as noted in Archbold 1999 at para. 4-48. This power has been described as a formidable safeguard, developed by the common law in England, to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so (Attorney-General of Trinidad and Tobago v Phillip (1995) 1 A.C. 396, P.C.). An abuse of process was defined, in Hui Chi-Ming v R (1992) 1 A.C. 34, PC, as "something so unfair and wrong that the Court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding". As also explained in Archbold 1999 at para 4-56, "The present boundaries of the doctrine are apparent from R v Beckford [1996] 1 Cr. App. R. 94, in which the Court of Appeal identified two types of case where proceedings may be stayed on the basis that their continuance would be an abuse of process, namely -

(a) where the defendant would not receive a fair trial, and

⁵ *BMI Healthcare Limited, HCA International Limited, Spire Healthcare Group v Competition Commission v The London Clinic* [2013] CAT 24, 2013.

⁶ Outline of UIL submissions for Hearing of 20 April 2022, para 47 citing *Connelly v DPP* [1964] A.C. 1254 (HL).

⁷ Outline of UIL submissions for Hearing of 20 April 2022, para 46, fn 12 citing *Competition Law*, 10th Ed, Whish & Bailey (OUP) at p418 and fn 111.

⁸ Outline of UIL submissions for Hearing of 20 April 2022, para 46.

⁹ *Ibid* citing *R. v Chief Constable, Ex p. Merrill* [1989] 1 W.L.R.1077 (CA); *R. v Chief Constable, Ex p. Calveley* [1986] Q.B. 424 (CA)

¹⁰ Outline of UIL submissions for Hearing of 20 April 2022, para 48.

(b) where it would be unfair for the defendant to be tried.

4.12. UIL further submits that failures of disclosure which deprive a party of a fair trial (and are irremediable or not remedied) satisfy the first limb for granting of a stay; and those which can properly be characterised as prosecutorial misconduct are capable of satisfying the second limb; but nothing less will do.¹¹ According to it, there are cases in which, even though a further adjournment and further disclosure is possible, the circumstances are such that it is inappropriate to allow the prosecutor that indulgence and the proper course is to stay the proceedings. UIL draws support from a number of criminal cases to advance the latter arguments.¹²

4.13. With regard to its application to stay proceedings, UIL asserts that the Commission is bound to stay proceedings on the ground of abuse of process because according to it the Commission cannot acquiesce to its process being rendered unfair and unlawful as a result of what it considered to be the Executive Director's deliberate defaults. In UIL's submission, both limbs of the test for granting a stay are satisfied namely -

- (a) UIL would not receive a fair hearing, i.e., one that is compliant with natural justice; and
- (b) a stay is necessary to protect the integrity of the judicial system (of which the Commission's statutory functions of a public nature form a part) because of the Executive Director's conduct in this matter.

The Executive Director's submissions in Reply

4.14. The Executive Director is resisting UIL's application for stay of proceedings for abuse of process on failure to disclose in proper time insofar as firstly, the Executive Director has agreed to provide UIL access to his investigation file on 20 April 2022 after obtaining legal advice.

4.15. The Executive Director further highlights the exceptional nature of a stay of proceedings as a remedy to be exercised with utmost caution and as a last resort.¹³ In support thereof, reference is made to the silence of the Act as to the circumstances in which the Commission can stay proceedings before it coupled with the absence of an express statutory power to this effect, as read from the provisions of section 6 of the Act.

4.16. The Executive Director denies the existence of a free-standing duty of disclosure on his part in light of the general non-disclosure rule couched from the wordings of section 70 of the Act and the prescribed limited grounds¹⁴ on which disclosure can be

¹¹ Outline of UIL submissions for Hearing of 20 April 2022, para. 49.

¹² *Ibid*, footnotes 17 – 20. Amongst the cited cases is the case of *Rajan v GMC*, Privy Council Appeal No. 18 of 1999 [2000] Lloyd's Rep Med 153, wherein the Privy Council allowed the appeal on the basis that the failure to disclose timeously a diary entry in its possession that assisted his case deprived R of a fair hearing. In that case, it was found that the diary entry "...should have been disclosed to the appellant's legal advisers on a date well before the date of the hearing, and that the failure to disclose in proper time rendered the finding ... unsafe, because that failure denied to the appellant and his advisers a proper opportunity to advance a case which might have succeeded" per, Lord Hutton, giving the decision of the Board

¹³ Executive Director's Reply submissions of 20 May 2022, para. 9.

¹⁴ *Ibid*, para 14 at al.

made. The Executive Director cautions against an unqualified application of common law principles on disclosure to the Executive Director's disclosure duties insofar as the Executive Director is not to be equated to a prosecutor in criminal proceedings. In support of his argument, the Executive Director cites from the case of *SA Hercules Chemicals NV v Commission of the European Communities*¹⁵ (hereinafter referred to as '*SA Hercules*') to the effect that the Commission is not required to divulge the contents of its files to parties. Regard for the rights of defence requires that a party be given the opportunity to express its views on all the objections raised against it by the Commission and on the evidence used to support those objections, as mentioned in the Commission's statement of objections or annexed to it. This, however, does not imply that a party be able to comment on all documents forming part of the Commission's file since there are no provisions requiring the Commission to divulge the contents of its file to parties concerned.

4.17. Reference is also made to the case of *Tobii AB v Competition and Markets Authority*¹⁶ (hereinafter referred to '*Tobii AB*') from which four points emerge. Firstly, that disclosure is not automatic and cannot allow for mere fishing expeditions. Secondly, disclosure would be ordered so long as disclosure sought was necessary, relevant, proportionate and in the interests of securing the just, expeditious and economical conduct of the proceedings. Thirdly, a disclosure request must be assessed on a case-to-case basis considering the nature of decision challenged, nature of the grounds for challenge and extent of disclosure sought. Fourthly, no general obligation exists upon the investigative authority to disclose underlying evidence and material collected in its investigations.

4.18. The Executive Director has also disputed the point in time when a disclosure request was formally put to him, arguing that such request only intervenes by way of UIL's *mise en demeure* of 24 September 2019 as opposed to the earlier date of 19th May 2019, as argued by UIL, relative to a correspondence addressed by UIL to the Commission.¹⁷

4.19. It is the Executive Director's further contention that UIL's basis for disclosure, grounded in the Commission's guidelines on disclosure in CC 7 – General provisions, is devoid of merits insofar as guidelines published by the Commission pursuant to section 38 of the Act do not apply to the Executive Director in the manner submitted by UIL. It is averred that the term Commission, as employed at section 38 of the Act, refers to the Competition Commission which in turn does not encompass the Executive Director considering the scope and wordings of sections 4 and 7 of the Act.¹⁸

4.20. The Executive Director raises concerns from the timing of UIL's request for disclosure that UIL could be on a "fishing expedition", seeking to incriminate him, as expressed

¹⁵ Judgment of the Court of First Instance (First Chamber) of 17 December 1991 Case T-7/89 cited at para. 14.3 of Executive Director's Reply submissions of 20 May 2022.

¹⁶ [2019] CAT 25; [2019] 10 WLUK 721.

¹⁷ Executive Director's Reply submissions of 20 May 2022, para. 16.3.

