



**Conferencia de las
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MANUAL DE LEGISLACIÓN SOBRE LA COMPETENCIA

Nota de la secretaría de la UNCTAD

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INTRODUCCIÓN

En el apartado c) del párrafo 6 de la sección F del Conjunto de Principios y Normas equitativos convenidos multilateralmente para el control de las prácticas comerciales restrictivas se prevé la compilación de un manual sobre legislación en materia de prácticas comerciales restrictivas.

La Cuarta Conferencia encargada de examinar todos los aspectos del Conjunto de Principios y Normas, celebrada en Ginebra del 25 al 29 de septiembre de 2000, así como el Grupo Intergubernamental de Expertos en Derecho y Política de la Competencia, en su cuarto período de sesiones, celebrado en Ginebra del 3 al 5 de julio de 2002, pidieron a la secretaría de la UNCTAD que siguiera publicando nuevos números del Manual sobre legislación de la competencia, inclusive el texto de los instrumentos nacionales e internacionales, que deberían complementarse con un resumen de las principales disposiciones de estos instrumentos sobre la base de las aportaciones que hicieran los Estados miembros (véase la resolución aprobada por la Cuarta Conferencia (TD/RBP/CONF.5/16) y las conclusiones convenidas del Grupo Intergubernamental de Expertos en su tercer período de sesiones (TD/B/COM.2/CLP/L.8).)

En consecuencia, la secretaría ha preparado la presente nota, que contiene comentarios sobre los textos de la legislación sobre la competencia de Lituania (en nueva ley), Malawi y Zimbabwe.

Hasta la fecha, la secretaría de la UNCTAD ha reproducido en sus manuales la legislación sobre la competencia de 47 países, a saber: Alemania, Argelia, Bélgica, Brasil, Bulgaria, Canadá, Chile, Colombia, Côte d'Ivoire, Croacia, Dinamarca, Eslovaquia, España, Estados Unidos de América, Finlandia, Francia, Georgia, Hungría, Indonesia, Italia, Jamaica, Japón, Kenya, Lituania, Malawi, Marruecos, México, Noruega, Nueva Zelandia, Pakistán, Polonia, Portugal, Reino Unido de Gran Bretaña e Irlanda del Norte, República Checa, República de Corea, Rumania, Senegal, Sri Lanka, Sudáfrica, Suecia, Tailandia, Túnez, Turquía, Ucrania, Venezuela, Zambia y Zimbabwe.

En su nota de 8 de marzo de 1996, el Secretario General de la UNCTAD pidió a los Estados que todavía no lo hubieran hecho, o que después de su última comunicación hubieran promulgado nuevas leyes o modificado la legislación vigente sobre la competencia, que proporcionaran a la secretaría la legislación, las decisiones judiciales y las observaciones pertinentes ajustándose al esquema indicado (véase la página 4). (Sin embargo, en el caso de los Estados que hayan promulgado legislación sobre la competencia por primera vez, las observaciones no tienen necesariamente que ajustarse al esquema.) Para facilitar la reproducción de los textos de la legislación en más de uno de los idiomas oficiales de las Naciones Unidas, se invitó a los Estados a que, de ser posible, proporcionaran los textos de su legislación en uno o varios de los idiomas oficiales de las Naciones Unidas.

La secretaría de la UNCTAD da las gracias a los Estados que han aportado el material solicitado para la compilación del Manual y pide nuevamente a los Estados que aún no lo hayan hecho que respondan a la petición del Secretario General de la UNCTAD mencionada más arriba.

ESQUEMA PARA LA INFORMACIÓN DESTINADA AL MANUAL

- A. Descripción de los motivos de la promulgación de la legislación.
- B. Descripción de los objetivos de la legislación y de la medida en que han evolucionado desde que se promulgó la legislación inicial.
- C. Descripción de las prácticas, actos o comportamientos sujetos a control, indicando en relación con cada uno de ellos:
 - a) El tipo de control -por ejemplo: prohibición absoluta, prohibición en principio o examen caso por caso; y
 - b) El grado de control a que están sometidas las prácticas, actos o comportamientos especificados en los párrafos 3 y 4 de la sección D del Conjunto de Principios y Normas, así como cualesquiera otras prácticas, actos o comportamientos que puedan ser objeto de control, en particular los relacionados expresamente con la defensa de los consumidores, como, por ejemplo, la publicidad engañosa.
- D. Descripción del ámbito de aplicación de la legislación, indicando:
 - a) Si es aplicable a todas las transacciones de bienes y servicios y, si no lo es, qué transacciones están excluidas;
 - b) Si se aplica a todas las prácticas, actos o comportamientos que producen efectos en el país en cuestión, con independencia de dónde ocurran; y
 - c) Si depende de la existencia de un acuerdo o de que éste se ejecute.
- E. Descripción del mecanismo encargado de la aplicación de la legislación (administrativo y/o judicial), con indicación de cualesquiera acuerdos de notificación e inscripción, así como las facultades principales de ese órgano u órganos.
- F. Descripción de cualquier legislación paralela o suplementaria, inclusive tratados o acuerdos con otros países en los que se establezca algún tipo de cooperación o procedimiento para solucionar controversias en la esfera de las prácticas comerciales restrictivas.
- G. Descripción de las principales decisiones tomadas por órganos administrativos y/o judiciales, y las cuestiones concretas a que se refieren esas decisiones.
- H. Bibliografía resumida en la que se citen fuentes de la legislación y las principales decisiones, así como publicaciones oficiales y textos o extractos de la legislación en la materia.

LEGISLACIÓN SOBRE LA COMPETENCIA

I. LITUANIA

Comentario del Gobierno de Lituania a la Ley sobre la competencia* Nº VIII-1099

A. Descripción de los motivos de la promulgación de la legislación

La Ley sobre la competencia Nº VIII-1099 fue promulgada por el Parlamento (Seimas) de la República de Lituania el 23 de marzo de 1999 y entró en vigor el 2 de abril de 1999. La ley reemplazó la anterior Ley sobre la competencia Nº I-2878, promulgada en 1992.

Tras casi siete años de experiencia en la aplicación de la Ley sobre la competencia Nº I-2878, el momento parece apropiado para examinar y mejorar este instrumento, especialmente a la vista de las medidas preparatorias para la adhesión a la Unión Europea, así como la firma y promulgación del Acuerdo Europeo propiamente dicho y la armonización de la legislación lituana con la de la Comunidad Europea. Estos fueron los principales factores que dieron lugar a la elaboración de la Ley sobre la competencia Nº VIII-1099 (llamada en adelante la "Ley sobre la competencia" o la "ley").

Los principales motivos para la promulgación de la nueva ley están relacionados con la aproximación de la legislación y la necesidad de crear un sistema de normas procesales. La ley introdujo importantes cambios, tanto de fondo como de procedimiento, inclusive cambios institucionales.

B. Descripción de los objetivos de la legislación y de la medida en que han evolucionado desde que se promulgó la legislación inicial

Los principios básicos de la legislación sobre la competencia que se enuncian en la Constitución de la República de Lituania (aprobada por sus ciudadanos en el referéndum de 25 de octubre de 1992). El artículo 46 de la Constitución prohíbe la monopolización de la producción y el mercado, y protege la competencia leal.

En la actualidad, la Ley sobre la competencia es el principal instrumento jurídico que rige las prácticas que limitan la libre competencia en el mercado. Su principal objetivo es "proteger la competencia leal en la República de Lituania". La ley regula "las actividades de las autoridades públicas y de las administraciones locales, así como las de las empresas, que limiten o puedan limitar la competencia, y también las actividades de competencias desleal" y establece "los derechos, deberes y obligaciones de dichas instituciones y empresas y el fundamento jurídico del control de la limitación de la competencia y de la competencia desleal en la República de Lituania".

* El texto de esta legislación refleja la versión facilitada a la UNCTAD por el Gobierno de Lituania.

La ley también tiene por finalidad armonizar la legislación lituana y de la Comunidad Europea que regula la competencia.

La ley prevé el establecimiento del Consejo de Defensa de la Competencia de la República de Lituania (llamado en adelante el "Consejo de Defensa de la Competencia" o "el Consejo"), "un organismo público de la República de Lituania encargado de aplicar la política estatal en materia de competencia y de supervisar el cumplimiento de la ley", y atribuye al Consejo un alto grado de independencia.

La Ley sobre la competencia ha fomentado el mejoramiento y desarrollo de la legislación sobre la competencia en Lituania al permitir la promulgación de legislación secundaria para facilitar la aplicación eficaz de las disposiciones de la Ley.

C. Descripción de las prácticas, actos o comportamientos sujetos a control, indicando en relación con cada uno de ellos

- a) El tipo de control, como, por ejemplo: prohibición absoluta, prohibición en principio o examen caso por caso;
- b) El grado de control a que están sometidas las prácticas, actos o comportamientos especificados en los párrafos 3 y 4 de la sección D del Conjunto de principios y normas, así como cualesquiera otras prácticas, actos o comportamientos que puedan ser objeto de control, en particular los relacionados expresamente con la defensa de los consumidores, como, por ejemplo, la publicidad engañosa.

Resumen de las principales disposiciones legales

La Ley sobre la competencia está estructurada de forma que permite prevenir y enjuiciar tres tipos principales de actividades anticompetitivas. En primer lugar, el artículo 5 prohíbe los acuerdos "que tienen por objeto limitar la competencia o que pueden limitarla". En segundo lugar, el artículo 9 prohíbe el abuso de una posición dominante en el mercado. En tercer lugar, los artículos 10 a 15 prevén la notificación previa a una fusión y el control de las fusiones (control de las concentraciones). La ley no solamente abarca las tres esferas tradicionales de las medidas antitrust, sino que también contiene disposiciones acerca de la competencia desleal y las actividades anticompetitivas por parte de las autoridades públicas y las administraciones locales.

Acuerdos prohibidos

Todos los acuerdos concluidos en cualquier forma (sea por escrito sea orales) entre empresas, así como las prácticas concertadas, inclusive las decisiones adoptadas por combinaciones de empresas (asociaciones, fusiones, etc.), están prohibidos si limitan o pueden limitar la competencia.

Los acuerdos prohibidos son nulos a partir del momento de su conclusión.

Están prohibidos tanto los acuerdos horizontales como los verticales.

El artículo 5 de la Ley sobre la competencia abarca los principales tipos de acuerdos prohibidos. La lista no exhaustiva de acuerdos prohibidos incluye aquellos que prevén:

- La fijación de precios o de otras condiciones de venta;
- La distribución de los mercados;
- La restricción de la producción, el desarrollo técnico o las inversiones;
- La aplicación de condiciones discriminatorias a transacciones de naturaleza equivalente;
- La sujeción de los contratos a obligaciones suplementarias no conexas, y
- Los acuerdos entre competidores para no presentar ofertas en licitaciones, o la coordinación de ofertas entre competidores.

Con arreglo al artículo 5 se considera que los cuatro primeros tipos de acuerdos entre competidores limitan, de por sí, la competencia. Los acuerdos prohibidos entre competidores (cárteles) se consideran una grave infracción de la Ley sobre la competencia. Sin embargo, el artículo 43 prevé una exención de las multas aplicables en el caso de una empresa que sea la primera de las partes en el acuerdo prohibido que presente toda la información disponible sobre el acuerdo de que se trate y cumpla otras condiciones establecidas por la ley.

Se pueden conceder exenciones en bloque o individuales en relación con los acuerdos enunciados en el artículo 5 de la ley. Las empresas que deseen obtener una exención individual, o una aprobación para asegurarse de que el acuerdo previsto cumple las condiciones de la exención en bloque deben solicitarlo en forma apropiada al Consejo de Defensa de la Competencia.

No se considera que los acuerdos concluidos entre empresas con una reducida cuota del mercado de que se trate, que, a causa de su escasa influencia no pueden limitar sustancialmente la competencia, violan las disposiciones de la ley. Los requisitos y condiciones relacionados con esos acuerdos se describen en una resolución separada del Consejo de Defensa de la Competencia.

Abuso de una posición dominante en el mercado

La ley define la "posición dominante" como una que entraña la capacidad de ejercer unilateralmente "una influencia decisiva" en un mercado. El hecho de tener una posición dominante no está prohibido de por sí. Con arreglo a la Ley, una cuota del 40% del mercado denota una presunción de dominio. Además, la Ley establece una presunción de dominio conjunto cuando las tres empresas más grandes tienen en un mercado una cuota conjunta del 70%.

El artículo 9 de la ley prohíbe el abuso de una posición dominante y da los siguientes ejemplos de tal abuso:

- La imposición directa o indirecta de precios inequitativos u otras condiciones inequitativas de compraventa;
- Las restricciones del comercio, la producción o el desarrollo técnico en perjuicio de los consumidores;
- La aplicación de condiciones discriminatorias a transacciones de carácter equivalente con determinadas empresas, colocándolas así en una situación competitiva desventajosa; o
- La supeditación de la conclusión de un contrato a la aceptación por la otra parte de obligaciones suplementarias que, por su carácter comercial o por los usos, no guardan relación con el objeto de tal contrato.

Los principios fundamentales para determinar la existencia de una posición dominante se describen en el documento titulado "Explicaciones del Consejo de Defensa de la Competencia acerca de la determinación de una posición dominante".

Control de las concentraciones

En virtud del artículo 10, la concentración o fusión que se proyecte llevar a cabo debe notificarse al Consejo de Defensa de la Competencia y se requiere la autorización de éste cuando:

- Los ingresos agregados conjuntos de las empresas interesadas exceden de 30 millones de litas (LT) (7,5 millones de dólares de los EE.UU., aproximadamente) en el ejercicio económico que preceda a la concentración; y
- Los ingresos agregados de cada una de, como mínimo, dos empresas involucradas exceden de 5 millones de LT (1.250.000 dólares de los EE.UU. aproximadamente) en el ejercicio económico que preceda a la concentración.

El concepto de concentración, tal como se define en la ley, abarca las fusiones y la adquisición de control que se haga de cualquier modo, inclusive el control por personas naturales.

La norma sustantiva que aplicará el Consejo de Defensa de la Competencia es si la concentración crea o refuerza una posición dominante como consecuencia de la cual se obstaculiza la competencia efectiva en grado considerable.

Para establecer la obligación de notificación, el Consejo tiene derecho a prever que las empresas que hayan llevado a cabo una concentración sin habérselo notificado adoptarán medidas para restablecer la situación anterior o eliminar las consecuencias de tal concentración, así como para imponer a las empresas las multas previstas en la ley.

La ley establece que el Consejo de Defensa de la Competencia deberá adoptar, dentro del plazo de un mes después de la notificación, una decisión final acerca de la fusión o decidir extender el examen. En este último caso, la decisión final deberá adoptarse dentro del plazo de cuatro meses a partir de la notificación.

Las normas de procedimiento relativas a la presentación y examen de las notificaciones de concentración o fusión, así como el cálculo de los ingresos agregados, las adopta el Consejo mediante una resolución.

Si un participante en una concentración o fusión es una empresa extranjera, sus ingresos agregados se calculan como la suma total de los obtenidos en los mercados de productos de la República de Lituania.

Competencia desleal

La ley prohíbe a las empresas realizar actividades que comporten una competencia desleal que afecte a las prácticas comerciales equitativas, y las buenas costumbres y tradiciones, si tales actividades limitan las oportunidades competitivas de otra empresa. Los ejemplos de tales actividades enumerados en el artículo 16 incluyen los siguientes:

- Uso no autorizado de una marca idéntica o análoga al nombre, una marca comercial registrada o una marca comercial reconocida no registrada de otra empresa;
- Actos para inducir a error a empresas proporcionándoles información errónea o infundada acerca de las propias mercancías o las mercancías de otra empresa;
- La utilización, transferencia o revelación de información que sea un secreto comercial de otra empresa, sin el consentimiento de ésta, y
- La simulación del producto de otra empresa, o de su embalaje.

En caso de competencia desleal, la empresa cuyos intereses jurídicos hayan sido lesionados podrá recurrir a un tribunal.

El Consejo de Defensa de la Competencia solamente investigará las actividades y medidas de competencia desleal en los casos en que se vean afectados los intereses de un número significativo de empresas o de consumidores.

Al investigar los casos de competencia desleal ligados a publicidad engañosa, el Consejo se ajustará también a las disposiciones de la Ley de publicidad. Esta ley y la Ley sobre la competencia establecen los derechos y obligaciones del Consejo en lo tocante al control de la publicidad engañosa y la publicidad comparativa. La Ley sobre la competencia prevé el procedimiento de investigación y examen de toda violación que se produzca.

Actividades anticompetitivas de las autoridades de la administración pública y las administraciones locales

Con arreglo al artículo 4, las autoridades de la administración pública y las administraciones locales tienen que garantizar una competencia libre y equitativa al reglamentar la actividad económica. No pueden discriminar ni en favor ni en contra de determinadas empresas, salvo cuando tal discriminación sea necesaria para desempeñar sus funciones de conformidad con la legislación de Lituania. La ley establece que el Consejo de Defensa de la Competencia puede pedir a los órganos gubernamentales que enmienden o anulen toda disposición que se considere infrinja la ley y, si no se adoptan tales medidas, puede recurrir a los tribunales, salvo en el caso de las disposiciones normativas del Gobierno de Lituania.

D. Descripción del ámbito de aplicación de la legislación, indicando

- a) Si es aplicable a todas las transacciones de bienes y servicios y, si no lo es, qué transacciones están excluidas;
- b) Si se aplica a todas las prácticas, actos o comportamientos que tienen efectos en el país, con independencia de dónde se realicen;
- c) Si depende de la existencia de un acuerdo o de que éste se ejecute.

La Ley sobre la competencia es aplicable a todas las transacciones de bienes. Con arreglo a la Ley, por "bienes" se entiende cualquier elemento que sea objeto de compra o venta, inclusive todo tipo de servicios y obras, derechos o valores.

La ley prohíbe a las empresas el desarrollo de actividades que restrinjan o puedan restringir la competencia, independientemente del carácter de tales actividades, salvo en los casos en que la propia ley o la legislación que rige las distintas esferas de actividad económica prevea exenciones y permita la realización de ciertas actividades prohibidas por la ley.

La ley establece el principio de extraterritorialidad, en virtud del cual sus disposiciones podrán aplicarse no sólo a las empresas lituanas, sino también a las empresas extranjeras registradas fuera del territorio de la República de Lituania, a condición de que sus actividades restrinjan la competencia en el mercado interno del país.

La ley no es aplicable a las actividades de empresas que limiten la competencia en mercados extranjeros, salvo disposición en contrario de los acuerdos internacionales en los que sea Parte la República de Lituania.

Cuando los acuerdos internacionales ratificados por el Parlamento de Lituania establezcan requisitos diferentes para proteger la libre competencia, se aplicarán las disposiciones de esos instrumentos internacionales.

E. Descripción del órgano o los órganos (administrativos y/o judiciales) encargados de la aplicación de la legislación, con indicación de las posibles disposiciones sobre notificación e inscripción, y facultades principales de ese órgano u órganos

La aplicación de la Ley sobre la competencia incumbe al Consejo de Defensa de la Competencia ("el Consejo"), que tiene carácter independiente y es una institución pública financiada con cargo al presupuesto. El Presidente y los cuatro miembros del Consejo son nombrados por el Presidente de la República, a propuesta del Primer Ministro. (El actual Consejo fue nombrado por el Presidente el 18 de octubre de 1999.) La ley también prevé el establecimiento de la estructura administrativa del Consejo.

Las principales funciones del Consejo se enuncian en el artículo 19. Se trata de las siguientes:

- Verificar el cumplimiento por las empresas, las autoridades de la administración pública y las administraciones locales de las disposiciones de la Ley sobre la competencia;
- Establecer los criterios y procedimientos para la definición de "mercado pertinente" y "posición dominante";
- Definir el "mercado pertinente" y calcular las cuotas de mercado;
- Emitir instrucciones obligatorias para la presentación de documentación;
- Recurrir a los tribunales para defender los intereses del Estado y de las personas protegidos por la Ley sobre la competencia;
- Imponer sanciones;
- Aprobar actos jurídicos y prestar asesoramiento al respecto, y
- Ejercer otras facultades previstas por la ley.

Los miembros de la administración del Consejo de Defensa de la Competencia investigan toda posible infracción de la ley y están facultados para adquirir pruebas y formular recomendaciones al Consejo. La ley prevé el otorgamiento de amplias facultades para obtener información de las personas o entidades objeto de una investigación. Esas facultades incluyen lo siguiente: entrar en sus locales y registrarlos, con o sin aviso previo, examinar y copiar los documentos que se encuentren en ellos y retirar documentos, así como recibir explicaciones orales y por escrito de dichas personas o entidades, inclusive exigiéndoles que comparezcan en las oficinas del Consejo. Sin embargo, para entrar en los citados locales, efectuar un registro de ellos y examinar y retirar documentos, deberá obtenerse una orden judicial al respecto. Además, la ley prevé que, durante una investigación, el Consejo podrá obtener información y documentos de otras entidades económicas (no objeto de investigación) y de las autoridades de la administración pública y las administraciones locales. Con vistas al mantenimiento del orden

público, los funcionarios del Consejo de Defensa de la Competencia que estén realizando una investigación pueden recabar asistencia de la policía.

La ley indica explícitamente los procedimientos administrativos que habrá de seguir el Consejo para el enjuiciamiento de un caso. El Consejo puede decidir iniciar una investigación tras la presentación de una denuncia o por propia iniciativa. En el caso de empresas cuyos intereses hayan sido lesionados por un comportamiento presuntamente anticompetitivo, los órganos de las autoridades públicas y las administraciones locales, y las asociaciones y federaciones de empresas y consumidores pueden presentar una solicitud formal para que se realice una investigación. El Consejo está obligado a decidir en el plazo de 14 días a partir de la fecha de presentación de una solicitud si la atenderá. Si se inicia una investigación, debe concluirse dentro del plazo de tres meses, salvo que el Consejo puede prorrogar cada vez el período hasta por otros dos meses.

En los casos que se indican a continuación, el Consejo deberá iniciar un procedimiento al recibir solicitud correspondiente:

- Una exención individual en relación con acuerdos prohibidos;
- Una "tramitación negativa" con arreglo al artículo 7, y
- Una autorización de concentraciones o fusiones.

En otros casos, cuando se denuncien presuntas infracciones de la ley, la decisión de iniciar o no un procedimiento queda librada a la discreción del Consejo de Defensa de la Competencia.

El Consejo puede celebrar audiencias públicas, en las que las partes en el procedimiento pueden participar y presentar pruebas. Tras una audiencia, el Consejo podrá aprobar una resolución en el sentido de que se ha producido o no una violación de la ley, y podrá imponer las sanciones apropiadas. Éstas pueden incluir providencias para la cesación de una actividad ilícita o la adopción de medidas encaminadas a eliminar las consecuencias de tal actividad. También se pueden imponer multas, tanto por infracciones sustantivas como por el incumplimiento de las obligaciones procesales impuestas por la ley. En el caso de infracciones de carácter más sustantivo, cuando se han llevado a cabo en circunstancias agravantes, la ley prevé la multa máxima, es decir, hasta un 10% de los ingresos anuales brutos. Las decisiones del Consejo de Defensa de la Competencia pueden recurrirse ante un tribunal.

Aunque la aplicación de la legislación y la política de la competencia en Lituania cae dentro de la jurisdicción del Consejo de Defensa de la Competencia, las demandas relacionadas con la libre competencia en el país pueden ser también investigadas por los tribunales.

F. Descripción de cualquier legislación paralela o suplementaria, en particular tratados o acuerdos con otros países en los que se establezca algún tipo de cooperación o procedimiento para solucionar controversias en la esfera de las prácticas comerciales restrictivas

Además de velar por el cumplimiento de la Ley sobre la competencia, el Consejo se encarga de supervisar la Ley de vigilancia de la ayuda estatal a las empresas, y también desempeña las funciones que se le han encomendado en virtud de la Ley de precios, la Ley de publicidad y la Ley antidumping.

Los principales instrumentos para solucionar las posibles controversias en materia de prácticas comerciales restrictivas son los establecidos por el Acuerdo Europeo y los convenios con otros países.

El Consejo de Asociación entre las Comunidades Europeas y sus Estados miembros, por una parte, y la República de Lituania, por otra, han tomado una decisión por la que se adoptan las normas que facilitan la aplicación de las disposiciones de las secciones 1) i), 1) ii) y 2) del artículo 64 del Acuerdo Europeo por el que se crea una asociación entre la Comunidad Europea y sus Estados miembros, por una parte y la República de Lituania por otra. Esas normas fueron aprobadas por el Consejo de Asociación el 26 de mayo de 1999. Su finalidad es legitimar la cooperación entre la Dirección General de la Competencia de la Comisión Europea y el Consejo de Defensa de la Competencia de la República de Lituania, durante la investigación de asuntos en los territorios de la Comunidad y Lituania.

Lituania ha firmado acuerdos de libre comercio con los Estados miembros de la Asociación Europea de Libre Intercambio (AELI) y con Eslovaquia, Eslovenia, Estonia, Hungría, la República Checa, Letonia, Polonia, Suiza y Turquía. Estos acuerdos contienen normas sobre la competencia que indican que los siguientes elementos son incompatibles con el debido funcionamiento de esos acuerdos, ya que pueden afectar el comercio entre las partes:

- Acuerdos entre empresas, cuyo objeto o consecuencia sea la prevención, limitación o distorsión de la libre competencia, y
- El abuso de una posición dominante en los mercados de los territorios de las partes en conjunto o en un área considerable de ellos.

El Consejo de Defensa de la Competencia también ha concluido los siguientes acuerdos bilaterales con las autoridades de defensa de la competencia de otros países:

- El Acuerdo de Cooperación entre la Oficina Estatal de la Competencia y la Protección del Consumidor de la República de Lituania y la Oficina Antimonopolio de la República de Polonia (01.03.1996).
- El Acuerdo de Cooperación entre las autoridades de la competencia de la República de Letonia y la República de Lituania (04.11.1996), y

- El Memorando de Entendimiento entre las autoridades de la competencia de la República de Estonia, la República de Letonia y la República de Lituania (04.11.1996).

Estos acuerdos contienen disposiciones sobre la conclusión de un entendimiento, las solicitudes de información y el carácter secreto y confidencial de la información, en relación con la investigación de actividades anticompetitivas.

G. Descripción de las principales decisiones tomadas por órganos administrativos o judiciales, y cuestiones concretas a que se refieren esas decisiones

Panorama general

El Consejo de Defensa de la Competencia ha adoptado medidas apropiadas para garantizar la debida aplicación de la política de la competencia en Lituania.

