

Enforcement Decision Series (E/13/01)

Competition Act 2002

Enforcement Decision of the Competition Authority (Case COM/11/07)

Resale price maintenance of FitFlop footwear products

19 April 2013

EXECUTIVE SUMMARY

In late 2011, the Competition Authority (the "Authority") opened an investigation into the pricing of FitFlop footwear products. The investigation was prompted by complaints from retailers alleging that the exclusive distributor of FitFlop products in the island of Ireland (Double Bay Enterprises Limited, trading as Brazil Body Sportswear ("BBS")) was operating a policy of resale price maintenance and was imposing other terms and conditions which restricted retailers' ability to compete with each other for customers. (The other terms and conditions operated by BBS included restrictions on mail order and Internet sales by retailers and restrictions on the customers to whom and the territory in which they could sell the FitFlop products.)

Such restrictions of retailers' freedom to trade, if proved, constitute serious infringements of section 4 of the Competition Act 2002 (the "Act") and, where trade between EU Member States may be affected, of Article 101 of the Treaty on the Functioning of the European Union (the "TFEU").

As part of its investigation, the Authority obtained witness statements from retailers and conducted an unannounced search at BBS's premises at which documentary and electronic evidence was seized. Following a review of this evidence, the Authority contacted BBS and offered it the opportunity to avoid High Court proceedings for infringement of section 4 and Article 101 by providing a series of cease and desist commitments to the Authority and having these commitments made an order of the Court under section 14B of the Act (as inserted by section 5 of the Competition (Amendment) Act, 2012).

Rather than presenting any justifications or defences that may have been available to it and in order to achieve a speedy resolution of the matter, BBS agreed to proceed in this manner and offered commitments to the Authority which the Authority agreed to accept. In particular, BBS undertook to advise its retailers of (i) their freedom to price the products at their own discretion and (ii) their freedom to supply the products to any customer, regardless of location, who sends an unsolicited order for the products. On 14 November 2012, BBS signed an agreement with the Authority setting out these commitments and agreed that the Authority should apply to the High Court to have the agreement made an order of the Court pursuant to section 14B of the Act. The Authority filed the application on 23 November 2012 and the High Court made the requested Order on 18 December 2012. Section 14B allows a period of 45 days from the making of such an order for certain affected third parties to apply to have the order varied or annulled. No such application was made in this case, so the Order came

into effect on 2 February 2013. Failure to comply with such an order constitutes contempt of court.

A copy of the Agreement is included in Annex 1 to this Enforcement Decision and a copy of the High Court Order is included in Annex 2.

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1. THE ISSUES

The complaint and the alleged infringements

- 1.1 In September 2011, the Competition Authority (the "Authority") received complaints from a number of footwear retailers in Ireland alleging that Brazil Body Sportswear ("BBS") had engaged in anticompetitive behaviour in relation to the distribution of FitFlop footwear products (the "Products") in breach of Irish and European competition law. (Brazil Body Sportswear is the trade name of Double Bay Enterprises Limited, the exclusive distributor of the Products in the island of Ireland.)
- 1.2 The Authority decided to investigate the complaints, focusing on the complainants' allegations relating to (i) a resale price maintenance policy operated by BBS in relation to the Products and (ii) certain BBS terms and conditions which restricted both the manner in which retailers could sell the Products (by prohibiting mail order and Internet sales without BBS's consent) and the customers to whom and the territory in which they could sell the Products (together, the "BBS Restrictions").
- 1.3 Resale price maintenance ("RPM") is the term used to describe an agreement between a supplier and its reseller (whether at the wholesale or retail level) which requires the reseller to sell the goods or services concerned at a price fixed by the supplier. RPM therefore eliminates the possibility of price competition between resellers and means that customers are denied the possibility of shopping around for better value. It is prohibited by both the Competition Act 2002 (the "Act") and the competition rules in the Treaty on the Functioning of the European Union (the "TFEU") and is regarded by the Authority (and most, if not all, other competition agencies around the world) as a serious competition law infringement.
- 1.4 A ban on mail order and Internet sales also restricts resellers from competing for customers. A ban on such sales unduly restricts competition by denying consumers access to these sales channels for the purpose of proactively searching for better quality, prices or services from different resellers. Such bans are generally regarded as serious infringements of Irish and EU competition law. Restrictions on the customers to whom or the territories into which resellers may sell goods also clearly restrict competition. They are permissible only in exceptional circumstances which would not normally apply to retailers and did not apply in this case¹.