¹⁸ *Ibid*, para 17.

in his letter of 21st October 2019. UIL's *mise en demeure* intervened more than one year after the Executive Director had already completed his investigations and issued his final reports to the Competition Commission and UIL. UIL had not addressed any disclosure request to the Executive Director during the investigation when it raised the same defences before the Executive Director, who went on to address the said defences in his reports. The Executive Director adds that documents referred to by the Executive Director in his final reports have been annexed thereto such that UIL was in possession of documents relied upon by the Executive Director for the purposes of his findings/recommendations. According to him, the belated disclosure request made by UIL is at least indicative of the fact that the information thereby sought is not necessary for preparing its defence, a task usually attended to by parties at the investigation stage, before the issue of the final reports.¹⁹

4.21. The Executive Director also casts doubt as to UIL's disclosure request being 'specific' insofar as, applying UIL's wordings, UIL seeks *"an opportunity to examine all the documents in the ED's investigation file or otherwise in his possession or control which may be relevant to UIL's defence, taking into account the specific defences raised by UIL"*.²⁰

4.22. The Executive Director denies having shown a 'contumelious disregard' for the Competition Commission's Ruling on the issues raised in the Preliminary Hearing of 29th October 2019 that he should comply with his disclosure duties, in order to uphold the principles of natural justice. The Executive Director remarks that firstly, the Competition Commission did not go as far as ordering him to disclose. Coupled with this, that the Commission did not rule on the motion brought by the Executive Director under section 290(2) of the Criminal Code Act during the Preliminary Hearing of 2019, meant that this was still a live issue in front of the Commission. It is argued that the motion having a direct bearing on the matter of disclosure, the Executive Director, therefore, had to submit himself to the ongoing proceedings and to any subsequent decision that would come from the Commissioners in this regard. Further, the Executive Director reviewed his stand on disclosure promptly after having sought legal advice and cleared the concerns which he entertained at the material time, and the said stand was communicated to UIL and the Competition Commission at the first available opportunity.²¹

4.23. The Executive Director contends that UIL has failed to show under the first limb of the test for abuse of process that the alleged failure of the Executive Director to disclose in proper time had a prejudicial effect on the fairness of the hearing before the Competition Commission²². Further, failure to disclose *per se* does not ordinarily

¹⁹ *Ibid*, paras 18 – 22.

²⁰ *Ibid*, para 23.

²¹ Executive Director's Reply submissions of 20 May 2022, para. 29.

²² *R. v Hewitt (Douglas Joseph)* [2020] EWCA Crim 124: *"There were undoubtedly regrettable shortcomings in the disclosure process. To justify the grant of a stay, the appellant had to show on the balance of probabilities that, because of the disclosure failings, absence of documentation and delay, he would suffer serious prejudice to the extent that a fair trial could not be held. The judge was entitled to find that the appellant had failed to discharge that burden"*.

amount to an abuse of process under this limb. The Executive Director seeks support from the case of *D Ltd v A*²³, in which David LJ noted -

"...[it is] important to bear in mind that the two limbs to the exercise of this jurisdiction to stay are legally distinct and have to be considered separately: considerations that may be relevant to the first limb may not be relevant to the second limb and vice versa. Moreover, the second limb requires a balance of the competing interests, whereas the first limb does not".

4.24. The Executive Director highlights that the Court of Appeal in the afore case accepted the argument that failures on the part of the prosecution are not themselves ordinarily relevant to the first limb of the test for abuse of process. The key issue is whether the consequences of those failures are such as to deprive the defendant of a fair trial.

4.25. In balancing competing public interests (*viz.*, that of maintaining confidence in the justice system versus that of ensuring that a breach be properly remedied/sanctioned) as part of the second limb test, the Executive Director opines that the balance tilts in favour of not acceding to the request for stay of proceedings because the integrity of the judicial system of the Competition Commission has not been compromised in as much as the Executive Director is now willing to disclose and it has not been proven that the Executive Director has acted in bad faith or maliciously or in an egregious so as to penalise UIL, a fact which UIL has failed to prove. Moreover, UIL's request for disclosure came at a belated stage after the submission of the final reports and the Competition Commission can proceed otherwise than halting the proceedings.²⁴ In this regard, the Executive Director submits that should the Commission find that an abuse of process has occurred, it can proceed with granting lesser remedies that are more just and proportionate by either adjourning proceedings to allow for disclosure or otherwise it can, *ex officio*, directly decide for disclosure in light of section 70 of the Act, rule 30 of the Rules of Procedure and paragraph 6.2 of CC 7 Guidelines.²⁵

UIL's rebuttal to submissions from the Executive Director

4.26. In its written submissions offered in reply to the Executive Director's case, UIL has objected to all points put forth by the Executive Director.

4.27. UIL argues that the Executive Director's characterisation of his taking legal advice as prompt is perverse since he chose to wait 2^{1/2} years to do so just ahead of the hearing and is devoid of any justification. Such action has derailed the course of proceedings removing any chance of having an effective hearing. The Executive Director has further kept to himself the fact that he proposed to disregard the Commission's Ruling urging him to give due regard to his disclosure duties in the interests of natural

²³ [2017] EWCA Crim 1172.

²⁴ Executive Director's Reply submissions of 20 May 2022, para. 33-35.

²⁵ Executive Director's Reply submissions of 20 May 2022, para. 37 – 39.

justice.²⁶ In any event, UIL advances that none of the concerns harboured by the Executive Director, in support of his stand taken in his letter of 21st October 2019, could possibly justify not complying with his disclosure duties with respect to data on his file pertaining to the issue of substitutability, an issue that is logically distinct from the issue of prosecutorial bias.

- 4.28. On the Executive Director's denial of a free-standing duty of disclosure, UIL asserts that the Executive Director acknowledges in his submissions that the request made in UIL's *mise en demeure* triggered a duty to disclose. UIL anchors the existence of a duty of disclosure in the wordings of section 70(1)(a)(ii) of the Act permitting the Executive Director and the Commissioners to disclose "for the purpose of administration of enforcement of the Act". Further the Executive Director's citation of EU and CAT case law also do not negate the general free-standing duty to make proportionate and necessary disclosure to ensure the fairness of the proceedings. Rather, the limitation that they describe is an expression of that principle. UIL does not argue for an unlimited right to access to all material in the ED's possession. Its requests are limited, targeted and proportionate.²⁷
- 4.29. UIL submits that the Executive Director's interpretation of the Commission in section 38 as excluding the Executive Director from the ambit of the CC 7 Guidelines (and all Guidelines generally) are wrong in law.²⁸
- 4.30. UIL further negates the Executive Director's contention that the proper timeframe for putting forward a disclosure question is at the investigation stage. UIL finds that there is nothing in the regulatory scheme that mandates that such request be formally made of that it is dependent upon a request being made at all. UIL refers to the provisions of CC 7 Guidelines (para 6.2) to the effect that said Guidelines does not require a request to be made in order for disclosure to be ordered, since it expressly speaks of the CCM ordering disclosure "either on its own initiative or upon request made by a main party".
- 4.31. Regarding the Executive Director's position that no stay is warranted in the present case; UIL avers that the real issue to be determined is the second limb one: whether the Commission should condone the egregious conduct of the Executive Director by declining to stay proceedings and giving the Executive Director more time to make disclosure.²⁹
- 4.32. Finally, UIL contests the Executive Director's position on what he is prepared to disclose as being a vague half promise that is inadequate to afford UIL its right to be provided with information necessary for it to prepare its defence such that a stay is the only available remedy in this case. Given the nature of material sought for disclosure in light of UIL's line of defence, UIL contends it is inevitable that further hearings would need to be devoted to thrashing out the detail of what the Executive

²⁶ UIL's rebuttal submissions of 18 June 2022, para. 6 – 9.

²⁷ *Ibid*, paras 12-16.

²⁸ *Ibid*, paras 18-23.

²⁹ UIL's rebuttal submissions of 18 June 2022, para. 29-32.

Director is prepared, and what if anything he is obliged, to disclose. UIL further avers that insofar as the Commission has determined that it has no power to direct the Executive Director to disclose (should he be disinclined to disclose certain material requested by UIL), then UIL will be left with no remedy with respect to that residue of material.³⁰

V. The Commission's Determination

5.1. As set out previously, UIL prays for a stay of proceedings against it on ground of abuse of process for failure to disclose in time. Such motion is being resisted by the Executive Director.

