

**IN THE MATTER BEFORE THE
BOARD OF THE COMPETITION
AND CONSUMER PROTECTION
COMMISSION**

Case File No. EXEM/12/05/2023/00026

BETWEEN

YALELO LIMITED

APPLICANT

AND

**THE COMPETITION & CONSUMER
PROTECTION COMMISSION**

RESPONDENT

BEFORE:

**Commissioner Angela Kafunda
Commissioner Derrick Sikombe
Commissioner Sikambala Musune
Commissioner Stanford Mtamira
Commissioner Emmanuel Mwanakatwe**

**Chairperson
Member
Member
Member
Member**

DECISION

Below is a summary of the facts and findings presented by the Competition and Consumer Protection Commission ("the Commission") to the Board of Commissioners following investigations carried out in the above case.

Introduction and Relevant Background

It was submitted that:

1. On 4th May 2023, the Competition and Consumer Protection Commission ("the Commission") received an application from Yalelo Limited ("Yalelo"), through their lawyers Chibesakunda and Co., for exemption of anti-competitive clauses in the distributorship agreement between Yalelo and their distributors of fresh tilapia/bream fish. The proposed agreement had three Tier Categories (Tier1 to Tier3) for distributors. The anti- competitive clause in question fell under Tier1 and had restrictive elements as it prevented distributors of Yalelo from interacting with direct and indirect competitors of Yalelo, provided that the distributor was a beneficiary of branding materials from Yalelo which were availed at no cost to the distributors.

2. The application was in line with Section 8; Section 12; Section 18 and Section 19 of the Competition and Commission Protection Act, No. 24 of 2010 (“the Act”).
3. Based on this formal application, the Commission reviewed the application for the purpose of establishing the effects of the agreement in the relevant market. In order to fulfil the notification requirement pursuant to Statutory Instrument No. 97 of 2011, the Applicant made a payment equivalent to **Forty-Five Thousand Zambian Kwacha (ZMW 45,000.00)** on 24th May 2023.

Legal Provision

It was submitted that:

4. Section 8 of the Act provides that, “*Any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti-competitive and prohibited*”.
5. Section 12 referred to in Section 18 of the Act states that, “*subject to sections eight, nine and ten, an agreement between enterprises is prohibited if the Commission determines that—*
 - a) *the agreement has the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia; and,*
 - b) *the agreement is not exempted under this Part.*
6. Section 18(1) of the Act provides that, “*Subject to subsection (2), an enterprise that wishes to be exempted from a prohibition under section twelve may apply to the Commission for exemption in the prescribed manner and form upon payment of the prescribed fee.*”
7. Section 18(2) of the Act provides that, “*Subsection (1) does not apply to an agreement that is prohibited per se under this Act*”.
8. Section 19 (1) of the Act provides that, “*the Commission may, after receipt of an application under section eighteen—*
 - a) *grant the exemption; or*
 - b) *refuse to grant the exemption.*”

9. Section 19(2) of the Act provides that, “the Commission shall grant an exemption to an agreement that contributes to, or is likely to contribute to, or result in—
- a) maintaining or promoting exports from Zambia;
 - b) promoting or maintaining the efficient production, distribution or provision of goods and services;
 - c) promoting technical or economic progress in the production, distribution or provision of goods and services;
 - d) maintaining lower prices, higher quality or greater choice of goods and services for consumers;
 - e) promoting the competitiveness of micro and small business enterprises in Zambia; or,
 - f) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or is likely to result, from the agreement.”

Assessment Tests

It was submitted that:

10. In the assessment of the application for potential and/or likely violation of the competition provisions of the Act, the Commission takes a multiple assessment approach, i.e., carries out a number of tests to ascertain whether the alleged conduct is or is likely to be restrictive and/or anti-competitive in the relevant market. The Commission reviews applications on rule of reason basis. The rule of reason is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited.¹
11. For the purpose of Section 8, the following elements had to be proved:
- i. *Whether there is an agreement, decision or concerted practice;*
 - ii. *Whether the object or effect of the agreement, decision or concerted practice leads to or is likely to lead to the prevention, restriction or distortion of competition; and,*

¹ <https://stats.oecd.org/glossary/detail.asp?ID=3305>

- iii. *Whether the prevention, restriction or distortion of competition is or is likely to be to an appreciable extent.*

Investigations Conducted

It was submitted that:

12. In assessing the application, the Commission reviewed the clauses in the agreement and their potential effect on competition in the relevant market. The Commission further obtained third party views from industry players such the distributors of Yalelo products on the subject matter. The Commission further conducted market surveillance.

Findings

The Applicant

Yalelo Limited

It was submitted that:

13. Yalelo Limited (Yalelo) operates a fresh and frozen fish (“Yalelo products”) business by breeding and selling fish across the country². Yalelo was founded in Zambia in 2011 and breeds their fish around the shores of lake Kariba. Yalelo operates 57 retail stores across the country and additionally has over 30 distributors across the country³.

