

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

MODEL LAW ON COMPETITION

PART I

Substantive Possible Elements for a Competition Law

TITLE OF THE LAW:

*Elimination or control of restrictive business practices:
Antimonopoly Law; Competition Act*

CHAPTER I

Objectives or purpose of the law

To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

CHAPTER II

Definitions and scope of application

I. Definitions

(a) “Enterprises” means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

(b) “Dominant position of market power” refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

(c) “Mergers and acquisitions” refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates.

(d) “Relevant market” refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product

and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.

II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.

(c) Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

CHAPTER III

Restrictive agreements or arrangements

I. *Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal:*

(a) Agreements fixing prices or other terms of sale, including in international trade;

(b) Collusive tendering;

(c) Market or customer allocation;

(d) Restraints on production or sale, including by quota;

- (e) Concerted refusals to purchase;
 (f) Concerted refusal to supply;

(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

II. *Authorization or exemption*

Practices falling within paragraph I, when properly notified in advance, and when engaged in by firms subject to effective competition, may be authorized or exempted when competition officials conclude that the agreement as a whole will produce net public benefit.

CHAPTER IV

Acts or behaviour constituting an abuse of a dominant position of market power

I. *Prohibition of acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power*

A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power:

- (i) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services;
- (ii) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

II. *Acts or behaviour considered as abusive:*

(a) Predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use 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) Fixing the prices at which goods sold can be resold, including those imported and exported;

(d) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

III. *Authorization or exemption*

Acts, practices or transactions not absolutely prohibited by the law may be authorized or exempted if they are notified, as described in article 7, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

CHAPTER V

Notification

I. *Notification by enterprises*

1. When practices fall within the scope of articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises

could be required to notify the practices to the Administering Authority, providing full details as requested.

2. Notification could be made to the Administering Authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

3. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.

4. Notification could be made to the Administering Authority where any agreement, arrangement or situation notified under the provisions of the law has been subject to change either in respect of its terms or in respect of the parties, or has been terminated (otherwise than by effluxion of time), or has been abandoned, or if there has been a substantial change in the situation (within (...) days/months of the event) (immediately).

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of articles 3 and 4, and existing on the date of the coming into force of the law, with the provision that they be notified within ((...) days/months) of such date.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

7. All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal.

II. Action by the Administering Authority

1. Decision by the Administering Authority (within (...) days/months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject where appropriate to the fulfillment of conditions and obligations.

2. Periodical review procedure for authorizations granted every (...) months/years, with the possibility of extension, suspension, or the subjecting of an

extension to the fulfillment of conditions and obligations.

3. The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the Administering Authority that:

(a) The circumstances justifying the granting of the authorization have ceased to exist;

(b) The enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization;

(c) Information provided in seeking the authorization was false or misleading.

CHAPTER VI

Notification, investigation and prohibition of mergers affecting concentrated markets

I. Notification

Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or conglomerate nature, should be notified when:

(i) At least one of the enterprises is established within the country; and

(ii) The resultant market share in the country, or any substantial part of it, relating to any product or service, is likely to create market power, especially in industries where there is a high degree of market concentration, where there are barriers to entry and where there is a lack of substitutes for a product supplied by firms whose conduct is under scrutiny.

II. Prohibition

Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, should be prohibited when:

(i) The proposed transaction substantially increases the ability to exercise market power (e.g. to give the ability to a firm or group of firms acting jointly to profitably maintain prices above competitive levels for a significant period of time); and

(ii) The resultant market share in the country, or any substantial part of it, relating to any product or

service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

III. *Investigation procedures*

Provisions to allow investigation of mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, which may harm competition could be set out in a regulation regarding concentrations.

In particular, no firm should, in the cases coming under the preceding subsections, effect a merger until the expiration of a (...) day waiting period from the date of the issuance of the receipt of the notification, unless the competition authority shortens the said period or extends it by an additional period of time not exceeding (...) days with the consent of the firms concerned, in accordance with the provisions of Possible Elements for Article 7 below. The authority could be empowered to demand documents and testimony from the parties and from enterprises in the affected relevant market or lines of commerce, with the parties losing additional time if their response is late.

If a full hearing before the competition authority or before a tribunal results in a finding against the transaction, acquisitions or mergers could be subject to being prevented or even undone whenever they are likely to lessen competition substantially in a line of commerce in the jurisdiction or in a significant part of the relevant market within the jurisdiction.

CHAPTER VII

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

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

An economic and administrative regulation issued by executive authorities, local self-government bodies or bodies enjoying a governmental delegation, especially when such a regulation relates to sectors operated by infrastructure industries, should be subjected to a transparent review process by competition authorities prior to its adoption. Such should in particular be the case if this regulation limits the independence and liberty of

action of economic agents and/or if it creates discriminatory or, on the contrary, favourable conditions for the activity of particular firms – public or private – and/or if it results or may result in a restriction of competition and/or infringement of the interests of firms or citizens.

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

II. *Definition of regulation*

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

III. *Definition of regulatory barriers to competition*

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

IV. *Protection of general interest*

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

CHAPTER VIII

Some possible aspects of consumer protection

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation.

CHAPTER IX

The Administering Authority and its organization

1. The establishment of the Administering Authority and its title.
2. Composition of the Authority, including its chairmanship and number of members, and the manner in which they are appointed, including the authority responsible for their appointment.
3. Qualifications of persons appointed.
4. The tenure of office of the chairman and members of the Authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies.
5. Removal of members of the Authority.
6. Possible immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.
7. The appointment of necessary staff.

CHAPTER X

Functions and powers of the Administering Authority

I. *The functions and powers of the Administering Authority could include (illustrative):*

- (a) Making inquiries and investigations, including as a result of receipt of complaints;
- (b) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;
- (c) Undertaking studies, publishing reports and providing information to the public;

(d) Issuing forms and maintaining a register, or registers, for notifications;

(e) Making and issuing regulations;

(f) Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy;

(g) Promoting exchange of information with other States.

II. *Confidentiality*

1. According information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.

2. Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation.

3. Protecting the deliberations of government in regard to current or still uncompleted matters.

CHAPTER XI

Sanctions and relief

I. *The imposition of sanctions, as appropriate, for:*

- (i) Violations of the law;
- (ii) Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;
- (iii) Failure to supply information or documents required within the time limits specified;
- (iv) Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense.

II. *Sanctions could include:*

- (i) Fines (in proportion to the secrecy, gravity and clear cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);

(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);

(iii) Interim orders or injunctions;

(iv) Permanent or long term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;

(vi) Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);

(vii) Restitution to injured consumers;

(viii) Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.

CHAPTER XII

Appeals

1. Request for review by the Administering Authority of its decisions in the light of changed circumstances.

2. Affording the possibility for any enterprise or individual to appeal within () days to the (appropriate judicial authority) against the whole or any part of the decision of the Administering Authority, (or) on any substantive point of law.

CHAPTER XIII

Actions for damages

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.