Competition in Paradise:
A look at the competition law and enforcement activities of Mauritius

SIVEN PILLAY RUNGIEN·

This article is about the Competition Act 2007, the competition law of Mauritius, and its development over the last two years. In particular, the article focuses on cases that have been completed by the Competition Commission of Mauritius so far and the implications these have on the law.

1. INTRODUCTION

This article examines the Mauritian competition framework two years after its inception. The first part considers the Act, specific elements of its drafting and what competition law means to Mauritius. The second part considers the five investigations which have been completed by the Competition Commission of Mauritius (the "CCM") so far, as a means to drawing some conclusions about the development of this competition regime still in its infancy.

2. THE COMPETITION ACT 2007

The Competition Act 2007 (the "Act") came into force in November 2009. It is one of the pieces of legislation that the Mauritian Chamber of Commerce and Industry (the "MCCI") refers to as 'Local Trade Legislation'. This group of legislation also includes the Consumer Protection (Price and Supplies Control) Act 1998, the Fair Trading Act 1979, the Customs Act 1988 and the Value Added Tax Act 1998. Together, these measures regulate the Mauritian economy.

The Act is the second piece of competition law drafted by the Mauritian legislator. The first, the Competition Act 2003, never entered into force. An ensuing change in government resulted in the proposition that a fresh Competition bill would be drafted. This, later became the Act. It has been suggested that the changes brought by the Act are for the better, as the previous legislation lacked teeth: interference from private sector interests had undermined the statute.[783] Furthermore, the legislation may represent a natural evolution in the Mauritian economy which, in time, has gradually moved from reliance on the private sector to correct market failures, to a combination of de-regulation, trade liberation and competition policy.[784]

With reference to competition law, Mauritius has a number of relevant labels. It is a developing nation, a small market economy and an island economy. Each of these

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· Ph.D candidate, University of Southampton. The author would like to thank Pamela Rungien for her feedback on this work. Any errors are my own. Further comment and feedback will be welcome. Please e-mail spr1g10@soton.ac.uk.

783 M. Sahebdin '*Competition Advocacy in Mauritius'* <www.cuts-ccier.org/Gaborone/ppt/S-2Mauritius.ppt> accessed 13 June 2011, slide 7.

784 R. Peerun, S. Bundoo and K. Jankee, *'Mauritius' in Competition Regimes in the World: A Civil Society Report Consumer Unity and Trust Society* (May 2006) <competitionregimes.com/pdf/Book/Africa/48-Mauritius.pdf> accessed 6 June 2011, 256

classifications poses subtle questions for the construction and implementation of a competition regime. It might be suggested that there is an optimal political, legal and social environment in which a competition regime may flourish. Such an environment may have the following characteristics: significant resources for investing in competition policy, accessible information, an independent judicial system and a legal system based on upon the rule of law.[785] By contrast, a deficient environment may lack these elements and others, or have undesirable characteristics such as unreasonable opposition to economic reform.[786] However, Kovacic does not go so far as to say that the characteristics he has identified represent an ideal competition environment, merely that they are the conditions possessed by Western countries that allow their competition laws function.

It may be prudent to consider that the typical competition concerns posed by a small market economy apply to Mauritius. In general, the following characteristics of Mauritius: its political climate and economy are of note when considering its competition law. Firstly, there is the close proximity between the Mauritian political elite and its private sector. Not only has this resulted in the concentration of economic/political power in a few individuals, but it is also suggested that this proximity caused the failure of the 2003 Act. A second interesting feature of the Mauritian economy is its infiltration by foreign multinationals. In general, the entering of markets by foreign companies is considered to be beneficial. By opening its economy to global trade, Mauritius hopes to achieve a number of things in boosting its economy such as increasing employment and attracting foreign direct investment. However, in the current circumstances, the participation of foreign firms might be considered adverse to the Mauritian economy. The case study which appears to be most cited at present concerns the supermarkets Score, Jumbo, Continent, Super U (originating from France) and Spar, Shoprite (South Africa).[787] On one hand, there is the ensuing struggle between local firms and the multinationals. This tussle between local and foreign firms is not unusual; rather it is to be expected when a country liberalizes its trade. As the multinationals flex their financial muscle and use economies of scale to bring lower prices and greater choice to Mauritian consumers, the local retailers struggle. On the other hand, and this is perhaps the more interesting issue, it is suggested that the multinational firms are practising anticompetitive behaviors which they are prohibited from doing in their home State. Hitherto such practices have continued with impunity.[788] Whether such practices will eventually be caught by the Act remains to be determined. At this point it would appear that the Commission has other enforcement priorities at present. A third feature is that a number of sectors in the Mauritian economy have a high concentration of firms. A fourth feature is that certain sectors of the Mauritian economy have been sheltered from 'real' competition due to general trade barriers and certain preferential agreements such as those that operated in the sugar industry. A final notable element is the difficulty in easily obtaining relevant information such as that pertaining to market structures or shares.[789] One of the objectives of competition advocacy is to engage the public and consumers on matters of

[785] William E. Kovacic, *'Getting Started: Creating New Competition Policy Institutions in Transition Economies'* (1997 - 1998) 23 Brook. J. Int'l L. 403, 409-413
[786] Kovacic, (n 4) 417-429.
[787] Peerun, Bundoo and Jankee, (n 3) Box 48.1.
[788] Peerun, Bundoo and Jankee, (n 3) Box 48.1.
[789] S. Gasparikova and R. Sengupta, *'Taking the right steps: Competition administration in Eastern and Southern Africa'* [2007], No 1/2008 CUTS Centre for Competition, Investment & Economic Regulation, <www.cuts-ccier.org/7up3/pdf/BriefingPaper01-2008.pdf> accessed 2 June 2011, 4.

law and show how they can be part of the process. Unnecessarily inhibiting the access of information, however, can only undermine this goal.

3. REGIONAL/INTERNATIONAL RELATIONSHIPS

The adoption of a competition law has also an external aspect with regards Mauritius' international relationships and obligations. As well as being a founding member of the WTO, Mauritius is also a member of two regional groups - the Common Market for Eastern and Southern Africa ("COMESA") and the Southern African Development Community ("SADC"). The frameworks for these regional organizations commit their members to adopt competition provisions as a means to achieve the chosen collective objectives. For example, SADC aims to establish (in sequence) a Customs Union, Monetary Union and finally a Free Trade Area. The implementation of appropriate competition policy and regulatory rules are seen as key components to reaching these goals. However, whilst membership of such organizations commits a State in principle to taking certain measures to meet its obligations; the ability of each State to satisfy its obligations will differ. Thus in 2004, for example, Mauritius felt that it was not yet ready to adopt a competition regime in line with its COMESA obligations. In particular, Mauritius has cited resource and capacity issues as main obstacles for implementation.[790] These significant issues have also led Mauritius to suggest the WTO that certain countries, small market economies in the main, will require 'special and differential treatment' when implementing competition policy.[791]

4. GOALS OF MAURITIAN COMPETITION LAW

Considering the idiosyncrasies of the Mauritian environment, one may consider that the goals of Mauritian competition law extend beyond the achievements of principal goals of economic efficiency or consumer welfare. However, it is difficult to pin down precisely the specific goals attributed to the Mauritian law. Whilst there is no overall statement of goals to be found in the Act, specific reference to achieving efficiency and protecting the interests of consumers is made in s.46 (3)(d) of the Act. According to this section, the CCM may consider the following when assessing monopoly cases:

> evidence of actions or behavior by an enterprise that is a party to the monopoly situation where such actions or behavior that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers.[792] (sic)

Whilst such considerations appear to be restricted to monopoly situations, the CCM has since extended the reach of these considerations to apply to its objectives 'more generally',[793] namely when investigating other breaches of the Act. Notwithstanding this extension, these statements of goals are relevant only to the actions of the CCM rather than the goals of Mauritian competition law per se.

