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HANDBOOK ON COMPETITION LEGISLATION

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Contents

	Page
INTRODUCTION	3
ALGERIA	5
AUSTRIA	35
BRAZIL	38
BULGARIA	70
BURKINA FASO	102
CZECH REPUBLIC	125
ESTONIA.....	151
EUROPEAN COMMISSION.....	196
GEORGIA.....	224
INDONESIA.....	234
JAPAN.....	267
LATVIA.....	342
LITHUANIA.....	366
MADAGASCAR	399
MALAWI.....	416
MALTA	442
MONTENEGRO.....	466
MOROCCO	488
NEW ZEALAND.....	517
POLAND	531
PORTUGAL	589
SERBIA	620
SINGAPORE	653
SOUTH AFRICA.....	726
SWITZERLAND	789
THAILAND	809
TURKEY	829
UKRAINE.....	858
UNITED REPUBLIC OF TANZANIA.....	877
ZIMBABWE.....	987

INTRODUCTION

UNCTAD is the focal point on all work related to competition policy and consumer welfare within the United Nations system. This mandate is established by the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (also known as the United Nations Set of Principles and Rules on Competition), unanimously adopted by the General Assembly in 1980. It has as a main objective “to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries”. The Set establishes broad principles and rules encouraging the adoption and strengthening of competition legislation and policies at the national and regional levels, and at promoting international cooperation in this area.

In sections F.5 and F.6 (c) the Set provides for the compilation of the Handbook on Restrictive Business Practices Legislation and for the continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation. The Set also envisages that, in this connection, States should provide necessary information and experience to UNCTAD. The Fifth United Nations Conference to Review All Aspects of the Set, held in Antalya, Turkey, from 14 to 18 November 2005, requested the UNCTAD secretariat to publish further issues of the Handbook on Competition Legislation and decided that UNCTAD should continue to work on periodic revision of the commentary to the Model Law in the light of legislative developments and comments made by member States (see the resolution adopted by the Review Conference contained in TD/RBP/CONF.6/14).

Despite a general widespread trend towards the adoption, reformulation or better implementation of competition laws and policies in developing countries and economies in transition, many of these countries still do not have neither up-to-date competition legislation nor adequate institutions for their effective enforcement and rely to a large extent on UNCTAD capacity building for this work. This Handbook was prepared by the secretariat taking into account that commentaries contributed by States together with texts of their national competition legislation could be used by countries for preparation and/or further revision and updating of national competition legislation, in particular as complementary material to the UNCTAD Model Law on Competition (its latest version was issued as TD/RBP/CONF.5/7/Rev.3). Moreover, this Handbook together with the Model Law could be used in the provision of UNCTAD’s technical cooperation activities to countries introducing or revising their legislation.

The Handbook contains commentaries on competition legislation provided by States and published by the secretariat in 2001-2008, as well as commentaries not included or provided after the publication of the 2008 edition of the Handbook. It includes commentaries on competition legislation of Algeria, Austria, Brazil, Bulgaria, Burkina Faso, Czech Republic, Estonia, European Commission, Georgia, Indonesia, Japan, Latvia, Lithuania, Madagascar, Malawi, Malta, Republic of Montenegro, Morocco, New Zealand, Portugal, Republic of Serbia, Singapore, Republic of South Africa, Switzerland, United Republic of Tanzania, Thailand, Turkey, Ukraine and Zimbabwe.

The texts of the competition legislation of these and other countries are available at the National Competition Legislation link of the UNCTAD's Competition and Consumer Policies Branch website <http://www.unctad.org/competition>. The UNCTAD secretariat is grateful to the States that have contributed the requested material for this issue of the Handbook. As it is envisaged to update the Handbook every year on the basis of contributions submitted, member States are encouraged to provide the secretariat with their commentaries on recent developments in national competition legislation and jurisprudence.

ALGERIA

COMMENTARY BY THE GOVERNMENT OF ALGERIA ON ALGERIAN COMPETITION LEGISLATION

A. INTRODUCTION

Dans le cadre des exigences induites par les actions de mise à niveau de notre économie et d'harmonisation de notre législation et à la faveur de la conclusion de l'Accord d'Association avec l'Union Européenne, l'Algérie a procédé à la refonte globale du dispositif législatif relatif à la concurrence.

