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Groupe intergouvernemental d'experts du droit
et de la politique de la concurrence
2-4 juillet 2003

MANUEL SUR LE DROIT DE LA CONCURRENCE

Note du secrétariat de la CNUCED

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INTRODUCTION

L'Ensemble de principes et de règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives prévoit, à la section F.6 c), l'établissement d'un manuel des législations appliquées en matière de pratiques commerciales restrictives.

La quatrième Conférence des Nations Unies chargée de revoir tous les aspects de l'Ensemble, qui s'est tenue à Genève du 25 au 29 septembre 2000, et le Groupe intergouvernemental d'experts du droit et de la politique de la concurrence, à sa quatrième session, tenue à Genève du 3 au 5 juillet, ont prié le secrétariat de la CNUCED de continuer à publier de nouvelles livraisons du Manuel des législations appliquées en matière de concurrence, y compris le texte des instruments régionaux et internationaux, qui devrait être complété par un résumé des principales dispositions des lois sur la concurrence, établi à partir de communications des États membres. [Voir la résolution adoptée par la Conférence (TD/RBP/CONF.5/16) et les conclusions concertées du Groupe intergouvernemental d'experts à sa troisième session (TD/B/COM.2/CLP/L.8)].

Le secrétariat a donc établi la présente note qui contient les commentaires de la Lituanie (nouvelle loi), du Malawi et du Zimbabwe sur leur législation en matière de concurrence, ainsi que les textes législatifs eux-mêmes.

À ce jour, le secrétariat de la CNUCED a publié des notes présentant le texte et le commentaire des lois sur la concurrence et les pratiques commerciales restrictives de 47 pays: Afrique du Sud, Algérie, Allemagne, Belgique, Brésil, Bulgarie, Canada, Chili, Colombie, Côte d'Ivoire, Croatie, Danemark, Espagne, États-Unis d'Amérique, Finlande, France, Géorgie, Hongrie, Indonésie, Italie, Jamaïque, Japon, Kenya, Lituanie, Malawi, Maroc, Mexique, Nouvelle-Zélande, Norvège, Pakistan, Pologne, Portugal, République de Corée, République tchèque, Roumanie, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Sénégal, Slovaquie, Sri Lanka, Suède, Thaïlande, Tunisie, Turquie, Ukraine, Venezuela, Zambie et Zimbabwe.

Le Secrétaire général de la CNUCED, dans une note du 8 mars 1996, a prié les États membres qui ne l'avaient pas encore fait ainsi que ceux qui avaient modifié leur législation sur la concurrence ou adopté des dispositions nouvelles depuis leur dernière communication au secrétariat de la CNUCED, de fournir à celui-ci le texte de leurs lois et décisions judiciaires, accompagné de commentaires, selon le mode de présentation prescrit (voir la page 4) (dans le cas des États qui ont adopté de telles lois pour la première fois, cependant, la présentation des commentaires peut s'écarter de ce modèle). Pour faciliter la publication des textes législatifs dans plusieurs langues officielles de l'ONU, les États ont été invités à fournir si possible des traductions dans au moins une autre de ces langues.

Le secrétariat remercie les États qui lui ont envoyé les renseignements demandés pour l'établissement de la présente livraison du Manuel, et invite de nouveau ceux qui ne l'ont pas encore fait à répondre à la demande du Secrétaire général de la CNUCED.

MODE DE PRÉSENTATION DES RENSEIGNEMENTS À FOURNIR POUR LE MANUEL

- A. Exposé des raisons qui ont motivé l'adoption de la législation.
- B. Description des objectifs de la législation et de leur évolution depuis l'adoption de la législation initiale.
- C. Description des pratiques, actes ou comportements soumis au contrôle, en indiquant pour chacun :
 - a) Le type de contrôle - par exemple interdiction pure et simple, interdiction de principe ou examen cas par cas;
 - b) La mesure dans laquelle les pratiques, actes ou comportements visés aux paragraphes 3 et 4 de la section D de l'Ensemble de principes et de règles sont soumis à ce contrôle, ainsi que les autres pratiques, actes ou comportements susceptibles d'y être assujettis et ceux qui font l'objet de mesures expressément liées à la protection du consommateur, comme la lutte contre la publicité mensongère.
- D. Description du champ d'application de la législation, en indiquant :
 - a) Si elle est applicable à toutes les transactions portant sur des biens et des services et, dans la négative, quelles transactions sont exclues;
 - b) Si elle s'applique à la totalité des pratiques, actes ou comportements ayant des effets sur le pays, quelle qu'en soit l'origine géographique;
 - c) Si elle dépend de l'existence d'un accord, ou de l'entrée en vigueur dudit accord.
- E. Description du mécanisme (administratif et/ou judiciaire) d'application, en indiquant les éventuels accords de notification et d'enregistrement et les principaux pouvoirs de l'organe ou des organes compétents.
- F. Description de toute législation parallèle ou supplémentaire, y compris des traités ou conventions avec d'autres pays, prévoyant une coopération ou des procédures pour régler les différends dans le domaine des pratiques commerciales restrictives.
- G. Description des principales décisions prises par les organes administratifs et/ou judiciaires, et des questions qui en font expressément l'objet.
- H. Bibliographie succincte donnant la référence des textes législatifs et des principales décisions, ainsi que les documents explicatifs publiés par les pouvoirs publics, ou les textes législatifs ou certains passages de ces textes.

DROIT DE LA CONCURRENCE

I. LITUANIE

Commentaires du Gouvernement lituanien concernant la loi sur la concurrence^{*} No VIII-1099

A. Exposé des raisons qui ont motivé l'adoption de la législation

La loi sur la concurrence n° VIII-1099 a été votée par le Parlement (Seimas) de la République de Lituanie le 23 mars 1999 et a pris effet le 2 avril 1999. Elle a remplacé l'ancienne loi sur la concurrence n° I-2878 adoptée en 1992.

Après avoir mis en œuvre la loi sur la concurrence n° I-2878 pendant près de sept ans, il a semblé opportun d'en réexaminer et d'en améliorer les dispositions, compte tenu notamment des procédures préparatoires à l'adhésion à l'Union européenne, ainsi que de la signature et de la promulgation de l'Accord européen et de l'harmonisation de la législation lituanienne avec celle de la Communauté européenne. C'étaient là les facteurs essentiels motivant la rédaction de la loi sur la concurrence n° VIII-1099 (ci-après la loi sur la concurrence ou la loi).

La nécessité de rapprocher les législations et de créer un système de règles de procédure étaient les raisons principales de l'adoption de la nouvelle loi. Celle-ci a apporté des changements notables tant sur le plan du fond que de la forme, notamment du point de vue institutionnel.

B. Description des objectifs de la législation et de leur évolution depuis l'adoption de la législation initiale

Les principes fondamentaux de la législation sur la concurrence sont définis dans la Constitution de la République de Lituanie (approuvée par le peuple lors du référendum du 25 octobre 1992). L'article 46 de la Constitution interdit de monopoliser la production et le marché et protège le droit à une concurrence loyale.

Actuellement, la loi sur la concurrence est le principal instrument juridique régissant les pratiques commerciales anticoncurrentielles en Lituanie. Le principal objectif de la loi est «de protéger le droit à une concurrence loyale dans la République de Lituanie». La loi régit «les actions des autorités publiques et locales et des entreprises qui restreignent ou pourraient restreindre la concurrence ainsi que les actes de concurrence déloyale» tout en établissant «les droits, devoirs et responsabilités de ces institutions et entreprises ainsi que les fondements juridiques du contrôle de restrictions à la concurrence et des pratiques de concurrence déloyale dans la République de Lituanie».

La loi vise aussi à harmoniser la législation lituanienne avec celle de la Communauté européenne en matière de réglementation de la concurrence.

^{*} Le texte de cette loi correspond à la version soumise à la CNUCED par le Gouvernement lituanien.

La loi porte création du Conseil de la concurrence de la République de Lituanie (dénommé ci-après le Conseil de la concurrence ou le Conseil), «organisme public de la République de Lituanie mettant en œuvre la politique de concurrence de l'État et veillant au respect de la loi», et dote le Conseil d'une indépendance accrue.

La loi sur la concurrence a contribué à améliorer et à développer le droit de la concurrence en Lituanie grâce à l'adoption de textes secondaires visant à faciliter la mise en œuvre effective des dispositions de la loi.

C. Description des pratiques, actes ou comportements soumis au contrôle, en indiquant pour chacun:

a) Le type de contrôle - par exemple interdiction pure et simple, interdiction de principe ou examen cas par cas;

b) La mesure dans laquelle les pratiques, actes ou comportements visés aux paragraphes 3 et 4 de la section D de l'Ensemble de principes et de règles sont soumis à ce contrôle, ainsi que les autres pratiques, actes ou comportements susceptibles d'y être assujettis et ceux qui font l'objet de mesures expressément liées à la protection du consommateur, comme la lutte contre la publicité mensongère.

Résumé des principales dispositions juridiques

La loi sur la concurrence est structurée de manière à prévenir et à poursuivre trois principales catégories d'actions anticoncurrentielles. Premièrement, l'article 5 interdit les accords qui ont «pour objet ou risquent de restreindre la concurrence». Deuxièmement, l'article 9 interdit l'abus de position dominante. Troisièmement, les articles 10 à 15 prévoient une procédure de notification préalable aux fusions et le contrôle des fusions (contrôle des concentrations). La loi non seulement couvre ces trois domaines traditionnels de la lutte antitrust, mais contient aussi des dispositions ayant trait à la concurrence déloyale et aux activités anticoncurrentielles des autorités publiques et locales.