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[790] Peerun, Bundoo and Jankee, (n 3) 255.
[791] Peerun, Bundoo and Jankee, (n 3) 255.
[792] Competition Act 2007, s.46(3)(d).
[793] Competition Commission of Mauritius 'Prioritisation principles' (June 2010) <http://www.gov.mu/portal/sites/ccm/pdf/Prioritization%20principles_For%20Consultation-17-06-2010.pdf> accessed 10 February 2011, para 4.5.

The Act is made of nine parts, the substantive clauses contained in Parts II - IX. Part I is the 'Preliminary' section, setting out the short title, the key definitions for the Act and the boundaries of its application. Part II contains the rules for establishing the Competition Commission. The rules state, inter alia, the function and powers of the Commission, how and for how long the Commissioners are to be appointed, and the role of the Commission's executive. Part III contains the substantive competition rules relating to the usual competition taxonomy of collusion, monopolies and mergers. Part IV sets out the criteria for when the Executive Director of the Commission may commence an investigation and the powers that he has, including when entry and search may be conducted. Part V concerns the hearings that may take place before the Commission following an investigation. Part VI contains the rules relating to the determination of cases, penalties and remedies by the Commission. Part VII requires memorandums of understanding to be drawn up in order to define the relationship between the Commission and other regulators. Part VIII sets out the right to appeal to the Supreme Court in the event that a party is dissatisfied with a decision made by the Commission. Finally, Part IX rounds off the Act, containing miscellaneous provisions including the rules of disclosure.

For those unfamiliar with competition statutes, the Mauritian Competition Act may seem oddly 'Commission-centric'. Its focus seems to be skewed towards the establishment of the Commission and its concomitant procedural and administrative rules, rather than declaring competition law per se. This impression may be conveyed when one considers the constituent parts of the Act as set out above. One may also consider the long title of the Act:

> [a]n Act to set up a Competition Commission, to make better provisions for the regulation of competition and for matters incidental thereto and connected therewith.

As it can be seen, the long title indicates that the Act has three clauses. The first is clear: to establish the Commission. The remaining clauses are vague and unspecific. One may compare this to the Australian competition statute - the Competition and Consumer Act 2010 (the "CCA"). The content and structure of its competition provisions may considered similar to the Mauritian act. However, its long title is quite different:

> An Act relating to competition, fair trading and consumer protection, and for other purposes.

Compared to the Mauritian long title, this title is more descriptive, stating the four areas of law with which the CCA is concerned. Furthermore, s.2 CCA sets out the object of the Act:

> to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

It is submitted that such drafting helps to legitimize and increase the relevance of law in the eyes of the Australian consumer. One may further compare the structure of the Act

to that of the UNCTAD Model Law on Competition (the "Model'').[794] Two points may be drawn from this comparison. First, the Model, as a template for a competition statute, proposes that such a statute should begin with an article clearly setting out the objectives or purpose of the law.[795] The example given by the Model states that the purpose of competition law is to control anticompetitive practices, that may harm access to markets, trade and the economy. It omits any reference to the establishment of a commission or competition authority. In providing this specific example of an objectives article, the Model refers to the UN Set of Principles and Rules on Competition (the "Set").[796] Section E(2) of the Set states that the objective of controlling anticompetitive behaviour for the benefit of markets, competition and economic development should form the basis or foundation for competition legislation. At the Fourth UN Conference to review the Set,[797] a resolution was passed calling on all members to implement the rules and principles contained therein.[798] One way of giving effect to this is for the statute to have an objectives article. The Mauritian act with its failure to include an objectives clause tying the Act to the consumer, and its imbalanced long title feels disconnected from those who might need it.

The second issue is the overall structure of the Act. To get to the substantive law elements, one must either read or skip to Part III of the Act, starting at section 41. One may feel that the law needs to be stated first, before one can consider who should enforce it. This is unlike the Model, which places its substantive provisions before the procedural/administrative ones. It is fair to say, however, that this drafting characteristic is not restricted to the Mauritian act. The CCA again provides an example.

Two further points be noted about the Act, both regarding abuse of dominance. The first concerns the test applied by s.46 of the Act - the monopoly provision. The second concerns enforcement.

S.46(2) of the Acts reads as it follows:

> (2) A monopoly situation shall be subject to review by the Commission where the Commission has reasonable grounds to believe that an enterprise in the monopoly situation is engaging in conduct that -
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> (a) has the object or effect of preventing, restricting or distorting competition.

The wording of the section suggests that a dual-test, purpose and effect, is available to assess monopolistic behaviour. Why does this matter? To generalise, one might argue

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[794] United Nations Conference on Trade and Development, 'UNCTAD Model Law on Competition TD/RBP/CONF.7/8' (August 2010) <http://www.unctad.org/en/docs/tdrbpconf7d8_en.pdf≥ accessed 10 August 2011.

[795] United Nations Conference on Trade and Development, (n 13) page 3.

[796] United Nations Conference on Trade and Development 'The United Nations set of principles and rules on competition TD/RBP/CONF/10/Rev.2' (2000) <http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf> accessed 10 August 2011.

[797] Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Palais des Nations, Geneva, from 25 to 29 September 2000.

[798] United Nations Conference on Trade and Development 'Report of the Forth United Nations Conference to review all aspects of the Set of multilaterally agreed equitable principles and rules for the control of restrictive business practices TD/RBP/CONF.5/16 including Corr.1' (September 2000) <http://www.unctad.org/en/docs/tdrbpconf5d16&c1.en.pdf> accessed 10 August 2011, page 5.

that only an effects-based test is applicable to abuse of dominance cases (and to competition law in general). One has to let the market and the actual competitive forces within play out to determine whether a monopolist's conduct has adversely affected the market. One may also argue however, that to act ex ante may lead to irreversible harm to the market and, therefore, a purpose-based test which captures behaviour before the anticompetitive effects come to pass is the better approach. It might be argued that the Mauritian legislation implements a pragmatic approach: that a test encompassing both purpose and effects elements provides much more flexible tool.

Section 60 of the Act sets out the directions that the Commission may give in the event that an enterprise abuses its position of dominance. The directions that may be given under the Act will be structural in nature. They may seek to either address the adverse effects suffered by competition[799] by consumers.[800] What the Commission cannot do, unlike with instances of collusion, bid-rigging or an anticompetitive vertical agreements,[801] is to impose a financial penalty upon enterprises who abuse a dominant position. Does this suggest that that monopoly is a 'better' anticompetitive behaviour than collusion? Does this suggest that monopolies can be controlled or encouraged to behave (more) competitively in the absence of financial penalties?

5. COMPLETED INVESTIGATIONS UNDER PART IV OF THE ACT

Following the proclamation of the Act, the Commission has hitherto completed five investigations. Four of these have been formal investigations into specific company behaviour: one investigation into abuse of dominance,[802] two investigations into collusive behaviour[803] and a merger review.[804] The Commission has also completed a market study.[805]

6. ABUSE OF A DOMINANT POSITION: THE IBL INVESTIGATION

The investigation examined the practices of IBL Consumer Goods ("IBL"), a foods distributor. In particular, the focus was upon IBL's distribution of Kraft Cheese and other Kraft products such as Philadelphia, Toblerone and Oreo cookies. The