Submissions by Yalelo⁴

It was submitted that:

14. On 4th May 2023, Yalelo through their legal counsel Chibesakunda and Co. submitted that they intended to have a homogeneous distributorship agreement with all their distributors in designated territories across the Country.
15. It was submitted that Yalelo would enter into agreements with their resellers and the resellers would have obligations with respect to the type of products sold and also obligations relating to maintaining standards relating to the brand. It was submitted that by signing the agreement, the reseller would not be allowed to sell products from other companies as there is a risk that the

² <https://yalelo.com/yalelo-about/>

³ Submissions from Yalelo on 27th July 2023

⁴ Letter from Chibesakunda and Co dated 4th May 2023

products from the other companies would not meet the standard and quality of the Yalelo Products. It was further submitted that further, Yalelo would bear the cost of branding and it is therefore necessary to protect its financial and reputational risk.

16. The Clause that appeared anti-competitive was among the terms in the Tier 1 Category schedule. The terms stated:
17. Tier 1 Category terms - *Yalelo's prior written consent is required for the sale of non- Yalelo tilapia/bream product in and on facilities owned and operated by the Reseller. Distributors are not precluded from selling other protein products without Yalelo's written consent. Once-off branding support may include some of the following, on a store-by-store agreement basis.*

Item	Description	Size	Quantity
<i>Store Fascia (Reseller brand)</i>	<i>Store Sign</i>	<i>Store Specific</i>	<i>1</i>
<i>Freezer-branding</i>	<i>Full branding of reseller-owned freezer</i>	<i>Store specific</i>	<i>1</i>
<i>Poster</i>	<i>Generic Yalelo</i>	<i>N/A</i>	<i>1</i>
<i>Pricing Board</i>	<i>Generic Yalelo</i>	<i>N/A</i>	<i>1</i>
<i>Wobblers</i>	<i>Generic Yalelo</i>	<i>N/A</i>	<i>2</i>
<i>T-shirts</i>	<i>Generic Yalelo</i>	<i>N/A</i>	<i>1</i>
<i>Cap</i>	<i>Generic Yalelo</i>	<i>N/A</i>	<i>1</i>

Justifications from Yalelo⁵

It was submitted that:

18. With respect to the Tier1 Category terms, the aim of the clause was to protect Yalelo's reputation and to ensure that the quality and standard of fresh and frozen fish products provided to consumers were of the standard and quality that it guarantees to customers. It was submitted that since the Tier1 Category involved Yalelo providing branding to the stores of their distributors, this made a representation to customers that all fish products sold in the store were Yalelo products with guaranteed Yalelo quality. It was submitted that in this regard, the prior consent required by Yalelo considers whether the provision of consent by distributors will in any way represent to the customer that the products being sold were of the guaranteed quality. It was submitted that a distributor would have to ensure that if they acquired fish from another supplier, the supplier should provide quality control guarantees to Yalelo's

⁵ Submissions from Yalelo made through Chibesakunda & Co. on 27th July 2023

satisfaction. It was submitted that this would ensure that Yalelo's brand was not tainted by a supplier who did not have similar values with respect to quality assurance.

19. It was submitted that in instances where prior consent to sell other similar products was requested, Yalelo could require that the distributor and the third party supplier provide an indemnity that the products sold are of similar or superior quality to Yalelo's and should there be a claim from a customer with respect to quality of products, the distributor and the third party supplier will and at all times keep Yalelo indemnified from any risks arising with respect thereto.
20. It was submitted that Yalelo would operate an opt in arrangement wherein a reseller decides which and how many of its stores would be covered under the agreement. It was submitted that a distributor was not compelled to include all its outlets under the agreement as the option remained entirely with the distributor.
21. It was submitted that the Tier1 Category had a full branding support and therefore if a distributor opted into the Agreement, Yalelo will then, at its own cost, cover the full branding costs as prescribed under the term of the Tier1 Category.
22. It was submitted that concern is also given as to whether providing the consent would amount to misrepresent to the customer that all the products being sold in a branded store were Yalelo products.

Third Party Submissions

It was submitted that:

23. To get submissions over the implications of the agreement, the Commission interviewed the following named Yalelo Distributors:
 - Yalelo Distributor 1
 - Yalelo Distributor 2
 - Yalelo Distributor 3
 - Yalelo Distributor 4
 - Yalelo Distributor 5
 - Yalelo Distributor 6

Submissions from Yalelo Distributor 1⁶

It was submitted that:

24. On 6th August 2023, the Commission interviewed Yalelo Distributor 1. It was submitted that Yalelo Distributor 1 only sold fish products at the moment. It was submitted that they had been in operation for five (5) years and had been distributing Yalelo products from inception. It was submitted that their customers were restaurants and local households. It was submitted that they did not distribute fish from other companies or receive any form of support from any fish company including Yalelo. It was further submitted that fish from Yalelo was not packaged in any branded packaging and that customers preferred fish from Yalelo as it tasted differently.
25. It was submitted that Yalelo Distributor 1 had a credit-facility, and they were given bonuses by Yalelo, based on the sales which were calculated annually. It was submitted that currently, Yalelo did not have any tiers for Distributors. It was submitted that Yalelo also supplied Zambeef stores with fresh fish. Further, Yalelo Distributor 1 submitted that they were willing to sell Yalelo products exclusively as the other fish companies sold low quality fish products. It was submitted that at the time, Yalelo Distributor 1 did the branding of their outlet on their own.

