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**Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally  
Agreed Equitable Principles and Rules for the Control of Restrictive Business  
Practices**

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**Review of application and implementation of the Set**

**Model Law on Competition (2010) – Chapter VII**

## Model Law on Competition (2010) – Chapter VII

### *The relationship between competition authority and regulatory bodies, including sectoral regulators*

#### I. *Advocacy role of competition authorities with regard to regulation and regulatory reform*

An economic and administrative regulation issued by executive authorities, local self-government bodies or bodies enjoying a governmental delegation, especially when such a regulation relates to sectors operated by infrastructure industries, should be subjected to a transparent review process by competition authorities prior to its adoption. Such should in particular be the case if this regulation limits the independence and liberty of action of economic agents and/or if it creates discriminatory or, on the contrary, favourable conditions for the activity of particular firms – public or private – and/or if it results or may result in a restriction of competition and/or infringement of the interests of firms or citizens.

In particular, regulatory barriers to competition incorporated in the economic and administrative regulation, should be assessed by competition authorities from an economic perspective, including for general-interest reasons.

#### II. *Definition of regulation*

The term “regulation” refers to the various instruments by which Governments impose requirements on enterprises and citizens. It thus embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which Governments have delegated regulatory powers.

#### III. *Definition of regulatory barriers to competition*

As differentiated from structural and strategic barriers to entry, regulatory barriers to entry result from acts issued or acts performed by governmental executive authorities, by local self-government bodies, and by nongovernmental or self-regulatory bodies to which Governments have delegated regulatory powers. They include administrative barriers to entry into a market, exclusive rights, certificates, licences and other permits for starting business operations.

#### IV. *Protection of general interest*

Irrespective of their nature and of their relation to the market, some service activities performed by private or government-owned firms can be considered by governments to be of general interest. Accordingly, the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner.

## COMMENTARIES ON CHAPTER I AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

### Introduction

1. A country's economic policy framework that reflects the often conflicting interests of various stakeholders is generally complex and in constant change due to the dynamic nature of economies. Competition law and policy that aim at minimizing economic inefficiencies created by anti-competitive behavior, form an important pillar of the policy framework of a market economy. As such, they are naturally subject to the interdependency and reciprocal influence that exists between the different parts of a country's policy framework and its translation into laws and other forms of regulation. In a democracy where pluralism of interests is the rule, tensions and frictions will necessarily arise between different economic policies and related norms, which will also influence the relationship between the respective enforcement bodies.
2. Against this background, Chapter VII of the UNCTAD Model Law on Competition is dedicated to the relationship between a country's competition authority and regulatory bodies, including sector regulators.

#### *Definition of regulation*

3. The Model Law on Competition has opted for a broad definition of regulation that covers various instruments by which governments impose requirements on enterprises and citizens. It embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which governments have delegated regulatory powers.
4. This broad definition of regulation encompasses all kind of norms expressing the hierarchic relationship between a state and its citizens in the various areas of life and is not limited to economic aspects. That is to say a country's competition law rules and rules applying to specific industry sectors would fall under the Model Law's definition of regulation in the same way as a country's criminal law, family law, or university regulation – to give just one example of a regulation by a self-regulatory body.
5. While all of these types of regulation may have a bearing on competition, regulation applying specifically to economic players is most relevant from the perspective of competition law and policy. While certain regulation in this field may apply across all industry sectors, for example tax law or corporate law provisions, so-called sector or industry specific regulation merits a particular emphasis.

#### *Sector specific regulation*

6. Sector specific regulation applies to particular industry sectors only. Traditionally, infrastructure service industries, such as energy, water, telecommunications and transport markets, have been subject to sector specific regulation. In a large number of countries, sector specific regulation actually preceded the introduction of competition law.
7. There are two main reasons why governments attach great importance to infrastructure service industries both in developed and developing countries and in economies in transition.
8. Firstly, these industries are fundamental to the performance of a country's economy, since they provide inputs for all other sectors of activity. Hence, they are sometimes referred to as

the backbone of the economy. The state of their operations and their level of efficiency not only affect the general productivity and level of competitiveness of a country, but may also have an impact on social order and even political stability if consumers express general dissatisfaction. It follows from the essential nature of these industries that they are often subject to public or universal service obligations, which means that the infrastructure operators are required to provide a particular service even when it is not profitable for them to do so. In this respect, Chapter VII of the Model Law on Competition states under the heading “Protection of general interest”, that “the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner.” For the same reason, i.e. the protection of general interest, in almost all countries, it was traditionally the State that provided directly or through State-owned enterprises for infrastructure services. This situation has, however, changed in a number of countries due to privatization and liberalization reforms in the past three decades.