Accords interdits

Tous les types d'accords (écrits ou oraux) conclus entre entreprises, ainsi que les pratiques concertées, notamment les décisions prises par un ensemble d'entreprises (associations, fusions, etc.) sont interdits s'ils restreignent ou risquent de restreindre la concurrence.

Les accords interdits sont nuls et non avenus dès leur conclusion.

Les accords horizontaux et verticaux sont interdits.

Les principaux types d'accords interdits sont couverts par l'article 5 de la loi sur la concurrence. Il s'agit notamment des accords:

- Fixant les prix ou d'autres conditions de vente;
- Allouant des marchés;

- Restreignant la production, le développement technique ou l'investissement;
- Appliquant des conditions discriminatoires à des transactions équivalentes;
- Conclus sous réserve du respect d'obligations supplémentaires sans lien avec le contrat;
- Conclus entre concurrents en vue de ne pas soumettre d'offres ou de coordonner les offres ou les soumissions.

L'article 5 de la loi dispose que les quatre premiers types d'accords entre concurrents sont considérés comme restreignant la concurrence en soi. Les accords interdits conclus entre concurrents (cartels) sont qualifiés de violations flagrantes de la loi sur la concurrence. Néanmoins, l'article 43 de la loi sur la concurrence prévoit qu'une entreprise qui est la première partie à informer les autorités de sa participation à un accord interdit et remplit d'autres conditions fixées par la loi est exemptée du paiement d'une amende.

Il est possible d'octroyer une exemption par catégorie ou une exemption individuelle pour les accords mentionnés à l'article 5 de la loi sur la concurrence. Les entreprises désireuses d'obtenir une exemption individuelle ou l'assurance que l'accord qu'elles envisagent de conclure répond aux conditions d'une exemption par catégorie doivent présenter une demande en bonne et due forme auprès du Conseil de la concurrence.

Les accords conclus entre des entreprises dont la part du marché en cause est trop petite pour restreindre de manière notable la concurrence, ne sont pas considérés comme enfreignant la loi sur la concurrence. Les critères et les conditions fixés pour ces accords sont décrits dans une décision distincte du Conseil de la concurrence.

Abus de position dominante

La loi définit la «position dominante» comme l'aptitude à exercer unilatéralement une «influence décisive» sur le marché. La position dominante n'est pas interdite en soi. Conformément à la loi, une part de marché de 40 % donne lieu à une présomption de position dominante. En outre, la loi crée une présomption de position dominante conjointe lorsque les trois plus grandes entreprises en place possèdent collectivement 70 % du marché en cause.

L'article 9 de la loi interdit tout abus de position dominante et donne des exemples d'abus:

- Imposition directe ou indirecte de prix déloyaux ou d'autres conditions d'achat ou de vente;
- Limitation du commerce, de la production ou du développement technique au détriment des consommateurs;
- Application de conditions différentes (discriminatoires) à des transactions équivalentes conclues avec certaines entreprises, les plaçant ainsi dans une position moins concurrentielle; ou

- La conclusion d'un contrat sous réserve de l'acceptation par l'autre partie d'obligations supplémentaires qui, de par leur nature ou leur usage commerciaux, n'ont rien à voir avec l'objet dudit contrat.

Les principaux principes permettant d'établir une position dominante sont décrits dans les explications données par le Conseil de la concurrence sur les moyens de déterminer une position dominante.

Contrôle des concentrations

En vertu de l'article 10 de la loi, la concentration envisagée doit être notifiée au Conseil de la concurrence, dont l'autorisation est nécessaire lorsque:

- Le chiffre d'affaires global cumulé des entreprises concernées est supérieur à 30 millions de litai (environ 7 500 000 dollars des États-Unis) pendant l'exercice financier antérieur à l'opération;
- Le chiffre d'affaires global de chacune des deux entreprises ou plus concernées est supérieur à 5 millions de litai (environ 1 250 000 dollars des États-Unis) pendant l'exercice financier antérieur à l'opération.

La notion de concentration, telle que définie par la loi, comprend les fusions, les prises de contrôle, quelle que soit la forme de l'acquisition, y compris par des personnes physiques.

La règle de fond que le Conseil de la concurrence doit appliquer consiste à savoir si la concentration crée ou renforce une position dominante avec pour effet d'entraver de manière sensible la concurrence en vigueur.

Afin de faire respecter l'obligation de notification, le Conseil de la concurrence est en droit d'obliger les entreprises qui ont mené une opération de concentration sans la lui notifier à rétablir la situation antérieure ou à éliminer les conséquences de la concentration, et d'imposer à ces entreprises le paiement d'amendes fixées par la loi.

La loi dispose que le Conseil de la concurrence doit, dans un délai d'un mois suivant la notification, prendre une décision définitive sur la fusion en question ou décider de poursuivre l'examen du dossier. Dans ce dernier cas, le Conseil doit prendre une décision définitive dans un délai de quatre mois suivant la notification.

Les règles de procédure régissant la soumission et l'examen des notifications de concentration et la méthode de calcul du chiffre d'affaires global sont définies dans la décision pertinente du Conseil de la concurrence.

Si l'une des entreprises participant à une opération de concentration est étrangère, son chiffre d'affaires global correspond au chiffre d'affaires total des produits vendus sur le marché de la République de Lituanie.

Concurrence déloyale

La loi interdit aux entreprises tout acte de concurrence déloyale portant préjudice aux pratiques commerciales loyales, aux bons usages et traditions, lorsque cet acte risque de restreindre la compétitivité d'une autre entreprise. Parmi les exemples énumérés à l'article 16 de la loi figurent les actes suivants:

- Utilisation non autorisée d'une marque identique ou similaire au nom, à la marque enregistrée ou à une marque bien connue, mais non enregistrée d'une autre entreprise;
- Le fait d'induire en erreur des entreprises en leur donnant des informations fausses ou infondées sur ses propres biens ou les biens d'une autre entreprise;
- L'utilisation, la transmission et la divulgation d'informations qui relèvent du secret commercial d'une autre entreprise, sans le consentement de cette dernière; et
- La simulation d'un produit ou d'un emballage de produit d'une autre entreprise.

En cas de concurrence déloyale, l'entreprise dont les intérêts juridiques ont été lésés, peut saisir la justice.

Le Conseil de la concurrence n'ouvre une enquête sur les affaires de concurrence déloyale que lorsque les intérêts d'un nombre significatif d'entreprises ou de consommateurs ont été lésés.

Dans les affaires de concurrence déloyale liées à la publicité mensongère, le Conseil de la concurrence doit aussi tenir compte des dispositions de la loi sur la publicité. Les droits et les obligations du Conseil de la concurrence en matière de publicité mensongère et de publicité comparative sont définis par la loi sur la publicité et la loi sur la concurrence. La procédure d'enquête et d'examen concernant les infractions commises est définie par la loi sur la concurrence.

Activités anticoncurrentielles des autorités publiques et locales

Conformément à l'article 4 de la loi, les autorités publiques et locales sont tenues de garantir le droit à une concurrence loyale dans le cadre de leur réglementation de l'activité économique. Il leur est interdit d'exercer des pratiques discriminatoires en faveur ou à l'encontre d'entreprises données, sauf dans les cas où ce traitement discriminatoire est nécessaire pour qu'elles s'acquittent de leurs responsabilités conformément à la législation lituanienne.

La loi stipule que le Conseil de la concurrence peut demander aux organes gouvernementaux de modifier ou d'abolir des lois considérées comme contraires à ses dispositions et, si les mesures qui s'imposent ne sont pas prises, le Conseil peut saisir les tribunaux, sauf dans le cas de textes normatifs émanant du Gouvernement lituanien.

D. Description du champ d'application de la législation, en indiquant:

a) Si elle est applicable à toutes les transactions portant sur des biens et des services et, dans la négative, quelles transactions sont exclues;

b) Si elle s'applique à la totalité des pratiques, actes ou comportements ayant des effets sur le pays, quelle qu'en soit l'origine géographique;

c) Si elle dépend de l'existence d'un accord, ou de l'entrée en vigueur dudit accord.

La loi sur la concurrence s'applique à toutes les transactions de biens. Selon la loi, le terme «bien» s'entend de tout objet acheté ou vendu, y compris tous types de services et de travaux, de droits ou de titres.

La loi interdit aux entreprises de mener des actions qui restreignent ou risquent de restreindre la concurrence, quel que soit le caractère de leur activité, sauf dans les cas où la loi sur la concurrence ou les lois régissant certaines activités économiques prévoient des exemptions et autorisent certaines actions interdites par la loi sur la concurrence.

La loi établit un principe d'extraterritorialité en vertu duquel elle s'applique non seulement aux entreprises lituaniennes, mais aussi aux entreprises étrangères enregistrées sur un territoire autre que celui de la République de Lituanie, à condition que leurs activités restreignent la concurrence sur le marché intérieur lituanien.

La loi ne s'applique pas aux activités des entreprises qui restreignent la concurrence sur des marchés étrangers, sauf dans les cas prévus par les accords internationaux auxquels la République de Lituanie est partie.

Lorsque des accords internationaux ratifiés par le Parlement de la République de Lituanie établissent des critères différents pour protéger la concurrence, les dispositions de ces accords s'appliquent.

E. Description du mécanisme (administratif et/ou judiciaire) d'application, en indiquant les éventuels accords de notification et d'enregistrement et les principaux pouvoirs de l'organe ou des organes compétents

La loi sur la concurrence est appliquée par le Conseil de la concurrence, organe indépendant financé par le budget de l'État. Le président et les quatre membres du Conseil sont nommés par le Président de la République, sur proposition du Premier Ministre. (Les membres actuels du Conseil de la concurrence ont été nommés par le Président le 18 octobre 1999.) La loi porte aussi création de l'administration du Conseil de la concurrence.