Submissions from Yalelo Distributor 2⁷

It was submitted that:

26. The business operated a retail store and sold products such as fish, soft drinks and mealie meal. It was submitted that they had been in operation for over one year. It was submitted that at the time of the interview, they had been distributors for Yalelo for eight (8) months. It was submitted that they were not aware of any Tiers for distributors and that Yalelo did not provide any form of support to their distributors. It was submitted that their customers were mostly women from households and restaurants. It was submitted that Yalelo fish was not packaged in any branded material. It was submitted that the only difference was that customers believed Yalelo products tasted better and hence Yalelo was a household name.
27. Yalelo Distributor 2 submitted that the idea of exclusively dealing with Yalelo would be a good idea as-long as supply was continuous. It was submitted that however, receiving branding material alone would not be enough unless they

⁶ Physical interview with Yalelo Distributor 1 on 6th August 2023.

⁷ Physical interview with Yalelo Distributor 2 on 6th August 2023.

also got a fridge and painting of their shops. Yalelo Distributor 2 submitted that he was willing to only sell Yalelo products as they were more popular on the market.

Submissions from Yalelo Distributor 3⁸

It was submitted that:

28. Yalelo Distributor 3 submitted that they owned a Butchery which also sold other meat products such as beef, sausage, chicken, fish, etc. Regarding the distribution and sale of tilapia fish, it was submitted that the business only sold Yalelo-tilapia. It was submitted that they began distributing tilapia fish on behalf of Yalelo in May⁸ 2023. It was submitted that Yalelo gave them branding materials for their store and ice to keep their fish fresh. It was submitted that at the time they only distributed fresh Yalelo-tilapia fish and had not begun distributing frozen fish.
29. Regarding Yalelo's application for exemption, it was submitted that it was a good initiative for Yalelo to provide branding to their distributors, however, it was submitted that the agreement could tie distributors to Yalelo such that they could not shift to another company even if another company came on the market with better conditions. It was submitted that it would be much more attractive to distributors if Yalelo could provide fridges and if distributors could withdraw from the Tier 1 Category of the Category Schedule at any time.
30. Regarding who constituted their customers, it was submitted that they mostly sold to households, restaurants, and a few retailers. It was submitted that they ordered their tilapia fish from Yalelo at K46.99 per Kilogram and sold it at K55.00 per Kilogram. It was submitted Yalelo at the time was the most popular as it had a lot of demand on the market.
31. In terms of investments, it was submitted that the main investments required by distributors for fish was a fridge, a weighing-scale, and a generator for a backup source of power in case of loadshedding.

⁸ The Commission contacted Yalelo Distributor 3 via Telephone on 21st August 2023

Submissions from Yalelo Distributor 4⁹

It was submitted that:

32. Yalelo Distributor 4 was a distributor of Yalelo tilapia-fish. It was submitted that Yalelo Distributor 4 had a Butchery which also sold other meat products. Regarding the distribution and sell of tilapia fish, it was submitted that they also sold tilapia fish from Cripeline, a fish supplier in Livingstone. It was submitted that there were several other distributors of tilapia fish in Livingstone such as Zambeef and Termite who sold tilapia fish from Yalelo, Zamfresh or Capital fisheries.
33. Regarding Yalelo's application for exemption, it was submitted that it would be a bad idea if for Yalelo forced distributors to choose the Tier 1 Category as it would slow down business especially in areas where butcheries need variety of stock. However, it was submitted that the branding material would be of help in luring customers.
34. With respect to customers, it was submitted that they mostly sold their fish to households, restaurants, and a few retailers. It was submitted that they ordered their tilapia fish from Yalelo at K47.00 per Kilogram and sold it at K58.00 per Kilogram. It was submitted that distributors were free to set their own prices.
35. In terms of investments, it was submitted that the main investments required by distributors for fish was a fridge and a weighing-scale. It was submitted that Yalelo Distributor 4 had several fridges so as to separate the fish from different companies as it had different prices.

Submissions from Yalelo Distributor 5¹⁰

It was submitted that:

36. Yalelo Distributor 5 had a distribution store. It was submitted that they began distributing tilapia fish on behalf of Yalelo in January 2022. It was submitted that the business had never gotten branding materials from Yalelo from the time they began operating. It was submitted that at the time they only distributed fresh Yalelo-tilapia fish.