Cette action s'est traduite par la promulgation de la nouvelle ordonnance n° 03-03 du 19 juillet 2003 relative à la concurrence en remplacement de l'ordonnance n° 95-06 du 25 janvier 1995, qui a été abrogée par le nouveau texte.

A cet effet, il convient de préciser les principales raisons ayant motivé la refonte de l'ordonnance n° 95-06 du 25 janvier 1995, à savoir:

1. la **première** raison a trait à la séparation des règles relatives à la concurrence (ententes et accords illicites, abus de position dominante et concentrations) de celles se rapportant aux pratiques commerciales;
2. la **deuxième** raison est liée à la nécessité de rompre avec le caractère répressif de notre législation et de mettre en place des mécanismes de concertation favorisant la concertation et la coopération entre l'Administration du Commerce, le Conseil de la Concurrence et les entreprises, en vue de familiariser ces dernières au fonctionnement concurrentiel du marché et de créer ainsi une culture de la concurrence;
3. la **troisième** raison concerne la nécessaire reconfiguration du Conseil de la Concurrence à l'effet de lui conférer un rôle plus dynamique de régulation du marché et de promotion de la concurrence;
4. la **quatrième** raison se rapporte aux exigences découlant de l'intégration de notre pays à l'économie régionale (Union Européenne) et mondiale (OMC), qui impliquent la modernisation et l'adaptation de notre législation nationale en matière de concurrence.
5. C'est sur la base de ces principales considérations que le nouveau dispositif législatif présenté ci-après, a été élaboré.

B. PRESENTATION DU NOUVEAU DISPOSITIF LEGISLATIF

a. Objet et champ d'application de l'ordonnance:

L'ordonnance n° 03.03 du 19 juillet 2003 relative à la concurrence a pour objectifs:

- de fixer les conditions d'exercice de la concurrence sur le marché;
- de prévenir toute pratique restrictive de concurrence;
- et de contrôler les concentrations économiques afin de stimuler l'efficacité économique et d'améliorer le bien-être des consommateurs.

Ce cadre législatif couvre l'ensemble des activités de production, de distribution et de services. Son champ d'application concerne également les activités des personnes publiques lorsque celles-ci n'interviennent pas dans le cadre de l'exercice de prérogatives de puissance publique ou dans l'accomplissement de missions de service public.

b. Contenu de l'ordonnance:

1°) Pratiques restrictives de concurrence:

En plus des pratiques d'ententes illicites et d'abus de position dominante déjà consacrées dans l'ancien dispositif (ordonnance n° 95-06 du 25 janvier 1995 relative à la concurrence), la nouvelle ordonnance intègre **d'autres pratiques restrictives de la concurrence** qui sont désormais interdites et sanctionnées, à savoir :

- l'abus de l'état de dépendance économique (**art. 11**);
- la constitution de monopoles par le biais de contrats d'achats exclusifs (**art. 10**);
- et la pratique de vente à des prix abusivement bas (**art. 12**).

Cette ordonnance prévoit cependant des **exceptions** à ces interdictions lorsque les pratiques et accords restrictifs résultent d'un texte législatif ou d'un texte réglementaire pris pour son application. Ces exceptions couvrent également les accords et pratiques qui permettent notamment aux petites et moyennes entreprises de renforcer leur position concurrentielle sur le marché ou qui favorisent l'emploi.

Par ailleurs, l'ordonnance en vigueur intègre une nouvelle disposition qui consacre une mesure **préventive et pédagogique en matière d'ententes et d'abus de position dominante, à travers l'instauration de l'attestation négative**. En effet, en vertu de cette nouvelle procédure, les entreprises dont les comportements sont susceptibles d'être non conformes aux règles de la concurrence, peuvent demander au Conseil de la Concurrence de vérifier si les pratiques ou accords qu'elles souhaitent mettre en œuvre peuvent être considérés comme compatibles avec cette loi et bénéficier ainsi d'une attestation négative.

Le nouveau dispositif institue également des **mesures de clémence**. Il s'agit d'une procédure par laquelle le Conseil de la Concurrence peut décider de réduire le montant de l'amende ou de ne pas prononcer du tout d'amende lorsque les entreprises concernées:

- reconnaissent les griefs qui leur sont imputés;
- contribuent à accélérer la procédure d'instruction de l'affaire;

- s'engagent à ne plus commettre d'infractions liées aux pratiques restrictives de concurrence.