The parties

- 1.5 BBS is the exclusive distributor of the FitFlop brand of footwear in the island of Ireland².
- 1.6 The FitFlops brand was established in 2007. It claims to use a patented technology that firms muscles by creating an unstable walking surface. In 2011, the brand was stocked in 159 stores throughout Ireland.

¹ See further paragraphs 4.9-4.13 below.

² <http://www.FitFlop.com/page/contact>.

The facts of the case

- 1.7 As indicated above, the object of the Authority's investigation was the BBS Restrictions.
- 1.8 During its investigation, the Authority gathered evidence which, in the opinion of the Authority, showed that BBS had actively policed retailers' compliance with the BBS Restrictions. This was done by invoking BBS's contractual terms and conditions with retailers, through the monitoring of websites and through correspondence and personal communications between BBS and the retailers.
- 1.9 Specifically in relation to RPM, the Authority gathered email correspondence which, in the opinion of the Authority, showed that BBS had made numerous attempts to enforce RPM by, for instance, (i) requiring retail prices to be raised to specified levels; (ii) requiring specified discounts to be applied to specified styles; (iii) seeking to control when retailers put the Products on sale and at what discount, and (iv) having retailers contact it when they become aware that another retailer was discounting the Products. The Authority obtained evidence of compliance by retailers with these restrictions, thereby showing, in the opinion of the Authority, the existence of agreements between BBS and retailers.
- 1.10 The Authority also gathered evidence which, in its view, indicated that BBS had placed restrictions on the manner in which retailers could sell the Products and on the territory in which or the customers to whom they could sell the Products, in particular by (i) requiring retailers not to sell the Products through mail order, Internet or other electronic media without the prior written consent of BBS; (ii) requiring retailers only to resell the Products to third parties within Ireland and (iii) prohibiting sales to other resellers and various specified outlets.

2. PROCEDURAL STEPS

- 2.1 Having gathered evidence, including witness statements from a number of complainants, the Authority opened a formal investigation into the BBS Restrictions in December 2011. During early 2012, it conducted an unannounced search at BBS's premises when it seized a substantial quantity of documentary and electronic evidence. Having analysed and considered the evidence it had gathered, the Authority wrote to BBS in July 2012 setting out its concerns in respect of the BBS Restrictions. In particular, the Authority communicated its preliminary view that the BBS Restrictions constituted an agreement between undertakings that infringed section 4 of the Act and/or Article 101 TFEU. At the same time, the Authority offered BBS the opportunity to avoid enforcement proceedings in the High Court by entering into an agreement with the Authority to cease to operate the BBS Restrictions and to have the commitments in that agreement made an order of the High Court.
- 2.2 BBS considered the Authority's preliminary view and rather than presenting any justifications or defences that may have been available to it and in order to achieve a speedy resolution of this matter, BBS agreed to offer a set of commitments that were acceptable to the Authority.

- 2.3 On 14 November 2012, the Authority entered into an Agreement with BBS whereby BBS provided satisfactory commitments to the Authority. A copy of the Agreement is set out in Annex 1 to this Enforcement Decision.
- 2.4 On 23 November 2012, the Authority filed an application to the High Court under section 14B of the Act for an Order in the terms of the Agreement entered into with BBS. The Order was made by the High Court on 18 December 2012. A copy of the Order is set out in Annex 2 to this Enforcement Decision. An explanation of the operation of section 14B is set out below.