Les principales attributions du Conseil de la concurrence sont définies dans l'article 19 de la loi. Elles consistent à:

- Contrôler que les entreprises et les autorités publiques et locales appliquent bien les dispositions de la loi sur la concurrence;
- Établir les critères et la procédure permettant de définir le marché en cause et la position dominante;
- Définir le marché en cause et calculer les parts de marché;
- Émettre des instructions faisant obligation de présenter des documents;

- Saisir les tribunaux afin de protéger les intérêts de l'État et d'autres personnes garantis par la loi sur la concurrence;
- Imposer des sanctions;
- Adopter et examiner des textes juridiques;
- Exercer les autres attributions prévues par la loi.

Le personnel de l'administration du Conseil de la concurrence enquête sur les infractions présumées à la loi et a le pouvoir d'acquérir des preuves et de formuler des recommandations au Conseil. La loi lui confère de nombreux pouvoirs pour obtenir des informations des personnes faisant l'objet de l'enquête, notamment celui de pénétrer dans le domicile des intéressés avec ou sans avertissement, de le fouiller, de copier les documents qui s'y trouvent et de les saisir, et d'obtenir des explications orales et écrites, y compris par la convocation des intéressés dans les bureaux du Conseil de la concurrence. Avant de pénétrer dans le domicile, de le fouiller, d'examiner des documents et de les saisir, une ordonnance du tribunal doit néanmoins être obtenue. En outre, la loi prévoit que le Conseil de la concurrence peut obtenir des informations et des documents auprès d'autres entités économiques (ne faisant pas l'objet de l'enquête) ainsi que des administrations publiques et des autorités locales dans le cadre de l'enquête. Pour assurer le maintien de l'ordre, les enquêteurs du Conseil de la concurrence peuvent faire appel à la police.

La loi définit expressément les procédures administratives que le Conseil doit suivre en engageant des poursuites. Le Conseil peut décider d'ouvrir une enquête à la suite de plaintes ou de sa propre initiative. Les entreprises qui ont été lésées par un comportement prétendument anticoncurrentiel, les organismes publics et les autorités locales, ainsi que les associations et les unions d'entreprises et de consommateurs peuvent demander officiellement l'ouverture d'une enquête. Le Conseil est tenu de décider, dans un délai de 14 jours suivant la réception de la demande, d'ouvrir ou non une enquête. Dans le cas où une enquête est ouverte, celle-ci doit être achevée dans un délai de trois mois, mais le Conseil peut proroger, à chaque fois, la durée de l'enquête pour une période allant jusqu'à deux mois supplémentaires.

Dans les cas suivants, le Conseil est tenu de procéder à une enquête dès la réception de la demande.

- Exemption individuelle d'accords interdits;
- Réponse négative au titre de l'article 7; et
- Autorisation des concentrations.

Dans les autres cas, lorsque des plaintes pour infraction présumée à la loi sont déposées, le Conseil de la concurrence est libre de décider d'ouvrir ou non une enquête.

Le Conseil de la concurrence peut organiser des auditions publiques auxquelles les parties peuvent participer et pendant lesquelles celles-ci peuvent apporter des preuves. À l'issue d'une audition, le Conseil de la concurrence peut adopter des décisions reconnaissant ou non qu'une infraction à la loi a été commise et imposant des sanctions, le cas échéant. Parmi ces sanctions

peuvent figurer l'instruction de cesser toute activité illégale ou de prendre des mesures pour éliminer les conséquences d'une telle activité. Des amendes peuvent aussi être imposées, soit pour des infractions de fond, soit pour défaut d'observation des obligations de forme imposées par la loi. Pour les infractions les plus graves commises avec des circonstances aggravantes, la loi prévoit le paiement de l'amende maximale, dont le montant peut aller jusqu'à 10 % du chiffre d'affaires annuel brut. Il est possible de faire appel des décisions du Conseil de la concurrence devant les tribunaux.

Même si le respect de la loi sur la concurrence et de la politique de la concurrence en Lituanie relève de la compétence du Conseil de la concurrence, des affaires de concurrence sont aussi examinées par les tribunaux.

F. Description de toute législation parallèle ou supplémentaire, y compris des traités ou conventions avec d'autres pays, prévoyant une coopération ou des procédures pour régler les différends dans le domaine des pratiques commerciales restrictives

Outre la loi sur la concurrence, le Conseil de la concurrence supervise la loi sur le contrôle des aides d'État aux entreprises, et s'acquitte de responsabilités qui lui ont été conférées par la loi sur les prix, la loi sur la publicité et la loi antidumping.

Les principaux instruments de règlement des différends dans le domaine des pratiques commerciales restrictives sont définis par l'Accord européen et les accords conclus avec d'autres pays.

Une décision du Conseil d'association entre les Communautés européennes et leurs États membres, d'une part, et la République de la Lituanie, d'autre part, a été prise en vue d'adopter les règles facilitant la mise en œuvre des dispositions des sections 1) i), 1) ii) et 2) de l'article 64 de l'Accord européen établissant une association entre les Communautés européennes et leurs États membres, d'une part, et la République de Lituanie, d'autre part. Ces règles, adoptées par le Conseil d'association le 26 mai 1999, visent à légitimer la coopération instaurée entre la Direction de la concurrence de la Commission européenne et le Conseil de la concurrence de la République de Lituanie dans le cadre d'enquêtes sur des affaires concernant à la fois le territoire de la Communauté et celui de la Lituanie.

La Lituanie a conclu des accords de libre-échange avec les États membres de l'Association européenne de libre-échange (AELE) et avec l'Estonie, la Hongrie, la Lettonie, la Pologne, la République tchèque, la Slovaquie, la Slovénie, la Suisse et la Turquie. Ces accords comportent des règles de concurrence considérant que les pratiques ci-après sont incompatibles avec le bon fonctionnement desdits accords dans la mesure où les échanges entre les parties risquent d'en être affectés:

- Accords entre entreprises qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence; et
- Abus de positions dominantes sur le territoire de l'ensemble des parties ou sur une partie substantielle de celui-ci.

Le Conseil de la concurrence a aussi conclu les accords bilatéraux ci-après avec des autorités chargées de la concurrence dans d'autres pays:

- Accord de coopération entre l'Office public de protection de la concurrence et des consommateurs de la République de Lituanie et l'Office antimonopole de la République de Pologne (1996 03 01)
- Accord de coopération entre les autorités de la concurrence de la République de Lettonie et de la République de Lituanie (1996 04 11)
- Mémoire d'accord entre les autorités de la concurrence de la République d'Estonie, de la République de Lettonie et de la République de Lituanie (1996 04 11)

Ces accords contiennent des dispositions sur les modalités de concertation, les demandes de renseignements ainsi que sur le secret et la confidentialité des informations dans le cadre des enquêtes menées sur des activités anticoncurrentielles.

G. Description des principales décisions prises par les organes administratifs et/ou judiciaires, et des questions qui en font expressément l'objet

Aperçu général

Le Conseil de la concurrence a pris des mesures appropriées pour veiller à ce que la politique de concurrence soit suffisamment respectée en Lituanie.

En 2000, le Conseil de la concurrence a émis 176 décisions, dont 161 ayant trait à l'application de la loi sur la concurrence. Au total, 92 enquêtes ont été ouvertes, dont 79 à la suite de plaintes et 13 de la propre initiative du Conseil. Dans 20 affaires, le Conseil a pris des décisions à l'encontre d'infractions à la loi: 5 d'entre elles portaient sur des pratiques restrictives d'organes publics, 3 sur des accords de cartel, 4 sur des abus de position dominante, 7 sur des pratiques de concurrence déloyale et 1 sur une opération illégale de concentration. Au total, 55 autorisations de concentration ont été délivrées.

En outre, le Conseil de la concurrence a examiné 2 demandes d'exemption individuelle et 5 demandes de confirmation d'exemption par catégorie.

En 2000, aucune décision relative à des affaires de concurrence n'a été prise par d'autres organes judiciaires lituaniens.

Application de la législation anticartel

Les enquêtes sur les cartels sont considérées comme prioritaires par le Conseil de la concurrence.

En 2000, le Conseil a examiné 3 affaires portant sur des cartels, dont 2 méritent d'être évoquées.

Activités concertées dans les services de développement photographique

Le Conseil de la concurrence a enquêté sur un accord passé dans le secteur des services photographiques. Il a été établi que 16 sociétés avaient supprimé les rabais qui étaient autorisés pour le développement des pellicules photographiques à compter du 1^{er} mars 2000. Cette décision simultanée a été prise après un échange d'informations lors d'une réunion entre les sociétés concernées. Dans cette affaire, «l'Accord» en question a été qualifié d'«action concertée entre des entreprises».

Le Conseil de la concurrence a exercé tous les pouvoirs d'investigation que lui confère la loi: il a notamment pénétré dans les locaux des entreprises concernées et les a fouillés, a examiné et copié des documents pertinents et a obtenu des explications orales et écrites. Avant de pénétrer dans les locaux, de les fouiller, d'examiner et de saisir des documents, il avait obtenu une ordonnance du tribunal.

Le Conseil de la concurrence a conclu à l'existence de preuves suffisantes que les entreprises en question avaient conclu un accord visant à mettre fin à un service gratuit de développement photographique, et avaient donc enfreint l'alinéa 1 du paragraphe 1 de l'article 5 de la loi sur la concurrence.