⁹ The Commission contacted Yalelo Distributor 4 via telephone on 21st August 2023

¹⁰ The Commission contacted Yalelo Distributor 5 via Telephone on 21st August 2023

37. Regarding Yalelo's application for exemption, it was submitted that they had no problem with it as long as distributors were free to choose which Tier they wished to operate in.
38. Regarding their customers, it was submitted that they mostly sold to households. It was submitted that they ordered their tilapia fish from Yalelo at K46.50 per Kilogram and sold it at K60.00 per Kilogram. Further, in terms of investments, it was submitted that their main investment required by distributors of fish was a fridge and a weighing-scale.
39. Yalelo Distributor 5 submitted that the only challenge they faced in their distribution was that on several occasions Yalelo delivered fish which weighed less than they ordered. It was submitted that this was because the fish lost water during transportation and as a result it became less heavy. It was submitted that Yalelo would pay them refunds for this, but they took around two weeks to receive the refund, which was too long.

Submissions from Yalelo Distributor 6¹¹

It was submitted that:

40. Yalelo Distributor 6 had a Butchery store which also distributed Yalelo tilapia fish. It was submitted that they began distributing tilapia fish on behalf of Yalelo in around June 2023. It was submitted that Yalelo promised to provide branding material to them, but they had not provided the material yet. It was submitted that at the time they only distributed fresh Yalelo-tilapia fish.
41. Regarding Yalelo's application for exemption, it was submitted that it would be a disadvantage if distributors had no choice of which Tier they wanted to belong to.

Market Surveillance Conducted by the Commission¹²

It was submitted that:

42. The Commission conducted surveillance to understand how the market operated. The Commission noted that like Yalelo, most tilapia fish producers supplied both frozen and fresh fish. The Commission noted that the most distributors were butcheries who also sold other meat products. It was found that the distributors visited had at least one fridge (where they stored their

¹¹ The Commission contacted Yalelo Distributor 6 via Telephone on 21st August 2023

¹² The Commission conducted a survey and visited some distributors of fish companies in August 2023

fish) and a scale for weighing fish. The Commission noted that in most instances, the distributors sold fresh fish exclusively from one supplier.

43. Further, it was found that the price of the fish was based on its weight. Further, the Commission noted that fresh fish was not pre-packed nor was there any branded packaging provided to customers after they purchased the fish. The Commission noted that only frozen fish was pre-packaged in branded material. Hence, this posed a difficulty as customers could not identify to which supplier a particular consignment of fish belonged to if it was mixed with fish from other suppliers.
44. The Commission noted that some fish suppliers, such as Yalelo, also had stores where they sold fish to final consumers and retailers. The Commission noted that supermarkets such as Shoprite and Pick and Pay also sold fresh fish and frozen fish. As was common with distributors, most supermarkets only sold fresh fish exclusively from one supplier. The fresh fish was sold from fridges which were branded with the branding material of the supplier. The frozen fish in supermarkets was sold in branded packages.

The Market Definition

The Relevant Market

It was submitted that:

45. Given that the relevant market consists of both the product market and geographic market, the Commission considered the relevant market as follows:

- *The production and distribution of fresh and frozen fish in Zambia.*

Relevant Findings

It was submitted that:

46. It was found that the distribution agreement would have three Tier Categories (Tier1, Tier2 and Tier3). It was found that the terms of the Tier 1 stated that¹³: *“Yalelo’s prior written consent required for the sale of non- Yalelo tilapia/ bream product in and on facilities owned and operated by the Reseller. Distributors were not precluded from selling other protein products without Yalelo’s written*

¹³ Under the agreement Yalelo would provide Branding materials to their distributors at full cost to Yalelo

consent. Once-off branding support may include some of the following, on a store-by-store agreement basis-

Item	Description	Size	Quantity
Store Fascia (Reseller brand)	Store Sign	Store Specific	1
Freezer-branding	Full branding of reseller-owned freezer	Store specific	1
Poster	Generic Yalelo	N/A	1
Pricing Board	Generic Yalelo	N/A	1
Wobblers	Generic Yalelo	N/A	2
T-shirts	Generic Yalelo	N/A	1
Cap	Generic Yalelo	N/A	1

47. It was found that Yalelo’s distributors would have the liberty to choose which Tier Category they preferred to fall in. It was established that because distributors under Tier 1 would be provided with free Yalelo-branded material, Yalelo required their distributors under Tier 1 to obtain consent from them before they engaged any other competing fish suppliers to supply them with fish¹⁴.

