

## Grabbing cartels by the horns

As the chase for corporate supremacy continues, the number of corporate gaffes continue to grow. On the 1<sup>st</sup> of March 2017, the Competition Commission of Mauritius (“CCM”) announced a temporary amnesty for initiators of cartels to come forward and take advantage of its Leniency Programme. The Guidelines on Collusive Agreements (“CCM3”) have been amended to this effect. Taking effect from the 1<sup>st</sup> of March 2017, and for a period of six months, ending the 31<sup>st</sup> of August 2017, the CCM is providing amnesty to cartel initiators, and consequently will waive Condition (iv), in Paragraph 5.5 of the CCM3 which states that the CCM will grant an enterprise the benefit of total immunity from financial penalties for a given infringement, provided that the enterprise did not initiate the cartel, or take steps to coerce other enterprises into participating in the cartel

The CCM may therefore grant immunity and leniency even for the initiators of cartels upon application for leniency. However, leniency will be denied to cartel initiators after the 31<sup>st</sup> of August 2017 when the waiver for Condition (iv), in paragraph 5.5 of the CCM3 and the offer of amnesty will expire.

The CCM believes that owing to the secret nature of cartels, enterprises participating or which have participated in cartel activities should be given an incentive to come forward and inform the CCM of their involvement. The rationale of the CCM is that the benefits of granting lenient treatment to enterprises which cooperate with the CCM outweigh the benefits arising from fully enforcing financial penalties on those enterprises.

The amnesty for cartel initiators is a one-off opportunity for cartel initiators to benefit from immunity or up to 100% reduction in fines as provided for under the CCM’s Leniency Programme. The amnesty is a real incentive for any enterprise to end its participation in a cartel. The Competition Act 2007 (**the “Act”**) provides for fines to the tune of 10% of the turnover of an enterprise for breach of the cartel prohibitions. This 10% fine can be multiplied by the number of years the enterprise has participated in the cartel to a maximum of five years. The objective of the CCM is that with the advent of the amnesty it would also be wise for non-initiators to apply for leniency as soon as possible since they now face the risk of being exposed by the initiator and to bear the financial penalty.

As at March 2017, the CCM listed 5 ongoing investigations on cartels, all of which have been marked as confidential and there is no way to know, for now, which companies are involved in such practices.

Regarding collusive agreements, section 41 of the Act prohibits agreements between enterprises to fix prices, share/allocate markets and to restrict supply. Section 42 of the Act prohibits bid rigging agreements and section 43 of the Act prohibits agreements between enterprises involving Resale Price Maintenance (“RPM”). RPM is defined as an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers.

The CCM believes that enterprises use RPM as a means to facilitate cartel activities. In that respect, the Commissioners of the CCM have, on the 16<sup>th</sup> of March 2017, delivered a decision (the “**Panagora decision**”) in relation to the Executive Director’s investigation into a ‘Potential Resale Price Maintenance in relation to Chantecler branded chicken distributed by Panagora Marketing Co Ltd.

The brief facts of the case (Decision Ref: CCM/DS/0020) are as follows:

- (a) Panagora Marketing Co Ltd sells chicken of the brand Chantecler to resellers, who in turn sell those products to consumers. Chantecler branded chicken is available both chilled and frozen and in different cuts and packaging.
- (b) Resellers compete among themselves in terms of price and service to attract clients. This in turn benefits consumers in terms of more competitive prices and restricting the ability of resellers to sell products at lower prices may distort competition
- (c) It is reproached that Panagora Marketing Co Ltd has engaged in various practices that may hinder the ability of resellers to determine freely the price they want to offer for Chantecler branded chicken products. In particular it has been alleged that Panagora Marketing Co Ltd has engaged in RPM by establishing fixed, or minimum prices to be observed by resellers when selling Chantecler branded chicken products.

