

## MEDIA RELEASE

30/03/2023

Investigation Ref: INV037/INV041

# COMPETITION COMMISSION STAYS PROCEEDINGS IN A CARTEL MATTER INVOLVING UNITED INVESTMENTS LTD IN RESPECT OF SUPPLY OF FERTILISERS. THE EXECUTIVE DIRECTOR APPEALS THE DECISION TO THE SUPREME COURT.

The Commissioners of the Competition Commission have stayed the proceedings in the matters of alleged collusion by the United Investments Ltd (UIL) in respect of the supply of fertilisers. UIL made a motion for a permanent stay of the proceedings to the Commission, on ground of abuse of process as the Executive Director's decision to grant access to the investigation file (disclosure) came too late. Three out of the panel of four Commissioners hearing the matter ruled in favour of granting the stay of proceedings and not to go ahead with hearing the matter on merits believing that doing so would vitiate principles of justice and fairness. The Vice Chairperson, however, issued a dissenting opinion stating that in his view, the late disclosure of the investigation file did not prejudice UIL. These come after the Executive Director had investigated Mauritius Chemical & Fertilizers Industry Ltd (MCFI) (now Ingenia) and UIL for cartel conduct and recommended fines totalling Rs.71 million on UIL and Rs.5 million on MCFI.

The decision together with the dissenting opinion has been published in the Government Gazette and is also available on the website of the Competition Commission.

### ***Background of the Investigations***

The Executive Director of the Competition Commission launched investigations in the supply of chemical fertilisers in Mauritius. 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. It is to be noted that price fixing and market sharing agreements referred to as a cartel, are prohibited in Mauritius under section 41 of the Competition Act 2007 (the Act) and such conducts are penalised with fines.

Consequently, on the basis of leniency information submitted by MCFI, the Executive Director assessed whether MCFI and UIL had 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 sugar estates. It is to be highlighted that 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 under section 42 of the Act and penalised by fines as per section 59 of the Act.

After completion of the investigations, the Executive Director's reports of investigation were submitted to the Commissioners of the Competition Commission in June 2018, for determination of the cases. The Executive Director's investigation found that UIL has participated in collusive agreement prohibited under section 41 of the Act and it has also participated in bid rigging in breach of section 42 of the Act. The Executive Director recommended the imposition of financial penalties totalling Rs 71 million on the UIL for the breaches as per section 59 of the Act.

### ***The Decision of the Commission***

The Commissioners issued their decision on 13 February 2023. It is noted that between June 2018 and beginning 2022, a number of preliminary issues was addressed by the Commissioners before a substantive hearing was eventually fixed for 20 April 2022. At the hearing on 20 April 2022, the Executive Director informed the Commission, at the very outset of the hearing, that he will grant UIL access to the investigation file as previously sought by the latter. UIL applied for a stay of proceedings on the ground that the Executive Director's decision to grant access to the investigation file was not made in proper time and came too late and therefore amounted to an abuse of process. The Executive Director resisted UIL's application and submissions were made to that effect.

By a majority of three against one, the Commissioners firstly determined that the Competition Commission derives an inherent power to stay proceedings which is necessary for the effective discharge of its adjudicatory function in order to protect the integrity of its process. The majority of the Commissioners held that the proceedings could not progress further with the substantive hearing since UIL did not have the opportunity to consider the disclosure proposed by the Executive Director prior to the hearing.

The Commissioners also held that they were not in a position to ascertain whether an alternative lesser remedy would be more just and proportionate, stating that there is an overriding principle that a party must be afforded a fair hearing within reasonable time and that as an adjudicative organ, the Commission has the sacrosanct duty to uphold the principles of natural justice, ensure fairness between parties, protect the integrity of its proceedings, and in so doing to ensure public confidence in its administration of justice.

The Commissioners thus decided that the proceedings against UIL be permanently stayed.

### ***Dissenting Opinion***

The Vice Chairperson issued a dissenting opinion, finding that an order for a stay of proceedings was not warranted, opining that a stay is a remedy to be exercised with utmost caution and as a last resort. According to the Vice Chairperson, the stay of proceedings was not justified in the circumstances since the Executive Director was willing to provide access to his investigation file so that UIL would have relevant information from the case file at its disposal to prepare its defence. Thus, the integrity of the judicial system of the Competition Commission had not been compromised. The fact that the proceedings might in that respect take some more time does not, according to the Vice Chairperson, cause any prejudice to UIL or to the proceedings.

Moreover, with respect to the publication of a media release on the investigation, the Vice Chairperson is of the view that the Commission should not direct the Executive Director regarding the exercising of his powers under section 30 of the Act. The Vice Chairperson was of the view that the media release did not single out UIL as alleged by the latter and therefore could not have a prejudicial effect on the proceedings or affect the impartiality of the Commission. Nonetheless, having expressed his dissenting opinion, the Vice Chairperson stated that he would abide by the majority decision.

***Appeal by the Executive Director***

Being dissatisfied with the decision of the Commission and having regard to the dissenting opinion, the Executive Director has appealed the decision to the Supreme Court. The Executive Director will therefore not make any comment since the matter is sub judice.

**End of media release**