48. It was established that the terms of Tier 2 stated that, “Tier 2 Category grants rights to Yalelo for the sale of tilapia/bream product in and on facilities owned and operated by the Reseller; with flexibility to sell other fish products other than Yalelo fish without Yalelo’s consent”. Yalelo provided the following branding materials under Tier 2:

Item	Description	Size	Quantity
Poster	Generic Yalelo	N/A	1
Pricing Board	Generic Yalelo	N/A	1
Wobbler	Generic Yalelo	N/A	1

49. It was established that the terms of Tier 3 stated that, “Tier 3 Category may sell other protein products other than Yalelo fish without Yalelo’s consent”. Yalelo provided the following branding materials under Tier 3:

Item	Description	Size	Quantity
Poster/Hanging Mobile	Generic Yalelo	N/A	1

¹⁴ It was submitted that the consent was to ensure that all fish sold in the store was of the guaranteed quality and that customers are not misrepresented that all fish products being sold the stores were from Yalelo

50. It was established that the proposed agreements would run for a period of 1 year and the parties would opt to renew or not to renew and whether to continue in the same Tier.
51. It was established that Yalelo did not preclude distributors under Tier 1 from engaging competing fish suppliers but required their distributors to obtain consent ensure that they implemented measures that would prevent reputational damage to Yalelo's brand.
52. The Commission established that Yalelo controlled approximately forty four percent (44%) market shares in the relevant market. It was established that Zambia consumed approximately 180,000 tonnes of tilapia fish annually of which Yalelo produced 80,000 tonnes¹⁵.
53. The Commission established that there were several other producers of tilapia fish in Zambia namely: Zamfresh; Capital Fisheries; Kariba Harvest; Kafue Fisheries; and Mpende Fisheries among others.
54. It was established that most of the distributors of Yalelo were small businesses which ran Butcheries and chain stores such as Shoprite, Pick and Pay etc.

Competition Analysis

Consideration of Section 8 of the Act

Whether the application for exemption is for an agreement, decision or concerted practice

It was submitted that:

55. The term 'agreement' in the Act is defined as, "*any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises*¹⁶." It follows from the foregoing definition that the term 'agreement' has a wide meaning and scope under the Act as it encompasses agreements that are orally made as well as agreements that are not legally enforceable. It is worth noting that the Act has a broader meaning of the term 'agreement' to also cover decisions

¹⁵ Form 1 submissions by Yalelo made on 4th May 2023

¹⁶ Competition and Consumer Protection Act, No. 24 of 2010; Page 319

by trade associations or associations of trade enterprises without limiting it to just an agreement between ordinary enterprises.

56. Yalelo intends to enter into agreements with their distributors using a standard contract. The Black Laws Dictionary 9th Edition defines a contract as, “*an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. Thus, a contract sets forth an agreement in writing.*” From the above, the contract between Yalelo and their distributors is an “agreement” thus the application for exemption will be considered by analysing the provisions provided in the contract between Yalelo and their distributors.

Whether the agreement has as its object or effect the prevention, restriction or distortion of competition

It was submitted that:

57. According to the Black’s Law Dictionary, object means “*something sought to be attained or accomplished; an end, goal or purpose.*” This definition when applied with respect to an agreement can be construed as the parties’ intention of entering into that particular agreement. Therefore, restriction of competition by object refers to conduct which is typically entered solely to restrict competition.
58. In its judgment of 11th September 2014, in ***Cartes Bancaires v. European Commission***, the Court of Justice of the European Union provided clarity on when an agreement has the object of restricting competition. In particular, it was explained that a ‘restriction by object’ may be found only after it is shown that the agreement, by its wording, objectives and context, displays a sufficient degree of harm to competition so that, by its very nature, they are intended to change, appreciably, the structure of the market¹⁷.
59. For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects relating to prices, output, innovation or the variety or quality of goods and services can be expected in the relevant market with a reasonable degree of probability. Such negative effects must be appreciable¹⁸.

¹⁷ Judgment of 11th September 2014 (Third Chamber) — CASE C-67/13 P CB v COMMISSION available on <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0067&from=EN>

¹⁸ <https://www.concurrences.com/en/glossary/anticompetitive-object-or-effect>

60. In view of the above, the Commission analysed the anti-competitive clauses in the distributorship agreement to determine whether the clauses had as their object or effect the restriction of competition.
61. With regard to Tier 1 Category, the terms stated that, “*Yalelo’s prior written consent required for the sale of non- Yalelo tilapia/bream product in and on facilities owned and operated by the Reseller. Not precluded from selling other protein products without Yalelo’s written consent. Once-off branding support may include some of the following, on a store-by-store agreement basis.*” This implies that if Yalelo provides branding material to a distributor falling in Tier 1 of the Category schedule, Yalelo requires their distributors to obtain consent from Yalelo if the distributors intend to sell non-Yalelo tilapia fish. As such, Yalelo intends to enter exclusive agreements and exclusively deal with their distributors of tilapia fish by restricting them from dealing with other fish producers unless they obtain consent from Yalelo.
62. The prohibition of exclusive conduct in competition law is based on the belief that enterprises with market dominance can use exclusive dealing to substantially reduce competition by creating market barriers and preventing other distributors from entering the market or to protect their market shares.
63. To analyse whether the terms in Tier 1 may prevent competition by object or effect, the Commission considered the justifications given by Yalelo for the exclusivity.
64. Yalelo submitted that the aim of the terms in Tier 1 was to protect Yalelo’s reputation and to ensure that the quality and standard of fresh and frozen fish products provided to consumers were of the standard and quality that Yalelo guarantees to customers. It was submitted that since the Tier 1 Category involved Yalelo providing Yalelo-branding distributors, this would make a representation to customers that all fish products sold in the particular store were from Yalelo and had the guaranteed Yalelo quality. It was submitted that in this regard, the prior consent required by Yalelo considers whether providing the consent will in any way represent to the customer that the products being sold were of the guaranteed quality¹⁹.
65. It was noted that Yalelo intended to offer branding support to their distributors by enhancing their visibility and to ensure that customers were aware of which brand of tilapia the distributors were selling.