En 2000, el Consejo publicó 176 resoluciones, 161 de las cuales se referían a la aplicación de la Ley sobre la competencia. Se inició un total de 92 nuevas investigaciones, de las cuales 79 se basaban en denuncias y 13 se iniciaron por propia iniciativa del Consejo. En 20 asuntos, se han adoptado decisiones por casos de violación de las disposiciones, inclusive 5 contra actividades comerciales restrictivas de órganos estatales, 3 contra acuerdos de cártel, 4 contra el abuso de una posición dominante, 7 contra la competencia inequitativa y 1 contra una concentración ilícita. En total se emitieron 55 autorizaciones de concentración o fusión.

Además, el Consejo examinó dos solicitudes para la concesión de exenciones individuales y cinco para la confirmación de que el acuerdo previsto reunía los requisitos para el otorgamiento de una exención en bloque.

Ningún otro órgano judicial de Lituania adoptó decisiones en esta esfera en 2000.

Aplicación de las disposiciones contra los cárteles

El Consejo de Defensa de la Competencia da prioridad a las investigaciones sobre los cárteles.

En 2000, el Consejo examinó tres casos de cárteles, dos de los cuales merecen ser descritos.

Actividades coordinadas de los servicios de revelado fotográfico

El Consejo realizó una investigación con respecto a un acuerdo en el sector de los servicios fotográficos. Se constató que 16 empresas habían abolido los descuentos anteriormente concedidos por el revelado de películas a partir del 1º de marzo de 2000. La decisión de poner término simultáneamente los descuentos en el caso del revelado se tomó tras un intercambio de información en una reunión de empresas que prestaban servicios fotográficos. El "acuerdo" se consideró en este caso "como una acción concertada de varias empresas".

El Consejo ejerció todas sus facultades de investigación que la ley le otorga, inclusive la entrada en los locales, y su registro, el examen y la copia de documentos pertinentes, y la obtención de explicaciones orales y escritas de las empresas objeto de investigación. Se obtuvo una orden judicial para la entrada y el registro, así como para el examen y la remoción de documentos.

El Consejo concluyó que había pruebas suficientes de que las empresas habían concluido un acuerdo para dejar de prestar servicios gratuitos de revelado de películas, y, por lo tanto, habían actuado infringiendo el apartado 1 del párrafo 1 del artículo 5 de la Ley sobre la competencia.

El Consejo impuso las multas apropiadas a las empresas interesadas y dictó una providencia para poner término al acuerdo.

Fijación de precios por empresas de venta de gasolina

El Consejo realizó una investigación a fin de determinar si las actividades de dos empresas locales que vendían gasolina se ajustaban a las disposiciones legales. Ambas compañías habían aumentado sus precios al mismo tiempo. Los precios coincidieron durante un mes. En sus explicaciones orales y escritas, los directores de las empresas negaron que se conocieran. Sin embargo, el registro de llamadas telefónicas, obtenido por el Consejo, demostró que se habían intercambiado varias llamadas.

El material reunido durante la investigación permitió llegar a conclusiones acerca de una acción concertada cuya finalidad era fijar los precios del combustible. Las actividades de los competidores pusieron de manifiesto que habían llegado a un acuerdo acerca de su comportamiento y habían coordinado sus decisiones comerciales en materia de precios, para lo cual no había ninguna otra explicación. Los actos de las empresas constituían una infracción de las disposiciones del apartado 1 del párrafo 1 del artículo 5 de la Ley sobre la competencia, que prohíbe los acuerdos para fijar directa o indirectamente los precios de ciertos bienes. Se multó a las empresas y se las exigió que pusieran término a sus actividades.

Abuso de una posición dominante

En 2000, el Consejo adoptó varias decisiones acerca de infracciones de la Ley sobre la competencia cometidas por empresas con una posición dominante en un mercado importante. Las investigaciones dieron lugar a la conclusión de que ciertas empresas que tenían un monopolio en el mercado solían abusar de su posición dominante.

El mercado de la gasolina

La sociedad anónima Mazeikiu Nafta es la refinadora de petróleo dominante en Lituania. Concedía grandes descuentos al vender productos refinados a las empresas del sector de la gasolina que tenían licencias de importación de este combustible y operaban en los mercados minoristas de este producto en Lituania. Sin embargo, otras empresas que no tenían licencia de importación no gozaban de los mismos descuentos en las compras de cantidades similares. Además, los acuerdos con las empresas que tenían licencias de importación preveían que, si éstas comenzaban a importar productos refinados, perderían los descuentos y, en algunos casos,

también pagarían una sanción adicional. Tras una investigación completa, el Consejo determinó que el efecto de esas restricciones era limitar la competencia en el mercado de la gasolina, elevando los precios que pagaban los consumidores. El Consejo impuso una multa de 100.000 LT (25.000 dólares de los EE.UU) a la Mazeikiu Nafta por abuso de su posición dominante.

Sistemas de calefacción

La sociedad por acciones Utenos Silumos Tinklai gozaba de una posición dominante como proveedor de energía calórica en la región de Utena. La sociedad Utenos Trikotazas era un gran consumidor de energía calórica y se le concedían descuentos en los precios a causa de sus grandes operaciones de compra. Tras enterarse de la posibilidad de que la Utenos Trikotazas podría recurrir a una fuente alternativa de energía (gas natural), la Utenos Silumos Tinklai puso término a todos los descuentos anteriormente concedidos a dicha sociedad. Los descuentos se suspendieron no por una reducción de las compras de energía calórica, sino porque la Utenos Trikotazas estaba considerando la posibilidad de recurrir a una fuente competitiva. Esta sociedad presentó una denuncia ante el Consejo de Defensa de la Competencia. El Consejo impuso una multa de 100.000 LT (25.000 dólares de los EE.UU.) a la Utenos Silumos Tinklai por abuso de su posición dominante.

Telecomunicaciones

El Consejo inició una investigación para determinar si las actividades de la SC Lietuvos Telekomas cumplían las disposiciones del artículo 9 de la Ley sobre la competencia, cuando la empresa decidió instalar filtros de limitación de las frecuencias de transmisión en las líneas analógicas fijas de la sede del operador. La SC Lietuvos Telekomas goza de monopolio en el sector de los servicios de telecomunicaciones fijos. La empresa decidió instalar filtros que limitaban la banda de frecuencias de transmisión por las líneas analógicas arrendadas a los nuevos clientes. La instalación de filtros impedía a los clientes utilizar las líneas analógicas para la transmisión de señales digitalmente moduladas de banda ancha. Los clientes se vieron pues obligados a arrendar líneas digital mucho más costosas y se vieron privadas de la oportunidad de competir con la SC Lietuvos Telekomas en el mercado de servicios de transmisión de datos. Además, a ciertas empresas que operaban en este mercado se les colocó en una posición más ventajosa que otras, ya que en las líneas arrendada a ellas no se instalaron filtros.

El Consejo determinó que la SC Lietuvos Telekomas, al tener una posición dominante en el mercado de arrendamiento de las redes de telecomunicaciones empleadas para la transmisión obstaculizó la expansión de los servicios de transmisión de datos y los progresos técnicos en este mercado de servicios, que está estrechamente ligado al mercado en el que la empresa tiene una posición dominante, y, por consiguiente, infringió las disposiciones del apartado 2 del artículo 9 de la ley. Además, esa decisión colocó a las nuevas empresas que habían entrado en el mercado en una situación competitiva desventajosa con respecto a las que ya realizaban actividades en él. Para prestar servicios, esas nuevas empresas se vieron obligadas a arrendar líneas digitales más costosas a la SC Lietuvos Telekomas y se les colocó en una situación de desventaja competitiva con respecto a los operadores que arrendaban líneas analógicas. La decisión de la empresa de instalar filtros en las líneas analógicas arrendadas discriminaba contra ciertas empresas y, por consiguiente, constituía una infracción del apartado 3) del artículo 9 de la ley.

El Consejo impuso a la SC Lietuvos Telekomas una multa de 150.000 LT (unos 37.000 dólares de los EE.UU.) y la obligó a anular la decisión de instalar filtros de limitación de la transmisión por frecuencias en las líneas analógicas arrendadas.

Desde 2001, cuando se creó la Junta Reguladora de las Comunicaciones, las cuestiones relativas a la interconexión de las redes de telecomunicaciones han sido principalmente de su competencia.

H. Bibliografía resumida en la que se citan fuentes de la legislación y las principales decisiones, así como publicaciones oficiales y textos o extractos de la legislación en la materia

- Ley sobre la competencia N° VIII-1099, de 23 de febrero de 1999;
- Ley de publicidad N° VIII-1871, de 18 de julio de 2000;
- Ley de vigilancia de la ayuda estatal a las empresas, N° VIII-1689, de 18 de mayo de 2000;
- Ley de precios, N° I-413, de 26 de julio de 1990;
- Ley antidumping, N° VIII-807, de 23 de junio de 1998;
- Ley de telecomunicaciones, N° VIII-774, de 9 de junio de 1998.

Actos jurídicos aprobados por el Consejo de defensa de la competencia:

- Resolución N° 2, de 22 de octubre de 1999, relativa al Reglamento de la administración del Consejo de Defensa de la Competencia (reemplazada por la resolución N° 67, de 22 de junio de 2000);
- Resolución N° 4, de 5 de noviembre de 1999 relativa al Reglamento provisional del Consejo de Defensa de la Competencia;
- Resolución N° 38, de 27 de diciembre de 1999, relativa a la concesión de una exención general a los acuerdos verticales con arreglo a los artículos 5, 6 y 7 de la Ley sobre la competencia;
- Resolución N° 1, de 13 de enero de 2000, relativa a los acuerdos de menor alcance que no caen en el ámbito de las disposiciones de los párrafos 1 y 2 del artículo 5 de la Ley sobre la competencia;
- Resolución N° 17, de 24 de febrero de 2000, relativa al aviso del Consejo de la Competencia sobre la definición de mercado pertinente;
- Resolución N° 45, de 27 de abril de 2000, relativa a las notificaciones de concentración y cálculo de la cifra de negocios agregada;

- Resolución N° 52, de 17 de mayo de 2000, relativa al aviso del Consejo de Defensa de la Competencia sobre la determinación de una posición dominante;
- Resolución N° 157, de 21 de diciembre de 2000, relativa a la providencia sobre preparación, presentación y examen de las solicitudes de confirmación de que el acuerdo involucrado reúne los requisitos para la concesión de una exención en bloque, así como de las solicitudes para la concesión de una exención individual;
- Resolución N° 11, de 18 de enero de 2001, relativa a la exención en bloque de los acuerdos entre empresas de transporte en determinados sectores del transporte en aplicación de las disposiciones de los artículos 5, 6 y 7 de la Ley sobre la competencia de la República de Lituania.

LAW ON COMPETITION
23 March 1999 No. VIII-1099
Vilnius

CHAPTER ONE
GENERAL PROVISIONS

Article 1. Purpose of the Law

1. The purpose of this Law is to protect freedom of fair competition in the Republic of Lithuania.
2. The Law shall regulate the actions of the public and local authorities and undertakings, which restrict or may restrict competition as well as actions of unfair competition, shall establish the rights, duties and liabilities of the said institutions and undertakings and the legal basis for the control of competition restriction and unfair competition in the Republic of Lithuania.
3. This Law seeks for the harmonisation of the Lithuanian and the European Union law regulating competition relations.

Article 2. Application of the Law

1. This Law shall prohibit undertakings from performing actions which restrict or may restrict competition, regardless of the character of their activity, except in cases where this Law or laws governing individual areas of economic activity provide for exemptions and permit certain actions prohibited under this Law.
2. This Law shall also be applicable to the activity of undertakings registered beyond the territory of the Republic of Lithuania if said activity restricts competition in the domestic market of the Republic of Lithuania.
3. This Law shall not be applicable to the activity of undertakings which restricts competition on foreign markets, unless international agreements to which the Republic of Lithuania is a party provide otherwise.
4. When international agreements ratified by the Seimas of the Republic of Lithuania establish different requirements to protect competition, the provisions of the above agreements shall apply.

Article 3. Definitions

1. **“Economic activity”** means any type of manufacturing, commercial, financial or professional activity, associated with purchase or sale of goods, except for acquisitions by natural persons intended for personal and household needs.
2. **“Good”** means any object of purchase or sale, including all kinds of services and works, rights or securities. Purchase or sale represents transfer or acquisition of goods based on the contracts of purchase, supply and other transactions. Articles (property) transferred under lease or loan-for-use contracts shall be comparable to goods.
3. **“Restriction of competition”** means any actions which prevent competition in a relevant market or may weaken, distort or otherwise have a negative effect on competition.

4. **“Undertaking”** means an enterprise, a combination of enterprises (associations, amalgamations, consortiums, etc.), an institution or an organisation, or other legal or natural persons which perform or may perform economic activity in the Republic of Lithuania or whose actions affect or whose intentions, if realised, could affect economic activity in the Republic of Lithuania. Public administration and local authorities of the Republic of Lithuania shall be considered to be undertakings if they engage in economic activity.

5. **“Relevant market”** means the market of certain goods in a relevant geographic territory.

6. **“Product market”** means the aggregate of goods which from the consumers’ point of view are appropriate substitutes according to their characteristics, application and prices.

7. **“Geographic territory (geographic market)”** means the territory in which the conditions of competition in a relevant product market are in essence similar to all undertakings and which, taking into consideration said fact, may be distinguished from adjacent territories.

8. **“Conditions of competition”** means various economic parameters of purchase or sale, the most important thereof being prices, discounts and markups or other payments as well as factors affecting them (legal restrictions of economic activity, aid granted by public and local authorities, production technologies and costs, peculiarities of the use and consumption of goods, transportation possibilities, etc.).

9. **“Competitors”** means undertakings which face or may face mutual competition in the same relevant market.

10. **“Agreement”** means contracts concluded in any form (written or verbal) between two or more undertakings or concerted actions of undertakings, including decision made by any combination (association, amalgamation, consortium, etc.) of undertakings or by representatives of such a combination.

11. **“Dominant position”** means the position of one or more undertakings in the relevant market directly facing no competition or enabling it to make unilateral decisive influence in such relevant market by effectively restricting competition. Unless proved otherwise, the undertaking with the market share of not less than 40% shall be considered to have a dominant position in the relevant market. Unless proved otherwise, each of a group of three or a smaller number of undertakings with the largest shares of the relevant market, jointly holding 70% or more of the relevant market shall be considered to enjoy a dominant position.

12. **“Group of associated undertakings”** means two or more undertakings which, due to their mutual control or interdependence and possible concerted actions are considered as one undertaking when calculating joint income and market share. Unless proved otherwise, a group of associated undertakings shall be deemed to be comprised of every undertaking concerned and:

1) of undertakings in which, as in the undertaking concerned, the shareholding of one and the same natural person or the same natural persons accounts for more than 1/4 of the authorised capital or carries more than 1/4 of all the voting rights;

2) undertakings which are subject to joint management or have a joint administrative subdivision with the undertaking concerned or a half or more of whose supervisory board, administrative board or other management body members are also members of the management bodies of the undertaking concerned;

3) undertakings in which the shareholding of the undertaking concerned accounts for more than 1/4 of the authorised capital or more than 1/4 of all the voting rights or which have a commitment to co-ordinate decisions relating to their economic activity with the undertaking concerned, or those undertakings the responsibility for the meeting of whose obligations to third parties has been assumed by the undertaking concerned, or those undertakings which have

undertaken to transfer all or part of their profit or have transferred the right to dispose of more than 1/4 of their assets to the undertaking concerned;

4) undertakings whose shareholding in the undertaking concerned accounts for more than 1/4 of the authorised capital or more than 1/4 all the voting rights, or with which the undertaking concerned has committed itself to co-ordinate decisions relating to its economic activity, or which have assumed the responsibility for meeting the obligations of the undertaking concerned to third parties, or those to which the undertaking concerned has undertaken to transfer all or part of its profit or has granted the right to dispose of more than 1/4 of its assets,

5) undertakings connected directly or indirectly through other undertakings with the undertakings referred to in subparagraphs 1, 2, 3 and 4 of paragraph 12 hereof in any way specified in subparagraphs 1, 2, 3 and 4 of paragraph 12 hereof.

13. **“Market share”** means the proportion of total sales or purchase in the relevant market accounted for by an undertaking or a group of associated undertakings.

14. **“Concentration”** means:

1) merger when one or more undertakings which terminate their activity as independent undertakings are joined to the undertaking which continues its operations, or when a new undertaking is established out of two or more undertakings which terminate their activity as independent undertakings;

2) acquisition of control, when one and the same natural person or persons already controlling one or more undertakings, or one or more undertakings, acting by contract, jointly set up a new undertaking or gain control over another undertaking by acquiring an enterprise or a part thereof, all or part of the assets of the undertaking, shares or other securities, voting rights, by contract or by any other means.

15. **“Control”** means any rights arising from laws or contracts that entitle a legal or natural person to exert a decisive influence on the activity of the undertaking, including:

1) ownership or the right to use all or part of the assets of the undertaking,

2) other rights which confer decisive influence on the decisions or the composition of the undertaking's managing bodies.

16. **“Controlling person”** means a legal or natural person having or acquiring control over an undertaking. A controlling person may be a citizen of the Republic of Lithuania, a foreign national or a stateless person, or any other undertaking, as well as public and local authorities. Spouses and their underage (adopted) children shall be considered as one controlling person. When two or more legal or natural persons, acting under contract, exercise control over an undertaking which is subjected to concentration, each of the legal or natural persons shall be considered a controlling person.

17. **“Decisive influence”** means the situation when the controlling person implements or is in the position to implement its decisions regarding the economic activity or the decisions or composition of the management bodies of the controlled undertaking.

18. **“Assets of an undertaking”** means the long-term tangible assets and other fixed assets used in economic activity.

19. **“Commercial secret”** means technical, technological, commercial or organisational information belonging to the undertaking and not disclosed publicly, the confidentiality of which is protected by the undertaking, except for information that cannot be considered a commercial secret under the laws of the Republic of Lithuania.

Article 4. Duty of Public and Local Authorities to Ensure Freedom of Fair Competition

1. When carrying out the assigned tasks related to the regulation of economic activity within the Republic of Lithuania, public and local authorities shall ensure freedom of fair competition.
2. Public and local authorities shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which bring about or may bring about differences in the conditions of competition for competitors in the relevant market, except where the difference in the conditions of competition cannot be avoided when the requirements of the laws of the Republic of Lithuania are complied with.

CHAPTER TWO RESTRICTIVE PRACTICES

SECTION ONE PROHIBITED AGREEMENTS

Article 5. Prohibition of Agreements Restricting Competition

1. All agreements which have as their object the restriction of competition or which may restrict competition shall be prohibited and shall be void from the moment of conclusion thereof, including:
 - 1) agreements to directly or indirectly fix prices of certain goods or other conditions of sale or purchase;
 - 2) agreements to share the product market on a territorial basis, according to groups of buyers, suppliers or in any other way;
 - 3) agreements to fix production or sale volumes for certain goods, as well as to restrict technical development or investment;
 - 4) agreements to apply dissimilar (discriminating) conditions to equivalent transactions with individual undertakings, thereby placing them at a competitive disadvantage;
 - 5) agreements to make conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their commercial nature or according to usage, have no direct connection with the subject of the contract;
 - 6) agreement between competitors to participate or not to participate, or to submit co-ordinated bids for public procurement contract, for tender or other procurement of a similar type.
2. When concluded between competitors, the agreements listed in subparagraphs 1, 2, 3 and 4 of paragraph 1 hereof shall be in any case considered as restricting competition.
3. The prohibition provided for in subparagraph 6 of paragraph 1 hereof shall not be applied, if a bid is officially submitted for the award of public procurement contract, for a tender or other similar purchase, drawn up on the basis of a joint activity contract or other contract which does not contradict the law.
4. Agreements concluded between undertakings possessing a small share of the relevant market, which because of their small influence cannot substantially restrict competition shall not be considered to be in breach of paragraphs 1 and 2 hereof.. The requirements and conditions of such

agreements shall be laid down by the Competition Council of the Republic of Lithuania (hereinafter referred to as the Competition Council) by a legislative deed.

5. The provisions of paragraphs 1 and 2 hereof shall not be applicable in the cases provided for in Articles 7 and 8 of this Law.

Article 6. Exemptions

1. Block or individual exemption may be granted to the agreements specified in Article 5 of this Law, provided the agreement promotes investment, technical or economic progress or improves the distribution of goods, thus allowing all consumers to get additional benefit, also when:

- 1) the agreement does not impose restrictions on the activity of the parties thereto which are not indispensable to the attainment of the objectives referred to in this Article;
- 2) the agreement does not afford contracting parties the possibility to restrict competition in a large relevant market share.

Article 7. Block Exemption

1. Taking into consideration the requirements of Article 6 of this Law, the Competition Council shall adopt legal acts on the granting of a block exemption with respect to certain categories of agreements and shall establish terms of application of the block exemption:

- 1) for agreements on licenses to use trade marks of goods and services, industrial design or other objects of intellectual property which may cause restrictions of production, sale, prices of certain goods or some other competition restrictions, if this is related to the protection of the rights to use trade marks, industrial design or other objects of intellectual property or to the requirements of the technical terms of licenses;
- 2) for agreements which are allowed in certain relevant markets;
- 3) for other specific categories of agreements, for which general exemption is granted pursuant to the legal provisions in effect in the European Union.

2. All undertakings shall have the right to conclude contracts which qualify for the granting and application of a block exemption.

3. Undertakings shall have the right to apply to the Competition Council for the confirmation that the intended agreement qualifies for a block exemption. If the Competition Council does not give a negative response within one month after the registration of the application, confirmation shall be deemed to have been given.

4. Undertakings must not later than within one month after the coming into effect of the agreement concluded according to the conditions of block exemption present information on the principal conditions of the agreement to the Competition Council. The Competition Council shall establish a standard form for the presentation of such information.

Article 8. Individual Exemption

1. An undertaking seeking to get an individual exemption according to Article 6 of this Law must submit an application for an individual exemption to the Competition Council prior to the conclusion or coming into force of the agreement. The agreement and the documents proving that the agreement satisfies the requirements of Article 6 shall be attached to the application.

2. The Competition Council must take a decision to grant an individual exemption not later than within three months after the registration of the application for granting an individual exemption, provided the agreement satisfies the requirements of Article 6, or take a decision to refuse granting an individual exemption. If the Competition Council fails take a decision to refuse granting an individual exemption within the specified period, an individual exemption shall be deemed to have been granted according to the conditions provided for in the application and in the agreement submitted by the undertaking alongside the application.

3. The decision to grant an individual exemption shall specify the date from which the individual exemption shall have effect, the period for which it shall have effect and the conditions and obligations to which the effect of the exemption shall be subject. The decision to refuse to grant an individual exemption shall state the principal reasons of non-applicability of an exemption.

4. On the application of the undertaking, the Competition Council may by its decision extend the effective period of exemption, provided the agreement and the conditions of its implementation satisfy the requirements of Article 6 and the conditions and obligations imposed by the decision on the granting of exemption.

5. The Competition Council may amend or cancel its decision to grant an individual exemption, if:

1) there has been a change of at least one of the circumstances due to which the decision to grant an individual exemption has been made;

2) the decision to grant an individual exemption was based on false or incomplete information;

3) the parties to the agreement have breached any of the conditions or mandatory obligations imposed by the decision on the granting of the exemption.

SECTION TWO ABUSE OF A DOMINANT POSITION

Article 9. Prohibition to Abuse a Dominant Position

It shall be prohibited to abuse a dominant position within the relevant market by carrying out actions which restrict or may restrict competition, limit without cause the possibilities of other undertakings to act in the market, or violate the interests of consumers, including:

1) direct or indirect imposition of unfair prices or other purchase or selling conditions;

2) limitation of trade, production or technical development to the prejudice of consumers;

3) application of dissimilar (discriminating) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage;

4) making the conclusion of contract subject to acceptance by the other party of supplementary obligations which, by their commercial nature or usage, have no connection with the subject of such contract.

SECTION THREE CONTROL OF CONCENTRATION

Article 10. Notification of Concentration

1. The intended concentration must be notified to the Competition Council and its permission shall be required where combined aggregate income of the undertakings concerned is more than LTL 30 million for the financial year preceding concentration and the aggregate income of each of at least two undertakings concerned is more than LTL 5 million for the financial year preceding concentration.

2. The combined aggregate income of the undertakings participating in a concentration shall be conceived as:

1) the sum of aggregate income of the undertakings concerned;

2) the sum of aggregate income of the undertakings where one or more of the undertakings concerned acquire by contract another undertaking (the whole or parts of the enterprise), all or a part of the assets of the undertaking or a part of its shares which, including all previous acquisitions, constitute 1/4 or more of the authorised capital, or confer 1/4 or more of all the voting rights. Where the undertaking acquiring a part of shares in another undertaking belongs to the group of associated undertakings, in calculating the shares being acquired, the shares in this entity that are owned by the undertakings belonging to the same group of associated undertakings shall be included. In the case of acquisition of a part of the undertaking (enterprise) or a part of assets of the undertaking, aggregate income and market share shall be calculated proportionately to the part of the property acquired;

3) the amount of aggregate income of the undertakings subject to concentration, in one or more of which one and the same natural person or persons, having the right of control, acquire another undertaking (whole enterprise or a part of it), all or a part of the assets of the undertaking or a part of its shares which, including previous acquisitions, constitute 1/4 or more of the authorised capital or confer 1/4 or more of all the voting rights. When calculating the part of the shares acquired by a natural person or natural persons from another undertaking, the shares owned in this undertaking by the undertakings controlled by a natural person or the same natural persons, as well as by all undertakings belonging to the same group of associated undertakings shall be included. In the case of acquisition of a part of the undertaking (enterprise) or a part of the assets thereof, aggregate income and market share shall be calculated proportionately to the part of the assets acquired;

4) the amount of aggregate income of the undertakings which, based on an agreement, jointly set up a new undertaking, or establish a common management body or any administrative subdivision, also of those which, due to the decisions taken, will have a half or more of the same members in supervisory board, administrative board or other management body, or of those which commit themselves to co-ordinate among themselves decisions concerning their economic activity or to transfer to each other the whole or a certain part of profit, or of those which confer to each other the right to dispose of all or a part of their assets, or one or several undertakings of which by contract or otherwise acquire control of another undertaking. Where one undertaking confers to another undertaking the right to dispose of a part of its assets, the aggregate income and market share shall be calculated proportionately to the part of the assets disposed.

3. If the participant of a concentration is:

1) a bank or another credit institution, 1/10 of the sum of the balance sheet assets shall be calculated instead of the aggregate income;

- 2) an insurance enterprise, the value of gross insurance premiums shall be calculated instead of the aggregate income;
- 3) investment company, aggregate income shall be calculated as the sum total of the aggregate income of all the undertakings under the control of this investment company;
- 4) an undertaking which belongs to the group of associated undertakings, its aggregate income shall be calculated as the sum total of the aggregate income of all the undertakings belonging to the group of associated undertakings.