Le Conseil de la concurrence a imposé des amendes aux entreprises concernées et leur a ordonné de mettre un terme à leur accord.

Fixation des prix par des sociétés de vente d'essence

Le Conseil de la concurrence a enquêté sur les activités de deux sociétés locales de vente de pétrole qui ont augmenté leur prix en même temps. Les prix ont été identiques pendant une période d'un mois. Les directeurs des sociétés en question ont nié, dans leurs explications orales et écrites, qu'ils se connaissaient. Néanmoins, le relevé des appels téléphoniques obtenu par le Conseil de la concurrence a prouvé qu'ils avaient eu plusieurs communications téléphoniques.

Les éléments recueillis au cours de l'enquête ont permis d'arriver à la conclusion qu'il y avait eu action concertée visant à fixer les prix des carburants. Le comportement des deux concurrents démontrait qu'il y avait eu accord et concertation sur les prix, aucune autre explication n'ayant été donnée à leurs décisions commerciales. Les pratiques de ces sociétés constituaient une infraction à l'alinéa 1 du paragraphe 1 de l'article 5 de la loi sur la concurrence qui interdit les accords de fixation directe ou indirecte des prix de certains biens. Les sociétés en cause ont été condamnées à une amende et ont dû cesser leurs activités.

Abus de position dominante

En 2000, le Conseil de la concurrence a émis plusieurs décisions concernant les infractions à la loi sur la concurrence commises par des entreprises ayant une position dominante sur le marché en cause. Les enquêtes ont mené à la conclusion que certaines entreprises détenant un monopole sur le marché en cause avaient eu tendance à abuser de leur position dominante.

Le marché de l'essence

La société anonyme Mazeikiu Nafta détient une position dominante dans le raffinage du pétrole en Lituanie. Elle accordait des rabais importants sur la vente de produits raffinés aux sociétés qui détenaient des licences d'importation d'essence et vendaient de l'essence au détail en Lituanie. Mais les sociétés qui ne possédaient pas de licence d'importation ne bénéficiaient pas des mêmes rabais pour l'achat de quantités similaires. En outre, les accords conclus avec les sociétés possédant des licences d'importation prévoyaient que si ces entreprises commençaient à importer des produits raffinés, elles perdraient leurs rabais et, dans certains cas, paieraient en plus une pénalité. Après une enquête complète, le Conseil de la concurrence a estimé que ces pratiques avaient pour effet de restreindre la concurrence sur le marché de l'essence et d'augmenter ainsi les prix payés par les consommateurs. Il a imposé une amende de 100 000 litai (25 000 dollars É.-U.) à Mazeikiu Nafta pour abus de position dominante.

Réseaux de chauffage

La société anonyme Utenos Silumos Tinklai détenait une position dominante en tant que fournisseur de chauffage dans la région d'Utena. La société anonyme Utenos Trikotazas était un grand consommateur de chauffage et bénéficiait de rabais sur les prix en raison de l'importance de ses achats. Après avoir appris que Utenos Trikotazas envisageait de faire appel à une autre source d'énergie (gaz naturel), Utenos Silumos Tinklai a supprimé tous les rabais accordés à cette dernière, non pas parce que Utenos Trikotazas avait diminué ses achats, mais parce que celle-ci envisageait de faire appel à une source d'énergie concurrente. Utenos Trikotazas a déposé une plainte auprès du Conseil de la concurrence, qui a imposé une amende de 100 000 litai (25 000 dollars É.-U.) à Utenos Silumos Tinklai pour abus de position dominante.

Télécommunications

Le Conseil de la concurrence a ouvert une enquête pour déterminer si la décision de SC Lietuvos Telekomas d'installer des filtres restreignant les fréquences de transmission sur les lignes analogiques fixes sur son site d'exploitation était conforme aux dispositions de l'article 9 de la loi sur la concurrence. SC Lietuvos Telekomas, qui détient le monopole des services de télécommunication fixes, avait décidé d'installer des filtres restreignant la bande de transmission des fréquences sur les lignes analogiques louées aux nouveaux clients, ce qui empêchait ces derniers d'utiliser les lignes analogiques pour la transmission de signaux à modulation numérique à large bande. Les usagers étaient donc obligés de louer des lignes numériques bien plus coûteuses et n'avaient pas la possibilité de concurrencer SC Lietuvos Telekomas sur le marché des services de transmission de données. En outre, certaines entreprises exploitant des services de transmission de données étaient davantage favorisées que d'autres, aucun filtre n'étant installé sur les lignes qu'elles louaient.

Le Conseil de la concurrence a jugé que SC Lietuvos Telekomas, du fait de sa position dominante sur le marché de la location de réseaux de télécommunication employés pour la transmission de la voix et de données, entravait l'expansion des services de transmission de données et les progrès techniques sur ce marché, qui est étroitement lié au marché sur lequel SC Lietuvos Telekomas détient une position dominante, et enfreignait donc l'alinéa 2 de l'article 9 de la loi sur la concurrence. Par ailleurs, la décision de SC Lietuvos Telekomas plaçait les nouveaux opérateurs en position concurrentielle défavorable par rapport aux acteurs en place. Afin de fournir des services, les nouveaux prestataires étaient forcés de louer des lignes numériques plus coûteuses auprès de SC Lietuvos Telekomas et étaient donc moins compétitifs que les opérateurs qui louaient des lignes analogiques. La décision de SC Lietuvos Telekomas d'installer des filtres sur les lignes analogiques louées était discriminatoire à l'encontre de certaines entreprises et constituait donc une infraction à l'alinéa 3 de l'article 9 de la loi sur la concurrence.

Le Conseil de la concurrence a imposé à SC Lietuvos Telekomas une amende de 150 000 litai (environ 37 000 dollars É.-U.) et a obligé cette société à renoncer à l'installation de filtres restreignant les fréquences de transmission sur les lignes analogiques louées.

Depuis la création, en 2001, de l'Autorité de réglementation des communications, les questions relatives à l'interconnexion des réseaux de télécommunication relèvent essentiellement des compétences de cette entité.

H. Bibliographie succincte donnant la référence des textes législatifs des principales décisions, ainsi que les documents explicatifs publiés par les pouvoirs publics, ou les textes législatifs ou certains passages de ces textes

- Loi sur la concurrence n° VIII-1099 du 23 février 1999
- Loi sur la publicité n° VIII-1871 du 18 juillet 2000
- Loi sur le contrôle des aides d'État aux entreprises n° VIII-1689 du 18 mai 2000
- Loi sur les prix n° I-413 du 26 juillet 1990
- Loi antidumping n° VIII-807 du 23 juin 1998
- Loi sur les télécommunications n° VIII-774 du 9 juin 1998

Textes juridiques adoptés par le Conseil de la concurrence:

- Décision n° 2 du 22 octobre 1999 «sur la réglementation de l'administration du Conseil de la concurrence» (remplacée par la Décision n° 67 du 22 juin 2000)
- Décision n° 4 du 5 novembre 1999 «sur le règlement intérieur provisoire du Conseil de la concurrence»
- Décision n° 38 du 27 décembre 1999 «sur l'octroi d'une exemption générale aux accords verticaux au titre des articles 5, 6 et 7 de la loi sur la concurrence»

- Décision n° 1 du 13 janvier 2000 «sur les accords d'importance mineure qui ne tombent pas sous le coup des articles 5 1) et 5 2) de la loi sur la concurrence»
- Décision n° 17 du 24 février 2000 «concernant l'avis du Conseil de la concurrence sur la définition du marché en cause»
- Décision n° 45 du 27 avril 2000 «sur les notifications de concentration et le calcul du chiffre d'affaires global»
- Décision n° 52 du 17 mai 2000 «concernant l'avis du Conseil de la concurrence sur la définition de la position dominante»
- Décision n° 157 du 21 décembre 2000 «concernant l'ordre d'établissement, de soumission et d'examen des demandes de confirmation qu'un accord remplit les conditions nécessaires pour bénéficier d'une exemption par catégorie, et des demandes d'octroi d'une exemption individuelle»
- Décision n° 11 du 18 janvier 2001 «sur les exemptions par catégorie aux accords conclus entre des entreprises de transport dans certains secteurs en application des articles 5, 6 et 7 de la loi sur la concurrence de la République de Lituanie»

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 Government of the Republic of Lithuania;
- 5) fulfil other functions assigned to him by the Competition Council.

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

LOI SUR LA CONCURRENCE ET LES PRATIQUES COMMERCIALES LOYALES, 1998*

MÉMORANDUM

La présente loi vise à encourager la concurrence dans l'économie en interdisant les pratiques commerciales anticoncurrentielles. Ses principaux objectifs sont les suivants:

- a) Mettre en place un mécanisme approprié de réglementation des pratiques commerciales monopolistiques et anticoncurrentielles, en particulier de la pratique des prix de vente imposés, des fusions-acquisitions et des pratiques commerciales restrictives telles que la collusion et la fixation des prix;
- b) Dissuader de recourir à des pratiques commerciales déloyales et protéger les consommateurs; et
- c) Mettre en œuvre et suivre les orientations et mettre en place des mécanismes d'application.

La première partie de la loi traite des questions préliminaires, notamment de l'interprétation de divers termes employés dans le texte. Elle précise aussi les domaines auxquels la loi ne s'applique pas, qui sont notamment les suivants:

- a) Les activités des salariés pour assurer aux intéressés une protection raisonnable en tant que salariés; et
- b) Les accords de négociation collective entre employeurs et salariés fixant les conditions d'emploi.