[799]Competition Act 2007, s.60(1)(b)(A).
[800] Competition Act 2007, s.60(1)(b)(B).
[801]Competition Act 2007, s.59.
[802]Competition Commission of Mauritius 'IBL Consumer Goods' sales contracts with retail store investigation CCM/INV/001' (June 2010) <http://www.gov.mu/portal/sites/ccm/pdf/Final%20Report%20-CCM-INV-001%20%20Kraft%20and%20General%20Rebates.pdf> accessed 4 November 2010.
[803] Competition Commission of Mauritius 'Travel Agents' service fees: Final Report INV 004' (July 2010) <http://www.gov.mu/portal/sites/ccm/pdf/INV004%20-%20Final%20Report.pdf> accessed 4 November 2010 and Competition Commission of Mauritius ' Importation of secondary school textbooks in Mauritius CCM/INV/006' (March 2011) <http://www.gov.mu/portal/sites/ccm/pdf/INV006%20-%20Final%20Report.pdf> accessed 10 August 2011.
[804] Competition Commission of Mauritius 'Review of completed merger of Event Strategy Ltd and LC Events Co. Ltd: Final Report' (February 2011) <http://www.gov.mu/portal/sites/ccm/pdf/INV008%20-%20Final%20Report%20Public%20Version.pdf> accessed 13 August 2011.
[805] Competition Commission of Mauritius 'Study of the market for cement in Mauritius CCM/MS/001' (October 2010) <http://www.gov.mu/portal/sites/ccm/pdf/Cement%20Market%20Study%20-%20Preliminary%20Report.pdf> accessed 6 March 2011.

investigation was concerned with IBL's 'Top Store Programme' ("TSP"). Two aspects of the TSP in particular were under consideration, i) volume discounts offered for a dominant product (Kraft Cheese) [806] and ii) shelf space requirements leveraging IBL's market power on the dominant product onto weaker products (other Kraft products) in other markets.[807]

Applying the s.46 test, it was suggested that there were three ways in which the discount programme could distort or otherwise adversely affect the market. First, the discount programme would either protect the market share of Kraft Cheese or reduce the market share of its competitors. Second, the shelf-space conditions contained within the discount programme would also have the effect of protecting market share or act to the detriment of others. Third, by offering discounts on a dominant product in return for shelf space for the non-dominant products, the programme would leverage IBL's dominant position in the cheese market into other markets, such as the confectionary and powdered juice markets.[808]

Narrowing its investigation, the Commission took into account the characteristics of the supply/distribution chain. In Mauritius, the chain may be dichotomised as traditional and modern. The traditional chain consists of the many small, independent shops on the island. The modern chain is made up by mainly foreign hypermarkets and supermarkets, that are now established.[809] It was established that the shelf space conditions of the discount programme was only negotiated with enterprises acting in the modern chain: the traditional stores were allowed to allocate shelf space themselves.[810]

One of the difficulties in this case is identifying when the practices of IBL might be classed as anticompetitive. In its decision, the Commission set out its rationale for why volume-related discounts, especially of a retroactive nature, might have an adverse effect on competition. Firstly, the Commission acknowledged the general competitive benefits and efficiency gains namely lower prices and increased demand, which may arise through such practices.[811] Retroactive volume discounts, however, may distort the market in a number of ways. The primary issue with such discounts is the way in which they protect market share if implemented by an enterprise with substantial market power. By tying the award of a discount of a certain product to a fixed number of purchases to be counted at the end of a reference period, a significant portion of the retailer's spending is locked to that product. By signing such an agreement for a financial year, for example, a retailer might not be free to purchase competing products as he chooses. Towards the end of the financial year (the reference period), the retailer has two products: the dominant product and a new product, both which has sold equally well. The retailer has enough money to buy ten of each product. If the retailer had not signed a programme such as the TSP, he would be free to analyse his market and decide which of the two items he would like to purchase. The TSP, however, would make the retailer more likely to buy the dominant product, even if the new product was competing very well, if to order but a few more of the dominant product would trigger a discount for his purchase of the dominant product over the whole year. Thus, when

[806] Kraft has a number of cheese products: the item in question is its block processed product.
[807] IBL (n 21) para 2.1.1.
[808] IBL (n 21) 2.1.2.
[809] IBL (n 21) 2.3.1.
[810] IBL (n 21) 2.3.2.
[811] IBL (n 21) 3.2.1.

exercised by firms with substantial market power, a competitor would have to offer substantial discounts in order to persuade the retailer to buy his products rather than trigger the discount available from the dominant firm. The Commission also set out the secondary effects that may flow from retroactive volume discounts such as retailer uncertainty over final prices due to the fact that the rebate in question will be triggered at the end of an agreed reference period only if the retailer has purchased the required volume of products.

The Commission also detailed its position on the buying of shelf space and the anticompetitive effects that may flow from such an arrangement. The usual case, as acknowledged by the Commission, is that of a dominant buyer i.e. the retailer demanding payment for shelf space from the supplier. In the case of IBL, however, the dominant supplier was offering to purchase shelf space.[812]

7. MARKET DEFINITION

In terms of legal analysis, the following points may be drawn from the Commission's investigation. In defining the relevant market, the Commission concluded the market share of Kraft Cheese to be of virtual monopoly in the processed cheese market (90%) or very high overall (70%) in the general cheese market.[813] The Commission also considered that the processed cheese market could be further divided into block cheeses and the chilled variety, but did not give a firm answer as to whether soft cheeses could be included in the same market.[814]

8. THE TOP STORE PROGRAMME (THE "TSP")

According to the Commission's investigation, the TSP was commenced by IBL in June 2009.[815] At its peak, the TSP had thirty participants.[816] However, other parties, which were not signed to the TSP and therefore not formally committed to the programme, nevertheless complied with the obligations required therein and received the ensuing discounts. The initial TSPs ran for six months, ending at the end of 2009. In 2010, IBL had signed TSPs with only two organisations. However, IBL considered the 'expired' TSPs to still be in force, with a view to renewal during that year.[817] As a result, the Commission held the thirty TSPs which were said to have expired as remaining effective.[818] In its defence, IBL offered four reasons for enacting the TSP. First, that volume discounts enacted per order were 'unsatisfactory'[819] as this led to sporadic orders from retailers. Second, the TSP was part of marketing campaign to boost the sales of Kraft Cheddar. The Commission noted that the TSP was but a small aspect of the campaign.[820] Third, the TSP was a method to promote lesser known brands under the Kraft label: placing the volume discount on the dominant tying product rather than the tied product was a safer strategy. Fourth, the TSP was enacted in response to a competitor's 'aggressive marketing campaign directed against Kraft products, possibly

[812] IBL (n 21) 3.6.2.
[813] IBL (n 21) 5.2.3.
[814] IBL (n 21) 5.2.4.
[815] IBL (n 21) 5.3.1.
[816] IBL (n 21) 5.4.1.
[817] IBL (n 21) 5.4.2.
[818] IBL (n 21) 5.4.3.
[819] IBL (n 21) 5.5.1.
[820] IBL (n 21), 5.5.1.

including the purchase of shelf space.'[821] However, as per the s.46 test, the Commission is able to consider both the object and effect of IBL's conduct. In theory, the TSP would create the incentive for retailers to promote the Kraft products over other rivals in order to obtain the volume discount.[822] However, examining the effects of the TSP in the short-term did not indicate that the market was being distorted. Competitors' figures for the time period which the TSPs were active prior to the investigation indicated that their sales had not reduced:[823] Kraft Cheese's overall sales however, taking into account stores signed to the TSP and those not, had increased.[824] Thus one of the objectives of the TSP offered by IBL had been met. The task of determining whether the TSP leads to market distorting effects - by assessing the counterfactual - was straightforward. Without the TSP, the Commission simply concluded that the distorting effects of the shelf space requirements or retroactive volume discounts would not exist.[825] Furthermore, there did not appear to be any anticompetitive effects caused by the TSP in the short-term. However, the Commission's concern was the long term development of the market should the TSP continue, in particular the adverse impact that may be suffered by new competitors. Retailers might be reluctant to buy new products if the additional expenditure means that they cannot purchase the required Kraft volume to obtain the TSP discount.[826] Furthermore, the shelf space requirements relating to both the dominant and non-dominant Kraft products may act as increased barriers to entry for new entrants to the market. As a result, the Commission held that IBL had breached s.46 of the Competition Act by implementing the TSP.[827]

