United Nations TD/RBP/CONF.7/L.5

United Nations Conference on Trade and Development

Distr.: Limited
30 August 2010

Original: English

Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices
Geneva, 8–12 November 2010
Item 6 (a) of the provisional agenda
Review of application and implementation of the Set

Model Law on Competition (2010) – Chapter V

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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 affluxion 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; and

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

COMMENTARIES ON CHAPTER V AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. As a preliminary matter, it should be noted that this chapter on notification discusses notification of agreements and not notifications of mergers and acquisitions. For consideration of notifications in the context of mergers and acquisitions, see Chapter VI of the Model Law on Competition.

2. A system of notification is one where the competition authority engages in *ex ante* supervision, analysis and subsequent validation or authorization by granting clearance or exemptions to individual agreements that are notified to it. As opposed to a system where the parties to potentially anti-competitive agreements have to undertake a self-assessment and bear the risk of wrongly assessing the agreement in question, the notification system transfers this responsibility to the hands of the competition authority. Where parties to an agreement believe that their agreements could be in contravention of any of the purposive clauses of the country's competition law, they can file a notification form with the competition authority. This form is typically designed by the competition authority to discern information about the subject matter of the agreement, the section of the law that is thought to be contravened, the relevant market, the competitors to the parties to the agreement, the largest customers affected by the transaction, and the facts relied on for the exemption. This information shall enable the authority to conduct a competition law analysis about the likely competitive effects of the transaction on the identified relevant market and whether there is cause to grant authorization/exemption as the case may warrant.

3. The model law lays out the standard purposive clauses used in a notification regime and these clauses can be incorporated in the primary legislation on restrictive trade practices or in the competition law, as well as in the subsidiary regulation.

4. A good example of a notification regime, and typical procedures used under such a regime is the former enforcement regime of the European Union which was put in place by Council Regulation No. 17 of 6 February 1962.[1] Under this regime, parties to agreements that possibly fell within the prohibitions of anti-competitive agreements could find that their agreement was void and unenforceable in a court of law if the agreement had not been notified to the European Commission and subsequently been granted exemption or clearance. This was the case even if the agreement would have warranted exemption in case of a notification. Only notification of an agreement to the Commission created the possibility of an exemption. Therefore, parties to an agreement could not enforce it in a national court during the period between the agreement coming into force and the time of its notification. This meant that if parties wanted their

[1] This is the regime that has been replaced by the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003 L1/1.

agreements to have the force of law they had to file a notification, which led to a large number of notifications being filed with the European Commission.[2]

5. In order to deal with the administrative backlog created by the enormous numbers of filings, the Commission devised a system whereby filed notifications that could not be given full treatment were assessed preliminarily. Upon preliminary assessment, one of two outcomes was possible: The European Commission issued a comfort letter or a letter of administration, neither of which was binding in a court of law. A comfort letter, by brief explanation, issued a statement that the agreement did not violate the prohibition of anti-competitive agreements (so-called negative clearance letter); or that an exemption was warranted for the agreement. The latter type of comfort letter issued a preliminary finding only and not an exemption and so this type of letter meant that the agreement was void and unenforceable because the EC Treaty stated that an agreement was void unless exempted); or that a block exemption or Commission notice applies to the agreement. If the Commission concluded in its preliminary assessment that an agreement was likely to produce anti-competitive effects and did not merit an exemption, it issued a so-called letter of administration, when it had taken the decision not pursue a formal decision.

6. The former notification regime of the EU and the passage that lead to modernization of that regime illustrates some of the advantages and disadvantages of a notification regime.

Box 5.1

Overview over advantages and disadvantages of a notification regime

Advantages	Disadvantages
– A notification system under which all agreements have to be notified helps a young competition regime during its institutional building phase to gather relevant information and build a useful and resourceful database. There is a continuous flow of information to the competition authority. – Often filings bring to the attention of the competition authority horizontal agreements that are anti-competitive and which otherwise would not necessarily have been revealed owing to the parties' similar interests.	– A notification regime can place a heavy burden on a competition authority's resources and can therefore prove counterproductive if insufficient resources remain available to deal with other matters, in particular if pernicious offenses cannot be properly investigated and prohibited. – If many filings are made with the authority agreement, it is difficult to give each adequate consideration.

[2] Sufrin B and Jones A (2004). *EC Competition Law*. 2nd Ed. Oxford University Press. According to Laurent Warlouzet "Historical Institutionalism and Competition Policy: the Regulation 17/62 (1962-2002)", available at: http://www.uaces.org/pdf/papers/0901/warlouzet.pdf: 37,000 filings were made within a few months of the system coming into force. Only five decisions were taken by the Commission by 1968, seven years after the regulation came into effect.

– A notification system builds legal certainty in an environment where the competition law is new to the legal landscape and the local jurists have little knowledge about the principles underpinning the law. – Thereby, it also helps establishing a "competition culture" at a time when competition law concepts are still little known.	