5) an undertaking of a foreign state, its aggregate income shall be calculated as the sum total of income, received on the product markets of the Republic of Lithuania.

4. The Competition Council shall establish the procedure for calculating the aggregate income as applied for the control of concentration.

5. A concentration shall not be deemed to arise where commercial banks, other credit institutions, intermediaries of public trading in securities, investment companies and insurance companies acquire more than 1/4 of shares in another enterprise or insurance company with a view to transferring them, provided that they do not exercise voting rights in respect of those shares and that any such disposal takes place within one year of the date of acquisition and information is submitted to the Competition Council not later than within one month after acquisition. If the financial institutions which acquired more than 1/4 of shares in another company decide not to comply with the conditions provided for in this paragraph, they must submit a notification of concentration in accordance with the established general procedure.

Article 11. Submission of Notification

1. Notification of intended concentration in the cases referred to in subparagraphs 2 and 3 of paragraph 2 of Article 10 shall be submitted by the controlling persons; in other cases notification shall be effected jointly by all undertakings participating in concentration.

2. Concentration shall be notified to the Competition Council not later than within 7 days from the submission of proposal to conclude the agreement or to acquire shares or assets, authorisation to conclude the agreement, conclusion of the agreement, acquisition of the right of ownership or the right to dispose of certain assets. The term shall begin when the first of those events occurs. The Competition Council shall establish a standard form for notification of concentration.

3. The notification of concentration shall include:

- 1) registration data of the undertakings participating in concentration;
- 2) reasons and objectives of concentration;
- 3) description of the way of concentration;
- 4) annual financial accounts of each undertaking participating in concentration, for the preceding three years prior to concentration;
- 5) data on the enterprises owned by each undertaking participating in concentration or the enterprises owned by controlling persons as well as data on the enterprises the share-holders of which they are;
- 6) purchase and sale volumes of each undertaking participating in concentration within the preceding three years prior to concentration and evaluation of their market share in a relevant market;
- 7) the list of the major purchasers and suppliers as well as the main competitors in the relevant markets of each undertaking participating in concentration.

4. Where notification of intended concentration with the participation of the undertaking belonging to a group of associated undertakings is submitted, the data on all the undertakings belonging to the group of associated undertakings shall be also submitted pursuant to the requirements of paragraph 3 hereof

5. Where the notified intended concentration is with participation of banks or other credit institutions, the Competition Council shall also be submitted the finding of the Bank of Lithuania.

Article 12. Suspension of Concentration

1. The undertakings or controlling persons participating in the concentration which is subject to notification shall have no right to further effect concentration after the performance of the first action of concentration until the Competition Council takes a decision permitting concentration concerned.

2. Any transactions and actions of the undertakings and controlling persons shall be deemed invalid and having no legal consequences if they contradict paragraph 1 hereof, except in cases provided for in paragraph 3 hereof.

3. Upon justified request of the undertaking participating in concentration or of the controlling person, the Competition Council, taking into account the consequences of the suspension of concentration on the persons concerned and the projected influence of concentration on competition, may permit to exercise individual actions of concentration until the adoption of the final decision. The permission of the Competition Council to implement individual actions of concentration may be made subject to certain conditions and obligations necessary for execution of the final decision of the Competition Council. The Competition Council must adopt a resolution establishing rules on release from suspension of concentration.

Article 13. Examination of Notifications by the Competition Council

1. Having received notification of concentration, the Competition Council shall publish an announcement to the effect in the "*Valstybes žinios*", indicating the nature of concentration and the parties concerned.

2. The Competition Council shall within 4 months examine the notifications of concentration submitted in accordance with the established requirements. The term shall begin on the day following the receipt of the notification of concentration which complies with the established requirements. If the notification of concentration does not comply with the established requirements, the Competition Council shall adopt a corresponding resolution and promptly inform the persons who submitted the notification thereof in writing.

3. The Competition Council must within a month after the receipt of the notice meeting the established requirements adopt a resolution pursuant to subparagraphs 1 and 2 of the paragraph 1 of Article 14 or a resolution to proceed with further examination of the notification of concentration.

4. When examining notifications of concentration, the Competition Council shall be entitled to obtain from undertakings, controlling persons, and public and local authorities information, oral or written clarifications necessary for taking a decision on concentration.

Article 14. Resolutions of the Competition Council on Concentration

1. Upon completing the examination of notification, the Competition Council shall take one of the following decisions:

- 1) to permit the concentration notified;
- 2) to permit the implementation of concentration attaching to its decision conditions and obligations for the participating undertakings or controlling persons in order to prevent creation or strengthening of a dominant position;
- 3) to refuse to grant a permission to implement concentration by imposing obligations on undertakings or controlling persons concerned to undertake actions restoring the previous situation, except certain actions of concentration which had been permitted by the Competition Council in accordance with paragraph 3 of Article 12 or which eliminate the consequences of concentration, including obligations to sell the enterprise or a part of it, assets of undertakings or part thereof, shares or part thereof, to cancel or modify contracts, as well as to establish the terms and conditions for the fulfilment of the above obligations, where concentration will establish or strengthen a dominant position and result in a substantial restriction of competition in a relevant market.

2. The resolution of the Competition Council permitting to implement the concentration shall specify possible restrictions of activity of the undertakings concerned, which are directly related and necessary in order to effect concentration.

3. The persons who submitted notifications of concentration shall be informed in writing of the adopted resolutions. If the Competition Council does not adopt the resolutions referred to in paragraph 2 of Article 13 or paragraph 1 hereof or if the persons who submitted notifications of concentration are not informed of the adopted resolution within 4 months after the day of receipt of the notification meeting the established requirements, the undertakings or controlling persons shall have the right to implement concentration according to the conditions specified in the notification.

4. Operative part of resolutions adopted by the Competition Council according to Article 14 of this Law shall be published in “*Valstybes žinios*”.

Article 15. Investigation of Infringements of Concentration Control and Amendment or Revocation of Resolutions on Concentration Adopted by the Competition Council

1. Where there are reasonable grounds for believing that a concentration has been put into effect in violation of the requirements of this Law or in breach of the resolutions of the Competition Council, the Competition Council shall carry out investigation according to the provisions of Section Five of this Law.

2. The Competition Council shall have the right to amend or to revoke the resolution on concentration provided for in paragraph 1 of Article 14 if such resolution has been adopted based on incorrect or incomplete information submitted by undertakings participating in concentration or by controlling persons, which information has had a decisive influence on the resolution, or where undertakings or controlling persons have violated the conditions and obligations of the implementation of concentration.

CHAPTER THREE UNFAIR COMPETITION

Article 16. Prohibition of Acts of Unfair Competition

1. Undertakings shall be prohibited from performing any acts contrary to honest business practices if such acts may be detrimental to competition interests of another undertaking, including:

1) unauthorised use of a mark identical or similar to the name, registered or unregistered well known trade mark or other reference having a distinguishing feature of another undertaking, if this causes or may cause confusion with that undertaking or its activity or where it is sought to take undue advantage of the reputation of that undertaking (its mark or reference) or where this may cause injury to the reputation (its mark or reference) of that undertaking or reduction of the distinguishing feature of the mark or reference applied by that undertaking;

2) misleading of undertakings by providing them with incorrect or unjustified information about quantity, quality, components, properties of usage, place and means of manufacturing, price of its goods or goods of another undertaking, or concealing risks associated with the consumption, processing or other possible usage of those goods;

3) using, transferring, disclosing the information representing a commercial secret of another undertaking without its consent, also obtaining such information from the persons having no right to transfer it, in order to compete, seeking benefit for oneself or inflicting damage on that undertaking;

4) proposing that the employees of the competing undertaking terminate their employment contracts or refrain from performing all or part of their work-related duties, with a view to self-benefit or seeking to inflict damage on the competing undertaking;

5) simulating the product or product packaging of another undertaking by copying the external shape or packaging colour or other distinguishing feature of the product, if this can be misleading in determining the identity of the product or if the acts are intended to obtain the benefits by taking undue advantage of the reputation of another undertaking;

6) providing incorrect or unsubstantiated information about its own or another undertaking's managing personnel, skills of the employees, legal, financial or other position if damage may thereby be inflicted on another undertaking;

7) advertising claims which are considered misleading under the laws of the Republic of Lithuania.

2. Subparagraph 1 of paragraph 1 hereof specifies the cases which shall not be considered as the use of identical or similar name, trade mark or reference mark: when the name or surname of the owner or the holder of controlling interest or the founder is used in a name, trade mark or reference mark, and the undertakings, using such a name, trade mark or reference mark have taken measures to prevent misleading the customers as to the identity of the undertaking or the good.

3. The information specified in subparagraph 2 of paragraph 1 hereof on the designation of origin of a good implies geographical indications provided in any suitable way characterising the good as produced in the territory of a certain state or in a certain region or area of the territory which is associated with quality, reputation or other properties of the good.

4. The persons who have acquired information of a commercial secret as a result of their work or any other contractual relations with the undertaking may use this information not earlier than after the passage of one year after the termination of employment or other contractual relations, unless legislation or the contract provides otherwise.

5. The actions taken with a view to achieving certain functional characteristics of a good or of its packaging shall not be considered a simulation of the appearance of the good or of the form of its packaging provided the person, responsible for such actions, has taken measures to prevent misleading other undertakings or consumers as to the identity of the manufacturer or the good.

Article 17. Protection of Rights

1. The undertaking legitimate interests whereof are violated by actions of unfair competition shall be entitled to bring an action in court seeking:

- 1) termination of illegal actions;
- 2) recovery of the damages;
- 3) imposition of the obligation to make one or several statements of a certain content or form, denying the previously submitted incorrect information or giving explanations as to the identity of the undertaking or its goods;
- 4) seizure and destruction of the goods, their packaging or attributes, directly related to unfair competition, unless infringements can be eliminated otherwise.

2. The organisations representing the interests of undertakings or consumers shall also enjoy the rights specified in subparagraphs 1, 3 and 4 of paragraph 1 hereof.

3. Liability for the use of misleading advertising shall be established by the laws of the Republic of Lithuania.

4. The Competition Council shall investigate the acts of unfair competition only in the cases where these acts violate the interests of a number of undertakings or consumers. The Competition Council shall impose sanctions for these acts provided for by legislation.

CHAPTER FOUR INSTITUTION CONTROLLING ACTIONS RESTRICTING COMPETITION

Article 18. Competition Council of the Republic of Lithuania

1. The Competition Council is a public body of the Republic of Lithuania implementing the state competition policy and supervising compliance with this Law.

2. The Competition Council shall be a legal person, having its accounts with the banks, a seal with the Lithuanian State Emblem and its name.

3. The Competition Council shall be governed by the Constitution of the Republic of Lithuania, by this and other laws, international agreements to which the Republic of Lithuania is a party, other legal acts, and the Regulations of the Competition Council approved by the Government.

4. The Competition Council shall be a budgetary institution financed from the Lithuanian State budget.

5. The Law on Budgetary Institutions shall be applicable to the activity of the Competition Council, unless this Law provides otherwise.

Article 19. Powers of the Competition Council

1. The Competition Council shall:

- 1) control the compliance by undertakings, public and local authorities with the requirements of this Law;
 - 2) establish the criteria and procedure for providing the definitions of the relevant market and a dominant position, investigate and define relevant markets, determine the market share of undertakings, and their position in a relevant market;
 - 3) give obligatory instructions to undertakings, from among them - to banks and other credit institutions as well as public and local authorities to submit financial and other documentation, including that containing commercial secrets and other information required for market investigation or fulfilment of other tasks of the Council;
 - 4) examine the conformity of legal acts or other decisions adopted by public and local authorities with the requirements of Article 4 of this Law, and, where there is sufficient cause, apply to public and local authorities with the request to amend or revoke legal acts or other decisions restricting competition. In case of failure to satisfy the requirement the Council shall have the right to appeal against such decisions, except for the statutory acts issued by the Government of the Republic of Lithuania, to the Higher Administrative Court.
 - 5) investigate and consider infringements of this Law and impose penalties on the defaulters in the cases and following the procedure provided for by law;
 - 6) appeal to the court for the protection of interests of the State and other persons safeguarded by this Law;
 - 7) adopt legal acts within the limits of its competence;
 - 8) within its competence carry out expert examination of drafts of laws and other legal acts, submit findings on the effect of said acts on competition to the Seimas and the Government of the Republic of Lithuania;
 - 9) exercise other powers provided for by this and other laws.
2. The Competition Council may delegate some of its powers to the Chairperson of the Competition Council or to the administration of the Competition Council, except for the powers to make decisions or to hear cases provided for by Articles 7, 8, Article 10 (4), Article 14 (1), Article 15 (2) of this Law and the authorisation to impose penalties prescribed by this Law and to adopt legal acts.
3. The administration of the Competition Council shall be formed to fulfil the functions of the Competition Council. Its structure and list of staff shall be approved by the Competition Council. The functions of the administration and the administrative staff shall be laid down in this Law and in the Regulations approved by the Competition Council.

Article 20. Composition and Formation of the Competition Council, Its Operational Procedure

1. The Competition Council shall consist of the Chairperson and 4 members. The Chairperson of the Competition Council and its members shall be appointed by the President of the Republic on the nomination of the Prime Minister of the Republic of Lithuania. The Chairperson of the Competition Council shall be appointed for a term of five years, the term of appointment of the members of the Competition Council shall be six years. Every three years there shall be a partial replacement of the Council members. During the first appointment of the members of the Competition Council two members shall be appointed for a term of six years and 2 members for three years.

2. Persons of highest integrity who are trained in law or economics and are citizens of the Republic of Lithuania may hold the office of the Chairperson and of members of the Competition Council.

3. The Chairperson and the members of the Competition Council shall be removed from office only:

- 1) of their own volition;
- 2) upon the expiry of their term of office;
- 3) upon being elected or appointed to another office;
- 4) upon the coming into force of the court sentence;
- 5) if instances of malfeasance are revealed;
- 6) if by their acts they discredit the name of the Chairperson or the member of the

Competition Council;

- 7) for health reasons.

4. The members of the Competition Council may not, during their term of office, engage in any other occupation, except for scientific, educational or creative work they may perform upon the approval of the Competition Council.

5. The Competition Council shall resolve issues assigned within its competence by passing resolutions. The resolutions shall be passed by majority vote with at least four members of the Competition Council, the Chairpersons including, participating in the voting. In the event of a tie, the Chairperson shall have the casting vote.

6. Operational procedure of the Competition Council and rules regulating the procedure of the investigation of cases shall be laid down in the Work Regulations adopted by the Competition Council.

Article 21. The Chairperson of the Competition Council

1. The Chairperson of the Competition Council shall:
 - 1) direct the work of the Competition Council;
 - 2) represent the Competition Council in the Republic of Lithuania and abroad;
 - 3) employ and dismiss the administrative staff of the Competition Council;
 - 4) submit annual reports on the Competition Council activities to the Seimas and
- 5) fulfil other functions assigned to him by the Competition Council.

Government of the Republic of Lithuania;

2. In the Chairperson's absence his duties shall be fulfilled by another member of the Competition Council, who shall be appointed by the Chairperson.

3. The Chairperson of the Competition Council or, in his absence, another member of the Competition Council appointed to act for him shall have the right to participate in the meetings of the Government of the Republic of Lithuania without the right to vote and must voice his comments should the decisions proposed for adoption contradict this Law.

Article 22. Protection of Commercial Secrets

1. Commercial secrets disclosed to the Competition Council and its administrative staff during their exercise of control over compliance with this Law must be kept confidential and, in the absence of the undertaking's consent, must be used only for the purpose the information was provided.

2. For the disclosure of commercial secrets of undertakings the Competition Council and its administrative staff shall be held liable under law.

CHAPTER FIVE
INVESTIGATION OF RESTRICTIVE PRACTICES AND HEARING OF CASES

SECTION FOUR
INVESTIGATION OF RESTRICTIVE PRACTICES, CARRIED OUT BY THE
COMPETITION COUNCIL

Article 23. Infringements Investigated by the Competition Council

1. The Competition Council shall investigate:
 - 1) infringement of agreements restricting competition and of conditions and obligations of exemption granted under Articles 7 and 8 of this Law;
 - 2) abuse of a dominant position;
 - 3) putting into effect of a concentration without notifying or without getting a permit or in breach of the established conditions or obligations stated as well as continuing to put in effect a concentration during its suspension;
 - 4) unfair competition in the cases provided for in paragraph 4 of Article 17 of this Law;
 - 5) infringements in case of failure to comply with the requests to supply information or failure to timely comply, also in case of provision of incorrect or incomplete information or, in the cases provided for in this Law, failure to supply information within the period fixed, or obstruction of the authorised officers of the Competition Council in carrying out the investigation or default on penalties or obligations imposed by the Competition Council.
2. The investigation shall be carried out by the administrative staff members of the Competition Council authorised by it (hereinafter – authorised officers).

Article 24. The Right to Initiate Investigation of Restrictive Practices

1. The right of request to start investigation of restrictive practices shall be vested in:
 - 1) undertakings whose interests have been violated due to restrictive practices;
 - 2) public and local authorities;
 - 3) associations and unions representing the interests of undertakings and consumers.
2. The Competition Council shall have the right to start investigation on its own initiative by taking a justified decision.

Article 25. Submission of Application for Investigation and Its Examination

1. The request for the investigation to be carried out shall be submitted in a written application, specifying the facts and circumstances of restrictive practices the applicant is aware of. Documents confirming the above facts shall be attached to the application.
2. The Competition Council shall set the general requirements for the data and documentation to be provided by the applicant in order to start investigation of restrictive practices.

3. The Competition Council must examine applications filed with respect to the restrictive practices not later than within 14 days from submission of the application and documentation and take a decision to start or to refuse to start the investigation.

4. The refusal to start investigation follows, if:

1) the facts indicated in the application are immaterial, causing no substantial damage to the interests protected under this Law;

2) investigation of the facts specified in the application is not within the Competition Council's remit;

3) the facts specified in the application have already been investigated and a resolution has already been taken on the issue;

4) the applicant has failed to provide, within the time period set by the Competition Council, the data and documents required in order to initiate the investigation.

5. The Competition Council shall take a justified decision to investigate the restrictive practices.

6. The Competition Council must complete the investigation not later than within 3 months from the commencement thereof. The Competition Council may extend the period by a justified resolution each time for up to 2 months.

Article 26. Rights and Duties of the Authorised Officers of the Competition Council in the Process of Investigation

1. The authorised officers of the Competition Council, carrying out the investigation, shall be empowered:

1) to enter and to check any premises, land and means of transport used by the undertaking;

2) to examine the documents of the undertaking under investigation required for investigation, get their copies and extracts, be given access to the notes of the employees of the undertaking, also copy the above notes as well as information stored in computers and magnetic disks;

3) to get oral and written explanations from the persons connected with the activity of the undertakings under investigation, summon them to the office of the investigating officer to give explanations;

4) to get from other undertakings, regardless of their subordination, data and documents or copies thereof relating to the economic operations of the undertaking under investigation, also from public and local authorities;

5) to audit (carry out an inspection of) the economic activity of the undertaking and obtain findings regarding the material of inspection from the institutions responsible for expert examination;

6) to take possession of any documents and articles having evidential value in the investigation of the case;

7) to enlist the assistance of specialists and experts in carrying out the investigation;

8) acting in compliance with the procedure established by law, use technical means for investigation purposes.

2. The actions of investigation specified in subparagraphs 1 and 2 of paragraph 1 hereof may be carried out only with the warrant of the judge.

3. For the maintenance of order the investigating officers of the Competition Council may enlist police assistance

4. Before commencing the actions specified herein, the authorised officers of the Competition Council must produce a document issued by the Competition Council confirming their powers, purpose and time limits of investigation.

5. While exercising their rights granted by law and the Competition Council, the officers authorised by the Competition Council shall register investigation actions in writing, i.e. shall draw up documents (acts, records, requests, etc.) the form and filling in procedure whereof shall be established by the Competition Council.

6. Instructions given by the authorised officers of the Competition Council while performing actions provided for in paragraph 1 hereof shall be obligatory to undertakings and to their management and administrative staff. Penalties provided for in laws shall be applied for failure to fulfil the instructions.

7. The authorised investigating officers shall warn the persons providing explanations in writing of their liability for giving false information or for refusal to provide information to the Competition Council.

Article 27. Appeal against the Actions of the Investigating Officers

1. The undertakings, suspected of having violated the Law on Competition, shall have the right to appeal to the Competition Council against illegitimate actions of the investigating officers. A complaint shall be filed not later than within 10 days from the date of actions subject to appeal. The Competition Council must take decision within 10 days from the date of receipt of the complaint.

2. If the undertakings, suspected of infringement of the Law on Competition, object to the decision of the Competition Council or if the Competition Council fails to make a decision within a 10-day period, the undertakings shall have the right to file a complaint with the Higher Administrative Court. The filing of the complaint shall not suspend investigation.

Article 28. Interim Measures

1. In cases, where there is sufficient evidence of infringement of the Law on Competition, the Competition Council, seeking to prevent substantial or irreparable damage to the interests of undertakings or public interests, shall have the right to apply interim measures necessary for the implementation of the final decision of the Competition Council. The application of interim measures shall cease upon the payment of the penalties imposed by the resolution of the Competition Council adopted after the investigation of the case.

2. In cases provided for in paragraph 1 hereof the Competition Council shall have the right to apply the following interim measures with respect to the undertaking suspected of infringement of the Law on Competition:

- 1) to obligate the undertakings to cease an illegal activity;
- 2) upon being issued a warrant by the judge of the Higher Administrative Court, to obligate the undertakings to perform certain actions if failure to perform same would result in serious damage to other undertakings or public interests or incur irreparable consequences.

3. Before adopting a resolution to apply interim measures, the Competition Council shall give the undertaking suspected of infringement of the Law on Competition an opportunity to make representations.

4. The decision of the Competition Council on the application of interim measures may be appealed against to the Higher Administrative Court within 1 month from the date of making the decision. The lodging of a complaint does not suspend the application of interim measures.

Article 29. The Procedure for Authorising Investigation Measures, Interim Measures and Restrictions of Economic Activities

1. Upon the adoption by the Competition Council of a resolution on the investigation actions as provided for in paragraph 2 of Article 26 or on interim measures as provided for in subparagraph 2 of paragraph 2 of Article 28, or on restrictions of economic activities as provided for in paragraph 2 of Article 40, the authorised officer of the Council shall submit an application to the court to authorise these actions, measures or restrictions. The application shall be submitted to the Higher Administrative Court.

2. The application shall state the name of undertaking, specify the character of alleged violations and the intended investigation actions, interim measures or restrictions of economic activity to be applied.

3. The judge of the Higher Administrative Court shall examine the application for the authorisation of investigation actions, interim measures or restrictions of economic activities and shall make a justified decision to grant or to reject the application.

4. The application for authorisation of investigation actions, interim measures or restrictions of economic activities shall be examined and the decision thereon shall be taken not later than within 72 hours from the moment of filing of the application.

5. If the authorised officer of the Competition Council disagrees with the decision of the judge of the Higher Administrative Court to reject the application, he shall have the right to appeal within 7 days against the judge's decision to the appeal court.

6. The appeal in court must investigate the complaint against the decision of the judge of the Higher Administrative Court not later than within 7 days. The representative of the Competition Council shall have the right to attend the complaint investigation.

7. The decision of the appeal court shall be final and shall not be referred to the court for review by cassation.

8. While considering applications and complaints regarding the authorisation of investigation actions, interim measures or restrictions of economic activities, the courts must ensure confidentiality of the provided information and intended actions.

Article 30. Completion of Investigation

1. Upon the completion of investigation the authorised officers of the Competition Council shall refer the case with their findings and proposals to the session of the Competition Council for investigation or shall discontinue the investigation according to the procedure laid down by the Competition Council.

2. The applicant and the interested parties shall be notified in writing of the decision taken.

3. Should new circumstances be revealed or if the undertaking fails to comply with the conditions and obligations laid down on the basis of this Law, the Competition Council shall have the right to reopen the closed investigation.

SECTION FIVE HEARING OF RESTRICTIVE PRACTICES CASES

Article 31. The Participants of the Hearing Process

1. The hearing of the case on infringements referred to in Article 23 shall be held with the following persons participating:

- 1) the applicant (the initiator of investigation);
- 2) the undertaking suspected of infringement of the Law on Competition (alleged defaulter);
- 3) on the decision of the Competition Council, other undertakings whose interests are directly related to the case under investigation;
- 4) representatives of public and local authorities, at their request;
- 5) experts, specialists and other persons, pursuant to the decision of the Competition Council;

2. Persons specified in subparagraphs 1, 2 and 3 of paragraph 1 hereof, hereafter in this Law shall be referred to as parties to the proceedings.

3. The parties to the proceedings may be represented by their representatives and lawyers.

Article 32. Notice of the Hearing of the Case

The parties to the proceedings shall be notified in writing of the findings of the authorised officers regarding the restrictive practices, of the place and time of hearing of the case and shall be offered to submit their written comments. The Competition Council may notify of the hearing of the case through the media.

Article 33. Persons Participating in the Hearing of the Case at the Session of the Competition Council

The case shall be heard in the presence of the parties to the proceedings and other persons participating in the case. In the absence of parties to the proceedings, the case may be heard only when information is available that said persons have been timely notified of the place and time of the hearing and have been given an opportunity to make representations and familiarise themselves with the findings of the investigation.

Article 34. The Right to Be Heard, to Give Explanations and to Familiarise Oneself with the Investigation Material

1. At the stages of investigation and hearing of the case the parties to the proceedings shall have the right to be heard and to give explanations both in writing and orally. Upon the completion of the investigation the parties to the proceedings shall be presented with the written findings of the authorised officer and shall be provided access to the documents of the case, other than those containing commercial secrets of another undertaking. In such cases the consent of this undertaking shall be required.

2. The parties to the proceedings and other persons participating in the case shall have the right to make an application to the Competition Council at any stage of investigation and hearing of

the case, requesting protection of their commercial secrets. The Competition Council or its authorised officer must make a justified decision on the protection of commercial secrets and notify the applicant thereof. The applicant may be obligated to produce within the set time period an extract of the document omitting commercial secrets, which shall be appended to the case.

Article 35. Public Hearing of Cases

The hearing of cases at the sessions of the Competition Council shall be public. The Competition Council may on its own initiative or at the request of the alleged defaulter or any other interested person announce a closed hearing of the case where it is necessary to keep the state secret or commercial secrets of undertakings.