Toutefois et en cas de récidive, les mesures de clémence ne sont pas accordées. La consécration de ces deux (02) dernières dispositions vise à amoindrir l'aspect répressif de l'ancienne ordonnance et à rendre ce nouveau dispositif plus attractif afin de favoriser ainsi son développement au niveau de la sphère commerciale et sa réelle application sur le terrain par les agents économiques.

2°) Concentrations économiques:

S'agissant des **concentrations économiques**, la nouvelle ordonnance reconduit la compétence du Conseil de la Concurrence en la matière. En effet, les agents économiques doivent notifier au Conseil leurs opérations de concentration lorsqu'elles sont de nature à porter atteinte à la concurrence et qu'elles atteignent **un seuil de plus de 40 %** des ventes ou achats à effectuer sur un marché. Le Conseil de la Concurrence prend sa décision dans un délai de trois (03) mois.

Cependant, elle consacre une exception à ce principe en accordant la faculté au Gouvernement d'autoriser, lorsque l'intérêt général le justifie, les concentrations économiques rejetées par le Conseil de la Concurrence à chaque fois que des conditions économiques objectives le justifient (notamment pour développer et assurer la compétitivité des entreprises nationales face à la concurrence internationale, créer de l'emploi et développer des technologies nouvelles).

3°) Conseil de la Concurrence:

Le nouveau dispositif apporte, par ailleurs, des enrichissements en ce qui concerne les attributions, l'organisation et le fonctionnement du **Conseil de la Concurrence**. La révision et l'amélioration du cadre organisationnel et juridique du Conseil sont motivées par la faiblesse du bilan de l'activité de cette institution au cours des années passées et par l'inadéquation de son organisation et de son fonctionnement par rapport à l'importance du rôle que doit jouer une telle autorité en matière de régulation économique et de mise en œuvre des règles de la concurrence.

Les enrichissements apportés aux attributions du Conseil de la Concurrence ont trait notamment:

- à la définition du Conseil en tant qu'autorité administrative autonome, jouissant de la personnalité juridique et de l'autonomie financière;
- au renforcement de ses prérogatives en matière de contentieux;
- et à l'élargissement de son champ d'intervention sur le plan consultatif, par l'intégration de nouvelles mesures lui permettant dorénavant de coopérer et d'échanger des informations avec les autorités de régulation sectorielles ainsi qu'avec les autorités étrangères homologues.

Les modifications apportées au plan de l'organisation et du fonctionnement du Conseil de la Concurrence ont pour but de renforcer ses capacités et ses compétences en tant que principal régulateur du marché.

Dans cette optique, le nombre des membres du Conseil est ramené à **neuf (09) membres permanents au lieu de douze (12) membres dont sept (07) non permanents prévus dans l'ancien texte.**

Sur les neuf (09) membres, deux (02) sont des magistrats et les sept (07) autres membres sont choisis parmi des personnalités connues pour leur compétence juridique, économique ou en matière de concurrence, de distribution et de consommation.

4°) Procédures d'instruction et de recours:

L'ordonnance sus-citée consacre deux (02) chapitres aux procédures d'instruction et de recours contre les décisions du Conseil de la Concurrence.

L'objectif visé est de renforcer la transparence et l'efficacité des procédures afin de sauvegarder et de garantir les droits des parties, de préserver et de faire respecter le principe du contradictoire.

Cette ordonnance instaure également un cadre de collaboration entre les différentes institutions chargées de la concurrence. C'est ainsi qu'il est prévu que la Cour d'Alger recueille l'avis du Ministre du Commerce et du Conseil de la Concurrence à l'occasion du traitement des contentieux qui lui sont soumis.

Compte tenu de la spécificité de la procédure, l'ordonnance précise les règles de recours en appel devant la Cour d'Alger.

S'agissant de la contestation des décisions de rejet des opérations de concentration, les recours en annulation sont désormais formulés devant le Conseil d'Etat, compte tenu de la nature juridique de la décision contestée (administrative) et ce, conformément à l'article 9 du code de procédure civile.

En outre, la nouvelle ordonnance a instauré un cadre de transparence dans le traitement des contentieux à travers:

- son chapitre III qui fixe les attributions du rapporteur ainsi que les différentes étapes de la procédure d'instruction;
- et son chapitre V relatif à la procédure de recours contre les décisions du Conseil de la Concurrence.