There are several notable points about the IBL investigation. First, the investigation makes it clear that Mauritian competition law is about protecting competition, not competitors. If the processed cheese market is accepted as the relevant market, the only other competitor in the market, with only a share of 10%, is Chesdale. Based on the anticompetitive behaviour and the virtual monopoly enjoyed by IBL in this market, it would have been easy for the CCM to conclude that it should address the TSP due to its further distorting effects on the current market. However, the Executive Director effectively states that to do so would achieve little and not be in the spirit of competition law. As 'there is...little competition to be lost'[828] between the two products currently on the market, the CCM's focus should be on new entrants and whether any action taken by the CCM can encourage renewed competition in the market. A second notable aspect of the investigation might be to consider the role of Kraft in implementing the TSP. The evidence before the CCM was that Kraft does not 'participate in the trade or commercial negotiations with retailers for their products.'[829] However, it would appear that Kraft had some guiding role in the creation of the TSP.[830] If Kraft had had a stronger role than 'discussion' in the creating/implementing of TSP, would it (also) have been subject to

[821] IBL (n 21) 5.5.1.
[822] IBL (n 21) 5.6.1.
[823] IBL (n 21) 5.6.2.
[824] IBL (n 21) 5.6.3 - 5.6.6.
[825] IBL (n 21) 5.7.3.
[826] IBL (n 21) 5.7.6.
[827] Competition Commission of Mauritius 'Decision of the Commissioners of the Competition Commission: IBL Consumer Goods' Sales Contract with Retail Stores' (September 2010) <http://www.gov.mu/portal/sites/ccm/pdf/INV001%20-%20Commissioners_Decision.pdf> accessed August 2010, 3.8
[828] IBL decision (n 46) 5.7.6.
[829] IBL decision (n 46) 5.3.1.
[830] IBL decision (n 46) 5.3.2.

the investigation, rather than its distributor IBL? A final point of interest is that the shelf space specifications are a new practice,[831] and therefore might be considered an innovative practice, to Mauritius. On one hand, the CCM seeks to deter other dominant undertakings from implementing similar arrangements.[832] On the other hand, the CCM states that the question 'is whether they are particularly distortionary in a market which has not experienced such practices to date.'[833] Let us say then, that dominant undertakings cannot implement such agreements but new undertakings (assuming they have deep pockets) can; gradually the new practice becomes an established practice, would such practices then no longer be viewed as 'particularly distortive'?

9. COLLUSIVE BEHAVIOUR: TRAVEL AGENTS' FEES

On the 21 December 2009, the Executive Director commenced an investigation into a potential collusive arrangement between the Mauritius Association of IATA Travel Agents ("MAITA") and Air Mauritius Ltd. ("Air Mauritius") to fix service fee levels. Horizontal collusive agreements which have the object or effect of distorting the market are prohibited by s.41 of the Act.

Prior to 2008, Air Mauritius used to pay a commission to travel agents for selling Air Mauritius flights. As of 2008, this system was cancelled and replaced by that of the service fee, whereby travel agents could decide and charge their own fee.[834] The Executive Director's investigation revealed that there were two ways by which the price fixing was agreed. First, there were direct negotiations between Air Mauritius and MAITA to agree the pricing structure by haulage and flight class.[835] Afterwards a number of communications followed, by which Air Mauritius informed the travel agents of the service fee pricing structure it would be applying,[836] including one press article carrying a recommendation that fees charged by the travel agents remain within the same pricing range.[837] However, the pricing structure was agreed prior to the Act coming into force. Therefore, the question before the Commission was whether the collusive agreement continued to be acted upon post-November 2009.

One of the key factors relied upon by the Commission in determining whether the agreement was operative after November 2009 was to investigate evidence of 'clustering', e.g. a high number of service fees being charged around the prices agreed than might be expected if the agreement was not in force.[838] The data analysis for Air Mauritius showed that 65% of service fees charged clustered around the agreed price.[839] The data analysis for MAITA members showed that 45% of service fees were at the level of the agreement for economy flights to Johannesburg;[840] 22% of service fees for

[831] IBL decision (n 46) 5.7.8.
[832] IBL decision (n 46) 5.7.8.
[833] IBL decision (n 46) 5.7.8.
[834] Competition Commission of Mauritius 'Travel Agents' service fees: Final Report INV 004' (July 2010) <http://www.gov.mu/portal/sites/ccm/pdf/INV004%20-%20Final%20Report.pdf> accessed 4 November 2010, 2.10.
[835] Travel Agents' service fees (n 53) 3.2 - 3.8.
[836] Travel Agents' service fees (n 53) 2.13 - 2.15.
[837] Travel Agents' service fees (n 53) 2.13.
[838] Travel Agents' service fees (n 53) 3.15.
[839] Travel Agents' service fees (n 53) 3.19.
[840] Travel Agents' service fees (n 53) 3.24.

London economy class;[841] and just over 20% of service fees for London business class.[842] Applying statistical mode analysis, the Commission argues that this demonstrates a greater cluster of fees around the agreed prices than might be expected if the collusive agreement had not been in place.[843]

Several arguments disputing the existence of a collusive agreement were before the Commission. First, it was argued that the communications between Air Mauritius and MAITA were for information purposes only, not negotiation. This was rejected by the Commission, however, on the basis that the evidence constituted negotiation by 'proposal and counter proposals it was an understanding.'[844] Second, there has been no evidence, i.e. further communications since the Act came into force to suggest that the collusive agreement was still in place. The lack of 'explicit communication' was accepted in principle by the Director, but deemed insufficient to support the proposition that the agreement had ceased, particularly when the pricing statistics were taken into consideration.[845] The final argument put to the Director was that pricing behaviour constituted both independent pricing[846] and parallel pricing arising from competition.[847] This was rejected on the basis that a) a certain pricing structure was negotiated between the parties before the Act came into force - it would be illogical to claim that prices originally negotiated were now competitive;[848] b) if the industry was competitive, then market forces should drive down the price of the service fees; and c) as a starting point or 'first approximation',[849] the first set of prices proposed by Air Mauritius in its negotiations may have represented independent pricing,[850] nevertheless, the prices subsequently agreed were '30 - 75% higher than initially proposed.'[851] As a result of the findings, the Executive Director held that s.41 of the Act had been breached.

The defining factor in this investigation was that negotiations between the parties about price had taken place prior to the Act coming into force. Once the Act came into force, however, there was no communication, explicitly or otherwise, from either party to suggest that the horizontal agreement was no longer in force. Coupled with the continuing pricing around the negotiated price points, the CCM held that s.41 of the Act had been breached. Nevertheless, the investigation raises two points. The first concerned the use of statistical mode as method to analyse evidence. It might be argued that when used with a small sample, for example the 56 tickets available for business class flights to London,[852] statistical mode analysis is not entirely satisfactory in determining the strength of evidence. The second issue, which the CCM did not have to consider, but may become an issue if a similar investigation is appealed, was the precise details of the negotiations and the agreement.

[841] Travel Agents' service fees (n 53) 3.32.
[842] Travel Agents' service fees (n 53) 3.35.
[843] Travel Agents' service fees (n 53) 3.37 and Table 6.
[844] Travel Agents' service fees (n 53) 4.2.
[845] Travel Agents' service fees (n 53) 4.3 - 4.4.
[846] Travel Agents' service fees (n 53) 4.7.
[847] Travel Agents' service fees (n 53), 4.5.
[848] Travel Agents' service fees (n 53) 4.5.
[849] Travel Agents' service fees (n 53) 4.8.
[850] Travel Agents' service fees (n 53) 4.8.
[851] Travel Agents' service fees (n 53) 4.7.
[852] Travel Agents' service fees (n 53) 3.35.