Article 36. Resolutions of the Competition Council Adopted upon the Completion of Hearing of the Case

1. Upon completing the hearing of the case, the Competition Council shall have the right to adopt a resolution:
 - 1) to impose the penalties provided for by this Law;
 - 2) to refuse to impose penalties where there are no legally established grounds;
 - 3) to close the case in the absence of infringements of the Law;
 - 4) to remand the case for supplementary investigation.
2. The resolution of the Competition Council must state the circumstances of infringement of this Law, evidence of guilt, explanations given to the Competition Council by the defaulter, applicant and other persons as well as their assessment, the motives and legal grounds of the resolution to be adopted.
3. The resolution of the Competition Council must be based only on those findings and facts and circumstances of the investigation with respect to which the person suspected of infringement of the Law on Competition had been afforded an opportunity to give explanations.
4. The resolution of Competition Council adopted pursuant to this Article may be amended or cancelled only by the court.

Article 37. Announcement of Resolutions of the Competition Council

1. The Competition Council resolution or its extract shall be delivered to the parties to the proceedings.
2. The operative part of the resolutions adopted by the Competition Council pursuant to Article 36 of this Law shall be published in "*Valstybes žinios*".

SECTION SIX
JUDICIAL INVESTIGATION OF COMPLAINTS AGAINST THE RESOLUTIONS
OF THE COMPETITION COUNCIL

Article 38. Appeal against the Resolutions of the Competition Council

1. The undertakings as well as other persons who believe that their rights protected by this Law have been violated shall have the right to appeal to the Higher Administrative Court against the resolutions of the Competition Council. The parties to the proceedings shall have the right to appeal against the resolutions of the Competition Council adopted pursuant to Article 36 of this Law.

2. A written complaint shall be lodged not later than within 20 days after the delivery of the resolution or publication of its operative part in “*Valstybes žinios*”.

3. Unless the Higher Administration Court decides otherwise, the lodging of a complaint shall not suspend the implementation of the resolutions of the Competition Council.

Article 39. Decision of the Court

Upon investigation of the complaint against the resolution of the Competition Council, the court shall make one of the following decisions:

- 1) to leave the resolution as it stands and to reject the complaint;
- 2) to revoke the resolution or its individual sections and to remand the case to the Competition Council for supplementary investigation;
- 3) to revoke the resolution or its individual sections;
- 4) to amend the resolution on the granting of individual exemption, concentration, application of penalties or interim measures.

CHAPTER SIX
LIABILITY FOR INFRINGEMENT OF THE LAW ON COMPETITION

Article 40. Penalties Imposed on Undertakings

1. Upon establishing that undertakings have engaged in conduct prohibited under this Law or have otherwise infringed this Law, the Competition Council shall have the right:

1) to place the undertakings under an obligation to end illegal activity, to carry out actions restoring the previous situation or eliminating consequences of infringement, including the obligation to cancel, amend or conclude contracts, also to set the time limit and lay down the conditions for meeting the above obligations;

2) to obligate the undertakings or controlling persons, who have effected concentration resulting in the establishment or strengthening of a dominant position and subsequent considerable reduction of competition in a relevant market without notifying the Competition Council or getting its permission, also in the cases provided for in paragraph 2 of Article 15 of this Law, to carry out actions restoring the previous situation or eliminating the consequences of concentration, including obligations to sell the enterprise or a part thereof, the assets of the undertaking or a part thereof, shares or a part thereof, to reorganise the enterprise, to cancel or change contracts, as well as to set the time limit and lay down the conditions for fulfilling of the above obligations;

3) to impose fines on undertakings fixed by this Law.

2. Upon being issued an authorisation by the Higher Administrative Court judge, the Competition Council may by its resolution prescribe the following restrictions of economic activity of undertakings which default on the imposed penalties specified in paragraph 1 hereof: suspend export-import operations, bank operations, the validity of the permit (licence) to engage in certain economic activity. The resolutions of the Competition Council shall have a binding force for the institutions empowered to apply the above restrictions and must be implemented without delay. The restrictions shall be lifted after the implementation of penalties imposed by the Competition Council.

3. For violation of this Law an action may be brought against undertakings not later than within three years from the date of infringement, and in case of continued violation - from the date of performance of the last acts.

Article 41. Fines

1. A fine of from LTL 3000 to 100000 may be imposed on undertakings for prohibited agreements; infringement of the conditions of exemption granted pursuant to Articles 7 and 8 of this Law; abuse of a dominant position, in the cases provided for in subparagraphs 1, 2, 3 and 4 of paragraph 1 of Article 9 of this Law; putting into effect of a notifiable concentration without the permission of the Competition Council; continuation of concentration within the period of its suspension, also infringement of concentration conditions or mandatory obligations established by the Competition Council. In the case when infringements listed in this paragraph have been made in aggravating circumstances, a fine of a larger amount may be imposed on the undertakings but not exceeding 10 % of the gross annual income.

2. A fine of from LTL 1,000 to 30,000 may be imposed on undertakings for the actions of unfair competition subject to investigation by the Competition Council. In the cases where infringements enumerated in this paragraph have been made in aggravating circumstances, a fine of a larger amount may be imposed on the undertakings but not exceeding 3 % of the gross annual income.

3. A fine of from LTL 1,000 to 10,000 may be imposed on undertakings for providing incorrect or incomplete information required for investigation, also for providing incorrect and incomplete information in an application for granting exemption under Article 8 of this Law, in notification of concentration or in any other notification submitted to the Competition Council in the cases provided for by this Law.

4. A fine of from LTL 3,000 to 100,000 may be imposed on undertakings for obstructing the officers of Competition Council from entering and checking the premises, land and means of transport used by the undertaking, to inspect or take possession of any documents and articles having evidential value in the investigation of the case.

5. A fine of from LTL 1,000 to 10,000 may be imposed on undertakings for each day of commission (continuation) of infringement in the event of failure to satisfy or to satisfy in good time the obligations of the Competition Council to put an end to illegal activity; to perform actions restoring previous situation or eliminating the consequences of infringement; also for failure to fulfil or fulfil without delay the instructions to provide information; for failure to provide notification of intended concentration within the time limits established by the Law; for failure to provide in good time information in the cases provided for by this Law.

Article 42. Imposition of Fines and Setting Their Amount

1. In setting the amount of a fine imposed on undertakings, regard shall be had to:
 - 1) amount of damage caused by the infringement;
 - 2) duration of the infringement;
 - 3) circumstances extenuating or aggravating the liability of an undertaking;
 - 4) amount of income due to the undertaking because of the infringement;
 - 5) influence of each undertaking in the commission of the infringement, if the infringement has been committed by several undertakings.
2. Voluntarily putting an end to the effect of detrimental consequences of infringement after the commission thereof, rendering of assistance to the Competition Council in the course of investigation, compensation for the losses or elimination of damage shall be considered as extenuating circumstances.
3. Obstruction of investigation, concealment of the committed infringement, failure to put an end to infringement notwithstanding the obligation by the Competition Council to discontinue illegal actions or repeated commission of the infringement for which the undertakings have been subjected to penalties provided for in this Law shall be considered as aggravating circumstances.
4. When setting the amount of a fine, the Competition Council may also recognise other circumstances not indicated herein as extenuating. The Competition Council shall take a decision whereby the rules of recognition of extenuating circumstances shall be laid down.

Article 43. Exemption from Fines

1. The undertaking which is a party to a prohibited agreement between competitors shall be exempted from fines provided for in respect of the infringement upon presenting to the Competition Council full information relating to the agreement if all the following conditions are satisfied:
 - 1) the undertaking provides information prior to the beginning of investigation of the agreement;
 - 2) the undertaking is the first of the parties to the prohibited agreement to provide such information;
 - 3) the undertaking provides complete information available to it regarding the prohibited agreement and co-operates with the Competition Council during the investigation;
 - 4) the undertaking has not been the initiator of the prohibited agreement and has not induced other undertakings to participate in such an agreement.
2. The dominating undertaking which has committed prohibited actions provided for in subparagraphs 1, 2, 3 and 4 of paragraph 1 of Article, 9 shall be exempted from the fines provided for in respect of those infringements, if all of the following conditions are satisfied:
 - 1) the undertaking provides complete information required for the investigation of abuse of dominant position and co-operates with the Competition Council during the investigation;
 - 2) the prohibited actions committed by the undertaking have not caused substantial and irreparable damage to the interests of other undertakings or public interests;
 - 3) the undertaking stops the prohibited actions of its own free will and furnishes proof thereof before the end of the investigation;
 - 4) the undertaking compensates of its own free will the damage caused by the prohibited actions and furnishes proof of this before the end of the investigation.

3. The Competition Council, having completed the investigation and when adopting the final resolution on the infringement shall decide, whether the conditions specified herein have been met and the undertaking qualifies for exemption from fines.

Article 44. Recovery of Fines

1. An undertaking must pay into the state budget the fine imposed by the Competition Council not later than within three months after the date of receipt of the resolution.
2. Upon a justified request of the undertaking payment of a fine or a part thereof may be postponed by a decision of the Competition Council for up to six months.
3. The fine not paid by the undertaking shall be recovered into the state budget. The resolution of the Competition Council shall be submitted to the bailiff for execution according to the procedure established by the Code of Civil Procedure. The resolution may be submitted for execution not later than within three years from the date of its adoption.

Article 45. Administrative Liability

Infringement of this Law shall incur administrative liability established by the laws of the Republic of Lithuania.

Article 46. Compensation for Damage

1. The undertakings who violate this Law must compensate for damage caused to other undertakings or natural and legal persons according to the procedure established by the laws of the Republic of Lithuania.
2. Damage caused to undertakings by illegal actions of the Competition Council or its officers shall be compensated according to the procedure established by law.

I hereby proclaim this Law enacted by the Seimas of the Republic of Lithuania

PRESIDENT OF THE REPUBLIC

VALDAS ADAMKUS

II. MALAWI

Proyecto de ley sobre la competencia y el comercio leal, 1998*

Memorando

El proyecto de ley tiene por finalidad promulgar una nueva ley que promueva la competencia en la economía mediante la prohibición de las prácticas comerciales anticompetitivas. Los principales objetivos del proyecto incluyen los siguientes:

- a) La creación de un mecanismo apropiado para regular las prácticas monopolísticas y las prácticas comerciales anticompetitivas, inclusive, en particular, el mantenimiento de precios de reventa, las fusiones y adquisiciones, y las prácticas comerciales restrictivas como la colusión y la fijación de precios;
- b) La disuasión de las prácticas de comercio desleal y la protección de los consumidores, y
- c) La aplicación de políticas y el seguimiento de las cuestiones normativas, así como la creación de mecanismos de aplicación.

La parte I del proyecto de ley trata de las cuestiones preliminares, inclusive la interpretación de varios términos utilizados en el instrumento. En esta parte también se indican las esferas a las que no se aplicará la ley, que incluyen, entre otras, las siguientes:

- a) Las actividades de los empleados para su propia protección razonable como tales, y
- b) Las disposiciones relacionadas con las negociaciones colectivas entre empleadores y empleados encaminadas a establecer las condiciones de empleo.

En la parte II del proyecto de ley, entre otras cosas, se establece la Comisión de la Competencia y el Comercio Leal y se prevé su composición, el período del mandato de los funcionarios y miembros de la Comisión, las vacantes y la remuneración de esos miembros.

En esta parte también se especifican las funciones y facultades de la Comisión, que incluyen las siguientes:

- a) Realizar investigaciones por propia iniciativa o a petición de toda persona que pueda verse afectada negativamente por una fusión propuesta;
- b) Adoptar las medidas que considere necesarias o apropiadas para impedir la realización de una fusión o el abuso de una posición dominante por cualquier empresa, o para remediar la situación que se cree con ello, y
- c) Facilitar información para que los consumidores conozcan sus derechos en virtud de la ley.

* Tal como se publicó en el suplemento de la *Gaceta de Malawi*, de fecha 30 de octubre de 1998.

Las facultades de la Comisión son, en particular, las siguientes:

- a) La citación y el examen de testigos;
- b) La solicitud de presentación y el examen de documentos, y
- c) La toma de juramentos.

En esta parte también se exige a los miembros de la Comisión que revelen los intereses que tengan en cualquier asunto de que conozca la Comisión.

La parte III del proyecto de ley prevé el establecimiento de la secretaría de la Comisión. La secretaría tendrá a su frente un Director Ejecutivo, y la Comisión utilizará los servicios de los demás empleados que considere necesarios.

En esta parte del proyecto se exige a los empleados que revelen cualesquiera intereses que puedan tener en todo asunto que examine la Comisión.

La parte IV trata de las disposiciones financieras y, entre otras cosas, indica las fuentes de financiación de la Comisión, que incluyen los fondos asignados por el Parlamento, gravámenes, subvenciones y donaciones.

En la parte V se enumeran prácticas comerciales restrictivas, que incluyen las siguientes:

- a) Supeditar el suministro de bienes o servicios a la aceptación de limitaciones sobre la distribución o fabricación de bienes que compitan con tales bienes, o con otros bienes, o la prestación de servicios que compitan con tales servicios o con otros servicios;
- b) Imponer restricciones en cuanto a dónde y a quién, o en qué forma o cantidades, los bienes suministrados u otros bienes pueden ser vendidos o exportados;
- c) La fijación de precios de reventa, y
- d) El comportamiento abusivo frente a los competidores, inclusive el recurso a la fijación de precios para menoscabar, obstaculizar o eliminar la competencia.

En esta parte del proyecto de ley también se exponen los criterios con arreglo a los cuales la Comisión permite las fusiones y adquisiciones. Esos criterios incluyen la determinación de si una fusión o adquisición se considera ventajosa para Malawi.

Esta parte contiene además disposiciones contra el abuso de dominio en el mercado por toda persona que tenga una posición dominante en él. A esa persona se le prohíbe utilizar su dominio en el mercado para, entre otras cosas:

- a) Eliminar o causar perjuicios a un competidor en ese o en cualquier otro mercado;
- b) Impedir la incorporación de una persona a ese o a cualquier otro mercado, o

- c) Impedir que una persona adopte un comportamiento competitivo en ese o en cualquier otro mercado.

En esta parte del proyecto de ley se encomienda a la Comisión la función de vigilar las concentraciones de poder económico y las prácticas comerciales restrictivas.

En esta parte también se prevé la protección del consumidor contra, entre otras cosas, lo siguiente:

- a) La exclusión de responsabilidad por bienes defectuosos;
- b) La reclamación del pago de bienes o servicios no solicitados;
- c) La adopción de un comportamiento inescrupuloso en el comercio de bienes o servicios;
- d) La organización de operaciones en "pirámide";
- e) La realización de ventas a precios engañosos;
- f) El ofrecimiento de regalos o premios sin intención de entregarlos, y
- g) La publicidad engañosa.

La parte VI del proyecto de ley contiene disposiciones varias. En esta parte se faculta a la Comisión para designar funcionarios de investigación y se describen las facultades de éstos.

En esta parte también se prevé la presentación de recursos ante una autoridad judicial por cualquier persona que se vea afectada por una decisión de la Comisión.

Además, esta parte contiene un artículo relativo a los delitos y sanciones. La multa prevista es de 500.000 kwachas (MK) o una cantidad equivalente a los beneficios financieros generados por el delito. La multa es de cuantía elevada para que sirva como disuasivo.

Con arreglo a esta parte del proyecto de ley, el Ministro tiene facultades para dictar reglamentos. Por último, el proyecto de ley prevé que las disposiciones de la ley sean aplicables al Estado y obliguen a éste.

COMPETITION AND FAIR TRADING ACT, 1998

Act

No. 43 of 1998

I assent

BAKILI MULUZI
President
30th December, 1998

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A BILL
entitled

An Act to encourage competition in the economy by prohibiting anti-competitive trade practices; to establish the Competition and Fair Trading Commission; to regulate and monitor monopolies and concentrations of economic power; to protect consumer welfare; to strengthen the efficiency of production and distribution of goods and services; to secure the best possible conditions for the freedom of trade; to facilitate the expansion of the base of entrepreneurship and to provide for matters incidental thereto or connected therewith

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

Short title and commencement

1. This Act may be cited as the Competition and Fair Trading Act, 1998, and shall come into operation on such date as the Minister shall appoint by notice published in the *Gazette*.

Interpretation

2. (1) In this Act, unless the context otherwise requires—
- “advertisement” means any form of communication made to the public or a section of the public for the purpose of promoting the supply of goods or services;
 - “affiliated” means associated with each other, formally or informally, shareholding or otherwise;
 - “anti-competitive trade practices” means the trade practices enumerated in sections 32, 33 and 34;
 - “Chairman” means the Chairman of the Commission appointed under section 5;
 - “Committee” means a committee of the Commission established under section 14.
 - “consumer” includes any person—
 - (a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale;
 - (b) to whom a service is rendered;
 - “controlling interest”, in relation to—
 - (a) any undertaking means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking;
 - (b) any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset;
 - “customer” means a person who purchases goods or services;
 - “distribution” includes any act by which goods are sold or services are supplied for consideration;
 - “distributor” means a person who engages in distribution;
 - “Executive Director” means the Executive Director of the Commission appointment under section 20;
 - “immediate family member”, in relation to any person, means that person’s spouse, child, parent, brother or sister;
 - “manufacturing” means transforming, on a commercial scale, raw materials into finished or semi-finished products, and includes the assembling of inputs into finished or semi-finished products but does not include mining.
 - “member” means a member of the Commission;
 - “merger” means—
 - (a) the acquisition of a controlling interest in—
 - (i) any trade involved in the production or distribution of any goods or services;

- (ii) an asset which is or may be utilized for or in connection with the production or distribution of any commodity, where the person who acquires the controlling interest already has a controlling interest in any undertaking involved in the production or distribution of the same goods or services; or
- (b) the acquisition of a controlling interest in any trade whose business consists wholly or substantially in—
 - (i) supplying goods or services to the person who acquires the controlling interest;
 - (ii) distributing goods or services produced by the person who acquires the controlling interest

“monopoly” means a situation in which a single person exercises, or two or more persons with a substantial economic connection exercise, substantial control of a market for any goods or services;

“person” includes an individual, a company, a partnership, an association and any group of person acting in concert, whether incorporated or not;

“sale” includes an agreement to sell or offer for sale and includes the exposing of goods for sale, the furnishing of a quotation, whether verbally or in writing, and any other act or notification by which willingness to enter into any transaction for sale is expressed;

“service” includes the sale of goods where the goods are sold in conjunction with the rendering of a service;

“supply”—

- (a) in relation to goods, includes supply or re-supply by way of gift, sale, exchange, lease, hire or hire purchase;
- (b) in relation to services, does not include the rendering of any services under a contract of employment but includes—
 - (i) the performance of engagements, for gain or reward (including professional engagements) for any matter; and
 - (ii) the rendering of services to order, and the provision of services by making them available to potential users, and “supplier” shall be construed accordingly;

“trade” means any trade, business, industry, profession or occupation, relating to the supply or acquisition of goods or services;

“trade association” means a body of persons, whether incorporated or not, which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members and, for the avoidance of doubt, does not include a trade union as defined in the Labour Relations Act; and

No. 16 of 1996

“trade practice” means any practice related to the carrying on of any trade and includes anything done or proposed to be done by any person which affects or is likely to affect the method of trading in any trade or class of traders or the production, supply or price in the course of trade or any goods whether real or personal, or of any service,

- (2) For the purpose of this Act—

- (a) any two companies are to be treated as affiliated enterprises if one of them is a company of which the other is a subsidiary or if both of them are subsidiaries of the same company; and
- (b) a group of affiliated enterprises shall be treated as a single enterprise.

(3) Every reference in this Act to the term “market” is a reference to a market in Malawi for goods and services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable to them.

(4) Reference in this Act to the lessening of competition shall, unless the context otherwise requires, include reference to hindering or preventing competition.

(5) For the purpose of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market, including competition from goods or services supplied or likely to be supplied by persons not resident or carrying on business in Malawi.

Non-application of the Act

3. Nothing in this Act shall apply to—

- (a) activities of employees for their own reasonable protection as employees;
- (b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment
- (c) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
- (d) those elements of any agreement which related exclusively to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trademark;
- (e) any act done to give effect to a provision of an agreement referred to in paragraph (d);
- (f) activities expressly approved or required under a treaty or agreement to which Malawi is a party;
- (g) those activities of professional associations which relate exclusively to the development and enforcement of professional standards of competence reasonably necessary for the protection of the public; and
- (h) such business or activity as the Minister may, by notice published in the *Gazette*, specify

PART II—THE COMPETITION AND FAIR TRADING COMMISSION

Establishment of the Commission

4. There is hereby established a body to be known as the Competition and Fair Trading Commission (in this Act otherwise referred to as the “Commission”) which shall be a body corporate with perpetual succession and a common seal capable of suing and being sued in its

corporate name, and with power, subject to this Act, to do or perform all such acts and things as a body corporate may by law do or perform.

Composition of the Commission

5. (1) The Commission shall consist of—
- (a) the following members nominated by the Minister and appointed by the President—
 - (i) two persons representing business interests;
 - (ii) a lawyer;
 - (iii) an economist;
 - (iv) an accountant; and
 - (v) two persons representing consumer interests
 - (b) the following members *ex officio*—
 - (i) the Secretary to the Treasury or his representative
 - (ii) the Secretary for Commerce and Industry or his representative; and
 - (iii) the General Manager of the Malawi Bureau of Standards or his representative

(2) A representative of a member *ex officio* referred to in subsection (1) shall be designated by, or on behalf of, the member *ex officio* by a notice in writing to the Commission to attend the meetings of the Commission, and upon such designation such representative shall not attend to the business of the Commission by representation.

(3) The Chairman shall be elected by the Commission from among its members.

Provided that no member appointed under paragraph (b) of subsection (1) shall be elected as Chairman.

(4) The names of all members as first constituted and every change of membership shall be published in the *Gazette*.

(5) The persons to be appointed under subsection (1) shall be chosen for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment.

(6) A member shall not be in the employ of the Commission nor serve on a full time basis.

Tenure of office and vacancies

6. (1) A member, other than a member *ex officio*, shall hold for a period of three years and shall be eligible for reappointment for another three-year term but the office of the member shall become vacant—

- (a) if he resigns by giving one month notice in writing to the Minister;
- (b) upon his death;

- (c) if he is absent without valid excuse from three consecutive meetings of the Commission of which he has had notice;
- (d) if he becomes an un-discharged bankrupt;
- (e) if he becomes of unsound mind; and
- (f) if he participates, directly or indirectly, in an activity which is in contravention of this Act.

(2) On vacation of office by a member, the vacancy shall be filled by a person appointed in accordance with the relevant provisions of section 5(1) (a) under which the former member was appointed:

Provided that if the remaining period is less than six months, the Minister may decide not to have the vacancy filled until the expiry of the period.

Allowances of members

7. Members of the Commission shall be paid such an allowance as the Minister shall determine

Functions of the Commission

8. (1) It shall be the function of the Commission to regulate, monitor, control and prevent acts or behaviour which are likely to adversely affect competition and fair trading in Malawi.

(2) Without derogation from the generality of subsection (1), the functions of the Commission shall be—

- (a) to carry out, on its own initiative or at the request of any person, investigations in relation to the conduct of business so as to determine whether any enterprise is carrying on anti-competitive trade practices;
- (b) to carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger;
- (c) to take such action as it considers necessary or expedient to prevent or redress the creation of a merger or the abuse of a dominant position by an enterprise;
- (d) to provide persons engaged in business with information regarding their rights and duties under this Act;
- (e) to provide information for the guidance of consumers regarding their rights under this Act;
- (f) to undertake studies and make available public reports regarding the operation of this Act;
- (g) to cooperate with and assist any association or body of persons to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act,
- (h) to advise the Minister on such matters relating to the operation of this Act as it thinks fit or as may be requested by the Minister; and
- (i) to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.

Commission shall seek information

9. The Commission shall obtain such information as it consider necessary to assist it in its investigation and, where it considers appropriate, shall examine and obtain verification of documents submitted to it.

Powers of the Commission

10. (1) For the purpose of carrying out its functions under this Act, the Commission is hereby empowered to—

- (a) summon and examine witnesses;
- (b) call for and examine documents;
- (c) administer oaths;
- (d) require that any document submitted to the Commission be verified by affidavit; and

(2) The Commission may hear orally any person who, in its opinion, will be affected by an investigation under this Act, and shall so hear the person if the person has made a written request for a hearing, showing that he is an interested party likely to be affected by the result of the investigation or that there are particular reasons why he should be heard orally.

(3) The Commission may require a person engaged in business or a trade or such other person as the Commission considers appropriate, to state such facts concerning goods manufactured, produced or supplied by him as the Commission may think necessary to determine whether the conduct of the business in relation to the goods or services constitutes an anti-competitive practice.

(4) If the information specified in subsection (3) is not furnished to the satisfaction of the Commission, it may take a finding on the basis of the information available before it.

Hearings to be held in public

11. Hearings of the Commission shall take place in public but the Commission may, whenever the circumstances so warrant conduct a hearing in private.

Policy directions

12. (1) The Commission may, where necessary, seek the general direction of the Minister as to the manner in which it is to carry out its duties under this part of the Act.

(2) Any direction given by the Minister under subsection (1) shall be in writing and published by the Commission in the Gazette.

Proceedings of the Commission

13. (1) Subject to the other provisions of this Act, the Commission may regulate its own procedure.

(2) The Commission shall meet for the transaction of business at least once every three months at such places and at such times as the Chairman may determine.

(3) A special meeting of the Commission may be called by the Chairman upon written notice of not less than seven days received from any member of the Commission and shall be called if at least four members so request in writing:

Provided that if the urgency of any particular matter does not permit the giving of such notice, a special meeting may be called upon giving a shorter notice.

(4) Half of the members shall form the quorum of any meeting of the Commission.

(5) There shall preside at any meeting of the Commission—

(a) the Chairman; and

(b) in the absence of the Chairman such member as the Chairman may designate or such member as the members present and forming a quorum may elect from among the ir number for the purpose of that meeting.

(6) The decision of the Commission on any matter before any meeting shall be that the majority of the members present and voting at the meeting and, in the event of an equality of votes, the person presiding shall have a casting vote in addition to his deliberative vote.

(7) No member appointed under section 5 (1) (a) shall attend to the business of his office by representation.

Committees of the Commission

14. (1) The Commission may, for the purpose of performance its functions under this Act, establish committees and delegate to any such committee such of its functions as it considers necessary.

(2) The Commission may appoint as members of a committee established under subsection (1) persons who are or are not members of the Commission and such persons shall hold office for such period as the Commission may determine.

(3) Subject to any specific or general direction of the Commission, a committee established under subsection (1) may regulate its own procedure.