La révision et la mise à niveau du dispositif législatif relatif à la concurrence, s'inscrivent notamment dans le cadre de la concrétisation du train des réformes économiques initié par les pouvoirs publics en vue de la consolidation des règles de l'économie de marché, d'intégration de l'Algérie dans les espaces économiques mondiaux et régionaux (Accord d'Association avec l'Union Européenne et Organisation Mondiale du Commerce) et de renforcement du dispositif d'encadrement et de régulation du marché dans le domaine de la concurrence.

Il permettra ainsi à notre pays de disposer d'un outil efficace et adapté dans le domaine de la régulation et de la concurrence à même de permettre la maîtrise du marché et la détection ainsi que la sanction des pratiques restrictives de concurrence.

C. HARMONISATION PAR RAPPORT A L'ACCORD D'ASSOCIATION AVEC L'UNION EUROPEENNE

La présentation du nouveau dispositif relatif à la concurrence permet de faire ressortir que notre législation en matière de concurrence est en harmonie avec les règles européennes de concurrence, dans la mesure où elle prohibe à travers ses **articles 6 et 7** (cf. article 41, 1er point, a et b):

1. les pratiques et actions concertées, conventions et ententes expresses ou tacites (point a);
2. ainsi que les abus de position dominante ou monopolistique sur un marché ou un segment de marché (point b).

Ces deux (02) pratiques sont interdites lorsqu'elles ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le libre jeu de la concurrence dans un même marché ou dans une partie substantielle de celui-ci (à savoir, en la matière, l'ensemble du territoire de la Communauté ou une partie substantielle de celui-ci ou l'ensemble du territoire algérien ou une partie substantielle de celui-ci).

Elle instaure, en outre, à travers ses **articles 41 à 43**, un cadre de coopération entre le Conseil de la Concurrence et les autorités étrangères de concurrence, en vue d'assurer la mise en œuvre adéquate des législations nationale et étrangère et de développer entre ces institutions des relations de concertation et d'échange d'information et ce, dans le respect des règles liées à la souveraineté nationale, à l'ordre public et au secret professionnel.

Ce cadre de coopération qui a une portée générale, est en totale conformité avec les règles de mise en œuvre de **l'article 41** de l'Accord d'Association avec l'Union Européenne, contenues dans **l'annexe n° 5** relative aux modalités d'application dudit article. En effet, les conditions d'application de **l'article 41** portent sur les actions de coopération et de coordination qui seront concrétisées à travers les procédures de notification, d'échange d'information et de consultation.

Par ailleurs, l'accord d'association prévoit que les deux parties s'engagent à prendre les mesures nécessaires pour la levée de toutes les discriminations pouvant affecter les échanges économiques et commerciaux entre la Communauté et l'Algérie, à travers:

- l'ajustement progressif des monopoles d'Etat à caractère commercial d'ici à la fin de la cinquième d'entrée en vigueur de l'accord (2010);
- la suppression de toutes les mesures contraires aux intérêts des parties notamment en ce qui concerne les entreprises publiques et celles auxquelles des droits spéciaux ou exclusifs ont été accordés.

D. TEXTES D'APPLICATION DE L'ORDONNANCE

Dans le cadre de la formalisation des textes d'application de l'ordonnance, **deux (02) décrets exécutifs** ont été publiés, à savoir:

- le décret exécutif n° 05-175 du 12 mai 2005 fixant les modalités d'obtention de **l'attestation négative** relative aux ententes et à la position dominante;
- le décret exécutif n° 05-219 du 22 juin 2005 relatif aux autorisations des opérations de **concentration**.

Le **premier texte**, qui découle de **l'article 08** de l'ordonnance, définit les modalités d'introduction de **l'attestation négative** par les agents économiques auprès du Conseil de la Concurrence et comporte en **annexe**, l'imprimé de demande d'obtention de l'attestation négative (identités du demandeur et des autres parties concernées ainsi que l'objet de la demande) et la fiche de renseignements à joindre à la demande (données relatives à l'entreprise, au marché concerné et aux motifs de la demande).

Le **second texte**, pris en application de **l'article 22** de l'ordonnance, fixe les conditions et procédures d'introduction de la demande d'autorisation de l'opération de **concentration** au niveau du Conseil de la Concurrence et intègre en **annexe**, le formulaire de la demande (identités du demandeur et des autres parties concernées ainsi que l'objet de la demande) et la fiche de renseignements devant accompagner la demande (informations relatives aux entreprises concernées par la concentration et aux données ayant trait à l'opération de concentration).