High Court Order under section 14B of the Act

- 2.5 A party under investigation for a possible infringement of competition law may offer commitments to the Authority with a view to addressing its concerns by agreeing to do or refrain from doing the things that gave rise to the investigation. In appropriate cases, the Authority will accept those commitments by entering into an agreement with the undertaking concerned. The agreement will set out the agreed commitments and, in return, the Authority will agree not to bring court proceedings against the undertaking concerned under section 14A of the Act.
- 2.6 Section 14B of the Act (which was inserted by section 5 of the Competition (Amendment) Act 2012³) provides an express statutory basis for the closure of investigations by the Authority in exchange for commitments from the party under investigation. Section 14B allows the Authority to seek an order from the High Court in the terms of an agreement such as that entered into by the Authority with BBS. The High Court will make an order if the requirements set out in section 14B(2) are met⁴. The High Court order compels the party to abide by the terms of the agreement. Failure to comply with the order constitutes contempt of court.
- 2.7 Section 14B allows a period of 45 days before the order comes into effect. This is to allow certain affected third parties the opportunity to apply to court to have the order varied or annulled.
- 2.8 The 45 day period relating to the agreement between the Authority and BBS expired on 1 February 2013. Since no third party application was made to the Court, the order took effect on 2 February 2013.

3. LEGAL CONTEXT

- 3.1 This section outlines the relevant legal framework for the Authority's assessment of the BBS Restrictions.
- 3.2 Section 4(1) of the Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State. Article 101(1) TFEU prohibits all agreements between

³ The 2012 Act was commenced on 3 July 2012 (S.I. No. 236 of 2012).

⁴ Section 14B(2) requires the Court to be satisfied that the following conditions have been satisfied: (i) the undertaking consents to the making of the order; (ii) the undertaking has obtained legal advice; (iii) the agreement is clear and unambiguous and capable of being complied with; (iv) the undertaking is aware that failure to comply with the order would constitute contempt of court and (v) that the Authority has published the terms of the agreement on its website and published a notice in two daily newspapers providing details of its proposed application for a High Court order.

undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

- 3.3 Anticompetitive agreements prohibited by section 4(1) and/or Article 101(1) are void unless they can satisfy the conditions for exemption set out in section 4(5) and Article 101(3) respectively. The parties to such agreements may also risk being subjected to significant penalties, either by the Irish courts or by the European Commission.
- 3.4 An agreement may restrict competition either by its object or effect, or by both. It is clear that these are alternative, not cumulative, requirements for a finding of an infringement⁵. Once it appears that an agreement has as its object the prevention, restriction or distortion of competition, it will be prohibited by section 4(1) and/or Article 101(1) without any need to consider its effects.
- 3.5 To establish an infringement of Article 101(1) TFEU, it is necessary to show that the agreement, decision by association of undertakings and concerted practice "may affect trade between Member States" and that the effect on trade is likely to be appreciable. (According to settled case law, it is sufficient that the agreement is capable of having an effect on trade for Article 101 TFEU to apply – it is not necessary to prove that it actually will do so⁶). The stronger the market position of the undertakings concerned, the more likely it is that any effect on trade will be appreciable⁷.
- 3.6 Most anticompetitive agreements prohibited by section 4(1) and/or Article 101(1) can be categorised as either horizontal or vertical agreements. Anticompetitive *horizontal* agreements are agreements entered into between two or more undertakings each of which operates, for the purposes of the agreement, at the *same* level of the production or distribution chain. This type of anticompetitive agreement frequently involves collusion between competitors regarding prices, customers and/or markets and involves the most serious forms of competition law infringements. Anticompetitive *vertical* agreements are agreements entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a *different* level of the production or distribution chain. This type of anticompetitive agreement establishes the terms and conditions of supply, purchase and resale between the parties. Such agreements are often pro-competitive because they promote the efficient distribution of goods and services for the benefit of consumers. They may, however, contain restrictive terms and conditions which cannot be justified on efficiency grounds.
- 3.7 The BBS Restrictions constituted a series of vertical agreements between BBS and its retailers.