¹⁹ Submissions from Yalelo Limited in a letter 27th July 2023

66. Further, Yalelo submitted that their distributors would have the liberty to choose which Tier Category they preferred to fall in. It was submitted that the agreement between Yalelo and their distributors had a Category schedule with three tiers from Tier 1 to Tier 3. The Commission noted that Yalelo only required their distributors in Tier1 to obtain consent as they were providing branding materials to the distributors under Tier1. It was submitted that where consent was requested, Yalelo could require that the Reseller and third-party supplier provided an indemnity that the products sold were of similar or superior quality to Yalelo and should there be a claim from a customer with respect to quality of product, the distributor and the third-party supplier would at all times keep Yalelo indemnified from any risks arising with respect thereto.
67. The Commission also noted that fresh fish was a peculiar product which could not be sold in branded material as it was sold according to its weight²⁰. As such, the fish could not be packaged before being sold to consumers hence if the fish from different suppliers was mixed in the same fridge or the same store, customers would not be able to differentiate the source of the fish. The Commission further noted that if the distributor did not properly separate the fish from different producers, customers would not be able to differentiate it in terms of quality and taste therefore making it difficult for fish producers to safeguard their reputation.
68. Due to the risks highlighted, it was reasonable for Yalelo to request their distributors to seek consent from Yalelo so that they could ensure that the distributor and the third-party fish producer implement safeguards to protect Yalelo's brand from being tainted by a supplier who does not have similar values with respect to quality assurance.
69. Given the above, the Commission is of the view that the agreement may prevent, restrict or distort competition by effect and not by object as Yalelo's concerns are valid.

Whether the prevention, restriction or distortion of competition was to an appreciable extent

It was submitted that:

70. What constitutes an "appreciable extent" is a subject of debate in several jurisdictions. It must be noted that the Act does not define "appreciable extent". It is, however, generally understood that an appreciable amount or

²⁰ The price set for fresh fish was per Kilogram

effect is that which is large enough to be important or clearly noticed²¹. How large depends on a specific subject in question. For example, in the ***Völk v Vervaecke*** case, the European Court of Justice (ECJ) held that ‘...an agreement falls outside the prohibition in Article [81(1)] where it has only an insignificant effect on the market,’²². The same ECJ in the ***United Brands and Hoffmann-La Roche*** cases held that, “a dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers.”²³ From this judgement, it therefore follows that dominant enterprises are presumed to have power that enables them to act independent to an appreciable extend.

71. The European Commission considers that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81 if the aggregate market share of the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement where the agreement is made between competing undertakings (i.e. undertakings which are actual or potential competitors in any of the markets concerned), or the market share of each of the parties to the agreement does not exceed 15 per cent in any of the relevant markets affected by the agreement where the agreement is made between non-competing undertakings, (i.e. undertakings which are neither actual nor potential competitors on any of the markets concerned)²⁴.
72. Zambia has a similar operation in terms Section 14 (b) of the Act which provides acquisition or supply threshold for authorization of restrictive agreements. All vertical agreements which are entered by an enterprise which individually supplies or acquires, at either one of the two levels of the market that are linked by the agreement, 15% or more of goods or services of any description in the relevant market are regarded as restrictive and should be the subject of authorisation.
73. One such agreement authorised by the Board of Commissioners was an ***Application for an Exemption for Anti-Competitive Clauses in Distribution Agreements by Varun Beverages Zambia Limited*** in December 2019. Under the agreement, Varun was to provide their distributors with benefits such as chilling machines; which were to be

²¹ <https://dictionary.reverso.net/english-cobuild/to+an+appreciable+extent>

²² <https://www.lexisnexis.co.uk/legal/guidance/appreciable-restriction-of-competition>

²³ <http://awa2013.concurrences.com/business-articles-awards/article/the-notion-of-dominance-in>

²⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284396/oft401.pdf

provided free of charge to the distributors. The Commissions Board granted an exemption to prevent the distributors and competitors of Varun from free riding on the chilling machines provided by Varun to distribute their products.

74. Submissions by Yalelo as part of the application indicate that it controls 44% of the relevant market²⁵. Given that Section 14 only requires either party to the agreement to have a 15% share of supply, it follows that at 44% share of supply, Yalelo's vertical agreement is capable of restricting competition to an appreciable extent.