La deuxième partie de la loi porte notamment création de la Commission de la concurrence et des pratiques commerciales loyales et fixe sa composition, la durée du mandat de ses membres, les modalités selon lesquelles les vacances de charge sont pourvues et les indemnités que reçoivent les membres de la Commission.

Dans cette partie sont aussi énoncés les fonctions et les pouvoirs de la Commission, qui consistent notamment à:

- a) Mener des enquêtes de sa propre initiative ou à la demande de toute personne susceptible d'être lésée par un projet de fusion;
- b) Prendre les dispositions qu'elle juge nécessaires ou utiles pour empêcher une fusion ou mettre un terme à un abus de position dominante de la part d'une entreprise; et
- c) Informer les consommateurs des droits que leur confère la loi.

* Publiée au Journal officiel daté du 30 octobre 1998.

La Commission est notamment habilitée à:

- a) Citer à comparaître et interroger des témoins;
- b) Demander et examiner des documents; et
- c) Faire prêter serment.

Conformément aux dispositions de cette partie, les membres de la Commission sont tenus de faire état des intérêts qu'ils auraient dans toute affaire examinée par la Commission.

La troisième partie de la loi porte création du secrétariat de la Commission. Le secrétariat est dirigé par un directeur exécutif et le recrutement des autres salariés est laissé à la discrétion de la Commission.

Les salariés sont tenus de faire état des intérêts qu'ils auraient dans toute affaire examinée par la Commission.

La quatrième partie contient les dispositions financières et prévoit les sources de financement de la Commission, qui se composent notamment des crédits alloués par le Parlement, d'impôts, de subventions et de dons.

La cinquième partie de la loi définit les pratiques commerciales anticoncurrentielles, qui consistent notamment à:

- a) Lier la fourniture de biens ou de services à l'acceptation de restrictions sur la distribution ou la production de biens concurrents ou autres ou la fourniture de services concurrents ou autres;
- b) Imposer des restrictions concernant la vente ou l'exportation des biens fournis ou d'autres biens (marchés, destinataires, modalités ou quantités);
- c) Imposer des prix de vente; et
- d) Avoir un comportement prédateur vis-à-vis des concurrents, notamment vendre à prix coûtant pour léser, entraver ou éliminer la concurrence.

Dans cette partie sont aussi énoncés les critères auxquels la Commission se réfère pour autoriser des fusions et des acquisitions. Celle-ci se demande notamment si l'opération envisagée sera avantageuse pour le Malawi.

Dans cette partie est en outre interdit tout abus de position dominante par une personne sur un marché donné ayant notamment pour objet:

- a) D'éliminer ou de léser un concurrent sur ce marché ou sur un autre marché;
- b) D'empêcher l'entrée d'une personne sur ce marché ou sur un autre marché; ou

c) D'empêcher une personne d'être concurrentielle sur ce marché ou sur un autre marché.

Conformément aux dispositions de cette partie, la Commission est chargée de surveiller les concentrations de pouvoir économique ou les pratiques commerciales anticoncurrentielles.

La loi protège le consommateur, notamment contre les actes suivants:

- a) Exclusion de responsabilité sur les biens défectueux;
- b) Paiement exigé de biens ou de services non demandés;
- c) Comportement léonin dans le commerce de biens ou de services;
- d) Vente à la boule de neige;
- e) Vente à prix d'appel;
- f) Promesse de cadeaux ou de prix sans intention de les fournir; et
- g) Publicité mensongère ou trompeuse.

La sixième partie de la loi contient diverses dispositions. Elle habilite notamment la Commission à nommer des enquêteurs et définit leurs pouvoirs.

Conformément aux dispositions de cette partie, toute personne mécontente d'une décision de la Commission a la possibilité de faire appel auprès d'un juge siégeant en chambre du conseil.

En outre, cette partie énumère les infractions et fixe les peines. L'amende payable est fixée à 500 000 kwacha ou à un montant équivalent au gain financier résultant de l'infraction. Le montant de l'amende est élevé afin d'avoir un effet dissuasif.

Conformément aux dispositions de cette partie, le Ministre a le pouvoir de régler. Enfin, la loi s'applique à l'État et a force obligatoire.

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 appointed 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 their 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 account 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

COMMENTAIRE DU GOUVERNEMENT ZIMBABWÉEN SUR LA LÉGISLATION DE LA CONCURRENCE DU ZIMBABWE

Exposé des raisons qui ont motivé l'adoption de la législation sur la concurrence au Zimbabwe

Depuis 1980, date de l'indépendance du pays, le Gouvernement zimbabwéen se préoccupe des pratiques commerciales restrictives et des abus de position dominante. Même si le nouvel État indépendant du Zimbabwe a hérité d'une économie très réglementée, il a utilisé cette réglementation¹ différemment de l'ancien régime colonial. Alors que ce dernier avait noué une coopération étroite avec le secteur privé, le nouveau Gouvernement se méfiait des entreprises et s'est efforcé de limiter la capacité de l'industrie d'exploiter des rentes de monopole et d'oligopole.

Le nouveau Gouvernement a donc poursuivi quatre orientations, qui visaient notamment à empêcher les monopoles et les oligopoles d'abuser de leur position dominante²:

1. Contrôle étendu des prix. Les prix des produits *essentiels* étaient fixés directement par le Conseil des ministres; ceux des produits *stratégiques* étaient établis par l'ancien Ministère de l'industrie et du commerce; ceux des autres biens de consommation étaient arrêtés sur la base du prix de revient affecté d'une majoration déterminée.
2. Intervention du Gouvernement pour fixer les traitements et les salaires et restreindre les possibilités de licenciement des travailleurs par les entreprises. Cette politique visait à contrôler l'inflation et à redistribuer les rentes.
3. Utilisation ponctuelle du mécanisme d'allocation des devises en tant que moyen de contrôler les entreprises.
4. Constitution d'entreprises publiques et participation de l'État dans les secteurs industriel et commercial en vue d'annuler l'influence des monopoles et des oligopoles.

En 1991, le Gouvernement zimbabwéen a lancé un programme d'ajustement économique et structurel (ESAP) de grande envergure, qui visait à libéraliser l'économie et à accroître la concurrence grâce à i) la libéralisation des échanges; ii) l'abolition du contrôle des prix; iii) la déréglementation du marché intérieur; et iv) la réforme et la privatisation des entreprises publiques.

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

² Ibid.

Néanmoins, le Gouvernement s'est rendu compte que les mécanismes du marché à eux seuls ne pourraient probablement pas régler tous les problèmes, en particulier remédier aux dysfonctionnements causés par les positions dominantes et leur abus. Un comité interministériel a été créé pour examiner les questions de concurrence. Il a commandé une étude des monopoles et de la politique de concurrence au Zimbabwe, qui a été réalisée par une équipe de consultants locaux et étrangers et financée au titre du projet de mise en œuvre des réformes d'orientation (IPC), sous les auspices de l'Agence des États-Unis pour le développement international (USAID).

Selon cette étude, publiée en septembre 1992, les pratiques commerciales restrictives étaient omniprésentes au Zimbabwe aussi bien dans les secteurs concentrés que dans ceux qui ne l'étaient pas; les auteurs recommandaient la promulgation d'une nouvelle législation sur la concurrence que serait chargée de faire respecter une autorité de la concurrence.

La législation zimbabwéenne sur la concurrence - Competition Act of 1996 (n° 7 of 1996) - est entrée en vigueur par le biais d'un décret (Statutory Instrument 21A of 1998) publié au Journal officiel du 6 février 1998. Cette loi porte création d'une Commission de la concurrence indépendante. Les membres de cette commission (les commissaires) ont été nommés à temps partiel pour un mandat de trois ans à compter du 28 janvier 1998 par le Président du Zimbabwe le 20 février 1998 (Notice 58 of 1998). Le Directeur de la Commission a été nommé le 9 novembre 1998 conformément à l'article 17 de la loi. Une fois le Directeur nommé, les autres cadres de la Commission et le personnel administratif ont pu être recrutés à partir de janvier 1999.

Objectifs de la législation sur la concurrence

Le préambule de la loi sur la concurrence de 1996 énonce les grands objectifs de la législation zimbabwéenne sur la concurrence, à savoir:

«Promouvoir et maintenir la concurrence dans l'économie zimbabwéenne; mettre en place une Commission de la concurrence dans l'industrie et le commerce et définir ses fonctions; prévenir et contrôler les pratiques restrictives, réglementer les fusions, prévenir et contrôler les monopoles et interdire les pratiques commerciales déloyales; et prendre des dispositions sur toutes les questions connexes ou accessoires».

Des objectifs particuliers sont énoncés dans les fonctions que la loi confie à la Commission de la concurrence (art. 5 1) de la loi), à savoir:

- Encourager et promouvoir la concurrence dans tous les secteurs de l'économie;
- Réduire les obstacles à l'entrée dans tous les secteurs de l'économie ou à l'exercice de toute forme d'activité économique;
- Enquêter sur les pratiques restrictives, les décourager et les empêcher;
- Étudier les tendances à la concentration économique, en vue d'enquêter sur les monopoles et de les empêcher lorsqu'ils sont contraires à l'intérêt public;

- Conseiller le Ministre de l'industrie et du commerce international sur tous les aspects de la concurrence économique, notamment sur les activités d'entreprises directement ou indirectement contrôlées par l'État, et sur l'élaboration, la coordination, la mise en œuvre et l'administration de la politique gouvernementale en matière de concurrence économique;
- Informer les personnes intéressées de la politique suivie en matière de pratiques restrictives, d'acquisitions et de monopoles, afin de leur fournir des orientations.

Contrôle des pratiques et des comportements

La législation sur la concurrence contrôle les pratiques et comportements tels que les pratiques restrictives (notamment les pratiques commerciales et voyages), les fusions et les monopoles.