5.2. The Commission has carefully considered the submissions and arguments respectively advanced by UIL and the Executive Director on the merits and demerits of UIL's application and finds that three questions are to be sequentially addressed by the Commission in the process of determining this matter –

5.2.1. first, whether the Commission has an inherent jurisdiction or power to stay proceedings before it considering the provisions of the Act and its procedural rules ('First Issue');

5.2.2. second and if so, whether UIL's application for stay on ground of abuse of process for failure to disclose in proper time finds merit in light of the history and circumstances of the present case ('Second Issue');

5.2.3. third and if so, whether such abuse can be effectively remedied through less drastic and more proportionate measure, other than a permanent stay of proceedings, while ensuring that a fair trial is still possible for UIL ('Third Issue').

A. As to the First Issue: Power to stay proceedings

5.3. In its submissions before the Commission, UIL has at times spoken of an inherent *jurisdiction* and at others, of an inherent *power* on the part of courts and regulatory panels – such as ours – to stay proceedings on ground of abuse of process. The Commission finds that the question before it is one of 'inherent power' to stay proceedings before it (for abuse of process) rather than of 'inherent jurisdiction'. The hereunder cited paragraph from the Supreme Court decision in *State v Fadhili Mwikalo Salim* 2000 SCJ 192 is speaking on the matter –

*It is now well settled that the Court has a **power** – and a discretion to be judiciously exercised in that connection – **to stay proceedings for abuse of process, this being an inherent power to protect its process from abuse** (...) [Emphasis ours].*

5.4. 'Jurisdiction' and 'power' are distinct concepts. Courts have jurisdiction *viz.*, 'the authority to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision'.³¹ They are also endowed with certain powers - other than those conferred by statute or rules of the court – *viz.*,

³⁰ *Ibid*, para. 34-36.

³¹ *Taylor v Attorney General* [1975] 2 NZLR 675, 681-682 citing 9 Halsbury's Laws of England (3rd ed) 350.

inherent powers, which only exist because they are necessary to enable the courts to act effectively within their jurisdiction in their primary sense. Such power *'arises by necessary implication as being ancillary to the performance of functions, powers and duties conferred by the statute. The statutory function must exist for the necessary power to be implied'*.³²

- 5.5. The Commission is conscious of the fact that the above-referred analysis is judicature-centric with the power being primarily exercisable by courts of law. However, this Commission, albeit not set up as a Court or a Tribunal, has previously ruled on the quasi-judicial capacity in which it acts insofar as its functions are analogous to those of judicial authorities³³. The nature of the functions of this Commission involves an adjudicatory process with serious consequences for parties found to be in breach of the law. Parties are required to be heard, appropriate directions are to be issued, the orders are required to be passed upon due application of mind and for valid reasons. The exercise of powers and passing of the orders by us under the Act cannot be arbitrary. It has to be in consonance with the principles of natural justice, our rules of procedure and the procedure evolved before the Commission. Natural justice has three indispensable facets, i.e., grant of notice, grant of hearing and passing of reasoned orders/decisions – all of which are procedural requirements that have to be met. An order or direction of the Commission is final and binding and can only be questioned by the Supreme Court.
- 5.6. The Commission is certainly established with quasi-judicial authority wherewith its statutory 'jurisdiction' is delineated at section 5 of the Act and its powers are listed at ensuing section 6. Reading the latter section literally, we observe that the legislator, in his wisdom, has not exhaustively set out the powers of the Commission but assured that the *'[t]he Commission shall have such powers as are necessary to enable it to effectively discharge its functions'* [emphasis ours]. Sub-provisos (a) to (e) of section 6 can be referred to as the 'express' powers conferred upon the Commission by statute. However, reading section 6 holistically, we may read into said provisions additional powers - 'implied powers' – exercisable by the Commission conditioned upon necessity to enable the Commission to effectively discharge its statutory functions. Hence, an implied power to stay proceedings as being ancillary to the performance of our adjudicative functions of hearing parties and determining cases brought before us. Insofar as such power is inherent, the law need not expressly provide for the circumstances in which the Commission can stay proceedings.
- 5.7. The Commission, in exercising such inherent power, must however be guided by necessity, judiciousness, and pragmatism in a manner that is not inconsistent with the provisions of the Act or our Rules of procedure. We accord with the Executive Director's view that the granting of a stay is an exceptional remedy, but we offer the contrary view that the power to grant a stay can and must be wielded if the

³² *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 and 703.

³³ Ruling of the Competition Commission CC/RL/0001 of 28 April 2020, paras 12.0 – 16.0.

circumstances of a matter so warrant for proper administration of justice and fairness. The underlying rationale of the abuse of process principle is the prevention of abuses that would strike at the public confidence in the Commission's process and so diminish its ability to fulfil its function. Therefore, when exercising its inherent power to stay, this Commission is in fact protecting its ability to function as adjudicator in the future as in the case before it.

- 5.8. In light of the foregoing, the Commission determines that neither the provisions of the Act nor the Rules of Procedure bar the exercise by the Commission of an inherent power to stay proceedings as ancillary to but necessary for the effective discharge of the Commission's function in order to protect the integrity of its process. We turn now to the second issue of whether the case before us demonstrates the existence of abuse of process warranting a permanent stay of proceedings.

B. As to the Second Issue: Abuse of Process for failure to disclose in proper time

- 5.9. UIL's application for stay is essentially grounded on the contention that the Executive Director has failed to abide by his disclosure duties since 2018 and despite having been on clear notice of UIL's disclosure request since 2019 by way of UIL's *mise en demeure*. The Executive Director disputes the point in time when he was under duty to consider UIL's disclosure request, averring for his part that such duty only arose as from 24th September 2019 when UIL formally addressed, for the first time, its *mise en demeure* to the Executive Director. The Executive Director also opposes an unqualified application of common law principles of disclosure to the disclosure duties of the Executive Director in that he should not be equated to a prosecutor in criminal matters and is not subject to the same disclosure duties as the prosecution in such matters.
- 5.10. The statutory premise for disclosure under the Act is section 70 entitled 'Disclosure of information'. Procedural aspects relating to disclosure of information are supplemented by Rule 30 of the Rules of Procedure and CC 7 Guidelines - General Provisions ('CC 7 Guidelines') at section 6. The Executive Director questions whether guidelines published by the Competition Commission, under section 38 of the Act, are intended to apply to him in the manner submitted by UIL and in the same breath, questions whether CC 7 Guidelines apply to the Executive Director's disclosure duties. The latter argument centres around the interpretation to be given to the term 'Commission' employed at section 38 of the Act read in light of the provisions of sections 4 and 7 thereof.
- 5.11. We have carefully considered the latter point advanced by the Executive Director. We find his proposition to be at odds with the submissions he made during the Preliminary Hearing to support the publication of the Media release (contested by UIL) -



(....) Again, under the Competition Act, section 30(g) of the Act, which talks about the powers of the Executive Director. It stipulates that the Executive Director shall:-

"publish and otherwise promote and advertise the provisions of this Act and the activities of the Commission"

Here, by the 'activities of the Commission', we mean the institution which would also encompass the enforcement activities of the Executive Director.