9. Secondly, infrastructure service industries are often characterized by the presence of natural monopolies, which means that, from an overall economic perspective, it is most efficient that one single operator provides the infrastructure service in question. Virtually all infrastructure service industries are network industries, where major investments would have to be made before a new network operator could enter the market. The costs for duplicating, for example, an electricity or water distribution network or a country’s railway system are generally so high that they constitute insurmountable barriers to entry in the respective distribution markets.<sup>1</sup> As a result, infrastructure service industries are characterized by the preeminence of a small number of incumbent firms. In other words, infrastructure industries generally suffer from a lack of competition/market failure.

10. Sector specific regulation that addresses these two main characteristics of the infrastructure service industry may comprise the following features: (i) “technical regulation” - setting and monitoring standards so as to assure compatibility and to address privacy, safety, and environmental protection concerns, (ii) “access regulation” - ensuring non-discriminatory access to necessary inputs, especially network infrastructures; (iii) “economic regulation” - adopting cost based measures to control monopoly pricing; and (iv) “competition protection” - controlling anti-competitive conduct and mergers.<sup>2</sup>

### **Competitive impact of regulation**

11. Before addressing the relationship between the competition authority and other regulators, including sector regulators, it appears necessary to shed some light on the interface between competition law and policy and regulation. While it is possible that competition law and policy and regulation co-exist without the latter having any bearing on competition, there are also situations where regulation produces effects on competition – in positive as well as in negative ways.

#### *Compensating market failure*

12. As mentioned above, industries that are subject to sector regulation are often characterized by natural monopolies and market failure. Therefore, one of the main objectives

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<sup>1</sup> In this context, it is worth mentioning that the qualification of a certain market as a natural monopoly is not everlasting. Due to innovation and development, duplication of certain networks may become technically and commercially feasible over time and allow for new entry and the establishment of competition.

<sup>2</sup> Organization for Economic Cooperation and Development Policy Roundtable, Relationship between Regulators and Competition Authorities 1998.

of sector regulation consists of mimicking competition in these industry sectors, e.g. through price regulation, which shall prevent the incumbent from charging excessive tariffs for its services, or through access regulation, which ensures that competition by downstream operators is not distorted and that a country's population has access to essential goods and services on a non-discriminatory basis. Sector regulation is typically viewed as aiming to alleviate market imperfections by substituting regulatory measures for the working of market forces. In addition, sector specific regulation may serve a number of additional legitimate objectives such as environmental safety or income redistribution goals, which may seem as lying outside the field of competition policy. As opposed to competition law, which mainly intervenes *ex post* (expect merger control), sector regulation applies *ex ante* and continuous. For example, price increases in regulated industries may be subject to prior approval by the specific regulator.

13. In a large number of countries, providers of infrastructure services which were traditionally under public ownership have been privatized in recent decades in order to remedy perceived inefficiencies of the respective industries and deficits of the public budget. Given the competitive features of infrastructure service industries, namely their restricted level of competition, sector specific regulation addressing these features is indispensable for successful privatization and liberalization processes.<sup>3</sup> In short, replacing a public monopoly by a private monopoly does not generate any efficiency gains, if not accompanied by further measures facilitating new entry and ensuring that the privately owned monopolist does not abuse its market power.

14. In this sense, regulation can play an important role in introducing and stimulating competition in specific industry sectors. In natural monopolies, it may even replace competition.

#### *Regulatory barriers to competition*

15. As indicated by the definition of regulatory barriers to competition provided for by the present chapter of the Model Law on Competition, regulation may, however, also have negative impacts on competition. Measures, which can negatively affect market entry, market exit and market operation, take a wide variety of forms, such as:

- (a) Creating administrative hurdles, such as complex and lengthy authorization procedures, for the establishment of new market players;
- (b) Requiring compliance with uncommon norms and standards amounting to barriers to market entry;
- (c) Preventing foreign firms from competing in national markets;
- (d) Privileging certain market players, for example national champions, and thereby awarding them a competitive advantage; and
- (e) Arbitrary public procurement and state aid decisions which distort competition.

16. Recognizing the potentially detrimental impact of regulation on competition, some jurisdictions have adopted expressive provisions dealing with this issue.

#### **Alternative approaches in existing legislation – Addressing regulatory barriers on competition**

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<sup>3</sup> In this context, one should remember that a number of privatization and liberalization reforms in developing countries did not result in the expected outcome, because competition issues were insufficiently addressed during the reform process.