Information to be provided in the notification form

7. A competition authority can request as much information as it needs to understand how the agreement will impact on competition and whether there are any redeemable features of the agreement or practice warranting an exemption. Therefore, in seeking authorizations, the enterprises would be required to notify the full details of intended practice or agreement to the Administering Authority. The particulars to be notified may depend on the circumstances and are unlikely to be the same in every instance. The information required can include, *inter alia*:

(a) The name(s) and registered address(es) of the party or parties concerned;

(b) The names and the addresses of the directors and of the owner or part owners;

(c) The names and addresses of the (major) shareholders, with details of their holdings;

(d) The names of any parent and interconnected enterprises;

(e) A description of the products or services concerned;

(f) The places of business of the enterprise(s), the nature of the business at each place, and the territory or territories covered by the activities of the enterprise(s);

(g) Further information on the relevant market and the parties' competitors;

(h) The date of commencement of any agreement;

(i) Its duration or, if it is terminable by notice, the period of notice required; and

(j) The complete terms of the agreement, whether in writing or oral, in which oral terms would be reduced to writing.

8. It is also important to note that the information provided in the notification form could become public and so the lawmaker must devise a system to protect the confidential information submitted in the notification. For example, the Competition Commission of South Africa provides a form in which the exemption applicant can identify information that is confidential and which would be submitted with the application.

9. In seeking authorization, it is often the notifying parties' responsibility to demonstrate that the intended agreement will not have the effects proscribed by the law, or that it is not in contradiction with the objectives of the law.

Alternative approaches in existing legislation – Notification regimes

Country	
Australia[3]	The Trade Practices Act specifies when the Australian Competition and Consumer Commission (ACCC) may grant authorization. Broadly, conduct may be authorized if the public benefit outweighs any public detriment. The Act contains different tests for authorizing different types of conduct. The two different tests are as follows: – The ACCC may not grant authorization for the making or giving effect to proposed or existing contracts, arrangements or understandings that might contain cartel provisions, might substantially lessen competition or involve exclusive dealing (other than third line forcing) unless it is satisfied in all circumstances that the agreement or conduct is likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition (the first test). – The ACCC may not grant authorization to proposed exclusionary provisions (primary boycotts), secondary boycotts, third line forcing and resale price maintenance unless it is satisfied in all the circumstances that the proposed provision or proposed conduct is likely to result in such a benefit to the public that the provision should be permitted to be made or the conduct should be allowed to take place (the second test).
Singapore	In Singapore, a good number of exemption and exclusion apply in respect of agreements. For example, in the Third Schedule the Competition Act 2004, an agreement that prevents, restricts or distorts competition, in contravention of section 34, is excluded from the application of section 34: – If the agreement was made to comply with a requirement imposed by a written law (see section 2(1)); – To avoid conflicts with Singapore's international obligations (see section 3); – If the Minister is satisfied that there are exceptional and compelling reasons of public policy warranting non-application of Section 34 to an agreement (see section 4); or

[3] *Source:* Australian Competition and Consumer Commission (ACCC), *Guide to authorisation*, 28 May 2007, available at: http://www.accc.gov.au/content/index.phtml/itemId/788405/fromItemId/3737.

Country	
	– If the agreement relates to goods or services to the extent that another written law relating to competition gives another regulatory authority jurisdiction over the matter (see section 5). Also, Section 34 will not apply to agreements which contribute to improving production or distribution or which promotes technical or economic progress. Further, an exemption can be granted for an agreement which contravenes Section 34 if a block exemption is likely to apply. A notification can be made to the Commission for **guidance** as to whether the agreement is likely to infringe section 34 and if so, whether the agreement is likely to be exempted by a block exemption. Alternatively a notification can be made to the Commission for a **decision** as to whether the section 34 has been infringed. Notification offers immunity from penalty during the period when the agreement is subject to review by the Commission—beginning with the date of notification and ending with the date a notice is issued by the Commission in respect of the notified agreement. No exemptions can be sought for an agreement made by an undertaking entrusted with the operation of services of general economic interests or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance of the particular tasks assigned to that undertaking. See the Third Schedule of section 1 of the Competition Act.
South Africa	In South Africa, section 10 of the Competition Act of 1998 allows for the granting of an exemption for an agreement or practice that constitutes a prohibited practice under Chapter 2 of the legislation which addresses restrictive horizontal and vertical practices and abuse of dominance. To qualify for an exemption the agreement or practice must be found to: – Contribute to the promotion or maintenance of exports; – Promote the competitiveness of small businesses or firms controlled or owned by historically disadvantaged persons; – Change the productive capacity to stop decline in an industry; – Maintain economic stability in an industry designated by the Minister.

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.