Minutes of meetings

15. The Commission shall cause minutes to be kept of the proceedings of every meeting of the Commission and of every meeting of a committee of the Commission.

Disclosure of interest

16. (1) If any member is present at a meeting of the Commission or if any committee of the Commission at which any matter which is the subject of consideration is a matter in which that

person or his immediate family member or his professional or business partner is directly or indirectly interested in a private or professional capacity, he shall, as soon as is practicable after commencement of the meeting, disclose such interest and, unless the Commission or the committee otherwise directs, that person shall not take part in any consideration or discussion of, or vote on, any question touching on such matter.

(2) A disclosure of interest shall be recorded in the minutes of the meeting at which it is made.

Protection of members

17. No action, suit or other proceedings shall be brought or instituted personally against any member in respect of any act done in good faith in the course of carrying out the provisions of this Act.

Invited persons

18. (1) The Commission may in its discretion at any time and for any period invite any person, and the Minister may in like manner nominate an officer in the public service, to attend any meeting of the Commission or of any of its committees and take part in the deliberations of the meeting, but such person or officer shall not be entitled to vote at the meeting.

(2) Section 16 shall apply, *mutatis mutandis*, to a person or an officer attending a meeting of the Commission pursuant to subsection (1).

PART III—SECRETARIAT

Secretariat of the Commission

19. The Secretariat of the Commission shall consist of the Executive Director and other employees of the Commission appointed under this Act

Executive Director of the Commission

20. (1) The Commission shall appoint, on such terms and conditions as it may determine, an Executive Director of the Commission who shall be the Chief Executive Officer of the Commission and shall in addition perform such duties as the Commission shall assign to his office and ensure the effective administration and implementation of this Act.

(2) Without derogation from the generality of the responsibilities and duties of the Executive Director conferred under subsection 81), the Executive Director shall be responsible for the day to day administration of the Commission.

(3) The Executive Director or such other officer of the Commission as the Executive Director may designate, shall attend meetings of the Commission and of any committee of the Commission and may address such meetings, but shall not vote on any matter.

Provided that the person presiding at any meeting may, for good cause, require the Executive Director or such other officer to withdraw from such meeting.

(4) Section 16 shall apply, *mutates mutandis*, to the Executive Director and of such other officer referred to in this section.

Other employees

21. (1) The Commission may appoint, on such terms and conditions as it may determine, such other employees, subordinate to the Executive Director, as it considers necessary for the performance of its functions and to assist the Executive Director in discharging his duties and responsibilities.

(2) The Commission may delegate to the Executive Director the appointment of employees of such junior ranks as the Commission shall specify.

Disclosure of interest by employees, etc.

22. (1) An employee of the Commission or a consultant to the Commission who, or whose immediate family members is directly or indirectly interested in a private or professional or official capacity in any matter being considered by the Commission shall disclose such interest.

(2) A disclosure of interest made under this section shall be made to the Executive Director who shall take such decision as he considers appropriate in each case and submit a report thereon to the Commission.

Oath of secrecy

23. Every—

- (a) member of the Commission;
- (b) member of a committee of the Commission
- (c) employee of the Commission and
- (d) consultant in the service of the Commission

shall, upon assumption of his office, take such oath of secrecy as may be approved by the Commission or as may otherwise be prescribed under this Act.

Prohibition of publication or disclosure of information by unauthorized persons

24. (1) No person shall, without the consent in writing given by or on behalf of the Commission, publish or disclose to any person, otherwise than in the course of his duties, contents of any document, communication or information which relates to, and which has come to this knowledge in the course of his duties under this Act.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and, upon conviction, liable to a fine of K50,000 and to imprisonment for three years.

Protection of employees

25. No action, suit or other proceedings shall be brought or instituted personally against any employee in respect of any act done in good faith in the course of carrying out the provisions of this Act.

PART IV—FINANCIAL PROVISIONS

Funds of the Commission

26. (1) The funds of the Commission shall consist of such monies as may—
- (a) be appropriated by Parliament for the purpose of the Commission;
 - (b) be obtained as a result of the levy imposed under section 27;
 - (c) be paid to the Commission by way of grants or donations;
 - (d) be received by the Commission under subsection (2);
 - (e) constitute proceeds of sales of the annual reports and progress reports of the Commission; and
 - (f) otherwise vest or accrue to the Commission.
- (2) The Commission may—
- (a) accept money by way of grants or donation from any source in or outside Malawi;
 - (b) subject to the approval of the Minister and the Minister responsible for Finance, raise, by way of loans from any source in or outside Malawi, such money as it may require for the discharge of its functions; and
 - (c) charge and collect fees in respect of programmes publications, seminars, documents, consultancy services and other services provided by the Commission.
- (3) The Commission may invest in such manner as it thinks fit such funds as it does not immediately require for the performance of its functions.

Levy

27. The Commission may, from time to time, by order published in the Gazette, impose a levy and such levy shall be appropriated for the general operations of the Commission.

Financial year

28. The financial year of the Commission shall be the period of twelve months ending on 30 June in each year or on such other date as the Minister may specify by Order published in the Gazette;
- Provided that the first financial year of the Commission may be such shorter or longer period than twelve months as the Minister shall determine but being not less than six months or more than eighteen months.

Accounts

29. (1) The Commission shall cause to be kept proper books of accounts and other records relating to its accounts.

(2) The accounts of the Commission shall be audited annually by independent auditors appointed by the Commission.

Annual reports

30. (1) As soon as practicable, but not later than six months after the expiry of each financial year, the Commission shall submit to the Minister a report concerning its activities during that financial year.

(2) The report referred to in subsection (1) shall be in such form as the Minister shall approve and shall include information on the financial affairs of the Commission, and there shall be appended to the report—

- (a) an audited balance sheet;
- (b) an audited statement of income and expenditure; and
- (c) such other information as the Commission may consider appropriate or as the Minister may direct.

(3) The Minister shall, during the meeting of the National Assembly next following receipt by him of the report referred to in subsection (1), lay the report before the National Assembly and subsequently the report shall be published.

Progress reports

31. The Commission shall, at the end of every financial year, produce a progress report on its activities during that period and shall publish the report.

PART V—ANTI-COMPETITIVE TRADE PRACTICES, ETC.

Enumeration of anti-competitive trade practices

32. (1) Any category of agreements, decisions and concerted practices which are likely to result in the prevention, restriction or distortion of competition to an appreciable extent in Malawi or in any substantial part of it are declared anti-competitive trade practices and are hereby prohibited.

(2) Subject to the provisions of subsection (1), enterprises shall refrain from the following acts or behaviour if they limit access to markets or otherwise unduly restrain competition, or have or are likely to have adverse effect on trade or the economy in general—

- (a) predatory behaviour towards competitors including the use of cost pricing to damage, hinder or eliminate competition.

- (b) discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods and services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
- (c) making the supply of goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods or the provision of competing or other services;
- (d) making the supply of particular goods or services dependant upon the purchase of other goods or services from the supplier to the consignee;
- (e) imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported.
- (f) resale price maintenance; or
- (g) trade agreements fixing prices between persons engaged in the business of selling goods or services, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between person engaged in the sale of purchased goods or services.

Trade agreements

33. (1) It shall be an offence for enterprises engaged on the market in rival or potentially rival activities to engage in the practices appearing in subsection (3).

Provided that this subsection shall not apply where enterprises are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other.

- (2) This section applied to formal, informal, written and unwritten agreements and arrangements,
- (3) For the purpose of subsection (1), the following are prohibited—
- (a) colluding in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors or suppliers of services, in settling uniform price in order to eliminate competition;
 - (b) collusive tendering and bid-rigging;
 - (c) market or customer allocation agreements;
 - (d) allocation by quota as to sales and production;
 - (e) collective action to enforce arrangements
 - (f) concerted refusals to supply goods or services to potential purchasers; or
 - (g) collective denials of access to an arrangement or association which is crucial to competition.

Anti-competitive trade practices by associations

34. (1) The following practices conducted by or on behalf of a trade association are declared to be anti-competitive trade practices and are prohibited—

- (a) unjustifiable exclusion from a trade association of any person carrying on or intending to carry on in good faith the trade in relation to which the association is formed; or
- (b) making of recommendations, directly or indirectly, by a trade association, to its members or to any class of its members which are relate to—
 - (i) the prices charged or to be charged by such members or any such class of members or to the margins included or to be included in the prices or to the pricing formula used or to used in the circulation of those prices; or
 - (ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms), of such member or any class of members and which directly affects prices or profit margins included in the pricing formula.

(2) Any trade association which contravenes the provisions of subsection commits an offence.

Control of mergers and takeovers

35. (1) Any person who, in the absence of authority from the Commission, whether as a principal or agent and whether by himself or his agent, participates in effecting—

- (a) a merger between two or more independent enterprise;
 - (b) a takeover of one or more such enterprises by another enterprise, or by a person who control another such enterprise,
- where such a merger or takeover is likely to result in substantial lessening of competition in any market shall be guilty of an offence.

(2) No merger or takeover made in contravention to subsection (1) shall have any legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be legally enforceable.

Application to the Commission for authorization

36. Any person may apply to the Commission of an order authorizing that person to effect a merger or takeover.

Investigation by the Commission

37. (1) The Commission shall investigate any application made under section 36 and for that purpose the Commission shall be entitled to require any participant in the market within which a merger or takeover is proposed to take place to grant to the Commission access to records relating to patterns of ownership and percentages of sales accounted for by participants in the proposed merger or takeover or by other leading enterprises in the relevant sector.

(2) The Commission may require any person possessing such records to give to the Commission copies of those records or alternatively to submit such records to the Commission for copying by the Commission.

Criteria for evaluating application for authorization

38. (1) In evaluating an application under section 36, the Commission shall have due regard to the following criteria—

- (a) a merger or takeover shall be regarded as disadvantageous to the extent that it is likely to reduce competition in the domestic market and increase the ability of producers of the goods or services in question to manipulate domestic prices, output and sales;
- (b) a merger or takeover shall be regarded as advantageous to Malawi to the extent that it is likely to result in—
 - (i) a substantially more efficient unit with lower production or distribution costs;
 - (ii) an increase in net exports;
 - (iii) an increase in employment;
 - (iv) lower prices to consumers;
 - (v) an acceleration in the rate of economic development;
 - (vi) a more rapid rate of technological advancement by enterprises in Malawi.

(2) The Commission shall not authorize a merger or takeover unless on balance that advantages to Malawi outweigh the disadvantages.

Order of the Commission on mergers and takeovers

39. (1) The Commission shall, within forty-five days of receipt of an application or the date on which the applicants provide the information sought by the Commission if that date is later, make an order concerning an application for authorization of a merger or takeover.

(2) An order made under subsection (1) may approve or reject the application, or it may approve the application on condition that certain steps be taken to reduce negative effects of the merger or takeover on competition.

(3) The Commission shall cause an order made under subsection (1) to be published in the *Gazette* not later than fourteen days after it is made.

Enforcement of orders

40. (1) The Commission or any person in whose favour or for whose benefit an order has been made may lodge a copy of the order, certified by the Commission or a person authorized by the Commission, with the Registrar of the High Court and the Registrar shall forthwith record the order as a judgement of the High Court.

(2) An order that has been recorded under subsection (1) shall, for the purposes of enforcement, have the effect of a civil judgement of the High Court.

Misuse of market power

41. (1) Any person that has a dominant position of market power shall not use that power for the purpose of—

- (a) eliminating or damaging a competitor in that or any other market;
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(2) Any person who contravenes the provisions of subsection (1) commits an offence.

Monitoring concentrations of economic power, etc.

42. The Commission shall keep the structure of production of goods and services in Malawi under review to determine where concentrations of economic power or anti-competitive trade practices exist whose detrimental impact on competition and the economy outweigh the efficiency advantages, if any.

Unfair trading

43. (1) A person shall not, in relation to a consumer—

- (a) withhold or destroy producer or consumer goods, or render unserviceable or destroy the means of production and distribution of such goods, whether directly or indirectly, with the aim of bringing about a price increase;
- (b) exclude liability for defective goods;
- (c) in connection with the supply of goods or services, make any warranty—
 - (i) limited to a particular geographic area or sales point;
 - (ii) falsely representing that products are of particular style, model or origin;
 - (iii) falsely representing that the goods are new of specified age; or
 - (iv) representing that products or services have any sponsorship, approval, performance and quality characteristics, components, materials, accessories, uses or benefits which they do not have;
- (d) engage in conduct that is likely to mislead that public as to the nature, price, availability, characteristics, suitability for a given purpose, quantity or quality of any products or service;
- (e) supply any product which is likely to cause injury to health or physical harm to consumers, when properly used, or which does not comply with a consumer safety standard which has been prescribed under any written law;
- (f) claim payment for unsolicited goods or services;
- (g) engage in unconscionable conduct in carrying out trade in goods or services;
- (h) engage in pyramid selling of goods and services;
- (i) engage in bait selling;
- (j) offer gifts or prizes with no intention of supplying them; and
- (k) put out an advertisement which is misleading or deceptive.

(2) Any person who contravenes the provisions of subsection (1) commits an offence.

Authorization of allowable acts

44. (1) The Commission may authorize any act, agreement or understanding which is not prohibited outright by this Act, that is, one which is not necessarily illegal unless abused if that act, agreement or understanding is consistent with the objectives of this Act and the Commission considers that, on balance, the advantage to Malawi outweigh the disadvantages.

(2) The Commission shall not authorize acts, agreements or understandings of a kind described in section 33 (3), 41 (1) and 43 (1).

PART VI—MISCELLANEOUS PROVISIONS

Investigating officers

45. (1) The Commission may designate any of its employees to be investigating officers for the purposes of this Act.

(2) Investigating officers shall carry out their functions under this Act subject to such directions as the Commission may give them.

(3) The Commission shall cause every investigating officer to be furnished with a certificate of appointment, which the investigating officer shall exhibit on demand by any interested person before carrying out any function under this Act.

Powers of entry and inspection

46. (1) An investigating officer may at all reasonable times and on the production of a search warrant obtained from a court of law—

- (a) enter any premises in or on which there is reasonably suspected to be any book, record or document relating to any anti-competitive trade practice or unfair trade practice or any actual or potential merger, takeover or monopoly situation, and
- (b) require any person upon the premises—
 - (i) to disclose all information at his disposal; and
 - (ii) to produce any book, record or document or copy thereof or extract there from, that may relate in any way to any anti-competitive trade practices, unfair trade practice, merger, takeover or monopoly situation referred to in paragraph (a); and
- (c) make copies of or take extracts from any book, record or document referred to in paragraph (b).

- (2) Any person who, without lawful excuse—
 - (a) hinders or prevents an investigating officer from exercising any power under subsection (1); or
 - (b) fails or refuses to comply with any requirements of an investigating officer under subsection (1); or

(c) upon being required under subsection (1) or disclose any information, fails or refuses to do so or provides information that is false or which he does not believe on reasonable grounds to be true,
shall be guilty of an offence and, upon conviction, be liable to a fine of K10,000 or to imprisonment for two years.

Secrecy to be observed

47. (1) A member of the Commission or of a committee thereof, and every investigating officer and other person appointed or employed under this Act shall not disclose to any person, except in the performance of his functions under this Act or when required to do so by any written law, any information which he may have acquired in the course of his duties in relation to the financial or business affair of any person, undertaking or business.

(2) An person who contravenes subsection (1) shall be guilty of an offence and, upon conviction, be liable to a fine of K10,000 or to imprisonment of two years.

Appeal against finding of the Commission

48. (1) Any person who is aggrieved by a finding of the Commission may, within fifteen days after the date of that finding, appeal to a Judge in Chambers.

(2) The Judge in Chambers may—

- (a) confirm, modify or reverse the findings of the Commission or any part thereof; or
- (b) direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.

(3) In giving any direction under this section, the Judge shall—

- (a) advise the Commission of his reasons for doing so; and
- (b) give to the Commission such directions as he thinks fit concerning the reconsideration of the matter by the Commission

(4) In reconsideration of the matter, the Commission shall have regard to the Judge's reasons for giving a direction.

Operation of order pending determination of appeal

49. Where an appeal is brought against any finding of the Commission any directions or order of the Commission based on such findings shall remain in force pending the determination of the appeal, unless the Judge otherwise orders.

Offences

50. Any person who—

- (a) contravenes or fails to comply with any provision of this Act or any regulation made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made hereunder;

- (b) omits or refuses—
 - (i) to furnish any information when required by the Commission to do so; or
 - (ii) to produce any document when required to do so by a notice sent by the Commission; or
- (c) knowingly furnishes any false information to the Commission, shall be guilty of an offence.

Penalty for offences

51. A person guilty of an offence under this Act for which no specific penalty is provided shall be liable to a fine of K500,000 or of an amount equivalent to the financial gain generated by the offence, if such amount be greater, and to imprisonment for five years.

Civil liability

52. Any person who suffers injury, loss or harm as a result of any agreement, arrangement, undertaking, act or omission which is prohibited under this Act may recover damages by way of civil proceedings in the High Court from the person responsible for any such agreement, arrangement, undertaking, act or omission.

Regulations

53. The Minister may, on the advice of the Commission, make regulations for carrying into effect the provisions of this Act, and, in particular and without prejudice to the generality of the foregoing power, such regulations may provide for—

- (a) anything required to be prescribed under or for the purposes of this act;
- (b) any forms required for the purposes of this Act;
- (c) fees payable in respect of any service provided by the Commission.

Government to be bound

54. This Act shall apply to and bind the Government.

Passed in Parliament this twenty-sixth day of November, one thousand nine hundred and ninety-eight.

R. L. Gondwe
Clerk of Parliament

III. ZIMBABWE

Comentarios del Gobierno de Zimbabwe a la legislación nacional sobre la competencia

Motivos de la promulgación de la legislación sobre la competencia en Zimbabwe

La preocupación del Gobierno de Zimbabwe por las prácticas comerciales restrictivas y el abuso de dominio en el mercado data de 1980, año en el que el país alcanzó la independencia. Aun cuando al independizarse el nuevo Estado de Zimbabwe heredó una economía altamente regulada, aplicó el sistema regulador en forma diferente¹ al del antiguo régimen colonial. Mientras que éste actuaba en estrecha cooperación con el sector privado, el nuevo régimen recelaba de la actividad empresarial y trató de lograr que la capacidad de la industria para obtener ingresos de los monopolios y oligopolios fuera limitada.

Por lo tanto, el nuevo Gobierno adoptó cuatro medidas normativas, que, entre otros objetivos, servían para contrarrestar la capacidad de los monopolios y oligopolios para abusar de su posición dominante en el mercado²:

1. Amplios controles de precios. Los precios de los productos *esenciales* los determinaba directamente el Gabinete ministerial; los de los productos *estratégicos* los fijaba el llamado a la sazón Ministerio de Industria y Comercio, y los de otros bienes de consumo se determinaban al precio de costo más un cierto margen.
2. La intervención del Gobierno para fijar los salarios y sueldos y limitar la capacidad de las empresas para despedir trabajadores. Los objetivos de esta política eran el control de la inflación y la redistribución de los ingresos.
3. La utilización informal del mecanismo de asignación de divisas como medio para mantener la actuación de las empresas dentro de los justos límites.
4. Propiedad y participación del Gobierno en los sectores industrial y comercial como medio para contrarrestar la influencia de los monopolios y oligopolios.

En 1991, el Gobierno introdujo un amplio programa de ajuste económico y estructural (ESAP). Los cuatro elementos principales de este programa encaminados a liberalizar la economía y mejorar el entorno competitivo en el país eran los siguientes: i) liberalización del comercio; ii) eliminación del control de precios; iii) desregulación en el plano interno, y iv) reforma y privatización de las empresas públicas.

Sin embargo, el Gobierno se dio cuenta de que las solas fuerzas del mercado tal vez no pudieran hacer frente a todos los problemas planteados en el mercado, sobre todo en las situaciones de disfunción de éste causadas por una posición dominante y por su abuso. Un

¹ *Study of Monopolies and Competition Policy in Zimbabwe, Implementing Policy Change (IPC)*, septiembre de 1992.

² *Ibíd.*

Comité interministerial creado para examinar las cuestiones de la competencia en Zimbabwe encargó la realización de un estudio sobre los monopolios y la política de la competencia del país. El estudio lo realizó un equipo de consultores nacionales y extranjeros financiado por el proyecto para la introducción de cambios normativos, bajo los auspicios de la Agencia de los Estados Unidos para el Desarrollo Internacional (USAID).

En el estudio del proyecto, cuyo informe se publicó en septiembre de 1992, se comprobó que las prácticas comerciales restrictivas estaban muy extendidas en Zimbabwe, tanto en las industrias concentradas como en las no concentradas, y se recomendó la promulgación de nueva legislación sobre la competencia cuya aplicación estaría a cargo de una autoridad de defensa de la competencia.

La legislación sobre la competencia de Zimbabwe -Ley sobre la competencia de 1996 (Nº 7)- entró en vigor en virtud del Texto Reglamentario 21A, de 1998, publicado en la *Gaceta extraordinaria del Gobierno* de 6 de febrero de 1998. La ley prevé el establecimiento de una Comisión de la Competencia, de carácter independiente. El Presidente de Zimbabwe nombró a los miembros de la Comisión (los comisionados) el 28 de enero de 1998 mediante el Aviso general 58, de 20 de febrero de 1998, para que actuaran a tiempo parcial con un mandato de tres años. El Director de la Comisión fue nombrado el 9 de noviembre de 1998 de conformidad con el artículo 17 de la ley. La designación del Director permitió la contratación de los demás funcionarios profesionales y de apoyo administrativo de la Comisión, proceso que comenzó efectivamente en enero de 1999.

Objetivos de la legislación sobre la competencia de Zimbabwe

El preámbulo de la Ley sobre la competencia, de 1996, enuncia los amplios objetivos de la legislación en la materia del país, como sigue:

"Promover y mantener la competencia en la economía de Zimbabwe; establecer una comisión de la competencia en la industria y el comercio y prever sus funciones; regular la prevención y el control de las prácticas restrictivas, la reglamentación de las fusiones, la prevención y el control de las situaciones de monopolio y la prohibición de las prácticas de comercio desleal, y establecer disposiciones acerca de las cuestiones relacionadas con lo que antecede, o las de carácter accesorio."

Los objetivos concretos de la legislación se indican en las funciones reglamentarias de la Comisión de la Competencia en la Industria y el Comercio (párrafo 5 1) de la ley, que son las siguientes:

- Alentar y promover la libre competencia en todo los sectores de la economía;
- Reducir los obstáculos a la entrada en cualquier sector de la economía o en cualquier forma de actividad económica;
- Investigar, desalentar e impedir las prácticas restrictivas;

- Estudiar las tendencias hacia una mayor concentración económica, con miras a investigar las situaciones de monopolio y prevenirlas, cuando sean contrarias al interés público;
- Asesorar al Ministro de Industria y Comercio Internacional acerca de todos los aspectos de la competencia económica, inclusive las actividades empresariales realizadas por instituciones directa o indirectamente controladas por el Estado, y la formulación, coordinación, aplicación y administración de la política gubernamental con respecto a la competencia económica, y
- Facilitar a las personas interesadas información sobre la política actual en materia de prácticas restrictivas, adquisiciones y situaciones de monopolio, para que les sirvan como directrices.

Prácticas y comportamientos objeto de control

La legislación sobre la competencia de Zimbabwe controla prácticas y comportamientos tales como las prácticas comerciales restrictivas (inclusive las prácticas de comercio desleal), las fusiones y las situaciones de monopolio.

- a) Las "prácticas restrictivas" se definen en la Ley sobre la competencia como:
- "a) Todo acuerdo, arreglo o pacto, independientemente de que sea o no aplicable, entre dos o más personas;*
 - b) Cualquier práctica comercial o método de contratación;*
 - c) Todo acto u omisión deliberado por parte de toda persona, sea que actúe en forma independiente o de común acuerdo con cualquier otra persona, o*
 - d) Toda situación resultante de las actividades de cualquier persona o clase de personas;*

que restrinja directa o indirectamente la libre competencia en grado considerable, en el sentido de que produce o es probable que produzca uno o varios de los siguientes efectos:

- i) restringir la producción o distribución de cualquier producto o servicio;*
- ii) limitar los medios disponibles para la producción o distribución de cualquier producto o servicio;*
- iii) aumentar o mantener el precio de cualquier producto o servicio;*
- iv) impedir la producción o distribución de cualquier producto o servicio por los medios más eficientes o económicos;*
- v) impedir o retardar el desarrollo o la introducción de mejoras técnicas con respecto a cualquier producto o servicio;*

- vi) *impedir o limitar la incorporación a cualquier mercado de las personas que produzcan o distribuyan cualquier producto o servicio;*
- vii) *impedir o retardar la expansión del actual mercado de cualquier producto o servicio, o la creación de nuevos mercados para tal producto o servicio."*

En la ley la expresión "práctica de comercio desleal" se define simplemente como "una práctica restrictiva u otro comportamiento especificado en la primera lista". En la primera lista de la Ley se enumeran como prácticas de comercio desleal las siguientes: i) la publicidad engañosa; ii) las ofertas a bajo precio falsas; iii) la distribución de productos o servicios a un precio más alto que el indicado en la publicidad; iv) la negativa infundada a distribuir productos o servicios; v) la manipulación de las licitaciones, y vi) los acuerdos colusorios entre competidores.

b) Las "fusiones" se definen en la ley como:

"a) *La adquisición de una participación mayoritaria en -*

- i) *una empresa dedicada a la producción o distribución de cualquier producto o servicio; o*
- ii) *un activo que se utilice o pueda utilizarse para la producción o distribución de cualquier producto, o en relación con ellas;*

cuando la persona que adquiera la participación mayoritaria ya tenga una participación de ese tipo en cualquier empresa dedicada a la producción o distribución del mismo producto o servicio; o

b) *La adquisición de una participación mayoritaria en una empresa cuyas actividades consistan totalmente o en forma sustancial en:*

- i) *proporcionar un producto o un servicio a la persona que adquiere la participación mayoritaria; o*
- ii) *distribuir un producto o servicio producido por la persona que adquiere la participación mayoritaria".*

c) Por una "situación de monopolio", tal como se define en la ley, se entiende "una situación en la que una sola persona ejerce o dos o varias personas con una importante relación económica entre ellas ejercen un control sustancial del mercado de cualquier producto o servicio."

Al igual que la legislación sobre la competencia de otros países, la Ley sobre la competencia de Zimbabwe se refiere a dos tipos de delitos: delitos *per se* y delitos con arreglo al "criterio del carácter razonable".