⁵ See, e.g. Consten and Grundig v Commission [1966] ECR 299, p. 343; Société Technique Minière v Maschinenbau Ulm GmbH [1966] ECR 235, p. 249 and Commission v Anic Partecipazioni [1999] ECR I-4125.

⁶ Commission's "Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty", paragraph 26.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0081:0096:EN:PDF>

⁷ Ibid, paragraph 45.

- 3.8 Section 4(5) of the Act and Article 101(3) TFEU provide for an exemption from the prohibition contained in section 4(1) and Article 101(1) against anti-competitive agreements. These exemption provisions are designed to ensure that agreements that are found to have restrictive elements are not condemned where they generate overriding efficiency gains. To benefit from the exemption an agreement must satisfy four conditions. In particular, the agreement:
- (a) must contribute to improving the production or distribution of goods or provision of services or to promoting technical or economic progress;
 - (b) must allow consumers a fair share of the resulting benefit;
 - (c) must *not* impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives; and
 - (d) must *not* afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.
- 3.9 These four conditions are cumulative so that if any of them is not satisfied, the agreement is prohibited. The burden of proof lies on the undertaking(s) seeking to defend an agreement to demonstrate that it satisfies these conditions.
- 3.10 When applying Article 101(3) to vertical agreements, the Authority has regard to the European Commission's Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices⁸ (the "Vertical Agreements Block Exemption" or the "Block Exemption") and is guided by the Commission's Guidelines on Vertical Restraints⁹. The Block Exemption exempts vertical agreements that meet specific requirements from the prohibition contained in Article 101(1). The Authority's Category Declaration in respect of Vertical Agreements and Concerted Practices¹⁰ (the "Vertical Agreements Declaration") fulfils a similar function in relation to section 4(5) of the Act.
- 3.11 In this case, Fitflop Limited, the manufacturer of the Products, is a company with its European headquarters in England. BBS is the exclusive distributor of the Products in the island of Ireland. Given the cross-border nature of the distribution arrangement, the Authority formed the preliminary view that Article 101 TFEU, as well as section 4 of the Act, would apply to the BBS Restrictions.

4. PRELIMINARY LEGAL AND ECONOMIC ANALYSIS

- 4.1 This section outlines the Authority's preliminary legal and economic analysis of the BBS Restrictions under section 4 of the Act and Article 101 TFEU.
- 4.2 The Authority formed a preliminary view that BBS's agreements with retailers included a number of restrictions that had as their object and/or

⁸ OJ [2010] L 102/1.

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:0411:FIN:EN:PDF>.

¹⁰ <http://www.tca.ie/EN/Enforcing-Competition-Law/Decisions-and-Notices/Declarations.aspx>.

effect the prevention, restriction or distortion of competition in the State in breach of section 4 of the Act and/or Article 101 TFEU.

4.3 In the Authority's view, the potential anti-competitive restrictions imposed by BBS on retailers were the following:

- (i) RPM; and
- (i) the selling restrictions referred to in paragraph 1.10 above.

Each of these restrictions is dealt with in turn below.

4.4 In many cases, the Authority analyses the effect of anti-competitive conduct on the market in question and, for that purpose, will normally define the relevant product and geographic market and assess the market position of the undertakings involved in the anti-competitive conduct. However, RPM and sales restrictions of the kind included in the BBS Restrictions, if proved, constitute 'hardcore' competition law infringements which do not, for example, benefit from either the Vertical Agreements Block Exemption or the Vertical Agreements Declaration – even if the market shares of the undertakings involved in such conduct fall below the thresholds specified in those documents. It was therefore unnecessary for the Authority to define the relevant market in this case: it was sufficient for the Authority to form the view that the evidence it had obtained indicated that the BBS Restrictions involved RPM and other restrictions on retailers' freedom to sell the Products. Nonetheless, the Authority formed the preliminary view in this case that, given the nature of the evidence gathered and the position of the Products in the overall footwear sector, the BBS Restrictions were likely to have a not insignificant effect on competition, regardless of how the markets were defined.