- a) La loi sur la concurrence définit les «pratiques restrictives» comme suit:

«a) Tout accord, arrangement ou entente, exécutoire ou non, entre deux ou plusieurs personnes; ou

b) Toute pratique économique ou méthode commerciale; ou

c) Tout acte ou omission délibéré de la part d'une personne, commis en toute indépendance ou de concert avec une autre personne; ou

d) Toute situation découlant des activités d'une personne ou d'un groupe de personnes;

qui restreint directement ou indirectement la concurrence de manière non négligeable, dans la mesure où il (elle) a ou risque d'avoir un ou plusieurs des effets suivants:

i) Restreindre la production ou la distribution d'un produit ou d'un service;

ii) Limiter les installations de production ou de distribution d'un produit ou d'un service;

iii) Augmenter ou maintenir le prix d'un produit ou d'un service;

iv) Empêcher la production ou la distribution d'un produit ou d'un service selon les moyens les plus efficaces ou économiques;

v) Empêcher ou retarder la mise au point ou l'apport d'améliorations techniques sur un produit ou un service;

vi) Empêcher ou restreindre l'entrée sur un marché de personnes produisant ou distribuant un produit ou un service;

- vii) *Empêcher ou retarder l'expansion du marché d'un produit ou d'un service ou le développement de nouveaux marchés.»*

Les «pratiques commerciales déloyales» sont définies dans la loi simplement comme «des pratiques restrictives ou tout autre comportement évoqués dans la première annexe». La première annexe de la loi énumère comme pratiques commerciales déloyales: i) la publicité mensongère; ii) les fausses soldes; iii) la distribution de produits ou de services à des prix supérieurs aux prix publiés; iv) le refus injustifié de distribuer des produits ou des services; v) les soumissions concertées; et vi) les arrangements collusoires entre concurrents.

b) La loi définit les «fusions» comme suit:

«a) *L'acquisition d'un intérêt majoritaire dans:*

- i) *Une entreprise participant à la production ou à la distribution d'un produit ou d'un service; ou*
- ii) *Un actif qui est ou peut être utilisé pour produire ou distribuer un produit ou pour des activités connexes;*

lorsque la personne acquérant l'intérêt majoritaire possède déjà un intérêt majoritaire dans une entreprise participant à la production ou à la distribution du même produit ou service; ou

b) *l'acquisition d'un intérêt majoritaire dans une entreprise dont l'activité consiste, en totalité ou en grande partie, à:*

- i) *fournir un produit ou un service à la personne qui acquiert l'intérêt majoritaire; ou*
- ii) *distribuer un produit ou un service produit par la personne qui acquiert l'intérêt majoritaire.»*

c) La loi définit le «monopole» comme une «situation dans laquelle une seule personne, ou deux ou plusieurs personnes ayant des liens économiques importants, exercent un contrôle considérable sur le marché d'un produit ou d'un service».

À l'image des législations des autres pays, la loi sur la concurrence du Zimbabwe traite deux types d'infractions: les infraction en soi et les infractions découlant de «la règle de raison».

Les infractions «en soi» sont celles qui font l'objet d'une interdiction de principe, le simple fait de les commettre étant suffisant à constituer une infraction. Les pratiques commerciales déloyales sont définies dans la loi comme des infractions en soi. «Toute personne qui se livre ou donne lieu à des pratiques commerciales déloyales est coupable d'une infraction» (art. 42 3) de la loi).

Les infractions découlant de «la règle de raison» sont établies après un examen préliminaire, par l'autorité de la concurrence, des avantages ou des inconvénients de la pratique ou du comportement en cause en vue de déterminer si l'intérêt public les justifie ou non. Toutes

les autres pratiques restrictives, les fusions et les monopoles, tels que définis dans la loi, entrent dans cette catégorie.

Une pratique restrictive est considérée comme contraire à l'intérêt public si elle est le fait d'une personne exerçant un contrôle considérable sur le marché du produit ou du service concerné, à moins que l'autorité de la concurrence considère (art. 32 2) de la loi):

«a) Que cette pratique restrictive est raisonnablement nécessaire, compte tenu de la nature du produit ou du service auquel elle s'applique, pour protéger les consommateurs ou les usagers, ou l'intérêt public, de tout préjudice ou dommage; ou

b) Que la cessation de cette pratique restrictive priverait les consommateurs ou les usagers du produit ou du service auquel elle s'applique d'autres bénéfices ou avantages spécifiques et notables dont ils jouissent ou pourraient jouir, du fait soit de la pratique restrictive elle-même soit de tout arrangement ou activité en résultant; ou

c) Que la cessation de cette pratique restrictive risquerait d'avoir des effets néfastes graves et persistants sur le niveau général du chômage dans une zone où est exercée une part importante de l'activité économique, commerciale ou industrielle concernée par cette pratique restrictive; ou

d) Que la cessation de cette pratique restrictive entraînerait probablement une réduction considérable de l'activité ou des recettes de toute entreprise ou négoce d'exportation au Zimbabwe; ou

e) Que cette pratique restrictive est raisonnablement nécessaire pour préserver une pratique autorisée ou toute autre pratique restrictive qui, de l'avis de la Commission, n'est pas contraire à l'intérêt public; ou

f) Que cette pratique restrictive ne restreint ni ne décourage directement ou indirectement la concurrence de manière significative dans aucune activité économique, commerciale ou industrielle et ne risque pas de la restreindre ou de la décourager.».

Une fusion est considérée comme contraire à l'intérêt public si l'autorité de la concurrence acquiert la certitude que cette fusion (art. 32 4) de la loi):

«a) A réduit ou risque de réduire de manière considérable la concurrence au Zimbabwe ou dans une partie substantielle de son territoire; ou

b) A abouti ou risque d'aboutir à une situation de monopole contraire à l'intérêt public.».

Une situation de monopole est considérée comme contraire à l'intérêt public à moins que l'autorité de la concurrence soit convaincue qu'une ou plusieurs des conditions suivantes sont remplies (art. 32 5) de la loi):

«a) Que cette situation de monopole a abouti ou devrait aboutir, grâce aux économies d'échelle ou à d'autres raisons, à une utilisation plus rationnelle des ressources dans une activité économique, commerciale ou industrielle;

b) *Que cette situation de monopole est ou serait nécessaire pour produire, fournir ou distribuer un produit ou un service au Zimbabwe, compte tenu, d'une part, des ressources nécessaires à la production, à la fourniture ou à la distribution de ce produit ou service et, d'autre part, de la taille du marché zimbabwéen pour ce produit ou ce service;*

c) *Que la cessation ou la prévention de cette situation de monopole priverait les consommateurs ou les usagers du produit ou du service en question d'autres bénéfices ou avantages spécifiques non négligeables dont ils jouissent ou jouiraient, soit du fait même de cette situation de monopole, soit du fait de tout accord ou activité en résultant;*

d) *Que cette situation de monopole est ou serait raisonnablement nécessaire pour permettre aux parties prenantes de négocier de justes conditions de distribution d'un produit ou d'un service fourni:*

i) *Par une personne ne participant pas au monopole et exerçant un contrôle total ou considérable sur la distribution de ce produit ou service; ou*

ii) *À une personne ne participant pas au monopole et exerçant un contrôle total ou considérable sur le marché de ce produit ou service;*

e) *Que la cessation ou la prévention de cette situation de monopole risquerait d'avoir des effets néfastes graves et persistants sur le niveau général du chômage dans une zone où est exercée une part considérable de l'activité économique, commerciale ou industrielle concernée par cette situation de monopole;*

f) *Que la cessation ou la prévention de cette situation de monopole risquerait d'entraîner une réduction importante de l'activité ou des recettes de toute entreprise ou négoce d'exportation au Zimbabwe.».*

Champ d'application de la législation sur la concurrence

Même si la législation zimbabwéenne sur la concurrence ne l'énonce pas expressément, elle s'applique implicitement à tous les secteurs de l'économie, à quelques exceptions près. Les dispositions pertinentes de la loi stipulent ce qui suit:

«3. 1) *La présente loi ne doit pas être interprétée comme:*

a) *Limitant tout droit acquis en vertu de:*

i) *La loi sur les phytogénéticiens [Chapitre 115]; ou*

ii) *La loi sur le droit d'auteur [Chapitre 200]; ou*

iii) *La loi sur les dessins et modèles industriels [Chapitre 201]; ou*

iv) *La loi sur les brevets [Chapitre 202]; ou*

v) *La loi sur les marques [Chapitre 203];*

sauf si ce droit est utilisé pour augmenter ou maintenir des prix ou pour toute autre motivation indiquée dans la définition des “pratiques restrictives” ...; ou

b) Empêchant les syndicats ou d'autres représentants des salariés de protéger les intérêts de leurs membres en négociant et en concluant des accords et autres arrangements avec leurs employeurs ou les représentants de leurs employeurs conformément à la loi sur les relations entre les partenaires sociaux, 1985 (n° 16 de 1985).

- 2) Sauf en cas de responsabilité pénale, la présente loi s'applique à l'État et a force obligatoire dans la mesure où celui-ci participe à la production et à la distribution de biens.*
- 3) La présente loi s'applique aux activités des établissements publics, sauf si les activités concernées sont autorisées, expressément ou implicitement, par une loi.».*

La loi ne donne pas à l'autorité de la concurrence une compétence extraterritoriale pour les actes anticoncurrentiels commis en dehors du Zimbabwe. L'autorité de la concurrence peut néanmoins examiner les effets sur la concurrence des fusions entre sociétés multinationales dans la mesure où ces opérations entraînent le regroupement des activités des filiales constituées au Zimbabwe.