10.Paragraph I.1 of Chapter V the Model Law creates room for a very broad and encompassing notification regime. The provision refers to both possibly anti-competitive agreements falling within the scope of Chapter III and unilateral behavior captured by the prohibition of the abuse of a dominant position in Chapter IV. Although there is nothing to stop a lawmaker from employing such a broad notification or exemption system, in fact it is rare that a notification system is used for abuse of dominance-type conduct. If a highly concentrated industry sector requires particular oversight and *ex ante* intervention in order to safeguard competition, sector regulation appears to be the more frequently used tool. Accordingly, incumbent companies in regulated industry are often subject to specific notification requirements outside the application of the general competition law regime.

11.Furthermore, as previously mentioned, a broadly worded notification regime can also lead to large numbers of notifications. New competition authorities should not underestimate the pressure posed by a notification regime on its resources. Competition authorities can become quickly paralyzed by the large numbers of notification. A new competition law regime would be well advised to use drafting language that can properly classify the types of agreements that are to be notified.

12.One approach to wording the notification or exemption provision could be to require notification for only certain classes of agreements, for example, notification could be required for specified classes of horizontal agreements which are potentially anticompetitive, or agreements which exceed a certain threshold, for example, where the combined market share of the notifying parties indicates that together they have substantial market power, which would require scrutiny of any agreement passed between them.

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.

13.Paragraph I.2 of Chapter V deals with the question of who should be entitled to notify an agreement.

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 affluxion of time), or has been abandoned, or if there has been a substantial change in the situation (within (...) days/months of the event) (immediately).

14.Paragraph I.3 of Chapter V concerns situations where a company enters into a number of parallel agreements with different parties. For the purpose of procedural efficiency, the provision suggests that it should be possible to notify only one of the parallel agreements, provided that their terms are the same and information as to the identity to all contracting partners is provided to the competition authority.

15.The provision provided for by paragraph I.4 of Chapter V becomes relevant when the authorization granted by the competition authority is not limited in time. If circumstances change that were relevant for the initial competition law assessment and authorization, it might be prudent for a competition law regime to order a notification of these changes and thereby allow the competition authority to reassess the agreement in light of its new circumstances.

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.

16.Paragraph I.5 of Chapter V addresses the situation where potentially anti-competitive agreements have been concluded and executed prior to the entry into force of the competition law. By obliging the parties to also notify also pre-existing agreements to the competition authority, it allows the authority to exercise its control function and to ensure compliance with the new competition law.

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.

17.From the perspective of the notifying parties, obtaining provisional authorization upon notification and being able to implement the agreement immediately may appear to represent the preferred option. However, such provisional authorization entails severe consequences in terms of restitution and liability if the competition authority does not grant an authorization after having carried out its assessment. From the perspective of legal certainty, making the entry into force of an agreement depending on its authorization may appear the best solution. However, if its workload does not allow the competition authority to assess all notifications in a timely fashion, this option may lead to significant delays, which may impact on an agreement's economic significance. Against this background, the third option set out in paragraph I.6 of Chapter V takes on board considerations of procedural efficiency. If a reasonable assessment period set by the law expires, the agreement is deemed authorized. This option enables the competition authority to

exercise its control function and scrutinize agreements that raise severe competition concerns, while it provides the notifying parties with a timeframe for their planning.

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.

18.Paragraph I.7 of Chapter V deals with the consequences of non-compliance with the notification obligation. The provision suggests that non-compliance should be "subject to the full sanctions of the law", which may entail automatic nullity of the agreement and the imposition of fines, even when the agreement would qualify for an exemption upon notification. Taking into account the principle of proportionality, it appears therefore also well justified that a competition law limits the sanctions for a failure to notify to the imposition of a procedural fine and reserves other sanctions for agreements that actually prove to be anti-competitive based on the assessment by the competition authority.

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.*

19.Paragraph II of Chapter V provides for the possible actions of a competition authority under a notification regime. With respect to paragraph II.1, it should be noted that setting a time limit for review of an agreement is a typical feature of a notification regime. It is often combined with the presumption that an authorization is deemed granted if the review period expires without action by the competition authority. While a stated time limit should be incorporated in the legislation, it is important to note that assessing the competitive effects of an agreement takes time and is generally burdensome, and could require review and assessment of information that goes beyond that which was provided on the notification form. Against this background, some competition law regimes allow the authority to extend the review period, if the complexity of the matter requires

additional time. This is also where the issuance of a provisional validity or temporary immunity during the currency of the assessment period becomes useful.

20.Given that relevant circumstances for the authorization, in particular the structure of the relevant market affected by the agreement, may change over time, it may be prudent for a competition law regime to order periodic revision of authorizations, if these authorizations are granted for and indefinite or extended period. If the competition authority limits authorizations in time, such revision may not be necessary, since the notifying parties will have to resubmit a notification upon expiry of the authorization.

21.Finally, an authorization may be withdrawn in the cases listed under paragraph II.3 c of Chapter V.