10. THE IMPORT OF SECONDARY SCHOOL BOOKS

The second completed investigation by the Executive Director regarding collusive behaviour involved the import of secondary school books into Mauritius by Editions Le Printemps ("ELP") and Editions de L'Ocean Indien ("EOI") and whether there was an agreement to fix wholesale trade discount rates. The information provided by ELP and EOI indicated that they generally gave the same discount percentages to both credit and cash purchasers.[853] However, there was no evidence to suggest an agreement falling under s.41 of the Act - collusive horizontal agreements - had been reached by the two parties. Investigating the market circumstances, the Commission made the following findings regarding collusive behaviour. First, both ELP and EOI use different formulas for calculating their rates.[854] Second, the mean discount rate offered by both importers against cash and credit sales was different.[855] Furthermore, the range of discount rate offered by EOI compared to that of ELP was greater.[856] Finally, under a Notice issued under s.52(1)(c) of the Act, both parties affirmed that there had been no communication, agreement or understanding to fix discount rates nor threats of retaliation relating to said pricing.[857]

The facts of this case may therefore be distinguished from the Travel Agents case. The behaviour between the Agents was considered to be 'concerted practice'[858] and therefore fell under the definition of agreement under the Act. This was due to the significant amount of communication and negotiation between the travel agents involved. As there was no proof of such contact between the book importers, the Executive Director considered whether tacit collusion was being committed: such behaviour would breach s.46 of the Act. Tacit collusion might be defined as the situation where companies deliberately avoid or reduce competition against each other 'to maintain profits or simply in the interest of a quieter life.'[859] There is a two-step evidentiary requirement to establishing tacit collusion. First, the CCM guidelines on monopoly situations[860] state that there are three conditions to be met in order to establish that tacit collusion is taking place: the firms in question must be able to reach an implicit agreement about price and monitor compliance with the agreement; it must be in the interest of each firm to participate in the behaviour; and competition from firms outside the arrangement must be weak.[861] If this first step is met, the CCM will take the second step of 'investigating the market outcomes in particular that enterprises are foregoing apparently profitable opportunities to undercut one another's prices and take one another's market share. For this purpose, the CCM may resort to evidence such

[853] Competition Commission of Mauritius 'Importation of secondary school textbooks in Mauritius CCM/INV/006' (March 2011) <http://www.gov.mu/portal/sites/ccm/pdf/INV006%20-%20Final%20Report.pdf> accessed 10 August 2011, 3.6.
[854] Importation of secondary school textbooks (n 72) 4.4.
[855] Importation of secondary school textbooks (n 72) 4.8.
[856] Importation of secondary school textbooks (n 72) 4.9.
[857] Importation of secondary school textbooks (n 72) 4.10 - 4.14.
[858] Competition Act 2007, s.2.
[859] Competition Commission of Mauritius 'Competition Commission of Mauritius Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009) <http://www.gov.mu/portal/sites/ccm/pdf/CCM4%20-%20Guidelines%20-%20Monopoly%20and%20NC%20agreements_Nov09.pdf> accessed 10 February 2011, 4.10.
[860] Monopoly Guidelines CCM 4 (n 78).
[861] Monopoly Guidelines CCM 4 (n 78) 4.12.

as price-cost comparisons, the stability of market shares or stable or parallel price levels over time.'[862]

Assessing the behaviour of ELP and EOI against the three criteria, the Commission found the following. First, relating to implicit agreements about price and monitoring of such agreements, ELP acknowledged that it was aware of the discounts offered by its competitors. However, this is to be taken in context: as well as importing books directly, ELP also bought books from other importers. EOI declared that it was unaware of the discounts offered by rivals or how its rivals calculated their offers.[863] Second, as the market conditions are such that if an agreement were in place and a participating firm unilaterally discounted further its prices, the Commission considered it 'credible' that a participating firm could initiate price wars to maintain discipline within the agreement.[864] Third, findings relating to barriers to entry were inconclusive. Barriers such as 'capital investment and consumer loyalty'[865] may exist: but this had not prevented new entrants entering the market in the past.[866] As a result of its findings, particularly in order to identify the necessary agreement, the first step to establishing tacit collusion was not met. Nevertheless, the Commission noted that the market conditions, for example 'the small size of the market and limited number of importers'[867] were capable of supporting tacit collusion arrangements.[868]

The first point to note about this investigation is the difficulty in establishing tacit collusion. The principles to be applied when investigating collusive agreements are elucidated in its 'Guidelines on Collusive Agreements' ("CCM 3").[869] As defined by the Act and expanded upon in CCM 3, the definition of agreement is broad. It includes agreements both enforceable and non-enforceable, a gentleman's agreement and also agreements reached by consensus or understanding.[870] Even under this wide definition of agreement, a finding of collusive behaviour could not be established. Looking at the first criteria in the primary step for establishing tacit collusion, an implicit agreement must be proven: how does one establish 'implicit agreement' under s.46 of the Act, when an 'understanding' could not be proved under s.41? If the concepts are not exclusive, does this mean such cases will fall under the same points? Further clarity about the relationship between the definition of agreement as per the Act and implicit agreement as per the tests for tacit collusion is required. Finally, the investigation revealed the lack of competition between retailers for secondary books: thus the market remains under the observation of the CCM.

11. MERGER: LC EVENTS AND EVENT STRATEGY

The investigation completed by the CCM so far considered the merger (by takeover) between LC Events Co Ltd. ("LCE") and Event Strategy Ltd ("ESL"). The investigation

[862] Monopoly Guidelines CCM 4 (n 78) 4.13.
[863] Importation of secondary school textbooks (n 72) 4.16.
[864] Importation of secondary school textbooks (n 72) 4.17.
[865] Importation of secondary school textbooks (n 72) 4.18.
[866] Importation of secondary school textbooks (n 72) 4.18.
[867] Importation of secondary school textbooks (n 72) 4.16.
[868] Importation of secondary school textbooks (n 72) 4.19.
[869] Competition Commission of Mauritius 'Competition Commission of Mauritius Guidelines: Collusive Agreements CCM 3' (November 2009) <http://www.gov.mu/portal/sites/ccm/pdf/CCM3%20-%20Guidelines%20-%20Collusive%20Agreements_Nov09.pdf> accessed 10 February 2011.
[870] Collusive Agreement Guidelines CCM 3 (n 88) 1.9.

was prompted by a complaint from LCE following the purchase of 33% of shares by ESL.[871] ESL is an events planning and services company providing, for example, lighting, rigging and staging for its customers. It is also a subsidiary of the Impact Production Group ("Impact"), forming one of the six subsidiaries providing a range of events services under the Impact banner.[872] LCE may be considered a direct competitor to Impact as not only it provides some of the services as done by ESL, but also Impact as a whole.[873] The two issues before the CCM were a) has a merger situation as per the Act taken place[874] and b) if it has, will the merger lead to the substantial lessening of competition.[875]

Sections 47 and 48 of the Act are the provisions dealing with mergers. S.47 states the criteria to be met in order to establish a merger situation; s.48 sets out which merger situations will be reviewed under the Act. The key test in establishing a merger situation under s.47 is 'common ownership or control'. Thus as, defined by the Act, if two or more companies, one of which operates in Mauritius, come under such ownership or control, the s.47 test will be met.[876] To be subject to review under the Act, s.48 requires that either the merged entity or one of the parties to the merger has 30% of the market share[877] and that there are reasonable grounds to believe that the merger will lead to a substantial lessening of competition (the "SLC test").[878] The SLC test is applied by 'considering how competitive the market was/is before the merger, and what is likely to happen after the merger.'[879] Thus the SLC test allows the Commission to consider the possible ex post effects and conditions of the merger, such as the possibility of new entry into the market, the continuation of rivalry from existing firms and product elasticity.[880]

12. ESTABLISHING THE MERGER SITUATION

According to the CCM, s.47(2) provides non-exhaustive examples of when 'enterprises are to be treated as being under common control,'[881] for example either through a subsidiary relationship,[882] or a person or group having control over all the participants.[883] S.47(3) sets out the three possible ways in which one may establish control - 'the ability to control or materially influence the enterprise but without having a controlling interest in it (de facto control); the acquisition of a controlling interest (de jure control); the ability to control a policy which already could be materially influenced.'[884]