Los delitos *per se* son los que están totalmente prohibidos; el mero hecho de cometerlos basta para constituir un delito. Las prácticas de comercio desleal, tal como se definen en la ley,

son delitos de este tipo. "Toda persona que inicie, realice o de otra forma lleve a efecto una práctica de comercio desleal será culpable de un delito" (artículo 42 3) de la ley).

Los delitos con arreglo al "criterio del carácter razonable" exigen que la autoridad de defensa de la competencia evalúe en primer lugar el fondo o lo infundado de la práctica o el comportamiento objeto de control para determinar si está o no justificado sobre la base de consideraciones de interés público. Todas las demás prácticas restrictivas, fusiones y situaciones de monopolio definidas en la ley corresponden a esta categoría.

Se considera que una práctica restrictiva es contraria al interés público si la lleva a cabo una persona con un considerable control del mercado del producto o servicio al que se refiera la práctica, a menos que a la autoridad de defensa de la competencia le conste alguna de las circunstancias siguientes (artículo 32 2) de la ley):

- "a) Que la práctica restrictiva es razonablemente necesaria, teniendo presente la naturaleza del producto o el servicio al que se refiera, para proteger a sus consumidores o usuarios, o al público en general, contra todo daño o perjuicio;*
- b) Que la terminación de la práctica restrictiva negaría a los consumidores o usuarios del producto o servicio al que se refiera, otros beneficios o ventajas concretos e importantes de que disfruten o es probable que disfrutarán, bien en virtud de la práctica restrictiva propiamente dicha, bien a causa de cualquier acuerdo u operación derivado de ella;*
- c) Que es probable que la terminación de la práctica restrictiva produzca efectos graves y negativos persistentes sobre el nivel general de desempleo en cualquier zona en que esté ubicada una proporción sustancial de la empresa, la actividad comercial o la industria a la que concierna esa práctica;*
- d) Que es probable que la terminación de la práctica restrictiva provoque una reducción considerable del volumen de ingresos de cualquier empresa de exportación o el comercio de exportación de Zimbabwe;*
- e) Que la práctica restrictiva es razonablemente necesaria para mantener una práctica autorizada o cualquier otra práctica restrictiva que a juicio de la Comisión no sea contraria al interés público;*
- f) Que la práctica restrictiva no limita o desalienta directa o indirectamente, en grado considerable, la competencia en cualquier sector empresarial, comercial o industrial y no es probable que lo haga."*

Se considera que una fusión es contraria al interés público si a la autoridad de defensa de la competencia le consta que la fusión (artículo 32 4) de la ley):

- "a) *Ha reducido sustancialmente o es probable que reduzca el grado de competencia en Zimbabwe o en cualquier parte considerable del país, o*
- b) *Ha provocado o es probable que provoque una situación de monopolio que es o será contraria al interés público."*

Se considera que una situación de monopolio es contraria al interés público a menos que a la autoridad de defensa de la competencia le conste una o varias de las siguientes circunstancias (artículo 32 5) de la ley):

- "a) *Que la situación de monopolio gracias al logro de economías de escala o por otras razones, ha permitido o es probable que permita un uso de los recursos en cualquier sector empresarial, comercial o industrial más eficiente, que si no existiera esa situación;*
- b) *Que la situación de monopolio es necesaria, o es probable que lo sea, para la producción, el suministro o la distribución de cualquier producto o servicio en Zimbabwe, teniendo presente, por una parte, los recursos necesarios para producir, suministrar o distribuir ese producto o servicio, y, por otro, las dimensiones del mercado nacional para tal producto o servicio;*
- c) *Que la terminación o prevención de la situación de monopolio privaría a los consumidores usuarios de cualquier producto o servicio otros beneficios o ventajas concretos e importantes de que disfrutaban, o es probable que disfruten, bien a causa de la situación de monopolio propiamente dicha, bien en virtud de cualquier acuerdo u operación derivada de la misma;*
- d) *Que la situación de monopolio es razonablemente necesaria, o es probable que lo sea, para permitir a las partes directamente interesadas negociar condiciones equitativas para la distribución de un producto o servicio:*
 - i) *de una persona ajena a la situación de monopolio y que ejerza un control completo o sustancial sobre la distribución del producto o servicio, o*
 - ii) *a una persona ajena a la situación de monopolio y que ejerza un control completo o sustancial del mercado del producto o servicio;*
- e) *Que la terminación o prevención de la situación de monopolio probablemente producirá efectos graves y perjudiciales persistentes sobre el nivel general de desempleo en cualquier zona en que esté ubicada una proporción importante de la empresa, actividad comercial o industrial a la que se refiera esa situación;*
- f) *Que la terminación o prevención de la situación de monopolio causará probablemente una reducción sustancial del volumen de ingresos de cualquier empresa de exportación o el comercio de exportación de Zimbabwe."*

Ámbito de aplicación de la legislación sobre la competencia

Aun cuando la legislación sobre la competencia de Zimbabwe no lo indica expresamente, en forma tácita se aplica a todos los sectores de la economía, con unas pocas excepciones. Las disposiciones pertinentes de la ley establecen que:

"3.1) La presente ley no se interpretará en el sentido de

a) Limitar ningún derecho adquirido en virtud:

i) la Ley de derechos de los fitogeneticistas [cap. 115],

ii) la Ley de derechos de autor [cap. 200],

iii) la Ley de diseños y modelos industriales [cap. 201],

iv) la Ley de patentes [cap. 202],

v) la Ley de marcas comerciales [cap. 203],

salvo en la medida en que tal derecho se ejerza con la finalidad de aumentar o mantener los precios o por cualquier otra consideración en la forma contemplada en la definición de "práctica restrictiva"... , o

b) Impedir a los sindicatos u otros representantes laborales que protejan los intereses de sus miembros mediante la negociación y conclusión de convenios y otros acuerdos con los empleadores, o los representantes de éstos, de conformidad con la Ley de relaciones laborales de 1985 (Nº 16 de 1985).

2) Salvo en lo tocante a la responsabilidad penal, las disposiciones de la presente ley obligarán al Estado en la medida en que éste participe en la fabricación y distribución de productos.

3) La presente ley será aplicable a todas las actividades de los órganos oficiales, salvo en la medida en que las mismas estén autorizadas, expresa o tácitamente, por un acto legislativo."

La ley no atribuye a la autoridad de defensa de la competencia jurisdicción extraterritorial alguna respecto de las actividades anticompetitivas que se realicen fuera de Zimbabwe. Sin embargo, esa autoridad puede examinar los efectos de las fusiones entre empresas multinacionales sobre la competencia, en la medida en que tales fusiones den lugar a una combinación de las operaciones de filiales de las empresas en el país.

Órgano u órganos encargados de la aplicación de la legislación

Los dos componentes principales de la Comisión de la Competencia son los miembros de ésta (los Comisionados), a los que se les ha confiado el desempeño de las funciones oficiales de la Comisión, y la Dirección a cuyo frente está el Director.

El artículo 17 1) de la Ley sobre la competencia prevé el nombramiento y establece las funciones del Director de la Comisión, como sigue:

"17.1) La Comisión nombrará un Director que será responsable de la administración de sus asuntos, fondos y bienes y que desempeñará cualesquiera otras funciones que se le encomienden o impongan en virtud de la presente ley, o que la Comisión le delegue o asigne."

De conformidad con las disposiciones mencionadas más arriba, la Comisión ha delegado funciones de investigación en el Director y la Dirección, quedando libre para concentrarse en el desempeño de las funciones de su competencia jurisdiccional. Todos los funcionarios profesionales de la Dirección (economistas, abogados, contadores y administradores de empresas) han sido designados "oficiales de investigación" de conformidad con el artículo 46 1) de la ley.

El artículo 28 de la Ley sobre la competencia otorga a la Comisión facultades para investigar las prácticas restrictivas, las fusiones y las situaciones de monopolio. Las disposiciones pertinentes son del tenor siguiente:

"1) Con sujeción a lo dispuesto en la presente ley, la Comisión podrá realizar las investigaciones que considere necesarias:

- a) Acerca de toda práctica restrictiva que tenga motivos para considerar que existe o puede llegar a existir;*
- b) A fin de determinar:*
 - i) si se proyecta realizar, se ha realizado o se está realizando una fusión;*
 - ii) la naturaleza y el alcance de cualquier participación mayoritaria que se tenga o pueda adquirirse en cualquier fusión o fusión propuesta.*
- c) Acerca de cualquier tipo de acuerdo, arreglo o pacto comercial, o método de contratación, que, a juicio de la Comisión, se está concluyendo o puede concluirse con miras a la creación o mantenimiento de una práctica restrictiva, o en relación con ella;*
- d) Sobre cualquier situación de monopolio que la Comisión tenga motivos para considerar que existe o puede llegar a existir.*

2) Antes de iniciar una investigación de conformidad con el párrafo 1) supra la Comisión publicará un aviso en la Gaceta y en un periódico que circule en la zona que abarque la investigación y que la Comisión considera apropiado:

- a) En el que se indique la naturaleza de la investigación propuesta,*
- b) Se pida a cualquier persona interesada que desee hacerlo que presente exposiciones por escrito a la Comisión con respecto al asunto al que se refiera la investigación propuesta.*

3) *A los efectos de toda investigación en virtud del presente artículo, la Comisión gozará de las facultades conferidas a un comisionado por la Ley de comisiones de investigación [capítulo 80], salvo la de ordenar que se detenga a una persona...*

4) *En toda investigación en virtud del presente artículo, la Comisión velará por que las normas reconocidas comúnmente como normas de la justicia natural sean observadas debidamente y, en particular, adoptará todas las medidas razonables para garantizar que cualquier persona cuyos intereses sea probable que se vean afectados por los resultados de la investigación tenga una oportunidad adecuada para hacer declaraciones sobre el asunto."*

Antes de que la Comisión inicie una investigación a fondo tal como se prevé en el artículo 28 de la ley, la Dirección realiza investigaciones preliminares sobre las preocupaciones identificadas acerca de la libre competencia a fin de determinar si hay indicios de delito que justifiquen dicha investigación.

Aun cuando la mayoría de las investigaciones se basan en denuncias, la Comisión inicia muchas veces su propia investigación a partir de informes en los periódicos y de sus estudios sobre la competencia en varios sectores de la economía.

Mientras esté investigando algún elemento que cause preocupación en relación con la competencia, la Comisión puede publicar un aviso por el que prohíba o suspenda toda práctica restrictiva o fusión que sea objeto de la investigación, hasta tanto se conozcan los resultados de ésta (artículo 29 1) de la ley). La Comisión también puede negociar con cualquier persona a fin de llegar a un acuerdo que garantice la terminación de cualquier práctica restrictiva o ponga término, impida o altere cualquier fusión o situación de monopolio, independientemente de que haya iniciado una investigación sobre la práctica restrictiva, la fusión o la situación de monopolio de conformidad con el artículo 28 (artículo 30 1) de la ley).

La ley autoriza a la Comisión a dictar ciertas providencias correctivas en relación con los elementos que causen preocupación en relación con la competencia. En cuanto a las prácticas restrictivas que se identifiquen, el artículo 31 1) de la ley establece que:

"Si le consta a la Comisión... que cualquier practica restrictiva que exista o pueda llegar a existir es o será contraria al interés público, podrá dictar una o varias de las siguientes providencias acerca de ella:

a) *Prohibir a cualquier persona mencionada en la providencia, o a toda clase de personas, llevar a efecto la práctica restrictiva o seguir cualquier otra conducta que se especifique en la providencia y que, a juicio de la Comisión, sea análoga en forma y efecto a la práctica restrictiva;*

b) *Requerir a toda persona que participe en la práctica restrictiva que ponga término a ésta, bien completamente bien en la medida que se indique en la providencia, dentro del plazo especificado en ella;*

c) *Exigir a toda persona mencionada en la providencia, o a cualquier clase de personas, que publique una lista de precios, o que notifique de otro modo éstos, con o sin la información adicional que se especifique en la providencia;*

d) *Regular el precio que toda persona mencionada en la providencia cobre por cualquier producto o servicio, en la inteligencia de que la Comisión no dictará tal providencia a menos que le conste que el precio que cobra la persona involucrada es esencial para el mantenimiento de la práctica restrictiva a la cual se refiera la providencia;*

e) *Prohibir a toda persona mencionada en la providencia, o a toda clase de personas, que notifique a las personas que suministren cualquier producto o servicio un precio recomendado o sugerido como apropiado;*

f) *En general, adoptar las disposiciones que, a juicio de la Comisión, sean razonablemente necesarias para poner término a las prácticas restrictivas o para reducir sus efectos."*

El artículo 31 2) prevé las providencias que puede dictar la Comisión en relación con las fusiones y las situaciones de monopolio, como sigue:

"Si le consta a la Comisión... que cualquier fusión o situación de monopolio existente o propuesta es o será contraria al interés público, podrá dictar una o varias de las siguientes providencias con respecto a tal fusión o situación:

a) *Declarar ilegal, salvo en la medida en que se indique en la providencia, y en las circunstancias que prevea, la conclusión o aplicación de cualquier acuerdo o arreglo que se especifique en la providencia y que, a juicio de la Comisión, dará lugar o mantendrá tal fusión o situación;*

b) *En el caso de una situación de monopolio, exigir a la persona que ejerza control sobre la empresa o actividad económica involucrada la adopción de las medidas que se indiquen en la providencia para poner término a dicha situación dentro del plazo especificado en ella;*

c) *Prohibir o restringir la adquisición por cualquier persona que se mencione en la providencia de la totalidad o cualquier parte de una empresa o activos, o la adopción ella de cualquier medida que dé o pueda dar lugar a dicha adquisición, si es probable que ésta se traduzca, a juicio de la Comisión, en una fusión o situación de monopolio;*

d) *Exigir a cualquier persona que adopte medidas encaminadas a la disolución de cualquier organización, independientemente de que sea o no una sociedad mercantil, o a la terminación de cualquier asociación, cuando le conste a la Comisión que esa persona está interesada en la fusión o la situación de monopolio, o que participa en una u otra;*

e) *Requerir que, si se realiza una fusión o existe una situación de monopolio, todo participante en una u otra mencionado en la providencia acatará dichas*

prohibiciones o restricciones con respecto a la forma en que lleva a cabo su actividad económica tal como se especifica en la providencia;

f) En general, adoptar las disposiciones que, a juicio de la Comisión, sean razonablemente necesarias para poner término o impedir la fusión o la situación de monopolio, o para reducir sus efectos."

En las providencias que se dicten con respecto a una fusión o situación de monopolio podrán preverse cualesquiera de las actividades siguientes (artículo 31 3) de la ley:

- La transferencia, cesión o asignación de bienes, derechos, deudas, compromisos u obligaciones;
- El reajuste de contratos, bien mediante su anulación o la reducción de cualquier responsabilidad u obligación, o bien de cualquier otra manera;
- La creación, asignación, rescate o cancelación de acciones de capital o valores; o
- La constitución o disolución de cualquier empresa, o la enmienda del instrumento de constitución o de cualquier otro instrumento que regule las actividades de cualquier empresa.

Las providencias dictadas por la Comisión pueden inscribirse en el Registro del Tribunal Superior o presentarse al secretario de cualquier tribunal que hubiera tenido competencia para dictarlas si habría conocido del asunto (artículo 33 1) de la Ley). A los efectos de su ejecución, las providencias de la Comisión registradas en el Tribunal Superior o el tribunal competente surten el efecto de una sentencia civil de estos órganos judiciales.

El incumplimiento de cualquier providencia dictada por la Comisión constituye un delito que puede sancionarse con una multa o con pena de prisión, o con ambas (artículo 33 7) de la ley).

La Comisión podrá, previa solicitud, autorizar ciertas prácticas restrictivas, fusiones y otros comportamientos anticompetitivos. El artículo 35 1) de la ley establece que:

"Toda persona que se proponga:

a) Concluir, realizar o llevar de otro modo a efecto cualquier acuerdo, pacto o arreglo, o

b) Llevar a cabo alguna práctica o seguir algún comportamiento,

que considere que puede estar prohibido, restringido o afectado de otra manera por la presente ley podrá solicitar a la Comisión que autorice tal acuerdo, pacto, arreglo, práctica o comportamiento."

Las solicitudes de autorización de prácticas restrictivas, fusiones y otros comportamientos se examinan siguiendo el mismo procedimiento que en el caso de las investigaciones previstas en

el artículo 28. Tras estudiar las solicitudes, y teniendo en cuenta cualesquiera declaraciones que formulen por las personas o partes interesadas, la Comisión puede (artículo 36 2) de la ley):

- Otorgar la autorización pedida por el solicitante, con sujeción a ciertas condiciones, si el acuerdo, pacto, arreglo, práctica o comportamiento de que se trate no es contrario al interés público, o
- Denegar la autorización pedida por el solicitante.

Las disposiciones de la ley relativas a la notificación de fusiones figuran en el artículo 34, que prevé que:

"1) Si le consta que algún tipo de fusión, si se lleva a efecto, es probable que reduzca en grado considerable la competencia en Zimbabwe, o en cualquier parte de su territorio, la Comisión podrá publicar un aviso en la Gaceta exigiendo a las partes en la fusión que obtengan su aprobación antes de concluir ésta.

2) Las partes en toda fusión propuesta de cualquier tipo especificado en un aviso de conformidad con el párrafo 1) supra:

a) Antes de concluir la fusión, notificarán por escrito a la Comisión su intención de llevarla a efecto; y

b) Proporcionarán a la Comisión la información prescrita acerca de la fusión propuesta o la que la Comisión pueda razonablemente pedir.

3) Al ser notificada de una fusión propuesta con arreglo al párrafo 2) supra, la Comisión con la diligencia debida:

a) Si considera que la fusión propuesta justifica la realización de una investigación de conformidad con el artículo 28, la iniciará y, cuando proceda, dictará, en virtud del artículo 31, toda providencia que la Comisión estime necesaria sobre esa fusión:

en la inteligencia de que no será necesario que la Comisión publique un aviso, de conformidad con el párrafo 2) del artículo 28, de su intención de iniciar la investigación,

b) Si considera que la fusión propuesta no justifica una investigación con arreglo al artículo 28,

enviará un aviso por escrito a las partes autorizándolas a llevar a efecto la fusión".

Toda persona que se considere perjudicada por una decisión de la Comisión podrá apelar de ella ante el Tribunal Administrativo de Zimbabwe.

Legislación paralela o suplementaria

En la actualidad Zimbabwe no tiene ninguna legislación paralela ni suplementaria, en particular tratados o acuerdos con otros países, que comporten cooperación o procedimientos para la solución de controversias en materia de prácticas comerciales restrictivas con arreglo a la política de la competencia.

Sin embargo, Zimbabwe participa activamente en la actual labor de la secretaría del Mercado Común del África Meridional y Oriental (MECAFMO).

Principales decisiones tomadas en materia de competencia

La Comisión de la Competencia ha tramitado unos 54 casos en esta esfera desde que inició efectivamente sus actividades en enero 1999. Los casos se han referido a las prácticas restrictivas (44%), las prácticas de comercio desleal (26%), la evaluación de fusiones en virtud del artículo 34 (19%) y autorizaciones de fusiones con arreglo al artículo 35 de la ley (11%).

La Comisión también ha realizado dos estudios sobre la competencia en los sectores de los servicios financieros y las telecomunicaciones y está en vías de realizar otros cuatro en las industrias de la molienda/panadería; la fabricación de azúcar; la de fertilizantes y la de aceites comestibles.

Se han seleccionado para su análisis dos de los casos sobre la competencia. A continuación se indican las cuestiones concretas abordadas en ellos.

a) Prácticas comerciales restrictivas y de comercio desleal en la industria del cemento

En noviembre de 1998, la Comisión recibió denuncias de algunos comerciantes de cemento acerca del suministro y distribución de este producto en el mercado interno de Zimbabwe. Las investigaciones preliminares de las denuncias realizadas por la Dirección pusieron de manifiesto que la industria del cemento del país estaba altamente concentrada, con dos grandes productores solamente y un número relativamente reducido de importadores desde Sudáfrica y Zambia. Las pruebas reunidas indicaban que los dos productores podrían estar abusando de su posición dominante en la industria llevando a cabo varias prácticas restrictivas y de comercio desleal, como las restricciones verticales de las entregas de cemento a los clientes, la distribución discriminatoria del producto, agrupando/vinculando las ventas de cemento y llevando a cabo una conducta colusoria.

Por consiguiente, se hizo una investigación a fondo de las denuncias de conformidad con el artículo 28 de la Ley sobre la competencia. La investigación comprobó que los dos principales productores nacionales de cemento a la sazón (después de la investigación han entrado nuevas empresas en la industria) realizaban prácticas anticompetitivas. Se constató que un productor restringía la distribución de su cemento mediante un sistema preferencial de recogida del producto, mientras que el otro vinculaba la venta del producto a la utilización de los vehículos de transporte de su filial. Aunque se determinó que ambos productores aumentaban o mantenían el precio del cemento a altos niveles en el mercado interno mediante la realización de importaciones directas de cemento a precios más elevados de Sudáfrica, se encontró un alegato a

favor del interés público en el hecho de que los productores solamente realizaban importaciones de cemento durante los períodos de aguda escasez del producto en Zimbabwe.

Con todo, la investigación no encontró pruebas que relacionaran a los productores de cemento con comportamientos colusorios o que implicaran un cártel.

Durante la investigación se constataron también varios aspectos preocupantes en función del interés público en las actividades de producción, comercialización y distribución del cemento en el país. Esos aspectos se referían al suministro irregular de cemento a los proyectos de construcción; las demandas injustificadas de pago antes de la entrega del producto; la comercialización paralela en el mercado negro; un régimen impositivo discriminatorio sobre las ventas del producto, y un derecho arancelario de carácter prohibitivo sobre el clínquer de cemento importado (una materia prima esencial para la producción de cemento).

De conformidad con el párrafo 1) del artículo 31 de la Ley sobre la competencia, la Comisión ordenó a ambos productores que pusieran término a las prácticas anticompetitivas identificadas, y formuló varias recomendaciones a las organizaciones y autoridades competentes a fin hacer frente a los aspectos preocupantes para el interés público.

b) Fusión de la Rothmans of Pall Mall y la British American Tobacco

En enero de 1999, la British American Tobacco Plc del Reino Unido anunció que había llegado a un acuerdo con los accionistas de la Rothmans International, la Compagnie Financière Richeumont AG de Suiza y la Rembrandt Group Limited de Sudáfrica, para fusionar sus actividades internacionales en el sector del tabaco.

Después de la ultimación de la fusión internacional entre la British American Tobacco Plc y la Rothmans International, la Rothmans of Pall Mall (Zimbabwe) Limited solicitó a la Comisión de la Competencia, de conformidad con el artículo 35 de la Ley sobre la competencia de 1996, autorización para adquirir todo el capital por acciones emitido de la British American Tobacco Zimbabwe Limited. Las partes en la fusión también indicaron como motivos de ésta la reducción del mercado de cigarrillos de Zimbabwe y el hecho de que la British American Tobacco Zimbabwe Limited era una empresa a punto de fracasar. Se afirmaba que el mercado de cigarrillos manufacturados de Zimbabwe se había reducido en tal medida que ya no era lo bastante grande para la continua viabilidad de dos fabricantes, como lo ponía de manifiesto los malos resultados obtenidos por la British American Tobacco Zimbabwe Limited en el ejercicio económico terminado el 31 de diciembre de 1998.

Aunque la Comisión consideró que la fusión crearía una situación virtual de monopolio en la industria de cigarrillos manufacturados del país (pero no en la industria del tabaco en conjunto), también señaló que entrañaba ciertas ventajas en función del interés público, a las que se hacía referencia en el párrafo 5) del artículo 32 de la Ley sobre la competencia.

Así pues, la Comisión autorizó la fusión con ciertas condiciones, cuya finalidad era reducir los posibles efectos negativos de la situación de monopolio que se crearía en la industria de cigarrillos manufacturados. Las condiciones eran las siguientes:

- i) Que todo el equipo sobrante de fabricación de cigarrillos de la British American Tobacco Zimbabwe Limited se enajenara en un plazo razonable a precios equitativos y realistas a terceros interesados en entrar en la industria de fabricación de cigarrillos; y
- ii) Que, al ultimarse la fusión, el precio en fábrica de todas las marcas de cigarrillos que actualmente producían las partes en la fusión no fueran más altos que los cobrados inmediatamente antes de ésta, y que los aumentos futuros de los precios de los cigarrillos fueran objeto de vigilancia por la Comisión de la Competencia y se justificaran mientras siguiera existiendo la situación de monopolio creada en la industria nacional de fabricación de cigarrillos.

La empresa fusionada aceptó estas condiciones y firmó un compromiso en ese sentido.

Bibliografía

La siguiente es una bibliografía resumida de la principal legislación sobre la competencia de Zimbabwe, así como de su legislación subsidiaria:

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- Aviso relativo a la competencia (notificación de fusiones), 2000 (texto reglamentario 63A de 2000), suplemento de la *Government Gazette Extraordinary* de Zimbabwe, de 14 de marzo de 2000, imprenta del Estado, Harare.
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COMPETITION ACT, 1996

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ACT

To promote and maintain competition in the economy of Zimbabwe; to establish an Industry and Trade Competition Commission and to provide for its functions; to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices; and to provide for matters connected with or incidental to the foregoing.

ENACTED by the President and the Parliament of Zimbabwe.

PART I PRELIMINARY

Short title and date of commencement

1. (1) This Act may be cited as the Competition Act, 1996.
- (2) This Act shall come into operation on a date to be fixed by the President by statutory instrument.