Mécanisme d'application

Les deux principaux instruments de la Commission de la concurrence sont ses membres (les commissaires), chargés de s'acquitter des fonctions statutaires de la Commission, et la Direction, avec à sa tête un Directeur.

L'article 17 1) de la loi sur la concurrence traite de la nomination et des fonctions du Directeur de la Commission:

«17. 1) La Commission nomme un Directeur, qui est chargé d'administrer les affaires, les fonds et les biens de la Commission et de s'acquitter de toute autre fonction conférée ou imposée par la présente loi ou en vertu de la présente loi, ou qui lui serait déléguée ou confiée par la Commission.»

Conformément aux dispositions susmentionnées de la loi, la Commission a délégué les fonctions d'enquête à son Directeur et à sa Direction, afin de se consacrer uniquement à l'examen des affaires. Tous les cadres de la Direction (économistes, juristes, comptables et administrateurs) ont été nommés «enquêteurs» conformément à l'article 46 1) de la loi.

L'article 28 de la loi sur la concurrence confie à la Commission le pouvoir d'enquêter sur les pratiques restrictives, les fusions et les monopoles. Les dispositions pertinentes stipulent ce qui suit:

«1) Sous réserve des dispositions de la présente loi, la Commission peut mener toutes les enquêtes qu'elle juge nécessaires:

- a) *Sur toute pratique restrictive dont la Commission a des raisons de croire qu'elle existe ou qu'elle pourrait apparaître;*
 - b) *Afin de vérifier:*
 - i) *Si une fusion a eu lieu, est en cours ou est envisagée;*
 - ii) *La nature et l'ampleur de tout intérêt majoritaire détenu ou qui pourrait être acquis dans une fusion effectuée ou proposée;*
 - c) *Sur tout type d'accord, d'arrangement, d'entente économique ou de méthode commerciale qui, de l'avis de la Commission est adopté ou pourrait être adopté avec pour objectif - ou en liaison avec - la mise en place ou le maintien d'une pratique restrictive;*
 - d) *Sur tout monopole dont la Commission a des raisons de croire qu'il existe ou qu'il pourrait apparaître.*
- 2) *Avant d'ouvrir une enquête au titre de l'alinéa 1, la Commission doit publier au Journal officiel et, si elle le juge nécessaire, dans tout journal diffusé dans la zone couverte par l'enquête un avis:*
- a) *Précisant la nature de l'enquête proposée; et*
 - b) *Demandant à toute personne intéressée qui le souhaite de soumettre des communications écrites à la Commission concernant l'objet de l'enquête proposée.*
- 3) *Pour les besoins de l'enquête ouverte conformément à cet article, la Commission jouit des pouvoirs conférés à tout commissaire par la loi sur les commissions d'enquête [chap. 80], autres que le pouvoir d'ordonner la détention d'une personne...*
- 4) *Dans toute enquête ouverte conformément à cet article, la Commission doit s'assurer que les principes élémentaires de la justice sont dûment respectés et, en particulier, prendre toutes les mesures raisonnables pour veiller à ce que toute personne dont les intérêts pourraient être affectés par l'issue de l'enquête bénéficie de la possibilité de s'exprimer sur la question.»*

Avant que la Commission n'ouvre une enquête en bonne et due forme conformément à l'article 28 de la loi, la Direction mène une enquête préliminaire pour établir s'il existe des éléments suffisants pour fonder l'affaire.

Si la plupart des enquêtes sont ouvertes après le dépôt d'une plainte, la Commission ouvre souvent des enquêtes de sa propre initiative sur la base d'articles de journaux ou d'études qu'elle a réalisées sur l'état de la concurrence dans divers secteurs économiques.

Au cours d'une enquête sur une affaire de concurrence, la Commission peut publier un avis interdisant ou suspendant toute pratique restrictive ou fusion faisant l'objet de l'enquête jusqu'à

l'issue de cette dernière (art. 29 1) de la loi). La Commission peut aussi négocier avec toute personne afin de trouver un arrangement garantissant la suspension ou la cessation de toute pratique restrictive, empêchant ou modifiant toute fusion ou situation de monopole, qu'elle ait ouvert ou non une enquête, conformément à l'article 28, sur la pratique restrictive, la fusion ou la situation de monopole concernée (art. 30 1) de la loi).

La loi confère à la Commission le pouvoir d'émettre des ordonnances correctives sur certaines affaires de concurrence. Concernant les pratiques restrictives, l'article 31 1) de la loi dispose ce qui suit:

«Si la Commission acquiert la certitude ... qu'une pratique restrictive en vigueur ou risquant d'apparaître est ou sera contraire à l'intérêt public, elle peut émettre une ou plusieurs des ordonnances ci-après concernant cette pratique restrictive:

- a) *Interdire à toute personne nommée dans l'ordonnance, ou à tout groupe de personnes, d'exercer la pratique restrictive concernée ou d'avoir tout autre comportement que celui stipulé dans l'ordonnance et qui, de l'avis de la Commission, équivaut dans sa forme et dans ses effets à la pratique restrictive concernée;*
- b) *Exiger de toute partie associée à une pratique restrictive de mettre fin à cette pratique, soit totalement soit dans la mesure et dans les délais stipulés dans l'ordonnance;*
- c) *Exiger de toute personne nommée dans l'ordonnance, ou de tout groupe de personnes, de publier une liste de prix ou de notifier des prix de quelque autre manière que ce soit, en fournissant ou non les informations stipulées dans l'ordonnance;*
- d) *Réglementer le prix que toute personne nommée dans l'ordonnance peut demander pour un produit ou un service donné:*

À condition que la Commission n'émette pas d'ordonnance dans ce sens si elle est convaincue que le prix demandé par la personne concernée est essentiel au maintien de la pratique restrictive à laquelle l'ordonnance s'applique;

- e) *Interdire à toute personne nommée dans l'ordonnance, ou à tout groupe de personnes, d'indiquer aux personnes fournissant un produit ou un service le prix recommandé ou suggéré que ces personnes doivent faire payer;*
- f) *Prendre en général toutes les dispositions qui, de l'avis de la Commission, sont raisonnablement nécessaires pour faire cesser les pratiques restrictives concernées ou atténuer leurs effets.»*

L'article 31 2) de la loi dispose que la Commission peut émettre des ordonnances sur les fusions et les situations de monopole dans les cas suivants:

«Si elle acquiert la certitude... qu'une fusion ou une situation de monopole existante ou proposée est ou sera contraire à l'intérêt public, la Commission peut émettre une ou

plusieurs des ordonnances ci-après concernant cette fusion ou cette situation de monopole:

- a) Déclarer illégale, sauf dans la mesure et dans les conditions stipulées dans l'ordonnance ou en vertu de celle-ci, la conclusion ou l'exécution de tout accord ou arrangement spécifié dans l'ordonnance et qui, de l'avis de la Commission, entraînera ou maintiendra une fusion ou une situation de monopole;*
- b) Dans le cas d'une situation de monopole, exiger de toute personne qui exerce un contrôle sur l'entreprise ou l'activité économique concernée de prendre les mesures stipulées dans l'ordonnance pour mettre fin à la situation de monopole dans les délais indiqués dans l'ordonnance;*
- c) Interdire ou restreindre l'acquisition par la personne nommée dans l'ordonnance de la totalité ou d'une partie d'une entreprise ou de ses actifs, ou tout acte de cette personne qui aboutisse ou puisse aboutir à une acquisition, si cette acquisition risque, de l'avis de la Commission, d'entraîner une fusion ou une situation de monopole;*
- d) Exiger de toute personne qu'elle prenne des dispositions pour s'assurer de la dissolution de l'organisation en cause, qu'elle soit constituée en société ou non, ou de la cessation de toute association, lorsque la Commission est convaincue que la personne en question est associée ou partie à une fusion ou à une situation de monopole;*
- e) Exiger, en cas de fusion ou de monopole, de toute partie nommée dans l'ordonnance qu'elle respecte les interdictions ou restrictions stipulées dans l'ordonnance concernant les modalités de poursuite de son activité économique;*
- f) Prendre en général les dispositions qui, de l'avis de la Commission, sont raisonnablement nécessaires pour mettre fin à une fusion ou à une situation de monopole, ou les empêcher ou, le cas échéant, atténuer leurs effets.»*

Les ordonnances émises concernant une fusion ou une situation de monopole peuvent porter sur l'un des aspects suivants (art. 31 3) de la loi):

- Le transfert ou l'octroi de biens, de droits, de responsabilités ou d'obligations;
- La modification de contrats: leur extinction, la réduction de responsabilités ou d'obligations, ou toute autre modification;
- La création, la location, l'abandon ou l'annulation d'actions, d'obligations ou de titres; ou
- La constitution ou la dissolution d'une entreprise, ou la modification de ses statuts ou de tout autre instrument réglementant l'activité de l'entreprise en question.

Les ordonnances de la Commission peuvent être déposées au greffe de la Haute Cour ou auprès du greffier de tout tribunal d'instance qui aurait compétence pour émettre l'ordonnance en question s'il avait eu à juger l'affaire concernée (art. 33 1) de la loi). Sur le plan exécutoire, les ordonnances de la Commission enregistrées auprès de la Haute Cour ou des tribunaux d'instance pertinents ont l'effet d'un jugement civil prononcé par la Haute Cour ou le tribunal d'instance compétent.

Le non-respect d'une ordonnance de la Commission constitue une infraction passible d'une amende ou/et d'une peine d'emprisonnement (art. 33 7) de la loi).