**ORDONNANCE NO.03-03 DU 19 JOUMADA EL OULA 1424
CORRESPONDANT AU 19 JUILLET 2003 RELATIVE A LA CONCURRENCE**

(Parue au journal officiel No. 43 du 20 juillet 2003)

Le Président de la République,

Vu la Constitution, notamment ses articles 122 et 124;

Vu l'ordonnance n65-278 du 16 novembre 1965, modifiée et complétée, portant organisation judiciaire;

Vu l'ordonnance n66-154 du 8 juin 1966, modifiée et complétée, portant code de procédure civile;

Vu l'ordonnance n66-155 du 8 juin 1966, modifiée et complétée, portant code de procédure pénale;

Vu l'ordonnance n66-156 du 8 juin 1966, modifiée et complétée, portant code pénal;

Vu l'ordonnance n75-58 du 26 septembre 1975, modifiée et complétée, portant code civil;

Vu l'ordonnance n75-59 du 26 septembre 1975, modifiée et complétée, portant code de commerce;

Vu la loi n83-17 du 16 juillet 1983, modifiée et complétée, portant code des eaux;

Vu la loi n89-02 du 7 février 1989 relative aux règles générales de protection du consommateur;

Vu la loi n90-10 du 14 avril 1990, modifiée et complétée, relative à la monnaie et au crédit;

Vu la loi n90-22 du 18 août 1990, modifiée et complétée, relative au registre de commerce;

Vu l'ordonnance n95-06 du 23 Châabane 1415 correspondant au 25 janvier 1995 relative à la concurrence;

Vu la loi organique n98-01 du 4 Safar 1419 correspondant au 30 mai 1998 relative aux compétences, à l'organisation et au fonctionnement du Conseil d'Etat;

Vu la loi n2000-03 du 5 Joumada El Oula 1421 correspondant au 5 août 2000 fixant les règles générales relatives à la poste et aux télécommunications;

Vu la loi n2000-06 du 27 Ramadhan 1421 correspondant au 23 décembre 2000 portant loi de finances pour 2001, notamment ses articles 32 et 33;

Vu la loi n01-10 du 11 Rabie Ethani1422 correspondant au 3 juillet 2001 portant loi minière;

Vu l'ordonnance n01-04 du Aouel Joumada Ethania 1422 correspondant au 20 août 2001 relative à l'organisation, la gestion et la privatisation des entreprises publiques économiques;

Vu la loi n01-18 du 27 Ramadhan 1422 correspondant au 12 décembre 2001 portant loi d'orientation sur la promotion de la petite et moyenne entreprise;

Vu la loi n02-01 du 2 Dhou El Kaada 1422 correspondant au 5 février 2002 relative à l'électricité et à la distribution du gaz par canalisation;

Vu la loi n02-11 du 20 Chaoual 1423 correspondant au 24 décembre 2002 portant loi de finances pour 2003 notamment son article 102;

Le Conseil des ministres entendu;

Promulgue l'ordonnance dont la teneur suit:

TITRE I DISPOSITIONS GENERALES

Article 1er. - La présente ordonnance a pour objet de fixer les conditions d'exercice de la concurrence sur le marché, de prévenir toute pratique restrictive de concurrence et de contrôler les concentrations économiques afin de stimuler l'efficacité économique et d'améliorer le bien-être des consommateurs.

Art. 2. - La présente ordonnance s'applique aux activités de production, de distribution et de services y compris celles qui sont le fait de personnes publiques, dans la mesure où elles n'interviennent pas dans le cadre de l'exercice de prérogatives de puissance publique ou dans l'accomplissement de missions de service public.