Country	
China	<p>Chapter V of the Anti-monopoly Law of the People's Republic of China describes administrative barriers.</p> <p>Article 33 states that no administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative power to block the interregional free commodity trading by taking any of the following measures: (a) setting discriminatory charges, implementing discriminatory charge rates, or fixing discriminatory prices for non-local commodities; (b) imposing technical requirements or inspection standards on non-local commodities that are different from those on their local counterparts, or taking discriminatory technical measures, such as repeated inspections or repeated certifications on non-local commodities, so as to restrict the entry of non-local commodities into the local market; (c) adopting the administrative licensing aimed at non-local commodities, so as to restrict the entry of non-local commodities into the local market; (d) setting up barriers or adopting any other means to block either the entry of non-local commodities or the exit of local commodities; or (e) other activities that may block the interregional free commodity trading.</p> <p>Article 35 forbids administrative organs – or organizations empowered by law or administrative regulation to administer public affairs – to abuse their administrative power to reject or restrict either investment in their jurisdictions or to establish local branches by non-local business operators by imposing unequal treatments on them that are different from those on the local business operators.</p> <p>Article 36 forbids administrative organs – or organizations empowered by law or administrative regulation to administer public affairs – to abuse their administrative power to compel business operators to engage in monopolistic activities that are prohibited by the Anti-monopoly Law of the People's Republic of China.</p>
Germany	<p>The German Act against Restraints of Competition addresses the issue that specific competition regulations by trade and industry association may contain restrictive provisions.</p> <p>According to Section 24 (2), competition rules of trade, industry associations and professional organizations are defined as provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct which violates the principles of fair competition or effective competition based on performance, and of encouraging conduct in competition which is in line with these principles.</p> <p>The respective organizations and associations may apply to the Federal Cartel Office for recognition of competition rules, which has to check whether a notified competition rule violates any provision of German or European competition law. If this is</p>

	not the case, the Federal Cartel office will issue a recognition, which implies that it will not challenge the notified regulation in the future.
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### The competition authority's role with respect to regulation

17. Taking into account the possible bearing of regulation on competition, Chapter VII of the Model Law suggests that the competition authority is awarded an advocacy role with regard to regulation and regulatory reform.

#### *Advocacy*

18. With respect to the design of sector regulation as part of a privatization or liberalization process, the advice of a competition authority is particularly valuable in ensuring that the newly created regulatory regime will indeed produce the expected outcomes in terms of enhanced efficiency. The expertise of a competition authority may, for example, be helpful to identify measures to facilitate new entry.

19. As to other forms of regulation, it is suggested that the competition authority is actively involved in the legislative process. This can, for instance, be realized by allowing the competition authority to comment on draft regulation or to submit an opinion on proposed regulatory reforms and projects.

20. Taking into account a competition authority's specific expertise, a number of competition law regimes expressly attribute to the competition authority an advocacy role on the legislative level.

#### Alternative approaches in existing legislation – Advocacy role of the competition authority

Country	
Indonesia	According to Article 35 e. of Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, the Indonesian Competition Authority KPPU shall "provide advice and opinion concerning Government policies related to monopolist practices and or unfair business competition".
Ireland	According to Article 30(1) of the Competition Act 2002, the Irish Competition Act has the following advocacy functions: [...] (c) to advise the Government, Ministers of the Government and Ministers of State concerning the implications for competition in markets for goods and services of proposals for legislation (including any instruments to be made under any enactment); (d) to publish notices containing practical guidance as to how the provisions of this Act may be complied with; (e) to advise public authorities generally on issues concerning competition which may arise in the performance of their functions; (f) to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy; (g) to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition.

	Furthermore, the Minister may request the Authority to carry out a study or analysis of any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition and submit a report to the Minister in relation to the study or analysis; the Authority shall comply with such a request within such period as the Minister may specify in the request.
Chile	According to Article 18 (4) of the DL N° 211 of 1973, as amended by Law N° 20.361 of July 13 2009, the Competition Tribunal is empowered to propose to the President of the Republic, through the relevant State Minister, the modification or derogation of any legal and regulatory precept that the Tribunal deems contrary to free competition, as well as the dictation of legal and regulatory precepts necessary for promoting competition or regulating the exercise of certain economic activities that are provided in non-competitive conditions.

### *Competition law enforcement in regulated industry*

21. Although not mentioned by the present chapter of the Model Law, it is worth noting that a competition authority may assume further functions with respect to regulated industries, namely enforcing general competition law provisions in regulated industries. The intensity of competition law enforcement in regulated industries mainly depends on two factors: firstly, the design of the interface between a country's competition law and its sector specific regulations; and secondly, on the relationship between the respective enforcement bodies.