Resale Price Maintenance

4.5 The imposition upon retailers of minimum or fixed resale prices for the supply of a product or the provision of a service constitutes RPM and raises serious concerns under competition law. Where an agreement includes an RPM restriction, the agreement is presumed to constitute a breach of section 4(1) of the Act and/or Article 101(1) TFEU and it is also presumed that the agreement is unlikely to fulfil the conditions of section 4(5) of the Act and/or Article 101(3)¹¹. (Undertakings are, of course, entitled to put forward evidence to show that restrictive agreements and concerted practices may be defensible under section 4(5) and Article 101(3). But RPM has never been found to satisfy the relevant conditions.)

4.6 RPM encompasses not only the setting of a fixed or minimum resale price, but also the imposition of limitations on the grant of discounts, fixing retailers' resale margins and other measures restricting retailers' freedom to determine their resale prices.

4.7 In principle, *recommended* resale prices do not raise competition concerns. Thus, a supplier is generally free to recommend resale prices to retailers. However, "recommended" resale prices will be regarded as fixed or minimum prices, and consequently as anticompetitive, where the supplier ensures, by whatever means, that the retailer does not resell

¹¹ Guidelines on the application of Article 101(3), paragraph 47. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF>

below the recommended price level. Various means are used by suppliers to achieve this outcome. For example, the operation of a price monitoring system by a supplier may provide supporting evidence of the enforcement of its recommended price as a fixed resale price. Similarly, making the grant of rebates or bonuses to retailers dependent on their sales at the recommended resale price is also likely to involve a breach of both EU and Irish competition rules.

- 4.8 As indicated above, the Authority formed the preliminary view that BBS had engaged in illegal RPM by imposing on retailers minimum or fixed resale prices for the Products and/or agreeing with retailers that the Products be sold by retailers at a certain price or not below a certain price. This was done mainly through email correspondence between BBS and the retailers.

Selling restrictions

- 4.9 Provisions in vertical agreements which restrict the territory into which or the customers to whom the buyer (e.g. retailers) may sell the contract goods or services generally involve a serious infringement of section 4(1) of the Act and/or Article 101(1) TFEU. Under the European Commission's Vertical Agreements Block Exemption Regulation and the Authority's Vertical Agreements Declaration, such restrictions are treated as "hardcore" infringements and are excluded from the benefit of the Regulation and Declaration except in certain specific circumstances.
- 4.10 As already explained, the BBS Restrictions included terms and conditions which:
- (a) required retailers not to sell the Products through mail order, internet or other electronic media without prior written consent of BBS;
 - (b) required retailers to resell the Products only to third parties within the island of Ireland and
 - (c) prohibited sales of the Products to other resellers and various specified outlets.
- 4.11 The evidence gathered by the Authority indicated that BBS had enforced these provisions through the monitoring of websites and email correspondence and oral communications with retailers.
- 4.12 The Authority formed the preliminary view that the BBS restrictions had the object of restricting competition and were therefore presumed to amount to a breach of section 4(1) of the Act and/or Article 101(1).

Section 4(5) and Article 101(3)

- 4.13 It is presumed that agreements containing hardcore restrictions of competition such as the BBS restrictions are unlikely to fulfil the conditions of section 4(5) and/or Article 101(3)¹². Undertakings may rebut this presumption by demonstrating that the agreement satisfies all four conditions under section 4(5) and/or Article 101(3). In this case, however, in order to achieve a prompt resolution to the matter, BBS did

¹² Guidelines on Vertical Restraints, paragraph 47.

not provide the Authority with any evidence that may have been available to it to show that the agreement(s) entered into by BBS and the retailers satisfied the four conditions for exemption under section 4(5) and/or Article 101(3).

Conclusion

4.14 In light of the above, the Authority formed the preliminary view that BBS had infringed section 4 of the Act and/or Article 101 TFEU by implementing:

- (i) a policy of resale price maintenance in relation to the sale of the Products ; and,
- (ii) terms and conditions which:
 - required retailers not to sell the Products through mail order, internet or other electronic media without prior written consent of BBS;
 - required retailers to resell the Products only to third parties within the island of Ireland and
 - prohibited sales of the Products to other resellers and various specified outlets.