Interpretation

2. (1) In this Act –

“authorized”, in relation to any agreement, arrangement, practice or conduct, means authorized by the Commission under Part V;

“Commission” means the Industry and Trade Competition Commission established by section *four*;

“commodity” means anything, whether movable or immovable, corporeal or incorporeal, which is capable of being acquired or disposed of for value;

“controlling interest”, in relation to –

- (a) any undertaking, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking;
- (b) any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset;

“Director” means the Director of the Commission appointed in terms of subsection (1) of section *seventeen*;

“distribute”, in relation to –

- (a) any commodity, includes to supply, sell, let for hire, store or transport the commodity;

- (b) any service, means to supply or provide the service, whether or not it is intended by the supply of a commodity;

“investigating officer” means a person appointed as an investigating officer in terms of section *forty-six*;

“member” means a member of the Commission, including the chairman and deputy chairman;

“merger” means –

- (a) the acquisition of a controlling interest in –
 - (i) an undertaking involved in the production or distribution of any commodity or service; or
 - (ii) an asset which is or may be utilized for or in connection with the production or distribution of any commodity;where the person who acquires the controlling interest already has a controlling interest in any undertaking involved in the production or distribution of the same commodity or service; or
- (b) the acquisition of a controlling interest in an undertaking whose business consists wholly or substantially in –
 - (i) supplying a commodity or service to the person who acquires the controlling interest; or
 - (ii) distributing a commodity or service produced by the person who acquires the controlling interest;

“Minister” means the Minister of Industry and Commerce or any other Minister to whom the President may, from time to time, assign the administration of this Act;

“monopoly situation” means a situation in which a single person exercises, or two or more persons with a substantial economic connection exercise, substantial market control over any commodity or service;

“order” means an order made by the Commission in terms of section *thirty-one*;

“price” includes any consideration whatsoever in respect of the distribution of a commodity or service;

“restrictive practice” means –

- (a) any agreement, arrangement or understanding, whether enforceable or not, between two or more persons; or
- (b) any business practice or method of trading; or
- (c) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or
- (d) any situation arising out of the activities of any person or class of persons; which restricts competition directly or indirectly to a material degree, in that it has or is likely to have any one or more of the following effect –

- (i) restricting the production or distribution of any commodity or service;
- (ii) limiting the facilities available for the production or distribution of any commodity or service;
- (iii) enhancing or maintaining the price of any commodity or service;
- (iv) preventing the production or distribution of any commodity or service by the most efficient or economical means;
- (v) preventing or retarding the development or introduction of technical improvements in regard to any commodity or service;
- (vi) preventing or restricting the entry into any market of persons producing or distributing any commodity or service;
- (vii) preventing or retarding the expansion of the existing market for any commodity or service or the development of new markets therefor;

“service” includes any service, whether personal, professional or otherwise, including any storage, transportation, insurance or banking service and any service provided in conjunction with the distribution of any commodity;

“substantial market control” has the meaning assigned to it in subsection (2);

“undertaking” means any person engaged for gain in the production or distribution of a commodity or service;

“unfair trade practice” means a restrictive practice or other conduct specified in the First Schedule.

- (2) A person has substantial market control over a commodity or service if -
- (a) being a producer or distributor of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to raise or maintain the price of the commodity or service above competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe;
 - (b) being a purchaser or user of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to lower or maintain the price of the commodity or service below competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe.

Application of Act

3. (1) This Act shall not be construed so as to -
- (a) limit any right acquired under -
 - (i) the Plant Breeders Rights Act [*Chapter 115*]; or
 - (ii) the Copyright Act [*Chapter 200*]; or
 - (iii) the Industrial Designs Act [*Chapter 201*]; or

- (iv) the Patents Act [*Chapter 202*]; or
 - (v) the Trade Marks Act [*Chapter 203*];
- except to the extent that such a right is used for the purpose of enhancing or maintaining prices or any other consideration in a manner contemplated in the definition of “restrictive practice” in section *two*; or
- (b) preventing trade unions or other representatives of employees from protecting their members’ interests by negotiating and concluding agreements and other arrangements with employers or representatives of employers in terms of the Labour Relations Act, 1985 (No. 16 of 1985).

(2) Except in so far as criminal liability is concerned, this Act shall bind the State to the extent that the State is concerned in the manufacture and distribution of commodities.

(3) This Act shall apply to the activities of statutory bodies, except in so far as those activities are authorized, expressly or by necessary implication, by any enactment.

PART II

INDUSTRY AND TRADE COMPETITION COMMISSION

Establishment of Commission

- 4. There is hereby established a commission, to be known as the Industry and Trade Competition Commission, which shall be a body corporate capable of suing and being sued in its corporate name and subject to this Act, of performing all acts that a body corporate may by law perform.

Functions of Commission

- 5. (1) Subject to this Act, the functions of the Commission shall be –
 - (a) to encourage and promote competition in all sectors of the economy; and
 - (b) to reduce barriers to entry into any sector of the economy or to any form of economic activity; and
 - (c) to investigate, discourage and prevent restrictive practices; and
 - (d) to study trends towards increased economic concentration, with a view to the investigation of monopoly situations and the prevention of such situations, where they are contrary to the public interest; and
 - (e) to advise the Minister in regard to –
 - (i) all aspects of economic competition, including entrepreneurial activities carried out by institutions directly or indirectly controlled by the State; and
 - (ii) the formulation, co-ordination, implementation and administration of Government policy in regard to economic competition; and
 - (f) to provide information to interested persons on current policy with regard to restrictive practices, acquisitions and monopoly situations, to serve as guidelines for the benefit of those persons; and

(g) to perform any other functions that may be conferred or imposed on it by this Act or any other enactment.

(2) For the better exercise of its functions, the Commission shall have power to do or cause to be done, either by itself or through its agents, all or any of the things set out in the Second Schedule, either absolutely or conditionally and either solely or jointly with others.

(3) Subject to this Act, in the lawful exercise of its functions under this Act the Commission shall not be subject to the direction or control of any other person or authority.

Membership of Commission

6. (1) Subject to subsection (2), the Commission shall consist of not fewer than five and not more than ten members appointed by the President.

(2) The persons to be appointed under subsection (1) shall be chosen for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment and, in selecting such persons, the President shall ensure that so far as possible all interested groups and classes of persons, including consumers, are represented on the Commission.

Disqualifications for appointment as member

7. (1) A person shall not be appointed as a member, and no person shall be qualified to hold office as a member, if –

- (a) he is not a citizen of or ordinarily resident in Zimbabwe; or
- (b) in terms of a law in force in any country –
 - (i) he has been adjudged or otherwise declared insolvent or bankrupt and has not been rehabilitated or discharged; or
 - (ii) he has made an assignment to, or arrangement or composition with, his creditors which has not been rescinded or set aside;
- or
- (c) he has been convicted in Zimbabwe or in any other country of an offence involving fraud or dishonesty and sentenced to a term of imprisonment imposed without the option of a fine, whether or not any portion of the sentence has been suspended, and he has not received a free pardon.

(2) A member of Parliament shall not be qualified for appointment as a member, nor shall he hold office as a member.

(3) A person shall not be qualified for appointment as a member, nor shall he hold office as a member, if he is a member of four or more other statutory bodies.

- (4) For the purposes of subsection (3) –
- (a) a person who is appointed to a council, board or other authority which is a statutory body or which is responsible for the administration of the affairs of a statutory body shall be regarded as a member of that statutory body;
 - (b) “statutory body” means –
 - (i) any commission established by the Constitution; or
 - (ii) any body corporate established directly by or under an Act for special purposes specified in that Act, the membership of which consists wholly or mainly of persons appointed by the President, a Vice-President, a Minister or any other statutory body or by a Commission established by the Constitution.

Terms and conditions of office of members

8. (1) Subject to this Part, a member shall hold office for such period, not exceeding three years, as the President may fix on his appointment, and upon the expiry of his term of office he shall be eligible for re-appointment as a member.
- (2) On the expiry of the period for which a member has been appointed, he shall continue to hold office until he has been re-appointed or his successor has been appointed:
- Provided that a member shall not continue to hold office under this subsection for a period exceeding six months.
- (3) Subject to this Part, a member shall hold office on such terms and conditions as the President may fix for members generally.

Vacation of office by members

9. A member shall vacate his office and his office shall become vacant –
- (a) one month after the date on which he gives notice to the President, through the Minister, of his intention to resign, or after the expiry of such other period of notice as he and the Minister may agree; or
 - (b) if he becomes a member of Parliament; or
 - (c) if he becomes disqualified in terms of paragraph (a) or (b) of subsection (1) of section *seven* or in terms of subsection (3) of that section to hold office as a member; or
 - (d) on the date he begins to serve a sentence of imprisonment, whether or not any portion has been suspended, imposed without the option of a fine in any country; or
 - (e) if he is required in terms of section *ten* to vacate his office.

President may require member to vacate his office or may suspend him

10. (1) The President may require a member to vacate his office if the member –
- (a) has been guilty of improper conduct as a member or guilty of conduct that is prejudicial to the interests or reputation of the Commission; or
 - (b) has failed to comply with any condition of his office fixed by the President in terms of subsection (3) of section *eight*; or
 - (c) is mentally or physically incapable of efficiently performing his functions as a member.
- (2) The President, on the recommendation of the Commission, may require a member to vacate his office if the President is satisfied that the member has been absent without the permission of the Commission from three consecutive meetings of the Commission, of which the member was given not less than seven days' notice, and that there was no just cause for the member's absence.
- (3) The President –
- (a) may suspend from office a member against whom criminal proceedings have been instituted in respect of an offence for which a sentence of imprisonment without the option of a fine may be imposed; and
 - (b) shall suspend from office a member who has been sentenced by a court to imprisonment without the option of a fine, whether or not any portion has been suspended, pending determination of the question whether the member is to vacate his office;

and while the member is so suspended he shall not exercise any functions or be entitled to any remuneration as a member.

Filling of vacancies on Commission

11. On the death of, or the vacation of office by, a member, the President may, subject to this Part, appoint a person to fill the vacancy:

Provided that, if as a result of the vacancy the number of members is fewer than the minimum specified in section *six*, the President shall appoint a person to fill the vacancy.

Chairman and vice-chairman of Commission

12. (1) The President shall designate one of the members to be the chairman of the Commission and another member to be the vice-chairman.
- (2) The chairman and vice-chairman of the Commission shall hold office as such for such period as the President may fix:

Provided that the President may at any time for good cause terminate the appointment of the chairman or the vice-chairman as such and designate another member as chairman or vice-chairman, as the case may be.

(3) The vice-chairman shall perform the chairman's functions during any period that the chairman is for any reason unable to perform them.

Meetings and procedure of Commission

- 13.** (1) The Commission shall hold its first meeting on a date and place fixed by the Minister, and thereafter shall meet for the dispatch of business and adjourn, close and otherwise regulate its meetings and procedure as it thinks fit:

Provided that the Commission shall meet at least six times in each financial year.

- (2) The chairman of the Commission –
- (a) may convene a special meeting of the Commission at any time; and
 - (b) shall convene a special meeting of the Commission on the written request of the Minister or not fewer than two members, which meeting shall be convened for a date not sooner than seven days and not later than thirty days after the chairman's receipt of the request.

(3) Written notice of a special meeting convened in terms of subsection (2) shall be sent to each member not later than forty-eight hours before the meeting and shall specify the business for which the meeting has been convened.

(4) No business shall be discussed at a special meeting convened in terms of subsection (2) other than –

- (a) such business as may be determined by the chairman of the Commission, where he convened the meeting in terms of paragraph (a) of subsection (2); or
- (b) the business specified in the request for the meeting, where the chairman of the Commission convened the meeting in terms of paragraph (b) of subsection (2).

(5) The chairman or, in his absence, the vice-chairman of the Commission shall preside at all meetings of the Commission:

Provided that, if the chairman and the deputy chairman of the Commission are both absent from any meeting of the Commission, the members present may elect one of their number to preside at that meeting as chairman.

(6) Half of the members shall form a quorum at any meeting of the Commission.

(7) Subject to subsection (11), all acts matters or things authorized or required to be done by the Commission may be decided by a majority vote at any meeting of the Commission at which a quorum is present.

(8) With the Commission's approval, the chairman of the Commission may invite any person to attend a meeting of the Commission or a committee, where the chairman considers that the person has special knowledge or experience in any matter to be considered by the Commission or the committee, as the case may be, at that meeting.

(9) A person invited to attend a meeting of the Commission or of a committee in terms of subsection (8) may take part in the proceedings of the Commission or the committee as if he were a member thereof, but shall not have a vote on any question before the Commission or committee, as the case may be.

(10) Subject to section *sixteen*, at all meetings of the Commission each member present shall have one vote on any question before the Commission and, in the event of an equality of votes, the person presiding at the meeting shall have a casting vote in addition to a deliberative vote.

(11) Any proposal circulated among all members and agreed to in writing by a majority of them shall have the same effect as a resolution passed by a duly constituted meeting of the Commission and shall be incorporated into the minutes of the next succeeding meeting of the Commission:

Provided that, if a member requires that such a proposal be placed before a meeting of the Commission, this subsection shall not apply to the proposal.

Committees of Commission

- 14.** (1) For the better exercise of its functions, the Commission may establish one or more committees in which it may vest such of its functions as it considers appropriate:

Provided that the vesting of any function in a committee shall not divest the Commission of that function, and the Commission may amend or rescind any decision of the committee in the exercise of that function.

(2) On the establishment of a committee in terms of subsection (1), the Commission -

- (a) shall appoint at least one member to be a member of the committee and shall designate that member or one of those members, as the case may be, to be chairman of the committee; and
- (b) may appoint as members of the committee, on such terms and conditions as the Commission may fix, persons who are not members.

(3) Meetings of a committee may be convened at any time and at any place by the chairman of the Commission or the chairman of the committee.

(4) Subject to subsection (3) and to section *sixteen* and *twenty-one*, the procedure to be followed at any meeting of a committee and the quorum at any such meeting shall be as fixed by the Commission.

Remuneration and allowances of members of Commission and committees

15. Every member of the Commission or of a committee shall be paid from moneys appropriated for the purpose by Act of Parliament -
- (a) such remuneration, if any, as the Minister, with the approval of the Minister responsible for finance, may fix for members of the Commission or of committees, as the case may be, generally; and
 - (b) such allowances as the Minister may fix to meet any reasonable expenses incurred by the member in connection with the business of the Commission or the committee, as the case may be.

Members of Commission and committees to disclose certain connections and interests

16. (1) If a member of the Commission or of a committee, or a spouse of such a member –
- (a) knowingly acquires or holds a direct or indirect pecuniary interest in a company or association of persons –
 - (i) whose conduct is the subject of an investigation or order under this Act; or
 - (ii) which is applying or negotiating for a contract with the Commission;
 - or
 - (b) tenders for or acquires or holds a direct or indirect pecuniary interest in a contract with the Commission;
 - or
 - (c) owns immovable property or a right in immovable property or a direct or indirect pecuniary interest in a company or association of persons which results in his private interests coming or appearing to come into conflict with his functions as a member of the Commission or of the committee, as the case may be;

the member shall forthwith disclose the fact to the Commission or the committee, as the case may be.

(2) A member referred to in subsection (1) shall take no part in the consideration or discussion of, or vote on, any question before the Commission or the committee, as the case may be, which relates to any investigation, order, contract, right, immovable property or interest referred to in that subsection.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and liable to a fine not exceeding two thousand dollars or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

Appointment and functions of Director of Commission

17. (1) The Commission shall appoint a Director, who shall be responsible for administering the Commission's affairs, funds and property and for performing any other functions that may be conferred or imposed upon him by or under this Act or that the Commission may delegate or assign to him.
- (2) The terms and conditions of the Director's appointment shall be as fixed by the Commission with the approval of the Minister.
- (3) Members shall not be eligible for appointment as the Director.
- (4) The Director's appointment shall be terminated if he would be required in terms of paragraph (b), (c) or (d) of section *nine* to vacate his office had that section and paragraphs (a) and (b) of subsection (1) of section *seven* applied to him.
- (5) An assignment of functions under subsection (1) -
- (a) may be made either generally or specially and subject to such restrictions, reservations and exceptions as the Commission may determine; and
 - (b) may be revoked by the Commission at any time; and
 - (c) shall not preclude the exercise of the functions by the Commission itself.

Policy directions to Commission

18. (1) Subject to subsection (2), the Minister may give the Commission such general directions relating to the policy the Commission is to observe in the exercise of its functions as the Minister considers to be necessary in the national interest.
- (2) Before giving the Commission a direction in terms of subsection (1), the Minister shall inform the Commission, in writing, of the proposed direction and the Commission shall, within thirty days or such further period as the Minister may allow, submit to the Minister, in writing, its views on the proposal.
- (3) The Commission shall take all necessary steps to comply with any direction given to it in terms of subsection (1).
- (4) When any direction has been given to the Commission in terms of subsection (1), the Commission shall ensure that the direction and any views the Commission has expressed on it in terms of subsection (2) are set out in the Commission's annual report.

Validity of decisions and acts of Commission and committees

19. No decision or act of the Commission or a committee and no act that is authorized by the Commission or a committee shall be invalid solely because there was a vacancy in the membership of the Commission or the committee or because a disqualified person purported to act as a member of the Commission or the committee, as the case may be, at the time the decision was taken or the act was done or authorized.

Execution of contracts and instruments by Commission

20. An agreement, contract or instrument approved by the Commission may be entered into or executed on the Commission's behalf by any person generally or specially authorized by the Commission for that purpose.

Minutes of proceedings of Commission and committees

21. (1) The Commission shall cause minutes of all proceedings of and decisions taken at every meeting of the Commission and of every committee to be entered in books kept for the purpose.
- (2) Any minutes referred to in subsection (1) which purport to be signed by the person presiding at the meeting to which the minutes relate or by the person presiding at the next following meeting of the Commission or the committee concerned, as the case may be, shall be accepted for all purposes as *prima facie* evidence of the proceedings and decisions taken at the meeting concerned.

Reports of Commission and supply of information to Minister

22. (1) As soon as is practicable after the 30th June in each year, the Commission shall prepare and submit to the Minister a report on all its activities during the year ended on that date, and the Minister shall lay the report before Parliament, together with any comments thereon that he wishes to make, during the next sitting of Parliament.
- (2) In addition to the report referred to in subsection (1), the Commission -
- (a) shall submit to the Minister such other reports as the Minister may require; and
 - (b) may submit to the Minister such other reports as the Commission considers desirable;

in regard to the operations and activities of the Commission.

- (3) The Commission shall give the Minister all information relating to its operations and activities that the Minister may at any time require.

PART III

FINANCIAL PROVISIONS RELATING TO COMMISSION

Funds of Commission

23. The funds of the Commission shall consist of –
- (a) moneys payable to the Commission from moneys appropriated for the purpose by Act of Parliament; and
 - (b) any other moneys that may vest in or accrue to the Commission, whether in terms of this Act or otherwise.

Investment of moneys not immediately required by Commission

24. Moneys not immediately required by the Commission may be invested in such manner as the Minister, acting on the advice of the Minister responsible for finance, may approve.

Accounts of Commission

25. (1) The Commission shall ensure that proper accounts and other records relating to such accounts are kept in respect of all the Commission's activities, funds and property, including such particular accounts and records as the Minister may direct.
- (2) As soon as possible after the end of each financial year, the Commission shall prepare and submit to the Minister a statement of accounts in respect of that financial year or in respect of such other period as the Minister may direct.

Audit of Commission's accounts

26. (1) Subject to the Audit and Exchequer Act [*Chapter 168*], the Commission shall appoint as auditors one or more persons approved by the Minister who are registered as public accountants under the Accountants Act [*Chapter 215*].
- (2) The accounts kept by the Commission in terms of subsection (1) of section *twenty-five* shall be examined by the auditors appointed in terms of subsection (1).
- (3) The auditors appointed in terms of subsection (1) shall make a report to the Commission and to the Minister on the statement of accounts prepared in terms of subsection (2) of section *twenty-five*, and in their report shall state whether or not in their opinion the statement of accounts gives a true and fair view of the Commission's financial affairs.
- (4) In addition to the report referred to in subsection (3), the Minister may require the Commission to obtain from the auditors appointed in terms of subsection (1) such other reports, statements or explanations in connection with the Commission's activities, funds

and property as the Minister may consider expedient, and the Commission shall forthwith comply with any such requirement.

- (5) If, in the opinion of the auditors appointed in terms of subsection (1) -
- (a) they have not obtained any information or explanation they require; or
 - (b) any accounts or records relating to any accounts have not been properly kept by the Authority; or
 - (c) the Commission has not complied with any provision of this Part;

the auditors shall include in their report made in terms of subsection (3) or (4), as the case may be, a statement to that effect.

(6) If in terms of the Audit and Exchequer Act [*Chapter 168*] the Commission's accounts are required to be audited by the Comptroller and Auditor-General, any reference in this section to auditors appointed in terms of subsection (1) shall be construed as a reference to the Comptroller and Auditor-General.

Powers of auditors

27. (1) An auditor referred to in section *twenty-six* shall be entitled to all reasonable times to require to be produced to him all accounts and other records relating to such accounts which are kept by the Commission or its agents and to require from any member of the Commission or employee or agent of the Commission such information and explanation as in the auditor's opinion are necessary for the purpose of his audit.
- (2) Any member of the Commission or employee or agent of the Commission who fails without just cause to comply with a requirement of an auditor in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

PART IV

INVESTIGATION AND PREVENTION OF RESTRICTIVE PRACTICES, MERGERS AND MONOPOLY SITUATIONS

Power of Commission to investigate restrictive practices, mergers and monopoly situations

28. (1) Subject to this Act, the Commission may make such investigation as it considers necessary –

- (a) into any restrictive practice which the Commission has reason to believe exists or may come into existence;
- (b) in order to ascertain –
 - (i) whether any merger has been, is being or is proposed to be made;
 - (ii) the nature and extent of any controlling interest that is held or may be acquired in any merger or proposed merger;
- (c) into any type of business agreement, arrangement, understanding or method of trading which, in the opinion of the Commission, is being or may be adopted for the purpose of or in connection with the creation or maintenance of a restrictive practice;
- (d) into any monopoly situation which the Commission has reason to believe exists or may come into existence.

(2) Before embarking on an investigation under subsection (1), the Commission shall publish a notice in the *Gazette* and in such newspaper circulating in the area covered by the investigation as the Commission thinks appropriate -

- (a) stating the nature of the proposed investigation; and
- (b) calling upon any interested person who wishes to do so to submit written representations to the Commission in regard to the subject-matter of the proposed investigation.

(3) For the purposes of an investigation under this section, the Commission shall have the powers that are conferred upon a commissioner by the Commissions of Inquiry Act [*Chapter 80*], other than the power to order a person to be detained in custody, and subsection (3) of section 2 and sections 9 to 12 and 14 to 18 of that Act shall apply, *mutatis mutandis*, in relation to an investigation under this section and to any person summoned to give or giving evidence at that investigation.

(4) In any investigation under this section, the Commission shall ensure that the rules commonly known as the rules of natural justice are duly observed and, in particular, shall take all reasonable steps to ensure that every person whose interests are likely to be affected by the outcome of the investigation is given an adequate opportunity to make representations in the matter.

(5) The prosecution or pending prosecution of a person under section *forty-two* for entering into, engaging in or otherwise giving effect to a restrictive practice which is an unfair trade practice shall not be a bar to the Commission's investigating the restrictive practice under this section or making an order in regard to it.

Prohibition of certain acts pending investigation

29. (1) At any time after publishing a notice in terms of subsection (2) of section *twenty-eight* in regard to any investigation, the Commission may publish a notice doing either or both the following -

- (a) prohibiting or staying any restrictive practice or merger that is the subject of the investigation;
- (b) directing that any action be taken which, in the Commission's opinion, will prevent or stay any restrictive practice or merger that is the subject of the investigation;

pending the outcome of the investigation.

(2) A notice in terms of subsection (1) shall be published in the *Gazette* and in such newspaper circulating in the area covered by the investigation as the Commission thinks appropriate.

(3) A notice in terms of subsection (1) shall remain in force –

- (a) until the completion of the Commission's investigation into the matter concerned; or
- (b) for a period of six months from the date of its publication in the *Gazette*;

whichever is the shorter period.

(4) The Commission may at any time amend or revoke a notice in terms of subsection (1);

Provided that no such amendment shall have the effect of prolonging the validity of the notice for longer than the period specified in subsection (3).

(5) It shall not be necessary for the Commission to notify or receive representation from any person before publishing a notice in terms of subsection (1) or amending or revoking any such notice, if in the Commission's opinion such notification or receiving of representations would unduly delay the publication of the notice or would defeat its purpose.

(6) The Commission shall without delay provide a written statement of its reasons for having published a notice in terms of subsection (1), upon being requested for such a statement by -

- (a) any party to the restrictive practice or merger to which the notice relates;
or
- (b) any other person, where the statement is requested for the purpose of any judicial review or other legal proceedings instituted in regard to the notice.

(7) Any person who contravenes or fails to comply with any provision of a notice in terms of subsection (1) with which it is his duty to comply shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(8) Section *thirty-three* shall apply, *mutatis mutandis*, to the civil enforcement of a notice published in terms of this section as if the notice were an order.

Negotiations by Commission

30. (1) The Commission may at any time negotiate with any person with a view to making an arrangement which, in the Commission's opinion, will –

- (a) ensure the discontinuance of any restrictive practice which exists or may come into existence; or
- (b) terminate, prevent or alter any merger or monopoly situation which exists or may come into existence;

whether or not the Commission has embarked on an investigation into the restrictive practice, merger or monopoly situation concerned.

(2) Where the Commission has made an arrangement after negotiations under subsection (1), it may embody the arrangement in an order.

Orders by Commission

31. (1) If the Commission is satisfied, having regard to the matters referred to in section *thirty-two*, that any restrictive practice which exists or may come into existence is or will be contrary to the public interest, the Commission may make any one or more of the following orders in respect of that restrictive practice –

- (a) prohibiting any person named in the order, or any class of persons, from engaging in the restrictive practice or from pursuing any other course of conduct which is specified in the order and which, in the Commission's opinion, is similar in form and effect to the restrictive practice;
- (b) requiring any party to the restrictive practice to terminate the restrictive practice, either wholly or to such extent as may be specified in the order, within such time as is specified therein;
- (c) requiring any person named in the order, or any class of persons, to publish a list of prices, or otherwise notify prices, with or without such further information as may be specified in the order;
- (d) regulating the price which any person named in the order may charge for any commodity or service:
Provided that the Commission shall not make any such order unless it is satisfied that the price being charged by the person concerned is essential to the maintenance of the restrictive practice to which the order relates;
- (e) prohibiting any person named in the order, or any class of persons, from notifying persons supplying any commodity or service of a price recommended or suggested as appropriate to be charged by those persons;
- (f) generally, making such provision as, in the opinion of the Commission, is reasonably necessary to terminate the restrictive practices or alleviate its effects.

(2) If the Commission is satisfied, having regard to the matters referred to in section *thirty-two*, that any actual or proposed merger or monopoly situation is or will be contrary to the public interest, the Commission may make any one or more of the following orders in respect of that merger or monopoly situation -

- (a) declaring it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to make or to carry out any agreement or arrangement which is specified in the order and which, in the Commission's opinion, will lead to or maintain the merger or monopoly situation;
- (b) in the case of a monopoly situation, requiring any person who exercises control over the business or economic activity concerned to take such steps as are specified in the order to terminate the monopoly situation within such time as is specified in the order;
- (c) prohibiting or restricting the acquisition by any person named in the order of the whole or part of any undertaking or assets, or the doing by that person of anything which will or may result in such an acquisition, if the acquisition is likely, in the Commission's opinion, to lead to a merger or monopoly situation;
- (d) requiring any person to take steps to secure the dissolution of any organization, whether corporate or unincorporated, or the termination of any association, where the Commission is satisfied that the person is concerned in or a party to the merger or monopoly situation;
- (e) requiring that, if any merger takes place or any monopoly situation exists, any party thereto who is named in the order shall observe such prohibitions or restrictions in regard to the manner in which he carries on business as are specified in the order;
- (f) generally, making such provision as, in the opinion of the Commission, is reasonably necessary to terminate or prevent the merger or monopoly situation, as the case may be, or alleviate its effects.