So, this is what the Executive Director has done (...) ³⁴. [Emphasis ours]

5.12. As opposed to the strict reading employed by the Executive Director, we are in favour of applying a purposive approach to term Commission considering the context in which it is employed in the Act. This is because the Act uses the term 'Commission' synonymously for 'Competition Commission' as body corporate and for 'Commissioners' as adjudicative arm of the Competition Commission. For instance, section 4 refers to the establishment of the Commission as body corporate named Competition Commission. Whereas sections 5 and 6 for instance refer solely to the functions and powers of the adjudicative arm of the Competition Commission through Commissioners. Considering the foregoing, we are of the considered view that the term 'Commission', as employed at section 38, must be understood in its true context and intends for the institution of the Competition Commission to publish set of guidelines and procedural rules to govern the procedures and guide the substantive assessments employed by the investigative and adjudicative arms of the institution in the interests of transparency. The Rules of Procedure are clear as applying to and binding upon the Executive Director (Rule 3(2) of the Rules of Procedure). As far as Guidelines are concerned, it would be quite remarkable indeed if the Executive Director could choose to depart at will and without justification from any of the guidelines adopted by the Commission. On the contrary, we note that the Executive Director's INV 037 and INV041 Reports of investigation quote extensively from CC 3 Guidelines – Collusive agreements on substantive assessment of the alleged impugned Fertco and bid rigging agreements and for purposes of assessing leniency as well as from CC 6 – Remedies and Penalties. We find therefore that the guidelines published pursuant to section 38 of the Act as well as our Rules of Procedure apply to the Executive Director as they apply to us.

5.13. Coming back to our assessment of the necessity for disclosure or, as UIL puts it, the 'free-standing duty of disclosure'; we remark at the outset that the European case law on the matter of disclosure in competition proceedings is quite developed and that the European Commission appears to have adopted rules exceeding the requirements laid down by the EU Courts³⁵. These sources, although influential in guiding our understanding of the permissibility, scope and form of disclosure, are subservient to corresponding provisions in our law and/or procedures regarding disclosure.

³⁴ Transcript of Preliminary Hearing, pg 37.

³⁵ SA Hercules, supra footnote 15, para. 53 – 54.



- 5.14. Two points emerge from our reading of section 70 of the Act regarding disclosure. Firstly, the provision clearly encompasses, within its remit, information obtained by the Executive Director under or by virtue of the Act. Interestingly, the term 'Commission' is not expressly employed in that section. Rather, the section extends to Commissioner(s) and staff of the Commission. However, we are not prepared to adopt a restrictive approach in reading through section 70 of the Act insofar as Commissioners sit as the adjudicative arm of the Commission and information is obtained by them under or by virtue of the Act such as when they sit to hear and determine matters brought before them. By necessary implication, the Commission is also captured within the ambit of section 70. Secondly, non-disclosure appears to be the rule of thumb subject to specified circumstances, exhaustively set out at provisos (i) to (v) of subsection (1)(a), which include disclosure made 'for the purpose of the administration or enforcement of this Act'. Considering the statutory construct of section 70, we would not go as far as saying that the latter provision embodies a 'free-standing duty of disclosure'; rather, disclosure under our Act has to be qualified and permitted through one of the gateways listed therein. At the same time however, we take the view that when a party makes a disclosure request to exercise its defence rights during investigation or in proceedings before the Commission, this clearly ought to be considered as disclosure made for the purpose of administration and enforcement is of the Act.
- 5.15. What is however not express from the section 70 provisions is whether disclosure for purposes of 'administration or enforcement of the Act' is exercised as a result of discretion or as a duty and further, whether it ought to be exercised *proprio motu* by the disclosing party or upon request made to the disclosing party. Rule 30(2) of our Rules of Procedure tends to suggest that disclosure is discretionary. Rule 30(2) is to the effect that '[i]nformation **may** be disclosed where (...)' [Emphasis ours]. Specified procedures for disclosure in proceedings under the Act, as catered for in CC 7 (Section 6), provide that a decision to disclose information may either be made upon the disclosing party's own initiative or upon request made by a main party.³⁶ If disclosure is not offered to a main party in the course of proceedings under the Act, then it is for the party necessitating access to file to diligently make known its request for disclosure to the holder of such information and to clearly state what is sought by it. A similar stand was adopted, on behalf of the Executive Director, during the Preliminary Hearing³⁷:-

"The Executive Director, we just pointed out, has given his report and all annexes, all materials that we used in the report are annexed in the report and this is what the parties also have. So, if parties need access to the investigation file, they have to make a request and it's not the duty of the Executive Director to volunteer that information [outright]. It's upon request". [Emphasis ours].

³⁶ CC 7 Guidelines, para. 6.2.

³⁷ Transcript of Preliminary Hearing, pgs 36- 37.

- 5.16. Whilst the European Model of access to file, referred to by UIL³⁸, is not authoritative upon us, its Notice³⁹ appears to rest on the similar view that *[access to the file will normally be granted upon request of a party]*⁴⁰[Emphasis ours]. Notwithstanding, once a party seeks disclosure for purposes of exercising its rights of defence, disclosure by the holder of the information cannot result from the exercise of a discretion simply. In our view, disclosure must then be reasonably afforded within the confines of our Act and established procedures in a manner that balances the requesting party's defence rights against the information givers' right to legitimate protection of confidential information.
- 5.17. There is nothing from the case proceedings to suggest that the Executive Director was in presence of or ought to have been aware of UIL's letter of 13th May 2019 to the Commission raising the issue of the Executive Director's compliance with his disclosure duties. UIL has also not contested the Executive Director's averment that no formal request for access to file had been made to the Executive Director during investigation proceedings although UIL had raised clear objections to the case made against it in INV 037 and INV 041 matters in its respective response to the Provisional Findings Reports issued to UIL by the Executive Director. What we have on record is that the Executive Director was formally notified of UIL's access request and scope of disclosure by way of UIL's *mise en demeure* on 24th September 2019. Be that as it may, the blunt fact is that a request for disclosure was made by UIL, a party subject to investigation and seeking to contest the findings of the investigation made against it. UIL's disclosure request pertained to information gathered during investigation stage or otherwise relating to the conduct of the investigation and was rightly addressed to the Executive Director. Once such disclosure request was placed before the Executive Director, it was for the latter to initiate relevant procedures for engaging upon the issue of disclosure.
- 5.18. The Commission also does not agree with the Executive Director's submission that the investigation stage is the 'most appropriate forum and time to request for disclosure and that the 'belated' disclosure request made by UIL – viz., a year after completion of the investigations – indicates that information thereby sought is not necessary for preparing its defence. The Commission does not find anything from the provisions of our Act or the Rules of Procedure to the effect that disclosure is debarred if a disclosure request does not intervene within a particular timeframe in proceedings under the Act. CC 7 Guidelines provides in the same vein that '*...granting access to [quantitative data or voluminous amount of confidential information] may nevertheless be necessary in particular, for the purpose of giving a party under investigation adequate information to prepare his defense or submissions in either the course of investigation proceedings (following the issuance of the Provisional*

³⁸ Outline of UIL submissions for Hearing of 20 April 2022, para 43 et al.

³⁹ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (2005/C 325/07).

⁴⁰ *Ibid*, para. 7 and 27 quoted in Outline of UIL submissions for Hearing of 20 April 2022 at para. 44.5.

*Findings to the main party) or before the Commission'*⁴¹. What we read therefrom is that the defence may exercise its rights regarding disclosure either during investigation or before the Commission. UIL was given the opportunity/ies to put forth its views at punctuated stages of the investigation and to contest the evidence relied upon by the Executive Director, which it did through written representations made to the Executive Director. UIL appears to have relied on the expectation that disclosure would be made in or around 2018 upon the Executive Director's own initiative considering the line of defence which UIL had adopted through its responses at Provisional Findings stage. Seeing nothing forthcoming in this sense, UIL addressed a formal disclosure request to the Executive Director – at least in 2019 – to contest, before the Commission, evidence, findings and recommendations from the Executive Director's Reports of investigation as well as the conduct of the investigations.