5. THE DECISION

5.1 The Authority was satisfied that BBS's legally binding commitments included in the Agreement addressed the principal competition concerns identified during the investigation. Following the granting of the section 14B Order by the High Court, the Authority closed its investigation into the BBS Restrictions.

For the Competition Authority



Gerald FitGerald
Member of the Authority
Director of the Monopolies Division

19 April 2013

ANNEX 1 - AGREEMENT

Agreement between the Competition Authority and Double Bay Enterprises Limited

AGREEMENT dated November 14th 2012 between

- (1) **THE COMPETITION AUTHORITY**, a statutory corporation whose head office is at Parnell House, 14 Parnell Square, Dublin 1 (hereinafter the "Authority")

and

- (2) **DOUBLE BAY ENTERPRISES LIMITED**, a limited company with its registered office at 125 Upper Abbey Street, Dublin 1 and which trades as Brazil Body Sportswear, with its head office at Need More Space Building, Old Airport Road, Santry, Dublin 9 (hereinafter "BBS")

WHEREAS:

- (A) BBS is the exclusive distributor on the island of Ireland of footwear products sold under the "FitFlop" brand (hereinafter called the "Products");
- (B) BBS supplies footwear products, including the Products, to retailers located in Ireland and Northern Ireland (the "Retailers");
- (C) The Authority has carried out, pursuant to section 30(1Xb) of the Competition Act 2002, as amended (the "Act"), an investigation into the business activities of BBS with respect to its supply of the Products to Retailers and the agreements between BBS and Retailers for the supply of those Products (the "Investigation");
- (D) As a result of the Investigation, the Authority has formed the preliminary view that BBS has infringed section 4 of the Act and Article 101 of the Treaty on the Functioning of the European Union, through resale price maintenance and the placing of restrictions on the making of passive sales, in particular by (i) imposing on Retailers minimum or fixed resale prices for the Products and/or agreeing with Retailers that the Products be sold by Retailers at a certain price or not below a certain price; (ii) requiring that Retailers not make sales of the Products through mail order, Internet or other electronic media without prior written consent of BBS; and (iii) requiring that Retailers only resell the Products to third parties within their allocated territories;
- (E) Section 148(1) of the Act (as inserted by section 5 of the Competition (Amendment) Act, 2012) applies to an agreement entered into by the Authority and an undertaking following an investigation referred to in section 30(1Xb) of the Act and that requires the undertaking to do or refrain from doing such things as are specified in the agreement in consideration of the Authority agreeing not to bring proceedings under section 14A of the Act in relation to any matter to which an investigation by the Authority related or any findings resulting from that investigation;
- (F) BBS has considered the Authority's preliminary view and taken its own legal advice. Rather than presenting any justifications and defences that may be available to it and in order to achieve a speedy resolution of this matter, BBS offers the undertakings contained herein, which at firm its commitment to compliance with all applicable laws;

- (G) It is the intention of the Authority to apply to the High Court under section 148 of the Act for an order in the terms of this Agreement;
- (H) BBS acknowledges that it is aware that failure to comply with any order so made would constitute contempt of court;
- (I) BBS has agreed to write, in a form agreed with the Authority, to its retailers enclosing amended Retail and Supply Terms and Conditions and notifying each retailer of (i) its ability to price the Products according to its own discretion and (ii) its freedom to supply the Products to any customer, regardless of location, who sends unsolicited orders for the Products to such retailers;
- (J) In consideration of BBS entering into this agreement, the Authority is willing to agree not to bring proceedings against BBS under section 144 of the Act in relation to any matter to which the investigation related or any findings resulting from the investigation.