Art. 3. - Il est entendu au sens de la présente ordonnance par:

- a) **entreprise:** toute personne physique ou morale quelle que soit sa nature, exerçant d'une manière durable des activités de production, de distribution ou de services;
- b) **marché:** tout marché des biens ou services concernés par une pratique restrictive, ainsi que ceux que le consommateur considère comme identiques ou substituables en raison notamment de leurs caractéristiques, de leurs prix et de l'usage auquel ils sont destinés, et la zone géographique dans laquelle sont engagées les entreprises dans l'offre des biens ou services en cause;
- c) **position dominante:** la position permettant à une entreprise de détenir, sur le marché en cause, une position de puissance économique qui lui donne le pouvoir de faire obstacle au maintien d'une concurrence effective, en lui fournissant la possibilité de comportements indépendants dans une mesure appréciable vis-à-vis de ses concurrents, de ses clients ou de ses fournisseurs;
- d) **état de dépendance économique:** la relation commerciale dans laquelle l'une des entreprises n'a pas de solution alternative comparable si elle souhaite refuser de contracter dans les conditions qui lui sont imposées par une autre entreprise, client ou fournisseur.

TITRE II DES PRINCIPES DE LA CONCURRENCE

Chapitre I **De la liberté des prix**

Art. 4 . - Les prix des biens et services sont librement déterminés par le jeu de la concurrence.

Toutefois, l'Etat peut restreindre le principe général de la liberté des prix dans les conditions définies à l'article 5 ci-dessous.

Art. 5. - Les biens et services considérés stratégiques par l'Etat peuvent faire l'objet d'une réglementation des prix par décret, après avis du Conseil de la concurrence.

Peuvent être également prises, des mesures exceptionnelles de limitation de hausse des prix ou de fixation des prix en cas de hausses excessives des prix provoquées par une grave perturbation du marché, une calamité, des difficultés durables d'approvisionnement dans un secteur d'activité ou une zone géographique déterminée ou par des situations de monopoles naturels.

Ces mesures exceptionnelles sont prises par décret pour une durée maximum de six (6) mois, après avis du Conseil de la concurrence.

Chapitre II **Des pratiques restrictives de la concurrence**

Art. 6. - Sont prohibées, lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la libre concurrence dans un même marché ou, dans une partie substantielle de celui-ci, les pratiques et actions concertées, conventions et ententes expresses ou tacites et notamment lorsqu'elles tendent à:

- limiter l'accès au marché ou l'exercice d'activités commerciales;
- limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique;
- répartir les marchés ou les sources d'approvisionnement;
- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse;
- appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence;
- subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.

Art. 7. - Est prohibé tout abus d'une position dominante ou monopolistique sur un marché ou un segment de marché tendant à:

- limiter l'accès au marché ou l'exercice d'activités commerciales;
- limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique;

- répartir les marchés ou les sources d'approvisionnement;
- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse;
- appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence;
- subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.

Art. 8. - Le Conseil de la concurrence peut constater, sur demande des entreprises intéressées, qu'il n'y a pas lieu pour lui, en fonction des éléments dont il a connaissance, d'intervenir à l'égard d'un accord, d'une action concertée, d'une convention ou d'une pratique tels que définis aux articles 6 et 7 ci-dessus.

Les modalités d'introduction de la demande de bénéficier des dispositions de l'alinéa précédent sont déterminées par décret.

Art. 9. - Ne sont pas soumis aux dispositions des articles 6 et 7, les accords et pratiques qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application.

Sont autorisés, les accords et pratiques dont les auteurs peuvent justifier qu'ils ont pour effet d'assurer un progrès économique ou technique, ou qu'ils contribuent à améliorer l'emploi, ou qui permettent aux petites et moyennes entreprises de consolider leur position concurrentielle sur le marché. Ne pourront bénéficier de cette disposition que les accords et pratiques qui ont fait l'objet d'une autorisation du Conseil de la concurrence.

Art. 10. - Est considéré comme pratique ayant pour effet d'empêcher, de restreindre ou de fausser le jeu de la libre concurrence, tout contrat d'achat exclusif conférant à son titulaire un monopole de distribution sur un marché.

Art. 11. - Est prohibée, dès lors qu'elle est susceptible d'affecter le libre jeu de la concurrence, l'exploitation abusive, par une entreprise, de l'état de dépendance dans lequel se trouve à son égard une entreprise, client ou fournisseur.

Ces abus peuvent notamment consister en:

- un refus de vente sans motif légitime;
- la vente concomitante ou discriminatoire;
- la vente conditionnée par l'acquisition d'une quantité minimale;
- l'obligation de revente à un prix minimum;
- la rupture d'une relation commerciale au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées;
- tout autre acte de nature à réduire ou à éliminer les avantages de la concurrence dans un marché.