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[871] ESL and LCE (n 23) 1.1.
[872] ESL and LCE (n 23) Figure 1.
[873] ESL and LCE (n 23) 2.9.
[874] ESL and LCE (n 23) 2.14.
[875] ESL and LCE (n 23) 2.14.
[876] Competition Act 2007, s.47(1).
[877] Competition Act 2007, §48(a) and (b).
[878] Competition Act 2007, s.48(c).
[879] Competition Commission of Mauritius 'Competition Commission of Mauritius Guidelines: Mergers CCM 5' (November 2009), <http://www.gov.mu/portal/sites/ccm/pdf/CCM5%20-%20Guidelines%20-%20Mergers_Nov09.pdf> accessed 13 August 2011, 3.16.
[880] ESL and LCE (n 23) 3.15 - 3.16.
[881] ESL and LCE (n 23) 4.12.
[882] Competition Act 2007, s.47(2)(a).
[883] Competition Act 2007, s.47(2)(b).
[884] ESL and LCE (n 23) 4.13.

As the merger took place via the purchase of shares, the CCM considered whether the purchase of a 33% shareholding was sufficient to establish the ability to materially influence policy. The CCM found that ESL had the ability to materially influence the policy of LCE on two grounds. The first ground was by virtue of the percentage of shares owned by ESL granting sufficient voting rights to be able to influence policy making.[885] The second ground was based upon possession of special voting rights or a veto. The possession of either would confer upon the possessor the ability to materially influence the policy of a company. The Companies Act 2001 requires that a majority of 75% or more shareholders are required for certain decisions, for example to approve a major transaction.[886] As a result of its percentage shareholding, ESL was deemed to have the right to veto such relevant decisions and therefore the power to materially influence the policy of LCE; accordingly the CCM found that a relevant merger situation had been created.

Having met s.47 of the Act, the CCM then had to consider whether the criteria under s.48, namely the 30% market share threshold and SLC test, had been met. First, the CCM analysed the relevant market and its structure, in particular to determine whether the ESL and LCE were competitors or not. Critical to this assessment was evidence provided by service users.[887] Regarding the first element of defining the relevant market - the product market - the CCM found that there were two aspects to the product market - the 'class of event' i.e. the type of event to be organised and 'type of event service' required, such as 'decor, light...fireworks'.[888]

Regarding the class of event, the evidence suggested that events could be classed into high and low class events. Thus the customers of ESL and LCE considered the two companies to be providers of 'high quality high class' events.[889] Such customers would not consider smaller companies or individual organisers to arrange their events. [890] The CCM found that the key characteristics of ESL, LCE and other like-organisations were reliability, timeliness and quality.[891] If a company organizing events can demonstrate these qualities and the requisite experience, it can command higher prices than might be expected under the market conditions:[892] those that cannot will not even be considered to organise such events.

The CCM then considered the services required for such events. It wished to establish whether the services were considered as separate, purchasable elements or as packages by the customer.[893] The following points may be drawn from the CCM's findings. First, customers generally see the individual services as packages to be bought from the organiser, rather than to be purchased singularly.[894] Thus, an events organiser, as long it can deliver the promised event, may outsource the services it cannot provide.[895] Second, events organisers offer a range of these services as part of the overall product they

[885] ESL and LCE (n 23) 4.14 - 4.16.
[886] Companies Act 2001, s.105(1)(c).
[887] ESL and LCE (n 23) 6.9.
[888] ESL and LCE (n 23) 6.16.
[889] ESL and LCE (n 23) 6.18.
[890] ESL and LCE (n 23) 6.17.
[891] ESL and LCE (n 23) 6.18.
[892] ESL and LCE (n 23) 6.18.
[893] ESL and LCE (n 23) 6.22.
[894] ESL and LCE (n 23) 6.23.
[895] ESL and LCE (n 23), 6.23.

provide.[896] Third, it was generally perceived that some organisers are better at providing certain services than others: where an organiser might be deemed weak in its service provision, outsourcing was seen as a solution to a) providing 'a better event' and b) ensuring that the organiser does not lose business.[897] As a result of its findings, the Executive Director deemed the product market to be 'high quality and high class event services provided as a package that are perceived to be reliable by corporate and "high-end" users.'[898] Having taken factors such as quality and reliability into account as a means of defining the product market, the Executive Director explored whether other 'functional' factors could further define the relevant market. User evidence suggested that two further factors played an important part in deciding what organisation(s) to use: event size and event importance.[899] If a customer placed a high value on these attributes, then he would be a) more cautious in selecting his provider, b) choose from a more limited pool of providers and c) be willing to or would pay a higher price for the quality of the event.[900] As such, the CCM was able to classify these functional factors as '"Big events of high Importance" (Big events), "Medium sized events of average importance" (Medium events) and "Small events" (Small events).'[901] While such categorisation might seem rudimentary, the CCM was in fact using terminology employed by the customers when describing the events that they might require.[902] Notwithstanding that the ESL and LCE operated across all three categories, customers perceived the two as providers for big and medium events.[903] The definition of the relevant market posited by the CCM was the 'market for packaged reliable high quality and high class event services and related services offered as a package to corporate and high-end users of big to medium sized events in Mauritius.'[904]

Establishing the relevant market provided the Commission with the framework for establishing the market share of the two companies. In assessing market share, the Commission took note of the following. First of all, the relevant market was based upon providing packaged services for events: thus it would be appropriate to consider the market share of Impact, ESL's umbrella organisation, rather than ESL alone.[905] If an event were to be organised by Impact, it would be provided by Impact using its six subsidiaries to meet the customer's needs. Second, customer evidence suggested that for big to medium sized events, Impact would be one of the organisations considered. This could not be used as a proxy for determining market share.[906] Third, the allocation of market shares would be variable as they are based on customer 'perception'.[907] For example, if one were to consider the extreme ends of the relevant market, the market shares for Impact would increase towards the 'big and important events' end of the market.[908] Moving towards the other end of the market, to relatively smaller and less important events, the market share of LCE would presumably increase, to the detriment

[896] ESL and LCE (n 23) 6.24.
[897] ESL and LCE (n 23) 6.25.
[898] ESL and LCE (n 23) 6.30.
[899] ESL and LCE (n 23) 6.36.
[900] ESL and LCE (n 23), 6.36.
[901] ESL and LCE (n 23) 6.39.
[902] ESL and LCE (n 23) 6.39.
[903] ESL and LCE (n 23) 6.40.
[904] ESL and LCE (n 23) 6.41.
[905] ESL and LCE (n 23) 6.43.
[906] ESL and LCE (n 23) 6.44.
[907] ESL and LCE (n 23) 6.42.
[908] ESL and LCE (n 23) 6.50.

of Impact. Furthermore, 20%-30% of customers saw LCE as competitors in terms of big to medium events.[909] Therefore, whilst the overall market shares allocated to Impact (ESL) was 50-60% and LCE 0-10%,[910] one would have to take into account this fluidity within the market. However, notwithstanding this fluidity, the CCM felt it had sufficient evidence to demonstrate that the 30% market share safe harbour had been breached and that LCE was a competitor to ESL.[911] The merger was therefore subject to review under s.48 of the Act.