- 5.19. Tenets of natural justice require the conduct of a fair hearing before an independent and impartial authority – giving maximum latitude to a party who stands accused of a wrongdoing to *inter alia* be given adequate time and facilities for the preparation of his defence. This, in our view, encompasses the opportunity to have access to relevant material that can assist the party under investigation in exculpating itself by casting doubt over the evidence brought against it or portraying such evidence in a different light before the decision-making body. In UIL's case the information concerning the investigation against it was to be found with the Executive Director.
- 5.20. UIL further disputes the stand adopted by the Executive Director, in his letter of 21st October 2019, for withholding disclosure, which was perceived by the latter as a fishing expedition in view of driving him into self-incrimination during cross-examination in substantiation of UIL's contention / allegation of prosecutorial bias on the part of the Executive Director. The Executive Director's concerns over UIL's alleged fishing expedition were raised from the scope and timing of UIL's request for disclosure in that its request was formulated a year after completion of the investigation when UIL had already been provided with documents relied upon by the Executive Director to reach his conclusions in his final reports.
- 5.21. The Commission has carefully considered the tenor of the Executive Director's letter of 21st October 2019 communicating its stand on disclosure to UIL against the backdrop of arguments advanced from both sides. Two points are at issue: firstly, the perception that UIL's disclosure request was no more than a fishing expedition and secondly, disclosure subjected to withdrawal of the allegation of prosecutorial bias.
- 5.22. We turn to the first issue of UIL's perceived attempt towards a fishing expedition. We do not find support from the facts and circumstances of the case before us for this proposition. The Executive Director alludes to the fact that UIL's disclosure request, through its *mise en demeure*, was set out in relatively wide terms, wherein UIL was seeking to have "an opportunity to examine all the documents in the Executive Director's investigation file or otherwise in his possession or control which may be relevant to UIL's defence, taking into account the specific defences raised by

⁴¹ CC 7 Guidelines, para. 6.3.

UIL....". So UIL was not seeking to be put in presence of **all the** material gathered by the Executive Director during his investigations. This view is reinforced by UIL's submissions made during the Preliminary Hearing⁴² and the Substantive Hearing⁴³ that it was seeking disclosure of specified materials relating to its substantive claims and defences, namely material relating to market definition and substitutability, the issue of prosecutorial bias and certain communications with / representations from MCFI, as defined in its *mise en demeure*. In any event, material which fell to be disclosed by the Executive Director would be material identified through the judicious use of his discretion, having regard admittedly to his confidential obligations under the Act. The Commission also recalls UIL's proposal made during the Preliminary Hearing that it was amenable to engaging with the Executive Director in a constructive process regarding procedures for redacting relevant confidential material.⁴⁴ Should UIL have been dissatisfied with the scope of the Executive Director's proposed disclosure, it was open for it to seek a disclosure order proper from the appropriate forum.

5.23. The Executive Director also reckons that UIL had been provided with '*documents referred to by the Executive Director in his final reports as annexed thereto such that UIL was in possession of documents relied upon by the Executive Director for the purposes of his findings/recommendations*' [Emphasis ours].⁴⁵ It stands to reason that UIL's disclosure request extended to material beyond that which had already been disclosed to it in the Reports of investigation and the related annexes issued to it. Such material may relate to information gathered by the Executive Director during his investigation and which, although innocuously found to be unrelated to the subject matter of the investigation for the purposes of the Executive Director's findings/recommendations, may hold some value to a party's defence. A party is not expected to be in the know of all material gathered by or in possession of the Executive Director during investigation unless presented with a reasonable opportunity to take stock of the nature of information gathered by or found in the Executive Director's possession in view of seeking disclosure of specific information therefrom that the party finds relevant to its defence. The fact that the Executive Director mentions, in his letter of 21st October 2019, his readiness to open his 'investigation file' to UIL appears to lend support to the afore proposition that information presented in a Report of investigation may not include all the material obtained, produced or assembled during the investigation. Further and in light of the offer made to UIL in the letter of 21st October 2019, one can easily understand why UIL harboured a legitimate expectation that additional investigative material, not contained in or annexed to the Report of investigation, could be found in the investigation file and could be made available to it.

⁴² Transcript of Preliminary Hearing, pgs 26 and 27.

⁴³ Outline of UIL submissions for Hearing of 20 April 2022, para. 54.

⁴⁴ Transcript of Preliminary Hearing, pg 40.

⁴⁵ Executive Director's Reply submissions of 20 May 2022, para. 18.2.

5.24. The Executive Director has referred to two cases in support of its argument relating to disclosure being used as an attempt at fishing expedition. But it does not seem to us that these cases, each of which turned on its own facts, are of any direct assistance to the Executive Director's case. In the case of *SA Hercules*, the facts demonstrate that after the statement of objections had been served, the Commission allowed the respondents to inspect its file⁴⁶. However, at issue in the latter case was the Commission's subsequent refusal, in response to Hercules's request, to disclose certain documents on the basis that it has already disclosed, through its Statement of Objections, all the information that was necessary and sufficient to enable Hercules to prepare its defence, that it had a duty to take into account all evidence, including that favourable to Hercules, and that, consequently, there was no need for Hercules to have access to the documents it had requested⁴⁷. In the present case, UIL has not been presented with any opportunity to inspect the investigation file despite its request made. Further, the Executive Director's letter of 21st October 2019 does not echo the reasoning adopted by the (European) Commission to substantiate the refusal to disclose information requested by UIL. Such reasoning was only put forth before us in the Executive Director's written submissions for purposes of the substantive Hearing.⁴⁸ When portraying UIL's request as a 'fishing expedition' in the letter of 21st October 2019, reasons were also not given to justify why UIL's request was considered to be unnecessary, irrelevant or disproportionate to exercising its rights of defence before the Commission.

5.25. The Executive Director also referred to the case of *Tobii AB* to support his view that disclosure was not automatic, and the Tribunal would not allow mere fishing expeditions. The principles of law quoted therefrom must be portrayed in their proper context. That case is set out against the backdrop of Tobii's application for judicial review of decisions of the UK Competition and Markets Authority's ('CMA') final report regarding its completed acquisition of named firms. One of the grounds for review was that the CMA had breached its duty of procedural fairness by refusing to disclose to Tobii and/or its external advisers certain evidence it considered relevant. The following passages quoted from the Competition Appeal Tribunal's Ruling are telling on the need to consider disclosure in the light of the facts and circumstances of each case –

"The nature and extent of disclosure before the Tribunal very much depends on the form of the proceedings. ... [W]here the proceedings consist of a challenge to a decision applying judicial review principles, disclosure is generally not necessary or is only limited to specific documents or categories of documents. The present proceedings are in the latter category.

(...)

⁴⁶ *SA Hercules*, supra footnote 15, para 46.

⁴⁷ *Ibid*, para 47.

⁴⁸ Executive Director's Reply submissions of 20 May 2022, para. 18.2, 19 and 20.

Further, in Tweed, Lord Carswell referred to the principle that “the intensity of review in a public law case will depend on the subject matter in hand” (see [26]). In particular, the need for disclosure depends on the requirements of each case, taking into account the facts and circumstances. Therefore, disclosure should not be ordered in the same routine manner in applications for judicial review as in merits-based applications but should be “carefully limited to the issues which require it in the interests of justice.” [Emphasis ours]⁴⁹

5.26. Finally, we also find substance in UIL’s proposition that the Executive Director’s qualms regarding UIL’s attempt at a fishing expedition through the prism of disclosure in order to subject him to cross-examination had fallen away following the Commission’s Ruling that the Executive Director may not be compelled to give oral evidence at the hearing and expose himself to cross-examination.⁵⁰ For all the reasons stated above, we do not find the withholding of disclosure on ground of its being a fishing expedition to be persuasive.