Consideration of Section 19 of the Act

It was submitted that:

75. Restrictive agreements such as the terms of the Tier 1 Category are assessed based on rule of reason. Section 19(2) of the Act allows for the exemption of restrictive agreements of clauses if the agreements have benefits that accrue to the public. While what constitutes public interest depends on the subject matter and maybe wide in definition, Section 19(2)(a) to (f) lists the public interest considerations that need to be tested and weighed against the anti-competitive (actual or likely) of the proposed agreement.
76. In assessing cases to determine application for exemption for enterprises with market share above 30%, the Commission makes a full analysis under Section 19(2)(a) to (f) of the Act.

Whether the agreement will maintain or promote exports from Zambia

It was submitted that:

77. The Commission noted that the application for exemption did not have clauses with regard to exports from Zambia as Yalelo would not export any products through its distributors.

²⁵ Form 1 submitted to the Commission by Yalelo

Whether the agreement will promote or maintain the efficient production, distribution or provision of goods and services;

It was submitted that:

78. In general, efficiencies are improvements that serve public interest and benefit the society at large. Efficiencies come in different ways and are triggered by different factors. For example, rivalry and competitive markets result in pricing closely linked to underlying costs (allocative efficiency), to the benefit of consumer welfare²⁶.
79. The Commission noted that agreements between Yalelo and their distributors would enhance the availability of Yalelo-tilapia fish on the market as there will be more distributors. It was established that Yalelo was the most popular brand of tilapia fish on the market as they controlled forty four percent (44%) market shares. It was found that allowing Yalelo to engage distributors for their tilapia fish will make their product easily accessible without customers incurring costs such as transportation costs.

Whether the agreement will promote technical or economic progress in the production, distribution or provision of goods and services

It was submitted that:

80. The anti-competitive clauses in the agreement should demonstrate that the agreement will promote technical or economic progress, for example through cost reduction (such as those originating from development of new production technologies and methods; synergies resulting from an integration of existing assets; economies of scale or scope; or better production planning) and/or through improvement in the quality and choice of goods and services. This must show appreciable objective advantages of such a character as to compensate for the disadvantage which they cause in the field of competition²⁷. The Commission assessed that the provision of branding materials would improve visibility of distributors, who are mostly small-scale business, in the market. Further, the Commission assessed that the branding material would enhance confidence in customers regarding the quality of fish being sold as they will identify the distributors with the quality guaranteed by Yalelo.

²⁶ <https://www.concurrences.com/en/glossary/economic-efficiency>

²⁷ EU Competition Law, Alison Jones, Brenda Sufrin, Niamh Dunne page 264

81. The Commission formed the view that branding of distributors trading premises with suppliers' brands would reduce the likelihood of freeriding among fish suppliers, resulting in enhanced competition among fish suppliers which in turn increases consumer welfare by increasing choice, lower prices and other types of innovations.

Whether the agreement will maintain lower prices, higher quality or greater choice of goods and services for consumers

It was submitted that:

82. The assessment was to be satisfied by showing that there was a pass on effect of the cost and quality efficiency to the consumer and that the consumer got a fair share of the resulting benefit of the agreement. The concept of "fair share" implies that the pass-on of the benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition²⁸. In this case, the consumer is interpreted broadly to include final consumers (end-users), and intermediate consumers, including distributors that purchase fresh and frozen fish in the course of their trade or business. The overall effect on the consumers in the relevant market must be favourable.
83. According to the justifications submitted by Yalelo, the agreement was meant to ensure that their high product quality provided to consumers by Yalelo and the brand of Yalelo were not compromised. Yalelo submitted that the terms in the Tier 1 category were a necessary restriction as they were aimed at protecting Yalelo's reputation and to ensure that the quality and standard of tilapia fish products provided to consumers by Yalelo was not compromised by fish products from other supplies. It was submitted that since the Tier 1 category involved Yalelo providing branding materials for stores, this made a representation to customers that all fish products sold in the store where Yalelo products with guaranteed Yalelo quality. It was submitted that in this regard, the prior consent to be provided by Yalelo to their distributors would consider whether providing the consent will in any way represent to the customer that the products being sold were of the guaranteed quality.
84. It was submitted that a distributor would have to ensure that if they acquired fish from another supplier, that supplier should provide quality control guarantees to Yalelo's satisfaction. It was submitted that this would ensure

²⁸ EU Competition Law, Alison Jones, Brenda Sufrin, Niamh Dunn
e page 269

that Yalelo's brand was not tainted by a supplier who did not have similar values with respect to quality assurance.

85. The Commission formed the view that this would ensure that customers get good quality fish from the distributors of Yalelo under tier1, as Yalelo would require its distributors to provide quality that is according to Yalelo's standard.

Whether the agreement will promote the competitiveness of micro and small business enterprises in Zambia

It was submitted that:

86. Compared with larger firms, SMEs typically have less ability to influence external relationships with customers, suppliers and factor markets. Thus, their ability to survive and grow depends on their flexibility to respond to external environmental change forces. With a more limited internal resource base compared with larger firms (particularly with respect to management and financial resources), cooperation with other firms or external organizations, represents a potentially important strategic response²⁹.
87. The provision of branding materials by Yalelo to distributors that fall within the Tier 1 Category may increase the competitiveness of the distributors as materials such as fliers, poster and reseller store branding by Yalelo would serve as a form advertisement to lure customers. Further, the branding materials provided by Yalelo would increase the credibility of the distributors' stores as customers would associate them with bigger companies such as Yalelo.