### *Interface between competition law and sector regulation*

22. In the event that a country opted for a specific sector regulation in addition to a general competition law regime, the question arises as to which law should govern competition issues in the regulated industries. There is no single answer to this question. A wide range of factors such as the social and economic context and the legal system may influence the design of the interface between the two legal regimes and the division of labour between the respective enforcement bodies. The characteristics of the regulated industry are also an important factor that has a bearing on the choice of regulatory framework, such that more than one approach might be employed within a country.

23. In fact, different countries have chosen different approaches to ensure coordination and policy coherence between sector regulators and the competition authority. These approaches can be classified into five types:<sup>4</sup>

- I. To combine technical and economic regulation in the sector specific regulation and leave traditional competition law issue, such as the prohibition of anti-competitive conduct and merger control, to the competition law;
- II. To combine technical and economic regulation in the sector specific regulation and include as well some or all traditional competition law aspects;
- III. To combine technical and economic regulation in the sector specific regulation and include as well some or all traditional competition law aspects, while

<sup>4</sup> See UNCTAD (2004). Best Practices for defining respective competences and settling of cases, which involve joint action of competition authorities and regulatory bodies. TD/B/COM.2/CLP/44. Geneva. 19 August 2004.



- ensuring that the sector regulator performs its functions in coordination with the competition authority;
- IV. To organize technical regulation as a stand-alone function for the sector regulator and include economic regulation into the general competition law;
- V. Rely solely on competition law enforced by the competition authority.

#### *Institutional set-up*

24. Whereas some countries, e.g. the Netherlands and Peru, have opted for an integrated agency that is empowered to enforce both sector regulation and competition law, most countries established competition authorities and sector regulators as separate enforcement entities. Often, sector regulators actually preceded the establishment of competition agencies. In the second case, jurisdictional conflicts often belong to the enforcement reality, if respective competences of the competition authority and the sector regulators are not clearly defined by law. In order to prevent/remedy such jurisdictional frictions, a memorandum of understanding between the separate enforcement entities may offer a solution.

#### **Alternative approaches in existing legislation – Interface between competition authority and sector regulators**

Country	
<b>Integrated agency model</b>	
The Netherlands <sup>5</sup>	<p>The Netherlands Competition Authority (NMa) is attributed general competition law enforcement as well as industry-specific regulation in the areas of energy and transport. Its enforcement powers are laid down in the Competition Act, the Electricity Act 1998, the Gas Act, the Passenger Transport Act 2000, the Railway Act and the Aviation Act.</p> <p>According to the organizational structure of the NMa, which is referred to as a “chamber model”, industry-specific regulation and monitoring tasks lie with the Office of Energy and Transport Regulation, a particular chamber within the NMa.</p> <p>Other sector specific regulation is administered by separate enforcement bodies, such as the Independent Post and Telecommunications Authority, with which the NMa cooperates and coordinates.</p>
<b>Separate enforcement entities with expressly attributed jurisdictions</b>	
Germany	<p>The German Act against Restraints of Competition contains specific rules for certain industries (agriculture, energy and press), which complement the general competition rules in these areas; see chapter 5 of the Act: “Special provisions for certain sectors of the economy”. Furthermore, the electricity, gas, telecommunications, postal and railway infrastructure markets are specifically regulated. The general competition rules apply to the regulated industries as long as the sector regulations do not provide for an exhaustive regulation of the specific matter, see e.g. section 2(3) TKG and section 111(3) EnWG. The jurisdiction of the Federal Cartel Office is not altered by the sector specific regulation, which provides for</p>

<sup>5</sup> Source: <http://www.nmanet.nl/engels/home/index.asp>.