5.27. We now address the second point at issue viz., the Executive Director’s concerns as to the matter of prosecutorial bias. We read from the Executive Director’s letter of 21st October 2019 letter that the Executive Director was willing to consider opening up the investigation file and to further consider a way forward on procedural modalities for disclosure on the condition that UIL withdraw its allegation of prosecutorial bias, which was considered as ‘*very serious allegations and accusations upon the Executive Director’s integrity*’. The Commission views the matter differently. Prosecutorial bias is a plea in law which may legitimately be raised by an interested party who will then bear the burden of substantiating and proving the allegation to the requisite standard before the court, tribunal or adjudicating authority. Determination rests with such court, tribunal or adjudicating authority and not with the accused party. The fact that UIL raised such a plea does not necessarily mean that the party was accusing the Executive Director of bad faith. Bias is not to be equated with bad faith. The Commission does not have the shadow of a doubt that the Executive Director has carried out his investigations in total good faith, as is required under the Act. The blunt fact remains that a party under investigation may, based on its own appreciation, not agree with the way the investigations have unfurled ; which in turn may have created a perception of bias. It is unfortunate that the Executive Director appears to have taken personal offense at a plea in law raised by UIL and in so doing, he failed to dispassionately consider UIL’s request for disclosure in its *mise en demeure*.

5.28. The Executive Director reckons that UIL’s contention of prosecutorial bias was put forth before the Executive Director during investigation, as part of the objections raised by UIL against the provisional findings of the Executive Director who went on to address the said defences in his reports⁵¹. It was thus, clearly known to the

⁴⁹ Tobii AB, supra footnote 16, paras 11 and 13.

⁵⁰ Ruling of the Competition Commission CC/RL/0001 of 28 April 2020, para 24.0.

⁵¹ Executive Director’s Reply submissions of 20 May 2022, para. 18 – 20.

Executive Director that prosecutorial bias was a pillar of UIL's defence, and his offer of disclosure made conditional upon that party's withdrawal of its line of defence cannot be justified.

5.29. We further note that UIL has also raised, in support of its plea of prosecutorial bias, the Media Release issued by the Executive Director on 22nd August 2019, and which had been reported in the press. UIL argued that the Executive Director's conduct *'departs from normal protocols adopted by the ED, singling out UIL, to its prejudice, and usurping the [Commission]'s prerogative under the Rules to consider the issue of publication'*.⁵² This coupled with other alleged procedural irregularities, in UIL's view, *'create a compelling picture of a systemic lack of due process in the investigation'*⁵³. What permeates from the oral submissions made on the day of the Preliminary Hearing⁵⁴, is that this media release was factual, devoid of confidential information and was issued pursuant to section 30(g) of the Act. Section 30(g) of the Act, in relation to the Functions and Powers of the Executive Director, provides that the Executive Director shall *"publish and otherwise promote and advertise the provisions of this Act and the activities of the Commission"*.

5.30. The Commission has had due regard to the contents and timing of the contested Media release. The said Media release contains detailed information on the investigative findings of breach and recommendations for the imposition of fines against the parties, including UIL. It is to be noted that the publication of such communiqué a year after completion of the investigations was forthcoming while the matter was yet to be heard by the Commission; this in itself is repugnant to the right of the parties to a fair trial before the Commission. Although in exercising its adjudicative function, this Commission shall not compromise on the impartiality of its proceedings and shall reach its determination strictly on the basis of the evidence placed before it, the blunt fact remains that nothing extraneous to the proceedings should be done which may give rise to a perception of bias when the adjudication process has not even started.

5.31. The Commission finds that the provisions of section 30(g) of the Act should not be stretched to bring within its scope publications by the Executive Director on matters which are yet to be determined by the Commission. Whilst the Commission has no doubt that the Executive Director, in all good faith, considered the need for a publication on completion of his investigative activities, we, however, find that too much had been prematurely made public about the analysis and the proposed fines in respect of a matter which was *sub judice* before the Commission and this indisputably is in the nature to create a wrong and misleading perception on the independence of the Commission if at the end of the day, on the basis of the its own sovereign appreciation of the evidence before it, the Commission were to uphold

⁵² Outline of UIL submissions for Hearing of 20 April 2022, para. 106.4.

⁵³ *Ibid*, para. 107.

⁵⁴ Transcript of Preliminary Hearing of 29th October 2019, pg. 37.

the conclusions reached by the Executive Director or the measures recommended by the latter.

- 5.32. In light of the foregoing, we also find that a case of abuse of process for failure to disclose information sought by the defence in proper time has satisfactorily been made out before us. The question that arises is whether the abuse of process in question necessitates or justifies a stay of proceedings against UIL.

C. As to the Third Issue: Necessity /Justification for grant of stay of proceedings in this case

- 5.33. The Commission is of the considered view that, considering the facts and circumstances of this case, a permanent stay of proceedings in respect of UIL in the matters of INV 037 and INV 041 is necessary and totally justified. We say so for the following reasons:

- 5.34. We find that UIL has put forth a compelling case of abuse of process based on the Executive Director's failure to disclose information to the defence in a timely manner. The Executive Director's acquiescence to grant access to the investigation file to UIL now only, almost four years after formal notification of UIL's disclosure request in September 2019 and two years after the Commission had, in its ruling delivered in April 2020, urged the Executive Director to give due regard to his disclosure duties in the interests of natural justice is belated, to say the least.

- 5.35. True it is, the Commission in its Ruling of April 2020 did not go so far as to order the Executive Director to disclose.⁵⁵ No such order or direction was issued upon the Executive Director for reasons given in the said Ruling. However, to the extent that the Commission had nevertheless '*urged the Executive Director to give due regard to his disclosure duties in the interests of natural justice*', the latter's response ought to have been forthcoming within reasonable delay; but the Executive Director had allowed a period of two years to lapse before communicating his stand through counsel.

- 5.36. Incidentally it was on the day of the substantive Hearing that learned counsel for the Executive Director stated that his client *now* had no objection regarding disclosure subject to his legal/confidentiality obligations. The justification given for such belated response was that this stand was being taken in the light of legal advice recently obtained. There has been no attempt to explain, why such advice could not have been sought and obtained earlier by the Executive Director. In this regard it may be apposite to point out that during the Preliminary Hearing, as far back as October 2019, it had been submitted, on the Executive Director's behalf, that "*(...) the Executive Director may consider, if he feels that his rights are properly protected after a ruling (on his motion made under section 290(2) of the Criminal Code Act), that he may consider his stand on disclosure to access to file but **it is the submission of the Executive Director that he would need to be legally advised before he can give any***

⁵⁵ Executive Director's Reply submissions of 20 May 2022, para. 29.

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*stand on the further disclosure of the investigative file”.*⁵⁶ However, as stated above there was no attempt made to obtain such legal advice until the day of the Hearing.

5.37. A further reason given in submission on behalf of the Executive Director for not engaging on disclosure between the Commission Ruling of 2019 and the day of the substantive Hearing was that the Commission had deferred for the determination on the merits (at the substantive Hearing) the Executive Director’s motion to formally reserve his right to seek redress against UIL’s allegation of prosecutorial bias so much so that disclosure remained a live issue. This submission, to our mind, is misconceived. To start with a motion for disclosure of information is distinct from a plea or even an allegation of prosecutorial bias. More importantly, the Commission had already ruled on the question of disclosure and expressly urged the Executive Director to consider his disclosure duties. In the premises the Commission is of the considered view that the explanation given for the undue delay in communicating the final stand of the Executive Director regarding disclosure is untenable.