In order to determine whether the merger would lead to an SLC, the CCM assessed the unilateral, coordinated and foreclosure effects of the merger. An example of unilateral effect caused by a merger is when one company merges with a competitor, thereby reducing the amount of competitors in the market and product elasticity.[912] The CCM asked customers to i) indicate their preferred service provider and ii) service providers that they would consider in the market. The findings suggested that after the merger, the majority of clients would continue to have choice, albeit reduced in the market: for 17% of customers however, who said that they would consider working only with Impact or LCE, the merger would be detrimental to their ability to choose one or the other.[913]
The CCM rejected the possibility that the merger would lead to coordinated effects e.g. collusive behaviour on two counts. First, after the merger, several companies similar in size to LCE would remain in the market. Second, Impact is the largest firm operating in the market, a merger would make it larger. Therefore the market structure would tend to lend itself to monopolistic/unilateral behaviour rather than coordinated effects.[914]

The CCM also deemed the merger would not lead to foreclosure on the market. The specific question before the CCM was whether losing LCE as an independent firm on the market would lead to foreclosure of its rivals, on the basis that the smaller players (LCE included) outsourced to each other in order to provide their services. Taking into account the low market share of LCE (0-10%) and that no competitors had expressed foreclosure concerns,[915] the CCM held that it did not have reasonable grounds for believing that foreclosure would result from the merger.

Finally, the CCM assessed barriers to entry. A merger that might lessen competition may be permitted to continue if 'entry is sufficiently timely, likely and effective that no long-term damage to competition will result.'[916] The assessment also took into account the ability of the current players to grow and compete in the market.[917] The CCM identified two key barriers to the market: the limited size of the market and, most importantly, client loyalty.[918] As noted, the ability of an event organisation to generate business in the relevant market is based upon the quality, reliability and class it can deliver. Thus new entrants may struggle to demonstrate or establish themselves to the

[909] ESL and LCE (n 23) 6.47.
[910] ESL and LCE (n 23) Table 5.
[911] ESL and LCE (n 23) 6.53.
[912] Competition Commission and Office of Fair Trading 'Merger Assessment Guidelines (September 2010) <http://www.oft.gov.uk/shared_oft/mergers/642749/OFT1254.pdf> accessed 13 August 2011, para 5.4.1
[913] ESL and LCE (n 23) Figure 7 and 7.13.
[914] ESL and LCE (n 23) 7.17.
[915] ESL and LCE (n 23) 7.21.
[916] Merger Guidelines CCM 5 (n 98) 3.21.
[917] ESL and LCE (n 23) 7.23.
[918] ESL and LCE (n 23) 7.24.

required level in a timely manner. Nevertheless, it was noted that whilst historically Impact would have been the only choice for a number of customers, new entrants have entered the market. Not only has this increased choice, but also reduced Impact's market share.[919] Finally, the CCM considered the ability of the former shareholders of LCE to set up a new entity and use their contacts and experience to set up a creditable competitor in the market.[920] Based on the findings, the Executive Director determined that there would be an immediate short-term SLC due to the unilateral effects of the merger.[921] However, this was to be balanced out against entrants who had recently entered the market and the possibility of new entrants in the future.[922]

The difficulty with merger analysis is that it involves predicting what the future outcomes of the market will be. Thus whilst the investigation found an immediate SLC should the merger take place, it predicted that, due to low barriers to entry, an appropriate level of competition through established players and new entrants would restore itself. Furthermore, the case demonstrated the complexity in defining the product market based on qualitative data e.g. the viewpoints of the customer rather than quantitative data. Nevertheless, it may be argued that the Commission's subsequent definition of the market, taking into account its fluidity, is a realistic and appropriate one. Ultimately, however, the Commission did not have to give a final decision as in a concurrent case brought before the Supreme Court, the transfer of shares between LCE and ESL was rendered null and void, meaning that a merger situation no longer existed.[923]

13. THE CEMENT MARKET STUDY

Hitherto, the CCM has completed one market study - the cement market - which it published in April 2011. Commenced in July 2010, the purpose of the study was two-fold. First, to understand the market conditions. Second, to make recommendations to Government that would increase competition in the market.[924] Mauritius does not produce its own cement; it imports all of its requirement, approximately 630,000 tonnes per year.[925] The annual amount of cement to be imported is set by the Government. Cement is key to a fundamental sector of the Mauritian economy - the construction industry.[926] A number of characteristics define the Mauritian cement market, its importance to the island and also the importance of the study. These characteristics are: the level of Government intervention; the regulatory framework; and the effects upon competition in the market.

[919] ESL and LCE (n 23) 7.30.
[920] ESL and LCE (n 23) 7.31.
[921] ESL and LCE (n 23) 7.34.
[922] ESL and LCE (n 23) 7.35.
[923] Competition Commission of Mauritius 'Decision of the Commissioners of the Competition Commission: Possible collusion in the market for secondary school books CCM/DS/002' (May 2011) <http://www.gov.mu/portal/sites/ccm/pdf/Books-Com-DS-090511.pdf> accessed 13 August 2011.
[924] Cement market study (n 24) 1.3.
[925] Cement market study (n 24) 1.1.
[926] Cement market study (n 24) 1.1.

14. GOVERNMENT INTERVENTION AND THE STATE OF THE MARKET[927]

The structure of the market at the time of the study involved three key players and potentially three new entrants. The three incumbents are STC, Lafarge Mauritius ("Lafarge") and Holcim Mauritius ("Holcim"). The latter two are private firms whilst the first is a state-owned enterprise. All three import cement to Mauritius: STC imports 50%, Lafarge and Holcim share the remaining 50%.[928] Furthermore, two firms, Binani Cement Ltd ("Binani") and Oriental Group Industry Ltd. ("Oriental") have been granted licences to manufacture cement in Mauritius. A third potential entrant, the Mauritius Chemical and Fertilizers Industry Ltd. ("MCFI") is also considering plans to manufacture cement.[929]

Initially, Lafarge was the only importer to and distributor of cement in Mauritius. However, as it could not meet Mauritius' cement needs in the early 1980's, the Government set up STC in 1984 to meet that need and to ensure that the industry benefitted from competitive pricing.[930] Initially, STC met 25% of Mauritius' demand, with Lafarge meeting 75%.[931] Holcim entered the market in 2000, leading to the 50% (STC):50% (Lafarge/Holcim) split we see today.

Regarding the sourcing of cement imports, both Holcim and Lafarge import through their respective parent companies. STC sources its cement through international tenders, in which the parent companies of Holcim and Lafarge participate.[932] Whilst, the role of STC is to import cement and, at present, to sell its quantity in equal shares to the two firms, Lafarge and Holcim also have inland processing facilities to store, pack and bag the cement. Furthermore, Holcim 'is the only company to own and operate a...cement unloading facility...'[933] Once the cement has reached Mauritius it is split into two general products, bagged and bulk cement. The cement is then used for various construction purposes, such as housing, commercial and infrastructure.[934]

15. THE REGULATORY FRAMEWORK

The regulatory framework[935] governing the cement market has a number of purposes. It allows the Government not only to fix the wholesale and retail prices of cement and but also to regulate trade and supply.[936] The retail price of bagged cement, which constitutes 60% of all cement sold, is fixed, but the retail price of bulk cement is not. It is suggested that the fixing of the retail price of bagged cement caps that of bulk cement.[937] The retail price for bagged cement reflects transport costs incurred. This means that the retail

[927] Cement market study (n 24) 2.1 - 2.18.
[928] Cement market study (n 24) 2.3.
[929] Cement market study (n 24) 2.4.
[930] Cement market study (n 24) 4.3.
[931] Cement market study (n 24) 2.7.
[932] Cement market study (n 24) 2.8.
[933] Cement market study (n 24) 2.9.
[934] Cement market study (n 24) Table 3.
[935] e.g. Consumer Protection (Price and Supplies Control) Act 1998, Consumer Protection (Consumer Goods) (Maximum Price) Regulations 1998, Consumer Protection (Control of Price of Taxable and Non-Taxable Goods) Regulations 1998, Consumer Protection (Provision for Incidental Matters) Regulations 2006.
[936] Cement market study (n 24) 3.1.
[937] Cement market study (n 24) 3.3.

price of bagged cement varies across the country.[938] The final piece of government intervention is the provision of import and export licences.