Following an investigation and a formal hearing where Panagora Marketing Co Ltd contested having engaged in RPM, the Commissioners of the CCM determined that Panagora Marketing Co Ltd has entered into three sets of agreements which constitute RPM, namely:

1. Agreements with resellers of pre-packed variable weight chilled 'Chantecler' branded chicken products, for which the Commissioners have imposed a fine of MUR 3,656,473;
2. Agreements with resellers of pre-packed variable weight frozen 'Chantecler' branded chicken, for which the Commissioners have imposed a fine of MUR 22,198,549; and
3. Agreements with certain resellers of 'Chantecler' branded chicken products to whom promotional sales were made, for which the Commissioners have imposed a fine of MUR 4,077,110.

The Commissioners of the CCM were satisfied that the Agreements entered into consisted of a serious breach of the Act and were done either intentionally or negligently. Consequently, Panagora Marketing Co Ltd was slapped with a total fine of MUR 29,932,132 and the Commissioners of the CCM have also imposed various directions on the offending company namely that they should amend their reseller sheets to exclude clauses inducing RPM and that all resellers have to be informed that they are not bound by such clauses.

### **Decision of the Commissioners of the CCM on Banning of Export of Scrap Metal (CCM/DS/0019)**

The Panagora decision delivered by the CCM has not been the first one in its attempt to disrupt cartel practices in Mauritius. It should be noted that on the 21<sup>st</sup> of December 2016, the Commissioners of the CCM delivered their decision in relation to the Cabinet of Ministers' decision to ban exports of scrap metal, effective from the 1<sup>st</sup> of July 2016, which according to some stakeholders seemed to give an advantage to one particular company, as explained below. Indeed, on the 15<sup>th</sup> of September 2016, in a bid to have a better control and to regulate scrap metal activities, the Cabinet of Ministers agreed to the following measures being implemented:

1. A ban on the export of scrap metal including copper (the “**ban**”);
2. A requirement for steel manufacturing plants in Mauritius or any other buyer of scrap metal to pay to scrap metal operators the international market rate for scrap metal, exclusive of export charges i.e. freight and insurance and;
3. A prohibition on the issue of new scrap dealer licences.

In light of such measures, several stakeholders raised concerns over the possible distortionary effects of these government measures on competition in the local scrap metal and iron bar markets. In particular, it was alleged that:

- I. The ban gave an undue advantage to Samlo Koyenco Steel Co Ltd (“**Samlo**”) which is the sole foundry in Mauritius, without sufficient consideration of the latter’s capacity to absorb the entire local production of scrap metal, in particular non-ferrous materials;
- II. No safeguards were put in place to prevent any abuse on the part of Samlo in dictating the terms and conditions of purchase of scrap metal from dealers and;
- III. The government policy was likely to increase the barriers to entry and limit expansion in the local industry.

In its decision, the Commissioners of the CCM considered each allegation. The Commissioners considered that exclusive reliance on Samlo for absorbing the entire volume of scrap metal is likely to create more business uncertainty, increase the risks and costs for scrap metal dealers, and potentially have an adverse impact on the competitiveness of the scrap metal industry. The Commissioners also highlighted that Samlo was only offering about MUR 4,000 per ton of scrap metal, which is clearly lower than the average export Free on Board (F.O.B) price of MUR 7000 per ton. Finally, the Commissioners highlighted that it is highly unlikely that newcomers in the industry will be tempted to invest in this sector in light of the declining volume of scrap metal exported over the years and the high cost and red-tapism involved in the setting up of a new foundry.

The Commissioners of CCM concluded that:

- (a) The ban is not conducive to encouraging competition but is more likely to hamper the development and growth of the scrap metal market;
- (b) The Cabinet of Ministers’ decision dated 23<sup>rd</sup> of September 2016 exempting metal industries operating in the manufacturing and Freeport Zone from the ban, neither addresses the competition concerns regarding potential foreclosures in the local scrap metal market and potential abuse by Samlo which is currently the sole foundry and buyer of scrap metal in Mauritius, in terms of pricing and trading conditions demanded from local dealers of scrap metal;
- (c) The ban, should be lifted and the market be left to operate according to the market and competitive forces of demand and supply and;
- (d) It would be advisable for the Ministry of Financial Services, Good Governance and Institutional Reforms to consider the potential adverse effects of the ban on competition and growth in markets concerned.