5.38. As regards the contention of the Executive Director that the *Commission ‘is not compelled to stay proceedings in as much as there are lesser remedies available which are just and proportionate viz.,*

(a) there is the possibility of adjourning the proceedings to allow for disclosure of material to UIL; or

*(b) the Competition Commission can, on its own initiative, directly decide for the disclosure of documents subject to the requirements of section 70 of the Competition Act and rule 30 of the Competition Commission Rules of Procedure 2009 pursuant to paragraph 6.2 of CC 7 - Guidelines General provisions’,*⁵⁷

we have the following to say ;UIL could not have a substantive hearing on 20th April 2022, since it had not received or had the opportunity to consider the disclosure which the Executive Director now proposed to offer. This means that the present proceedings would have to be adjourned to enable the Executive Director to initiate the disclosure process. The Commission is not in a position to ascertain whether the alternative ‘lesser remedy’ prayed for by the Executive Director would be more just and proportionate in the absence of any indication at his end as to the scope and timing of the proposed disclosure as well as the procedures intended to be deployed by his Office for managing both volume of disclosable material and his confidentiality concerns; there will result inevitably further procrastination of the present proceedings. As regards the second alternative proposed (para. 5.42(b) above) we are of the considered view that the Executive Director cannot now ask the Commission to cure a procedural defect by ordering disclosure in UIL’s favour, when such ‘duty’ befell upon him in the first place as far back as September 2019.

5.39. The Commission is alive to the overriding principle that a party must be afforded a fair hearing within a reasonable time. As adjudicative organ, this Commission has the

⁵⁶ Transcript of Preliminary Hearing of 29 October 2019, pg 36.

⁵⁷ Executive Director’s Reply submissions of 20 May 2022, para. 38.

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sacrosanct duty to uphold the principles of natural justice, ensure fairness between parties, protect the integrity of its proceedings in all matters that come before it and in so doing, to ensure public confidence in its administration of justice. We do not find the necessity of ascribing whether the consequences of the belated disclosure proposed to be made to UIL qualifies be a first limb test ('deprivation of a fair trial'); or a second limb test ('protecting the integrity of our proceedings') for abuse of process insofar as it has been recognised⁵⁸ that an overlap may be discerned between these categories. Neither has a case been made on, nor are we prepared to impute bad faith, unlawfulness or malpractice on the part of the Executive Director relative to non-disclosure. What we have before us is that already four years have elapsed since a party under investigation made a request for a substantive hearing, seeking disclosure for the purposes of raising its substantive defences in the course of that hearing, neither of which has occurred as of date. Considering the manner in which this case has unfurled, we find there to be a real danger that allowing the proceedings to continue in the prevailing situation would operate injustice and deny UIL of its right to be timeously heard before us.

VI. Commission's Decision

Now Therefore,

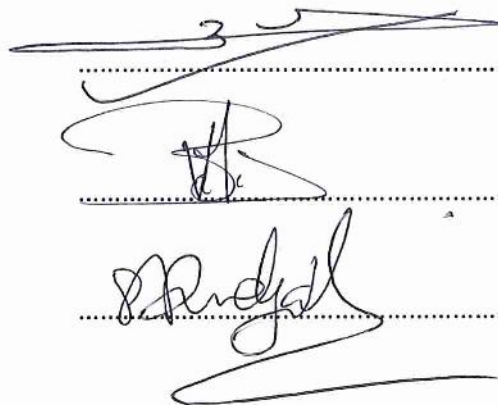
6.1. For the reasons set out in this Decision, We, the Commission, accordingly, grant the motion prayed for by UIL and hold that proceedings against it in the matters of INV037 and 041 be permanently stayed.

6.2. We decide accordingly.

Mr. M. Bocus
(Chairperson)

Mrs. V. Bikhoo
(Commissioner)

Mrs. S. Dindoyal
(Commissioner)



Made on 13 January 2023.

⁵⁸ *R v Beckford* [1996] 1 Cr. App. R. 94 cited at footnote 15 of Outline of UIL submissions for Hearing of 20 April 2022, at pg. 22, in which the Court of Appeal identified two types of case where proceedings may be stayed on the basis that their continuance could be an abuse of process, namely a) where the defendant would not receive a fair trial, and b) where it would be unfair for the defendant to be tried. However, in some of the decided cases (...) it is possible to discern an overlap between these categories".

Annex 1 – Media Release from the Executive Director's Office dated 22nd August 2019

	Competition Commission 10th Floor, Hennessy Court Cnr Suffren Rd & Pope Hennessy St. Port Louis Tel. No. 211-2005 Fax No. 211-3107 email: info@ccm.mu
MEDIA RELEASE	
	Date: 22/08/2019 Investigation Ref: INV037 & INV041
THE EXECUTIVE DIRECTOR RECOMMENDS FINES OF Rs 76 MILLION, ON TWO SUPPLIERS OF CHEMICAL FERTILISERS FOR ILLEGAL CARTEL CONDUCTS IN THE FORM OF PRICE FIXING, MARKET SHARING AND BID RIGGING.	

The Executive Director has completed two investigations in the supply of chemical fertilisers in Mauritius. The reports of the investigations have been submitted to the Commissioners of the Competition Commission for determination of the case. The findings of the Executive Director is that Mauritius Chemical & Fertilizers Industry Ltd ('MCFI') and United Investments Ltd ('UIL') which are two main suppliers of fertilisers in Mauritius, have operated a cartel to fix price and share the market, and they have also participated in bid rigging. Such conducts (collusive agreements) are illegal and in breach of the Competition Act 2007. The Executive Director has recommended the imposition of financial penalties totalling Rs 76.4 million on the enterprises concerned.

The Executive Director of the Competition Commission launched a first investigation in the supply of chemical fertilisers in Mauritius, referenced as 'INV037'. The competition concern was whether the two suppliers, namely MCFI and UIL through its subsidiaries [Island Fertilisers Ltd ('IFL') and Island Renewable Fertilisers Ltd ('IRFL')], have illegally agreed to fix price and share the market for the supply of chemical fertilisers to customers in Mauritius. Price fixing and market sharing agreement referred to as a cartel, are prohibited in Mauritius and such conducts are penalised with fines.

During the investigation, MCFI applied for leniency. Under the Competition Commission's leniency programme an enterprise which has participated in a collusive agreement can benefit from either full immunity from fines or up to 100% reduction in the financial penalty when it voluntarily comes forward and provides information about the cartel to the Competition Commission. MCFI, thus, cooperated with the investigation by providing information of the cartel. The leniency application of MCFI also disclosed another cartel, in the form of bid rigging,



between MCFI and UIL in the supply of chemical fertilisers by MCFI and UIL in response to calls for bids by some sugar estates for the supply of fertilisers.

Consequently, the Executive Director started a separate investigation (INV041) to assess this new issue of whether MCFI and UIL have participated in bid rigging by agreeing amongst themselves on the price, and terms and conditions to be submitted in response to the invitation for tenders issued by the sugar estates. Bid rigging occurs when suppliers, instead of submitting their offers independently and competitively, agree amongst themselves on the price or conditions they would offer, or they agree on who would submit a bid, so as to eliminate competition between tenderers. Bid rigging is prohibited and penalised by fines under the Competition Act.

The finding of the Executive Director for the first investigation (INV037) based on evidence gathered is that MCFI and UIL have participated in collusive agreements (in breach of section 41 of the Act), over a three-year period starting 2014 to 2016 in the supply of fertiliser in Mauritius. The view of the Executive Director is that price fixing and market sharing are serious breaches which warrant the imposition of financial penalty. The Executive Director has therefore recommended the imposition of financial penalty of Rs 55.9 million on UIL. The Executive Director has also recommended that MCFI be granted leniency with a 90% reduction in the fines imposable on it as reward for having disclosed vital information of the cartel and for having cooperated with the investigation. Thus, the recommended fines for MCFI after deduction of leniency discount is Rs 5.4 million instead of Rs 54 million.