	<p>specific rules on the cooperation between the Federal Network Agency, the sector regulator and the Federal Cartel Office.</p> <p>The respective provision of the Telecommunications Act (section 2(3) TKG) reads as follows:</p> <p>“The provisions of the Act against Restraints of Competition remain applicable as long as this law does not expressly provide for an exhaustive regulation. The tasks and competences of the cartel authorities remain unaffected.”</p>
United Kingdom	<p>The Office of Fair Trading and sector regulators have concurrent jurisdiction. The Competition Act 1998 (Concurrency) Regulations 2004 spell out the procedure by which it is decided which authority is better/best placed to deal with a case, and settlement procedures in the event of a dispute. The relevant provisions read as follows:</p> <p><i>“Determination of the exercise of prescribing functions</i></p> <p><i>“4. - (1) If a competent person proposes to exercise any of the prescribed functions in relation to a case and he considers that another competent person has or may have concurrent jurisdiction to exercise Part 1 functions in relation to that case, he shall inform that other competent person of his intention to exercise prescribed functions in relation to that case.</i></p> <p><i>“ (2) Where a competent person has informed another competent person of his intention to exercise prescribed functions in accordance with paragraph (1) in relation to a case all such competent persons (together “the relevant competent persons”) shall agree who shall exercise prescribed functions in relation to that case.</i></p> <p><i>“(3) When agreement has been reached in accordance with paragraph (2), the case shall be transferred to the competent person who is to exercise prescribed functions in relation to that case and the OFT shall as soon as practicable inform in writing the relevant competent persons which competent person is to exercise prescribed functions in relation to the case.</i></p> <p><i>“Dispute</i></p> <p><i>“5. - (1) If the relevant competent persons are not able to reach agreement in accordance with regulation 4(2) within a reasonable time, the OFT shall inform the Secretary of State in writing.</i></p> <p><i>“(2) Any relevant competent person may make representations in writing to the Secretary of State no later than the date upon which the OFT informs the Secretary of State in accordance with paragraph (1) of the failure to reach agreement.</i></p> <p><i>“(3) The Secretary of State shall within 8 working days of receipt of a communication made in accordance with paragraph (1) -</i></p>

	<p><i>“(a) determine which competent person shall exercise prescribed functions in relation to the case and direct that the case shall be transferred to that competent person; and</i></p> <p><i>“(b) inform in writing all relevant competent persons which competent person is to exercise jurisdiction in relation to the case and the date of transfer of the case.</i></p> <p><i>“(4) In making a determination in accordance with paragraph (3)(a) the Secretary of State shall take into consideration any representations made in accordance with paragraph (2).”</i></p>
<b>Separate enforcement entities without expressive repartition of competences</b>	
Mauritius	<p>Mauritian competition law requires that the competition commission and specific sector regulators enter into a memorandum of understanding governing their respective competences.</p> <p>The relevant provision of the Mauritian Competition Act No. 25 of 2007 reads as follows:</p> <p><i>“66. Memorandum of Understanding between Commission and regulators</i></p> <p><i>“The Commission and regulators shall enter into a memorandum of understanding governing the effective exercise of their respective responsibilities and establishing mechanisms for practical cooperation in the exercise of those responsibilities, including the use of the sector-specific expertise of the regulators in respect of investigations under this Act.”</i></p>
South Africa	<p>Sector regulators have concurrent jurisdiction. However, the Competition Act neither explicitly defers to other regulation nor explicitly claims precedence over it. The competition authority is required to negotiate agreements with sector regulators to coordinate the exercise of jurisdiction over competition matters in regulated sectors (in those sectors where the regulators have an explicit mandate over competition matters in their sector – i.e. this does not imply agreements with every sector regulator). In 2004, the competition authority had agreements with regulators in the broadcasting and electricity sectors, and under these agreements the Competition Authority is the lead investigator in concurrent jurisdiction matters.</p> <p>The relevant provisions of the South African Competition Act read as follows:</p> <p><i>“3. Application of Act</i></p> <p><i>“This Act applies to all economic activity within, or having an effect within, the Republic, except –</i></p> <p><i>[...]</i></p> <p><i>“(1A) (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect</i></p>

	<p><i>of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.</i></p> <p><i>“The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).</i></p> <p><i>“21. Functions of Competition Commission</i>  <i>“The Competition Commission is responsible to –</i>  <i>[...]</i>  <i>“(h) negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;</i>  <i>(i) participate in the proceedings of any regulatory authority;</i>  <i>(j) advise, and receive advice from, any regulatory authority;</i>  <i>[...]</i></p> <p><i>“82. Relationships with other agencies</i>  <i>“(1). A regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector –</i>  <i>“(a) must negotiate agreements with the Competition Commission, as anticipated in section 21(1)(h); and</i>  <i>“(b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement.</i>  <i>“(2) Subsection (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission.</i>  <i>“(3) In addition to the matters contemplated in section 21(1)(h), an agreement in terms of subsection (1) must -</i>  <i>“(a) identify and establish procedures for the management of areas of concurrent jurisdiction;</i>  <i>“(b) promote cooperation between the regulatory authority and the Competition Commission;</i>  <i>“(c) provide for the exchange of information and the protection of confidential information; and</i>  <i>“(d) be published in the Gazette.</i>  <i>“(4) The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of this Act, to exchange information with a similar foreign agency.”</i></p>
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