16. COMPETITION ISSUES IN THE CEMENT MARKET

The general issue with such government intervention and frameworks is that they prevent market forces from determining supply and demand and potentially stifle efficiency and innovation. However, the CCM notes with caution that small market economies need large firms in order to achieve efficiencies. Thus, competition in Mauritius' cement sector cannot be completely deregulated.[939] Nevertheless, the Government intervention into the market takes three forms: price controls, import of cement and import controls.[940] The CCM acknowledged the initial rationale behind the price controls and import of cement: to ensure competitive pricing given the concentration in the market and to meet need. Notwithstanding this intervention, however, the market has been functioning somewhat, as a new entrant came to the market in 2000 (Holcim),[941] and three new firms are at various stages of planning to enter the cement market. Furthermore, it was argued that the price controls hamper quality and choice.[942] The fixed price of bagged cement relates to a particular strength (minimum quality OPC CEM 1); thus importers are limited to importing this type of cement because the price margins are already very tight.[943] Furthermore, the pricing policy and current course of dealing prevents Holcim and Lafarge taking advantage of economies of scale that they may gain from their infrastructures. For example, the current arrangement adopted by STC means that Holcim is limited to 25,000 tonnes per shipment. However, if the pricing was deregulated, Holcim could arrange for larger shipments and pay lower freight costs.[944] Finally, the CCM noted that the fixing of price means that sector is unresponsive to trends in world pricing, 'if the world price of cement is on a downward trend [...] price control will deprive local consumers of the resulting benefit of the lower cement price.'[945]

The study asks the Commission to consider the following: a competitive market would not require the prices of cement to be fixed. The prices would be determined by supply and demand. However, one has to account for the high concentration of the markets: deregulation of which may facilitate collusion and other anticompetitive practices.[946] Nevertheless, this concern can be set off against the fact that there are new firms wishing to enter the market. Therefore the question is whether price controls should be removed following entry, or before 'such entry relying on competition law to prevent' anticompetitive abuses.[947]

Having set out its considerations for price control, the Commission considered that the role of STC in the market should be reviewed. Taking into account the capacity of the

[938] Cement market study (n 24) 3.4.
[939] Cement market study (n 24) 4.2.
[940] Cement market study (n 24) 4.4.
[941] Cement market study (n 24) 4.6.
[942] Cement market study (n 24) 4.7.
[943] Cement market study (n 24) 4.7.
[944] Cement market study (n 24) 4.8.
[945] Cement market study (n 24) 4.10.
[946] Cement market study (n 24) 4.11 - 4.12.
[947] Cement market study (n 24) 4.14.

two private firms operating the market,[948] and the fact that STC has been purchasing its cement from the parent companies of the firms over the last few years,[949] it would appear that initial rationale for the role of STC, to safeguard supply, is no longer warranted. Furthermore, the STC's importing of one type of cement to meet 50% of demand is preventing the use of other types of cement in the market.[950] The Commission assessed the current role of import/export controls in the sector. It found that there was overall agreement of such controls to maintain the quality of cement coming to Mauritius.[951] However, the CCM found that import quotas no longer serve a useful purpose, if they ever did, in the cement market. The short-term effect of import quotas appears to be the propping up of the role of the STC, allowing it to sell the cement it has imported.[952] The long-term effect, if the quotas are to remain in force, could be the distortion of the market, artificially restricting demand and therefore increasing price.[953]

Finally, the CCM considered the regulatory and strategic barriers to entry. Regarding regulatory barriers, the CCM considered that the use of price and import controls may have been necessary in a market with 'high concentration and high barriers to entry'.[954] However, despite the regulatory framework and high concentration in the market, new entrants have and are willing to enter the market. Price control may therefore no longer be required. Nevertheless, there remains a role for import control in maintaining the quality of cement imported to Mauritius. The Commission identified three strategic barriers to entry - infrastructure, minimum efficient scale ("MES") and vertical integration. Concerning infrastructure, the CCM noted the large investment that would be required from firms wishing to enter the market and compete with the incumbents. In particular, if new entrants were unable to develop their own unloading facilities, they would be forced into a position of dealing with a competitor, Holcim, to use their facilities.[955] It is clear from the study that new entrants to the market are to be encouraged. Nevertheless, it appears that cement market in Mauritius is at or close to MES. Demand for the aggregate amount of cement has been stable, with almost half brought in by the STC. Given that a new entrant would need to import a minimum amount 'to cover operating cost [...] there may not be place for a third player' due the current demand.[956] The substantive part of the survey leaves a brief note about vertical integration. It records that both Holcim and Lafarge are vertically integrated with large buyers in the bulk cement part of the market.[957] This may also present a barrier to entry for firms willing to enter the sector.

In July 2011, the CCM published its advice to the Minister of Business, Enterprise, Commerce and Consumer Protection.[958] The following points may be drawn from the

[948] Cement market study (n 24) 4.16.
[949] Cement market study (n 24) 4.17.
[950] Cement market study (n 24) 4.51.
[951] Cement market study (n 24) 4.36.
[952] Cement market study (n 24) 4.39.
[953] Cement market study (n 24) 4.37.
[954] Cement market study (n 24) 4.55.
[955] Cement market study (n 24) 4.61.
[956] Cement market study (n 24) 4.62.
[957] Cement market study (n 24) 4.63.
[958] Competition of Commission of Mauritius 'Advice of the Commission to the Minister of Business, Enterprise, Commerce and Consumer Protection: Study of the cement market CCM/AS/001/MS001' (July 2011) <http://www.gov.mu/portal/sites/ccm/pdf/MS001-COMADVICE-BK-010711.pdf> accessed 13 August 2011.

statement. The Commissioners' agree that price liberalisation would lead to greater competition in the market and lower prices for the consumer.[959] Nevertheless, such liberalisation in the absence of competition, as is the current situation, may result in anticompetitive behaviour. As such, the Commission recommends price liberalisation once new entrants have entered the market. This outlines the difficult line that must be drawn. It might be argued that standard application of economic theory would mean that the market needs to be liberalised; that cement prices should be allowed to rise if as a result of market forces which, in turn, would potentially entice new entrants to the market. The Commissioners' also endorse a two-pronged approach to monitoring and controlling the newly liberalised market through the STC and CCM.[960] As part of its submissions to the market study, the STC suggested that it should withdraw as an importer and adopt a watchdog role.[961] This would be worth exploring. Given the particular characteristics of the cement market and its importance to the overall economy of Mauritius, having a two-tier system to monitor the market during its new developments may be beneficial. Furthermore, having a sector-specific regulator, who is able to respond quickly to anticompetitive behaviour in the market, may allow policy makers to reconsider the possibility of liberalising prices prior to new entry rather than after. Finally, the Commissioners noted that liberalisation of the market would require the physical infrastructure e.g. cement storage to be in place.[962] Without these facilities, the objectives and benefits of a more competitive cement industry would be rendered unattainable. Thus the recommendations founded in competition law must be supported by the appropriate measures in competition policy.

17. CONCLUSION

The Competition Act 2007 provides a much needed framework to manage the issues which may arise from trade liberalisation in Mauritius. However, further clarity about the law and its application is required. For example, an explicit statement about the goals of Mauritian competition law would be welcome. Such a statement would identify why the selected competition goals are relevant to Mauritius, and would also respect the distinction between the goals of competition law and the goals of competition policy. The law will continue to evolve as the Commission develops its experience and consumers become more familiar with the competition rules and principles. The process of evolution will be sharpened however, once cases are brought before the courts and the principles being applied by the Commission are tested before the judiciary. Nevertheless, the seed of a competition culture has been sown; if Mauritius is to benefit from it, the political will must continue to lend its support.

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[959] CCM advice on cement market study (n 178) para 5.
[960] CCM advice on cement market study (n 178) 9 and 10.
[961] Cement market study (n 24) 4.23.
[962] CCM advice on cement market study (n 178) 14.