Whether there were benefits obtaining for the public which outweighs or would outweigh the lessening in competition that would result, or is likely to result, from the agreement

It was submitted that:

88. The reason they required consent from their distributors in Tier1 who had stores bearing their brand was to ensure that the distributors implemented measures that prevented reputational damage to Yalelo. Further, it was submitted the branding materials given to the distributors were to ensure that the public and customers who preferred Yalelo-tilapia could easily identify the stores which sold Yalelo fish and be guaranteed of purchasing good quality

²⁹<http://www.oecd.org/cfe/smes/2012844.pdf>

tilapia fish. This would therefore give customers confidence that the fish they were purchasing truly belonged to Yalelo.

89. In the case the of **CCPC vs. Parmalat Zambia Limited (1999)**, Parmalat Zambia drew up agreements with some 15 of its distributors in various parts of the Country, binding them for one year not to distribute competitors' products. For its part, Parmalat agreed that in each demarcated territory it would sell only to the designated distributor for that territory. Under the arrangements Parmalat also supplied a refrigerated container to each distributor so that retailers could obtain supplies of milk and fruit juice from that source. The distributors were given a loan to purchase the container and the loan was easily repayable within months, rather than years. The Commission considered that these exclusive distribution agreements were not likely to be anticompetitive because:

- Other dairy suppliers enjoy unrestricted access to other retail outlets;
- Major supermarkets like Shoprite and Melissa stocked milk and fruit juice products from different manufacturers who apparently make direct deliveries;
- The distributors have no exclusive rights in respect of retailers;
- The distribution agreements were aimed at making Parmalat's distribution system efficient and effective; and,
- The industry players contacted by the Commission stated that they had not been adversely affected by the exclusive distributorship agreement.

90. Similarly to the above case, the Commission is of the view that the agreement has minimal effects on limiting competition due to the following:

- The agreement had three Tiers and distributors were free to choose which Tier they preferred;
- Only Tier1 distributors were required to get consent from Yalelo before they engaged a competitor of Yalelo;
- Yalelo was only requiring their distributors under Tier1 to obtain consent from them and not outrightly refusing to allow their distributors to engage their competitors;

- The agreements had a one-year duration which could be renewed, and the distributor would have opportunity to change their Tier; and,
- There were several small businesses (butcheries) that sold meat products and that the market was characterised by low barriers to entry, hence, it was unlikely to foreclose the distribution market to other tilapia fish suppliers.

Board Deliberations

Consideration of Section 8 of the Act

91. The Board deliberated that the application for exemption by Yalelo was an agreement. It was deliberated that the proposed agreement by Yalelo had the effect of restricting competition to an appreciable extent. It was deliberated that as Section 14 only requires either party to the agreement to have a 15% share of supply, it followed that at 44% share of supply, Yalelo had enough market share to affect competition to an appreciable extent.

Consideration of Section 19 of the Act

92. The Board deliberated that branding of distributors with suppliers' brands would reduce the likelihood of freeriding among fish suppliers, resulting in enhanced competition among fish suppliers which in turn increases consumer welfare. The Board deliberated that strong competition among fish suppliers would ensure good quality provision by fish suppliers.

Board Determination

93. Following the Board's deliberations, the Board determined that the agreement was unlikely to foreclose the market as other competitors would still access the market given the low barriers to entry in the fish distribution sector and that Yalelo were only requiring their distributors under Tier 1 to obtain consent from them. It was deliberated that Yalelo distributors were free to choose which Tier they preferred. Additionally, it was deliberated that the contract had a duration of one year, after which the contract could be renewed, and the distributor could change their Tier.

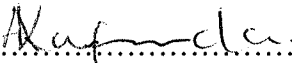
Board Directives

94. In view of the above deliberations, the Board of Commissioners directed that:
- i. Yalelo must clearly inform their potential distributors and resellers of the options of different Tiers;

- ii. Yalelo must include a clause in their contract that distributors are free to change Tiers once the agreement duration of one-year lapses;
- iii. Yalelo must clearly state in their contract what safeguards are required for a distributor under Tier 1 to engage another tilapia supplier;
- iv. Yalelo shall not unreasonably withhold its consent for distributors to engage other tilapia suppliers;
- v. Yalelo be granted exemption from the anti-competitive clauses in their distributorship agreement in accordance with Section 19 of the Act; and,
- vi. The Commission engages Yalelo for periodic monitoring and compliance programmes.

Note: any party aggrieved with this order or direction may, within thirty (30) days of receiving this order or direction, appeal to the Competition and Consumer Protection Tribunal.

Dated this 19th Day of October 2023


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Chairperson

Competition and Consumer Protection Commission