La Commission peut, sur demande, autoriser certaines pratiques restrictives, fusions et autres comportements anticoncurrentiels. L'article 35 1) de la loi dispose ce qui suit:

«Toute personne qui envisage:

- a) De conclure, d'exécuter ou de donner effet à un accord ou à un arrangement; ou*
- b) D'exercer une pratique ou d'avoir un comportement;*

qu'elle considère comme pouvant être interdit, restreint ou influencé de toute autre manière par la présente loi, peut demander à la Commission d'autoriser l'accord, l'arrangement, la pratique ou le comportement en question.»

Les demandes d'autorisation de pratiques restrictives, de fusions et d'autres comportements sont examinées de la même manière que les affaires faisant l'objet d'enquêtes ouvertes conformément à l'article 28. Après avoir enquêté sur ces demandes et pris en compte les communications qui auraient pu être reçues de personnes ou de parties intéressées, la Commission peut soit (art. 36 2 de la loi):

- Délivrer l'autorisation demandée par le requérant, sous réserve que certaines conditions soient remplies, si l'accord, l'arrangement, la pratique ou le comportement en question n'est pas contraire à l'intérêt public; soit
- Refuser d'octroyer l'autorisation demandée.

L'article 34 de la loi contient les dispositions relatives à la notification des fusions, qui stipulent ce qui suit:

- «1) Si la Commission acquiert la certitude que la réalisation de tout projet de fusion risque de réduire la concurrence de manière non négligeable au Zimbabwe ou sur une partie de son territoire, elle peut publier un avis au Journal officiel exigeant des parties qu'elles obtiennent l'approbation de la Commission avant de procéder à leur fusion.*
- 2) Les parties à un projet de fusion entrant dans la catégorie indiquée dans un avis publié au titre de l'alinéa 1 doivent:*

- a) *Adresser à la Commission, avant la réalisation de la fusion, une notification écrite indiquant leur intention de procéder à une fusion; et*
 - b) *Fournir à la Commission les informations relatives au projet de fusion qui peuvent être exigées ou que la Commission peut raisonnablement demander.*
- 3) *Dès la réception de la notification du projet de fusion en vertu de l'alinéa 2, la Commission doit, avec toute la célérité voulue:*
- a) *Ouvrir une enquête si elle considère que le projet de fusion le mérite au titre de l'article 28 et, le cas échéant, émettre une ordonnance en ce sens conformément à l'article 31 concernant le projet de fusion si la Commission le juge nécessaire:*

À condition qu'il ne soit pas nécessaire pour la Commission de publier un avis indiquant son intention d'ouvrir une enquête au titre de l'alinéa 2 de l'article 28.

- b) *Envoyer un avis écrit aux parties les autorisant à réaliser leur fusion si elle estime que le projet de fusion ne mérite pas l'ouverture d'une enquête conformément à l'article 28.»*

Toute personne lésée par une décision de la Commission peut faire appel auprès du tribunal administratif zimbabwéen.

Législation parallèle ou supplémentaire

Le Zimbabwe ne possède pas actuellement de législation parallèle ou supplémentaire et n'a conclu avec d'autres pays aucun traité ni accord ayant trait à la coopération ou aux procédures de règlement des différends dans le domaine des pratiques commerciales restrictives relevant de la politique de la concurrence.

Néanmoins, le Zimbabwe participe activement aux travaux en cours du secrétariat du Marché commun des États de l'Afrique de l'Est et de l'Afrique australe (COMESA).

Principales décisions prises concernant la concurrence

La Commission de la concurrence a examiné 54 affaires depuis qu'elle a commencé ses activités en janvier 1999. Ces affaires ont porté sur des pratiques restrictives (44 %), sur des pratiques commerciales déloyales (26 %), sur des évaluations de fusions réalisées conformément à l'article 34 de la loi (19 %) et sur des autorisations de fusions au titre de l'article 35 de la loi (11 %).

La Commission a aussi mené deux études de la concurrence dans les secteurs des services financiers et des services de télécommunication et s'appête à réaliser quatre autres études dans les secteurs suivants: meunerie/boulangerie; fabrication de sucre; production d'engrais; production d'huiles de cuisine.

Deux affaires de concurrence examinées par la Commission ont été choisies afin d'être analysées. Elles portaient sur les questions suivantes:

a) Pratiques commerciales restrictives et déloyales dans l'industrie du ciment

En novembre 1998, la Commission a reçu des plaintes de négociants de ciment concernant la fourniture et la distribution de ciment sur le marché zimbabwéen. L'enquête préliminaire de la Direction a montré que l'industrie zimbabwéenne du ciment était très concentrée: celle-ci ne comptait que deux grands producteurs et de petits importateurs de ciment sud-africain et zambien. Les éléments de preuve recueillis laissaient penser que les deux producteurs de ciment avaient peut-être abusé de leur position dominante en s'adonnant à diverses pratiques commerciales restrictives et déloyales - restrictions verticales sur les livraisons de ciment aux clients, distribution discriminatoire de ciment, ventes groupées/liées de ciment et collusion.

Une enquête en bonne et due forme a donc été menée conformément à l'article 28 de la loi sur la concurrence pour vérifier ces allégations. Elle a permis d'établir que les deux principaux producteurs zimbabwéens de l'époque (deux nouveaux concurrents sont arrivés depuis l'enquête) se livraient à des pratiques anticoncurrentielles. L'un d'eux restreignait la distribution de ciment par le biais de son système préférentiel de collecte, tandis que l'autre liait la vente de son ciment à l'utilisation des véhicules de transport de sa filiale. Si les deux producteurs augmentaient ou maintenaient à un niveau élevé le prix du ciment sur le marché zimbabwéen en important directement du ciment sud-africain plus cher, ils le faisaient dans l'intérêt public, car ces importations n'étaient effectuées que pendant les périodes de forte pénurie de ciment au Zimbabwe.

Néanmoins, l'enquête n'a pas permis d'établir qu'il existait une collusion et une entente entre les producteurs de ciment.

L'enquête menée a aussi permis d'identifier un certain nombre de préoccupations liées à l'intérêt public dans les domaines de la production, de la commercialisation et de la distribution de ciment au Zimbabwe: irrégularité des fournitures de ciment aux chantiers; demandes injustifiées de paiement préalable à la livraison; commercialisation parallèle de ciment sur le marché noir; existence d'un régime fiscal discriminatoire sur les ventes de ciment; et imposition de droits de douane excessivement élevés sur les importations de clinker (matière première indispensable pour la production de ciment).

Conformément à l'article 31 1) de la loi sur la concurrence, la Commission a ordonné aux deux producteurs de ciment de cesser les pratiques anticoncurrentielles signalées et a formulé un certain nombre de recommandations aux organisations et aux autorités compétentes pour remédier aux problèmes mettant en jeu l'intérêt public.

b) Fusion entre Rothmans of Pall Mall et British American Tobacco

En janvier 1999, British American Tobacco Plc (Royaume-Uni) a annoncé la conclusion d'un accord avec les actionnaires de Rothmans International, de Compagnie Financière Rlichemont AG (Suisse) et de Rembrandt Group Limited (Afrique du Sud) portant sur la fusion de leurs activités internationales dans le secteur du tabac.

Après la réalisation de la fusion internationale entre British American Tobacco Plc et Rothmans International, Rothmans of Pall Mall (Zimbabwe) Limited a demandé à la Commission de la concurrence, conformément à l'article 35 de la loi sur la concurrence de 1996, l'autorisation d'acquérir la totalité du capital émis de British American Tobacco Zimbabwe Limited. Les parties ont justifié leur projet de fusion par le déclin du marché des cigarettes au Zimbabwe et le fait que British American Tobacco Zimbabwe Limited était une entreprise défaillante. Elles ont soutenu que la demande de cigarettes sur le marché zimbabwéen avait diminué à tel point que les activités des deux producteurs n'étaient plus économiquement viables, comme le démontraient les mauvais résultats de British American Tobacco Zimbabwe Limited au cours de l'exercice financier achevé le 31 décembre 1998.

Même si elle a estimé que cette fusion créerait une situation de quasi-monopole sur le marché zimbabwéen de la production de cigarettes (mais pas dans l'ensemble du secteur du tabac), la Commission a noté que ce regroupement présentait certains avantages pour l'intérêt public conformément à l'article 32 5) de la loi sur la concurrence.

La Commission a donc autorisé la fusion sous certaines conditions visant à atténuer les effets néfastes potentiels du monopole qui serait créé dans le secteur de la production de cigarettes. Ces conditions étaient les suivantes:

- i) Tout le matériel excédentaire de British American Tobacco Zimbabwe Limited devait être cédé dans un délai raisonnable et à des prix justes et réalistes à des tiers souhaitant produire des cigarettes; et
- ii) Après la réalisation de la fusion, les prix départ usine de toutes les marques de cigarettes produites par les parties à la fusion ne devaient pas être plus élevés que ceux pratiqués juste avant la fusion et les hausses futures du prix des cigarettes devaient être surveillées par la Commission de la concurrence et justifiées aussi longtemps que la situation de monopole créée dans le secteur zimbabwéen de la production de cigarettes perdurerait.

Les parties à la fusion ont accepté les conditions susmentionnées et ont signé un engagement à cet effet.

Bibliographie

Une bibliographie succincte des principaux textes législatifs sur la concurrence et des textes réglementaires s'y rapportant est reproduite ci-après:

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- Competition (Authorization of Mergers) Regulations, 1999 (Statutory Instrument 295 of 1999), Journal officiel (*Government Gazette*) du 27 août 1999, presses gouvernementales, 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.

- (2) 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.