(3) Notwithstanding any other law and without derogation from the generality of subsection (2), an order made in respect of a merger or monopoly situation may provide for any of the following matters -

- (a) the transfer or vesting of property, rights, liabilities or obligations;
- (b) the adjustment of contracts, whether by their discharge or the reduction of any liability or obligation or otherwise;
- (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (d) the formation or winding up of any undertaking or the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.

(4) An order shall be in writing and served on every person named therein:

Provided that, if the order applies to persons generally or if, in the Commission's opinion, it is impractical to serve it individually on all the persons to whom it applies, the Commission shall cause the order to be published in the *Gazette* and in such other manner as the Commission considers will bring it to the attention of the persons to whom it applies.

(5) Before making an order under this section, the Commission shall ensure that every person affected thereby is informed of the broad terms of the order it proposes to make and is given an adequate opportunity to make representations in the matter:

Provided that, if the proposed order will apply to persons generally or if, in the Commission's opinion, it is impractical to notify its terms to all the persons to whom it will apply, the Commission shall cause the broad terms of the proposed order to be published in the *Gazette* and in such other manner as the Commission considers will bring it to the attention of the persons to whom it will apply.

(6) The Commission may amend or revoke an order at any time, and this section shall apply, *mutatis mutandis*, in regard to any such amendment.

Factors to be considered by Commission when making orders

32. (1) In determining, for the purposes of section *thirty-one*, whether or not any restrictive practice, merger or monopoly situation is or will be contrary to the public interest, the Commission shall take into account everything it considers relevant in the circumstances, and shall have regard to the desirability of –

- (a) maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe; and
- (b) promoting the interests of consumers, purchasers and other users of commodities and services in Zimbabwe, in regard to the prices, quality and variety of such commodities and services; and
- (c) promoting, through competition, the reduction of costs and the development of new techniques and new commodities, and of facilitating the entry of new competitors into existing markets.

(2) For the purposes of section *thirty-one*, the Commission shall regard a restrictive practice as contrary to the public interest if it is engaged in by a person with substantial market control over the commodity or service to which the practice relates, unless the Commission is satisfied as to any one or more of the following –

- (a) that the restrictive practice is reasonably necessary, having regard to the character of the commodity or service to which it applies, to protect consumers or users of the commodity or service, or the general public, against injury or harm;
- (b) that termination of the restrictive practice would deny to consumers or users of the commodity or service to which the restrictive practice applies, other specific and substantial benefits or advantages enjoyed or likely to

- be enjoyed by them, whether by virtue of the restrictive practice itself or by virtue of any arrangement or operation resulting therefrom;
- (c) that termination of the restrictive practice would be likely to have a serious and persistently adverse effect on the general level of unemployment in any area in which a substantial proportion of the business, trade or industry to which the restrictive practice relates is situated;
 - (d) that termination of the restrictive practice would be likely to cause a substantial reduction in the volume or earnings of any export business or trade of Zimbabwe;
 - (e) that the restrictive practice is reasonably required to maintain an authorized practice or any other restrictive practice which, in the Commission's opinion, is not contrary to the public interest;
 - (f) that the restrictive practice does not directly or indirectly restrict or discourage competition to a material degree in any business, trade or industry and is not likely to do so.

(3) A restrictive practice that is an unlawful trade practice shall be deemed for the purposes of section *thirty-one* to be absolutely contrary to the public interest.

(4) For the purposes of section *thirty-one*, the Commission shall regard a merger as contrary to the public interest if the Commission is satisfied that the merger -

- (a) has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe; or
- (b) has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest.

(5) For the purposes of section *thirty-one* and subsection (4) of this section, the Commission shall regard a monopoly situation as contrary to the public interest unless the Commission is satisfied as to any one or more of the following -

- (a) that the monopoly situation, through economies of scale or for other reasons, has resulted in or is likely to result in a more efficient use of resources in any business, trade or industry than would be the case if the monopoly situation did not exist;
- (b) that the monopoly situation is or is likely to be necessary for the production, supply or distribution of any commodity or service in Zimbabwe, regard being had on the one hand to the resources necessary to produce, supply or distribute the commodity or service and, on the other hand, to the size of the Zimbabwean market for that commodity or service;
- (c) that termination or prevention of the monopoly situation would deny to consumers or users of any commodity or service, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them, whether by virtue of the monopoly situation itself or by virtue of any arrangement or operation resulting therefrom;

- (d) that the monopoly situation is or is likely to be reasonably necessary to enable the parties to it to negotiate fair terms for the distribution of a commodity or service –
 - (i) from a person who is not a party to the monopoly situation and who exercises complete or substantial control over the distribution of the commodity or service; or
 - (ii) to a person who is not a party to the monopoly situation and who exercises complete or substantial control over the market for the commodity or service;
- (e) that terminating or prevention of the monopoly situation would be likely to have a serious and persistently adverse effect on the general level of unemployment in any area in which a substantial proportion of the business, trade or industry to which the monopoly situation relates is situated;
- (f) that termination or prevention of the monopoly situation would be likely to cause a substantial reduction in the volume or earnings of any export business or trade of Zimbabwe.

Enforcement of orders

33. (1) The Commission or any person in whose favour or for whose benefit an order has been made may lodge a copy of the order, certified by the Director or a person authorized by the Director, with –

- (a) the Registrar of the High Court; or
- (b) the clerk of any magistrates court which would have had jurisdiction to make the order had the matter been determined by it;

and the Registrar or clerk shall forthwith record the order as a judgment of the High Court or the magistrates court, as the case may be.

(2) An order that has been recorded under subsection (1) shall, for the purposes of enforcement, have the effect of a civil judgment of the High Court or the magistrates court concerned, as the case may be.

(3) If an order that has been recorded under subsection (1) is -

- (a) varied or set aside by the High Court on review or by the Administrative Court on appeal; or
- (b) amended or revoked by the Commission in terms of subsection (6) of section *thirty-one*;

the Registrar of the High Court or clerk of the magistrates court concerned, as the case may be, shall make the appropriate adjustment in his records.

(4) Where an order contains, amongst other provisions, a provision favouring or benefitting a particular person, that provision of the order may be lodged and recorded

under subsection (1) in all respects as if it were the entire order, and may be enforced accordingly.

(5) The Commission may make such investigation as it considers necessary to ascertain the extent to which any order has been or is being complied with, whether or not the order has been recorded under subsection (1), and may make such further order as it considers necessary in respect of the restrictive practice, merger or monopoly situation which was the subject of the original order.

(6) Section *twenty-eight to thirty-two* and subsections (1) to (4) of this section shall apply, *mutatis mutandis*, to any investigation carried out and order made in terms of subsection (5).

(7) Without derogation from subsections (1) to (6), any person who contravenes or fails to comply with any provision of an order with which it is his duty to comply shall be guilty of an offence and liable to a fine not exceeding twenty thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Notification of proposed mergers

34. (1) If the Commission is satisfied that any class of merger, if carried out, is likely to reduce competition to a material extent in Zimbabwe or any part of Zimbabwe, the Commission may publish a notice in the *Gazette* requiring the parties to any such merger to obtain the Commission's approval before concluding the merger.
- (2) The parties to any proposed merger of a class specified in a notice under subsection (1) shall -
- (a) before concluding the merger, notify the Commission, in writing, of their intention to effect the merger; and
 - (b) provide the Commission with such information regarding the proposed merger as may be prescribed or as the Commission may reasonably require.
- (3) Upon being notified of a proposed merger in terms of subsection (2), the Commission shall, with all due expedition -
- (a) if it considers that the proposed merger warrants investigation under section *twenty-eight*, embark upon such an investigation and, where appropriate, make such order under section *thirty-one* in regard to the proposed merger as the Commission considers necessary: Provided that it shall not be necessary for the Commission to publish a notice in terms of subsection (2) of section *twenty-eight* of its intention to embark upon the investigation.

- (b) if it considers that the proposed merger does not warrant investigation under section *twenty-eight*, send a written notice to the parties authorizing them to conclude the merger.

PART V

AUTHORIZATION OF RESTRICTIVE PRACTICES, MERGERS AND OTHER CONDUCT

Application to Commission for authorization

35. (1) Any person who proposes to –
- (a) enter into, carry out or otherwise give effect to any agreement or arrangement; or
 - (b) engage in any practice or conduct;

which he considers may be prohibited, restricted or otherwise affected by this Act may apply to the Commission for its authorization of such agreement, arrangement, practice or conduct.

(2) An application under subsection (1) shall be made in such form and manner as may be prescribed and shall be accompanied by the prescribed fee, if any, and such information and particulars as may be prescribed or as the Commission may reasonably require.

(3) Any person who, in or for the purposes of an application under subsection (1), makes a statement which he knows to be false or misleading or does not believe on reasonable grounds to be true, shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Grant or refusal of authorization

36. (1) On receipt of an application under section *thirty-five*, the Commission shall publish a notice in the *Gazette* and in such newspaper as the Commission considers appropriate –
- (a) stating the nature of the authorization sought by the applicant; and
 - (b) calling upon any interested person who wishes to do so to submit written representations to the Commission in regard to the authorization sought by the applicant:

Provided that, where the applicant has sought the Commission's authorization of a proposed merger, the Commission need not publish such a notice if the Commission considers that publication of the notice may prejudice the parties to the merger and is not

likely to produce representations or information that will materially assist the Commission in its determination of the application.

(2) After conducting such investigation as it considers necessary into any application under section *thirty-five*, and taking into account any representations received in response to the relevant notice published under subsection (1), the Commission shall either -

- (a) grant the authorization sought by the applicant, subject to such terms and conditions as the Commission thinks appropriate, if the Commission is satisfied that the agreement, arrangement, practice or conduct concerned is not contrary to the public interest; or
- (b) refuse to grant the authorization sought by the applicant, if the Commission is not satisfied as provided in paragraph (a).

(3) The Commission shall observe the requirements of section *thirty-two* in determining whether or not any agreement, arrangement, practice or conduct is contrary to the public interest.

(4) For the purposes of any investigation under subsection (2) the Commission may exercise any of the powers conferred on it by section *twenty-eight* and shall observe the rules referred to it in subsection (4) of that section.

(5) Any investigation under subsection (2) shall be conducted, and any decision under that subsection shall be reached, as expeditiously as possible.

Effect of authorization

37. While an authorization under section *thirty-six* is in force, nothing in this Act shall prevent the person to whom it was granted from -

- (a) entering into, carrying out or otherwise giving effect to the agreement or arrangement to which the authorization relates; or
- (b) engaging in the practice or conduct to which the authorization relates;

as the case may be.

Amendment or revocation of authorization

38. (1) Subject to this section, the Commission may amend or revoke any authorization granted under section *thirty-six*, if the Commission is satisfied that -

- (a) the authorization was granted in error or on the basis of information that was false or misleading; or
- (b) that there has been a breach of any term or condition subject to which the authorization was granted; or

- (c) that there has been a material change of circumstances since the authorization was granted and, as a result, the agreement, arrangement, practice or conduct that was authorized is contrary to the public interest.

(2) Before amending or revoking an authorization under subsection (1), the Commission -

- (a) shall cause the person to whom the authorization was granted to be informed, in writing, of the proposal to amend or revoke his authorization and shall afford him a reasonable opportunity to make representations in regard to the proposal; and
- (b) may conduct an inquiry into the proposed amendment or revocation, in which event the Commission may exercise any of the powers conferred on it by sections *twenty-eight* and *twenty-nine* and shall observe the rules referred to in subsection (4) of section *twenty-eight*.

(3) The Commission shall observe the requirements of section *thirty-two* in determining whether or not any agreement, arrangement, practice or conduct is contrary to the public interest for the purposes of paragraph (c) of subsection (1).

Register of authorizations

39. (1) The Commission shall keep a register in which it shall cause to be recorded such particulars as may be prescribed or as it may consider appropriate, of -

- (a) every application for an authorization made under section *thirty-five*; and
- (b) every authorization granted under section *thirty-six*, together with any terms and conditions attaching thereto; and
- (c) every refusal to grant an authorization under section *thirty-six*; and
- (d) any amendment or revocation of an authorization under section *thirty-eight*.

(2) The register kept under subsection (1) shall be open to inspection by members of the public, on payment of the prescribed fee, if any, during ordinary business hours at the offices of the Commission.

PART VI

APPEALS

Right of appeal to Administrative Court

40. (1) Any person who is aggrieved by a decision of the Commission under Part IV or V may appeal against it to the Administrative Court.

(2) An appeal under subsection (1) shall be made within such period and in such form and manner as may be prescribed in rules made under the Administrative Court Act, 1979 (No. 39 of 1979).

Composition Administrative Court for the purposes of this Act

41. (1) For the purpose of hearing any appeal under this Act, the Administrative Court shall consist of a President of the Administrative Court and two assessors appointed by the President of the Administrative Court from the list of persons referred to in subsection (2).

(2) The Presidents of the Administrative Court, with the approval of the Chief Justice and the Minister, shall draw up a list of names of not fewer than ten persons who have ability and experience in commerce, industry, agriculture or administration or who have professional qualifications and are otherwise suitable for appointment as assessors, but who are not members of the Public Service.

PART VII

GENERAL

Unfair trade practices

42. (1) The acts or omissions specified in the First Schedule shall be unfair trade practices for the purposes of this Act.

(2) The Minister, on the recommendation of the Commission, may by statutory instrument amend the First Schedule -

- (a) by adding any restrictive practice thereto, where the Minister is satisfied that the restrictive practice concerned, if engaged in by any undertaking, would be unfair or deceptive and contrary to the public interest;
- (b) by altering any provision therein;
- (c) by deleting any provision therefrom:

Provided that no such amendment shall have the effect of rendering criminal anything done or omitted before the date commencement of the amendment.

(3) Any person who enters into, engages in or otherwise gives effect to an unfair trade practice shall be guilty of an offence and liable -

- (a) in the case of an individual, to a fine not exceeding fifty thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
- (b) in any other case, to a fine not exceeding one hundred and fifty thousand dollars.

Certain conduct to have no legal effect

43. Any agreement, arrangement, undertaking, act or omission which –
- (a) constitutes an unfair trade practice or which is entered into in furtherance of an unfair trade practice; or
 - (b) is entered into in contravention of this Act or any order or notice under this Act;

shall be void with effect from the date on which the conduct concerned became an unfair trade practice or the order or notice concerned was made or issued, as the case may be.

Right of action of injured parties

- 44, (1) Any person who suffers injury, loss or harm as a result of any agreement, arrangement, undertaking, act or omission referred to in section *forty-three* may recover damages, by proceedings in a court of competent jurisdiction, from every person responsible for the agreement, arrangement, undertaking, act or omission.
- (2) Subsection (1) shall not limit any person's remedy under any other law for injury, loss or harm that has been or may be occasioned to him by any agreement, arrangement, undertaking, act or omission referred to in section *forty-three*.

Commission may require returns

45. (1) Subject to subsection (3), for the purpose of investigating and detecting restrictive practices and monopoly situations, the Commission may serve a written notice on any person engaged in any business or industry requiring him to furnish the Commission, within such reasonable period or at such reasonable intervals as the Commission may specify in the notice, with information regarding his business or operations, including information as to –
- (a) any business agreement which he may at any time have entered into with any other person, or in which he may at any time have been concerned; and
 - (b) any arrangement or understanding to which he or his business or industry may at any time have been a party; and
 - (c) any interest which he or his business or industry may at any time have acquired in any other business, undertaking or asset.
- (2) Any person who, when required to furnish the Commission with information under subsection (1) -
- (a) fails or refuses to do so; or
 - (b) furnishes the Commission with information which he knows to be false or does not believe on reasonable grounds to be true;

shall be guilty of an offence and liable to a fine not exceeding five thousand dollars or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

(3) Nothing in this section shall be construed as requiring any person to disclose information that he could not be required to disclose when giving evidence in a court of law.

Investigating officers

46. (1) The Commission may –

- (a) designate any of its employees; and
- (b) with the approval of the Public Service Commission, designate any member of the Public Service;

to be an investigating officer for the purposes of this Act.

(2) Investigating officers shall carry out their functions under this Act subject to such directions as the Commission or the Director may give them.

(3) The Commission shall cause every investigating officer to be furnished with a certificate of appointment, which the investigating officer shall exhibit on demand by any interested person before carrying out any function under this Act.

Powers of entry and inspection

47. (1) Subject to subsection (2), an investigating officer may at all reasonable times –

- (a) enter any premises in or on which there is reasonably suspected to be any book, record or document relating to any restrictive practice or unfair trade practice or any actual or potential merger or monopoly situation; and
- (b) require any person upon the premises –
 - (i) to disclose all information at his disposal; and
 - (ii) to produce any book, record or document or copy thereof or extract therefrom;
- (c) make copies of or take extracts from any book, record or document referred to in paragraph (b).

(2) The powers of entry and inspection conferred by subsection (1) shall not be exercised except with the consent of the owner or person in charge of the premises concerned, or where there are reasonable grounds for believing that it is necessary to exercise them for the prevention, investigation or detecting of an offence, other than an offence in terms of subsection (2) of section *forty-five*, or for the obtaining of evidence relating to such an offence.

- (3) Any person who, without lawful excuse -
- (a) hinders or prevents an investigating officer from exercising any power under subsection (1); or
 - (b) fails or refuses to comply with any requirement of an investigating officer under subsection (1); or
 - (c) upon being required under subsection (1) to disclose any information, fails or refuses to do so or provides information that is false or which he does not believe on reasonable grounds to be true;

shall be guilty of an offence and liable to a fine not exceeding five thousand dollars or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

Secrecy to be observed

48. (1) The Director and every member of the Commission or of a committee thereof, and every investigating officer and other person appointed or employed under this Act shall not disclose to any person, except in the performance of this functions under this Act or when required to do so by any law, any information which he may have acquired in the course of his duties in relation to the financial or business affairs of any person, undertaking or business.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Certificates of Director to be evidence

49. (1) For the purposes of section *thirty-three*, a document purporting to be a copy of an order and to be certified by the Director shall be presumed, unless the contrary is proved, to set out the terms of the order concerned and to have duly certified by the Director, and shall be recorded as a judgment accordingly.
- (2) In any proceeding before any court, a document purporting –
- (a) to set out the terms of any order, notice, arrangement, authority or decision of the Commission; or
 - (b) to state whether or not any authorization has been granted, amended or revoked by the Commission;

shall, if it purports to be signed by the Director, be admissible on its production by any person as *prima facie* proof of its contents.

Regulations

50. (1) The Minister, after consultation with the Commission, may by regulation prescribe anything which by this Act is required or permitted to be prescribed or which, in his opinion, is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Regulations made under subsection (1) may provide for –
- (a) the procedure to be followed in investigations carried out by the Commission;
 - (b) the form of notices, orders, applications and authorizations made or issued under this Act;
 - (c) fees and charges for any information given, authorization granted or any other thing made or done under this Act.

FIRST SCHEDULE (Sections 2 and 42)

UNFAIR TRADE PRACTICES

ARRANGEMENT OF PARAGRAPHS

Paragraph

- 1. Interpretation.
- 2. Misleading advertising.
- 3. False bargains.
- 4. Distribution of commodities or services above advertised price.
- 5. Undue refusal to distribute commodities or services.
- 6. Bid-rigging.
- 7. Collusive arrangements between competitors.

Interpretation

1. In this Schedule –
- “group of companies” means two or more companies which –
- (a) have the relationship to each other of holding company and subsidiary or wholly owned subsidiary as defined in the Companies Act [*Chapter 190*]; or
 - (b) are substantially controlled by the same person or persons, whether as shareholders, directors or otherwise;

“publish”, in relation to an advertisement, means to make the advertisement known in any manner whatsoever to the public or any section of the public;

“publisher”, in relation to an advertisement, means the person who publishes the advertisement or causes it to be published or on whose behalf it is published.

Misleading advertising

2. (1) For the purposes or in the course of any trade or business, publishing an advertisement -
 - (a) containing a representation which the publisher knows or ought to know is false or misleading in a material respect; or
 - (b) containing a statement, warranty or guarantee as to the performance, efficacy or length of life of any commodity, which statement, warranty or guarantee the publisher knows or ought to know is not based on an adequate or proper test thereof; or
 - (c) containing a statement, warranty or guarantee that any service is or will be of a particular kind, standard, quality or quantity, or that it is supplied by any particular person or by a person of a particular trade, qualification or skill, which statement, warranty or guarantee the publisher knows or ought to know is untrue.
- (2) For the purposes of subparagraph (1), a representation, statement, warranty or guarantee expressed on or attached to an article offered or displayed for sale, or expressed on the wrapper or container of such an article, shall be deemed to have been made in an advertisement.

False bargains

3. Advertising any commodity or service for distribution at a price –
 - (a) which is represented in the advertisement to be a bargain price; or
 - (b) which is so represented in the advertisement as to lead a person who reads, hears or sees the advertisement to the reasonable belief that it is a bargain price;

if the distributor of the commodity or service does not intend to distribute it at that price, or has no reasonable grounds for believing that he can do so, for a period that is, and in quantities that are, reasonable in relation to the nature of the commodity or service concerned and the nature and size of the distributor's undertaking.

Distribution of commodities or services above advertised price

4. (1) Having advertised any commodity or service for distribution at a particular price, distributing it, during the period and in the market to which the advertisement relates, at a higher price than that advertised.

- (2) Subparagraph (1) shall not apply in any case where –
- (a) the advertisement prominently stated that the price of the commodity or service concerned was subject to error or alteration without notice; or
 - (b) the advertisement was immediately followed by another advertisement correcting the price mentioned in the first advertisement.

(3) For the purposes of subparagraph (1), the market to which an advertisement relates is the market to which it could reasonably be expected to reach, unless the advertisement defines its market specifically by reference to a particular area, store, outlet or otherwise.

Undue refusal to distribute commodities or services

5. (1) Failing or refusing to distribute any commodity to another person unless the other person –
- (a) causes or refrains from distributing or using a commodity produced by some other person; or
 - (b) restricts his distribution of a commodity produced by some other person; or
 - (c) distributes the commodity at a specified price or at a price which is not less than a specified minimum price.

(2) Failing or refusing to distribute a commodity or service to any person, under the usual conditions of distribution, on the ground or belief that that person or someone else connected with him -

- (a) has furnished the Commission or a committee or an investigating officer with any information which he is required to furnish in terms of this Act; or
- (b) has given evidence before the Commission at any investigation under this Act; or
- (c) has given evidence before a court in regard to any restrictive practice, merger, monopoly situation or unfair trade practice.

Bid-rigging

6. (1) Entering into or giving effect to an agreement, arrangement or understanding, whether enforceable or not, with another person whereby –
- (a) any of the parties to the agreement, arrangement or understanding undertakes not to submit a bid or tender in response to a call or request for bids or tenders; or
 - (b) in response to a call or request for bids or tenders, some or all the parties to the agreement, arrangement or understanding submit bids or tenders that have been arrived at by agreement between themselves.

(2) Subparagraph (1) shall not apply to an agreement, arrangement or understanding between companies which are all part of a single group of companies.

Collusive arrangements between competitors

7. (1) Being a producer or distributor of any class or type of commodity or service, entering into or giving effect to any agreement, arrangement or understanding, whether enforceable or not, with another person who produces or distributes a commodity or service of the same or a similar class or type –

- (a) to distribute the commodity or service at a particular price or within a particular range of prices; or
- (b) to share the market for the commodity or service, whether the market shares are divided according to geographical area, class of consumer or otherwise; or
- (c) to limit, by number or quantity, the commodities or services produced or distributed.

(2) Subparagraph (1) shall not apply to an agreement, arrangement or understanding -

- (a) between companies which are all part of a single group of companies; or
- (b) *bona fide* intended solely to improve standards of quality or service in regard to the production or distribution of the commodity or service concerned.

SECOND SCHEDULE (Section 5)

POWERS OF COMMISSION

1. To acquire premises necessary or convenient for the exercise of its functions and, for that purpose, to buy, take in exchange, hire or otherwise acquire immovable property and interests in and rights over such property.
2. To buy, take in exchange, hire or otherwise acquire movable property.
3. To maintain, alter and improve any of its property.
4. To mortgage or pledge any of its assets and, with the Minister's approval, to sell, exchange, let, dispose of, turn to account or otherwise deal with any assets which are not required for the exercise of its functions, for such consideration as the Commission may determine.
5. To draw, make, accept, indorse, discount, execute and issue promissory notes, bills of exchange, bills of lading, securities and other negotiable or transferable instruments.
6. To insure against losses, damages, risks and liabilities which it may incur.
7. To make contracts and enter into suretyships or give guarantees, and to modify or rescind such contracts or rescind such suretyships or guarantees.
8. With the approval of the Minister and the Minister responsible for finance, to establish and administer funds and reserves.
9. To employ, on such terms and conditions as the Commission thinks fit, such persons as are necessary for carrying out the Commission's functions and conducting the Commission's affairs, and to suspend or discharge any such employees.
10. With the approval of the Minister and the Minister responsible for finance, to pay such remuneration and allowances and grant such leave of absence and to make such gifts and bonuses and the like to its employees as the Commission thinks fit.
11. To provide pecuniary benefits for its employees on their retirement, resignation, discharge or other termination of service or in the event of their sickness or injury and for their dependants, and for that purpose to effect policies of insurance, establish pension or provident funds or make such other provision as may be necessary to secure for its employees and their dependants any or all the pecuniary benefits to which this paragraph relates.
12. With the Minister's approval, to purchase, take in exchange, hire or otherwise acquire land or dwellings for use or occupation by its employees.

13. To construct buildings and other improvements for use or occupation by its employees on land which it has purchased, taken in exchange, hired or otherwise acquired.
14. To sell or let land or dwellings for residential purposes to its employees.
15. With the Minister's approval, to make or guarantee loans to its employees or their spouses for –
 - (a) the purchase of dwellings or land for residential purposes; or
 - (b) the construction or improvement of dwellings on land which is the property of its employees or their spouses.
16. To provide security in respect of loans such as are described in paragraph 15 by the deposit of securities, in which it may invest such moneys as the Commission considers necessary for the purpose.
17. To do anything for the purpose of improving the skill, knowledge or usefulness of its employees, and in that connection to provide or assist other persons in providing facilities for training, education and research.
18. Generally, to do anything that is calculated to facilitate or is incidental or conducive to the performance of its functions under this Act or any other enactment.