In respect of the second investigation (INV041), the finding is that MCFI and UIL have participated in bid rigging agreements (in breach of section 42 of the Act). The evidence gathered showed that MCFI and UIL have agreed on the price to submit in response to calls for bids for the supply of fertilisers by sugar estates namely, Alteo Ltd, Omnicane Ltd, Compagnie de Beau Vallon Ltée, and ENL Agri Ltd. The Executive Director has recommended the Commission to impose a penalty amounting to Rs 15,1 million on UIL. And to grant full immunity from fines to MCFI for having disclosed the cartel as part of its leniency application.

The investigative function at the Competition Commission is vested in the Executive Director whilst the adjudicative function is vested in the Commissioners. The Commissioners are empowered to impose fines and directions on enterprises which are found to have participated in cartels. It has to be noted that at the moment the fines mentioned above are only recommendations from the Executive Director. It is now incumbent on the Commissioners to assess the findings of the Executive Director and determine on the breach and the fines. In its assessment and determination of the matter, the Commissioners may agree or disagree with the findings and recommendations of the investigations. The Commissioners will henceforward convene hearings for both investigations with the parties to provide them the opportunity to make submissions. After the hearing, the Commissioners will determine the cases and issue their decisions.

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Statement of the Executive Director

"The two investigations were carried out in parallel into the supply of chemical fertilisers which is an important input in crop production. Both investigations were completed at the same time and I have recommended leniency at the rate 90% discount in the first investigation and full immunity from fines in the second investigation to the leniency applicant, on the basis of the relevance of the information submitted by MCFI and its collaboration in the whole investigative process.

Having submitted my Reports of investigation, it is now for the Commissioners to make a determination based on my findings and after having heard the main parties during a hearing process.

I would, like to emphasise that these two investigations highlight the importance of leniency as an effective tool to detect and bring an end to cartels. The cases also show that leniency remains the only positive avenue for an enterprise which has participated in a cartel to amend its conduct. If a cartelist does not avail itself of leniency irrespective of whether the Competition Commission has started an investigation, then such enterprise lends itself to large financial penalties.

Since the matter is at the level of the Commission for determination, I would not make any comment on the fines. However, we believe that the imposition of fines would have a major deterrent effect against collusion and therefore, help in preserving the process of competition between rival firms for the benefit of the economy in general and more specifically for the benefit of the local agricultural sector. On a different note, I may add that the agricultural sector which is a founding pillar of our economy is already facing major sector-specific challenges both in the local and the international context, thus, stopping such cartels and the restoration of competition will undoubtedly benefit the sector.

Cartels are detrimental to consumers and prevent the economy from functioning at optimum efficiency. We are employing the wide powers of investigation to detect and end cartels and there are several cartel investigations that are currently ongoing, some are nearing completion. I would like to add that the Competition Commission remains resolute in the fight against cartels."

For more information please consult CCM 3 Guidelines on Collusive Agreements and the Explanatory notes on leniency for cartel initiators and coercers available on our website www.ccm.mu.

22 August 2019
End of media release

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shaping markets, furthering progress

Dissenting Opinion of the Vice-Chairperson
Mr. A.Mariette of the Commission

DS 0028/3 - UIL

Confidential

In the Matters of -

**Supply of chemical fertilisers (INV 037 and INV 041)
involving United Investments Ltd**

13 February 2023

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Dissenting Opinion of the Vice-Chairperson Mr. A.Mariette of the Competition Commission (the 'Commission')

of 13 February 2023

relating to proceedings before the Commission against United Investments Ltd in the matters referred to as -

- (1) "INV 037: Final Report of the Executive Director on Investigation into the supply of chemical fertilisers", and**
- (2) "INV041: Final Report of the Executive Director on Bid rigging in the supply of fertilisers"**

1.1. I, the undersigned Vice- Chairperson wish to state that I am in agreement with the majority of the findings of the Executive Director. However, I wish to put on record my disagreement with the view taken by the majority of the Commissioners to the effect that an order for a stay of the proceedings is warranted having regard to all the circumstances of the case.

1.2. I opine that a stay is a remedy to be exercised with utmost caution and as a last resort and is not justified in the circumstances since the Executive Director is willing to provide access to his investigation file so that UIL can now have at its disposal relevant information to prepare its defence before the Competition Commission. Therefore, I do not see any prejudicial effect on the fairness of the hearing before the Competition Commission.

1.3. I have, in particular, concerns about and cannot agree with the following:

1.3.1. I do not agree with the submissions of UIL where it says in its speaking notes for preliminary hearing dated 29th October 2019 and referring to the Executive Director: *"It is not appropriate to make his compliance with his basic disclosure duties conditional upon UIL withdrawing a pillar of its defence which he finds personally offensive"*. My reading of the Executive Director's contention is that he is not asking UIL to withdraw its submission of prosecutorial bias. He is rather asking UIL to remove its accusations which are barely cloaked in the notice of 24 September 2019 through the use of words like 'wilfully blind' and imputing motives when asking for communications between MCFI and the Executive Director on the issue of amendments to CC3 Guidelines – Collusive agreements. These sinister motives have nothing to do with the plea of prosecutorial bias. In any event, in line with paragraph 5.27 of the majority decision, if UIL are to bring a plea of prosecutorial bias, they bear the burden of substantiating and proving the allegation.

1.3.2. I do not concur with paragraph 5.38 of the majority decision which states the following: *'This means that the present proceedings will have to be adjourned to*



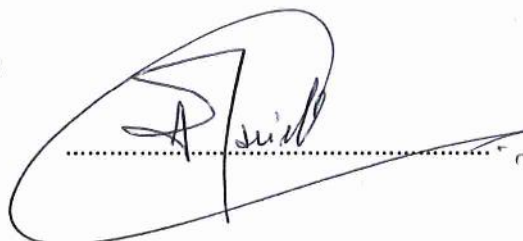
enable the Executive Director to initiate the disclosure process'. Further in the same paragraph it says *"...there will result inevitably further procrastination of the present proceedings"*. I reiterate the point that since we have not yet started to hear UIL on the merits, the integrity of the judicial system of the Competition Commission has not been compromised in as much as the Executive Director is now willing to disclose his investigative file. Further, the fact that the proceedings might take some more time does not cause any prejudice to UIL or the proceedings since we are looking here at a cartel case, which under the Competition Act is a prohibited conduct. And as the conduct is a past one therefore, any penalty/ direction to be imposed on UIL will not prejudice it since the penalties and directions are for the past conduct and is not affected by market dynamics. Once the file is disclosed to UIL it may be given ample time to peruse the file and come up with its defence.

1.3.3. I am not of the view that the issuing of the media release by the Executive Director is a matter to be considered by the Commissioners. Section 30 powers under the Competition Act are the province of the Executive Director, and I do not believe that the Commissioners should direct the Executive Director when to issue media releases or not as mentioned at paragraph 5.30 of the majority decision. In any case, having perused the media release, I do not agree with the majority of the Commissioners stating that the Executive Director singled out UIL at any point in the media release and I fail to see how it may have a prejudicial effect on the proceedings before the Commission. We, as Commissioners, already have the full report of the Executive Director and we know already what is reproached of MCFI and UIL and also what are the fines recommended by the Executive Director on both parties. We did not learn this through the media release. I also believe that the media release is factual and explicitly states that these are the findings of the Executive Director and the matter is yet to be determined by the Commission. I thus fail to see how the issue of the media release can affect our impartiality.

1.4. Having expressed this dissenting opinion for the record, I shall abide by the majority decision.

Dated this 13 February 2023

Mr. A. Mariette
(Vice-Chairperson)

A handwritten signature in blue ink, appearing to be 'A. Mariette', written over a horizontal dotted line. The signature is stylized with a large loop at the end.