NOW BBS AND THE AUTHORITY HEREBY AGREE AS FOLLOWS:

1. In order to address the Authority's concerns arising from the investigation, BBS undertakes
 - a. Not to enter into or enforce agreements with Retailers which set minimum or fixed resale prices for the Products;
 - b. Not to engage in practices and/or understandings with Retailers which set minimum or fixed resale prices for the Products save that BBS may recommend a selling price to Retailers;
 - c. Not to restrict the ability of Retailers to determine the selling price of the Products, save that BBS may recommend a selling price;
 - d. Not to restrict its Retailers' freedom to supply the Products to any customer, regardless of location, who sends unsolicited orders for the Products to such Retailers.
2. BBS hereby consents to the Authority making an application to the High Court pursuant to section 148 of the Act for an order in the terms of this Agreement and further consents to the High Court making an order in the terms of Clause 1 of this Agreement. BBS hereby acknowledges that it is aware that failure to comply with any order so made would constitute contempt of court.
3. In consideration of BBS entering into this Agreement and subject to BBS's compliance with its terms, the Authority agrees not to bring proceedings against BBS under either section 8(9) or 14A of the Act in relation to any matter to which the investigation related or any findings resulting from the investigation.

SIGNED on behalf of Double Bay Enterprises Limited, trading as Brazil Body Sportswear, by:



Deldre Carey

SIGNED on behalf of the Competition Authority by:



Gerald FitzGerald, Member of the Competition Authority

ANNEX 2 – HIGH COURT ORDER

THE HIGH COURT

COMPETITION
2012 434 MCA
(2012 No 4 CMP)

Tuesday the 18th day of December 2012
BEFORE MR JUSTICE COOKE

IN THE MATTER OF THE COMPETITION ACTS 2002 TO 2012

BETWEEN

THE COMPETITION AUTHORITY

APPLICANT

AND

DOUBLE BAY ENTERPRISES LIMITED
TRADING AS BRAZIL BODY SPORTSWEAR

RESPONDENT

Upon Motion of Counsel for the Applicant pursuant to Notice of
Motion herein dated the 23rd day of November 2012

Whereupon and on reading the said Notice the Pleadings herein and
the documents adduced in evidence (including copy published notices herein) and
the two Affidavits of Gerald FitzGerald one filed the said 23rd day of November
2012 and filed the 13th day of December 2012 and the documents and exhibits
therein referred to

And the Court being satisfied that these proceedings are competition
proceedings within the meaning of Order 63B of the Rules of the Superior Courts

IT IS ORDERED that these proceedings be entered in the
Competition List for hearing and that all further applications and Motions be heard
in said list

And Counsel for the Applicant informing the Court that the
Applicant has entered into agreement (hereafter called "the Agreement") with the
Respondent pursuant to Section 14B of the Competition Acts 2002 to 2012

And upon reading the Terms of the said Agreement (a copy of the
electronic version received annexed as a Schedule hereto By Order) dated the 14th

THE HIGH COURT

day of November 2012 executed on behalf of the said Applicant and Respondent
(the original Agreement being retained by the Applicant)

And the Respondent by its Counsel confirming to the Court that it

- i. consents to the application being made unto the Court this day
- ii. obtained legal advice prior to the said consent being committed
- iii. understands that an infringement of the of the said Agreement is a contempt of Court

And the Court being satisfied that the

1. requirements of subsections (2) and (3) of Section 14B are complied with in respect of the said Agreement and the publication of this application
2. restriction of subsection (6) does not apply
3. said Agreement is capable of being complied with

IT IS ORDERED pursuant to Section 14B of the Competition Acts 2002 to 2012 that the said copy Agreement be received and filed in Court and made a Rule of Court

And the Court noting the obligations undertaken by the Competition Authority the Applicant herein under the said Agreement

And IT IS ORDERED that the Respondent do abide by the terms of the said Agreement

IT IS FURTHER ORDERED that this Order shall have effect subject to and in accordance with the provisions of subsections (4) and (8) of the said Section 14B

Liberty to either or both parties herein to apply

Noeleen McDonnell
REGISTRAR
Perfected 20th day of December 2012

David McFadden Competition Authority Solicitor
Solicitors for the Plaintiff

Eames
Solicitors for the Defendant

IN WITNESS WHEREOF
I, the REGISTRAR, have signed this Order
FOR REGISTRATION