Art. 12. - Sont prohibées les offres de prix ou pratiques de prix de vente aux consommateurs abusivement bas par rapport aux coûts de production, de transformation et de commercialisation, dès lors que ces offres ou pratiques ont pour objet ou peuvent avoir pour effet d'éliminer d'un marché ou d'empêcher d'accéder à un marché, une entreprise ou un de ses produits.

Art. 13. - Sans préjudice des dispositions des articles 8 et 9 de la présente ordonnance, est nul tout engagement, convention ou clause contractuelle se rapportant à l'une des pratiques prohibées par les articles 6, 7, 10, 11 et 12 ci-dessus.

Art. 14. - Les pratiques visées aux articles 6, 7, 10, 11 et 12 ci-dessus sont qualifiées de pratiques restrictives de concurrence.

Chapitre III Des concentrations économiques

Art. 15. - Aux termes de la présente ordonnance, une concentration est réalisée lorsque:

1 - deux ou plusieurs entreprises antérieurement indépendantes fusionnent,

2 - une ou plusieurs personnes physiques détenant déjà le contrôle d'une entreprise au moins, ou bien, une ou plusieurs entreprises, acquièrent directement ou indirectement, que ce soit par prise de participations au capital ou achat d'éléments d'actifs, contrat ou par tout autre moyen, le contrôle de l'ensemble ou de parties d'une ou de plusieurs autres entreprises.

3 - la création d'une entreprise commune accomplissant, d'une manière durable, toutes les fonctions d'une entité économique autonome.

Art. 16. - Le contrôle visé au point 2 de l'article 15 ci-dessus, découle des droits des contrats ou autres moyens qui confèrent seuls ou conjointement, et compte tenu des circonstances de fait ou de droit, la possibilité d'exercer une influence déterminante et durable sur l'activité d'une entreprise et notamment:

1- des droits de propriété ou de jouissance sur tout ou partie des biens d'une entreprise;

2- des droits ou des contrats qui confèrent une influence déterminante sur la composition, les délibérations ou les décisions des organes d'une entreprise.

Art. 17 . - Les concentrations qui sont de nature à porter atteinte à la concurrence en renforçant notamment la position dominante d'une entreprise dans un marché, doivent être soumises par leurs auteurs au Conseil de la concurrence qui prend une décision dans un délai de trois (3) mois.

Art. 18. - Les dispositions de l'article 17 ci-dessus s'appliquent à chaque fois que la concentration vise à réaliser un seuil de plus de 40 % des ventes ou achats effectués sur un marché.

Art. 19. - Le Conseil de la concurrence peut, après avis du ministre chargé du commerce, autoriser ou rejeter, par décision motivée, la concentration.

L'autorisation du Conseil de la concurrence peut être assortie de prescriptions de nature à atténuer les effets de la concentration sur la concurrence. Les entreprises parties à la concentration peuvent d'elles-mêmes souscrire des engagements destinés à atténuer les effets de la concentration sur la concurrence.

La décision de rejet de la concentration peut faire l'objet d'un recours devant le Conseil d'Etat.

Art. 20. - Pendant la durée requise pour la décision du Conseil de la concurrence, les auteurs de l'opération de concentration ne peuvent prendre aucune mesure rendant la concentration irréversible.

Art. 21. - Lorsque l'intérêt général le justifie, le Gouvernement peut, sur le rapport du ministre chargé du commerce et du ministre dont relève le secteur concerné par la concentration, autoriser d'office ou à la demande des parties concernées, la réalisation d'une concentration rejetée par le Conseil de la concurrence.

Art. 22. - Les conditions et modalités de demande d'autorisation des opérations de concentration sont déterminées par décret.

TITRE III DU CONSEIL DE LA CONCURRENCE

Art. 23. - Il est créé auprès du Chef du Gouvernement une autorité administrative ci-après dénommée " Conseil de la concurrence", jouissant de la personnalité juridique et de l'autonomie financière.

Le siège du Conseil de la concurrence est fixé à Alger.

Art. 24. - Le Conseil de la concurrence est composé de neuf (9) membres relevant des catégories ci-après:

1-deux (2) membres exerçant ou ayant exercé au Conseil d'Etat, à la Cour suprême ou à la Cour des comptes en qualité de magistrat ou de conseiller;

2- sept (7) membres choisis parmi les personnalités connues pour leur compétence juridique, économique ou en matière de concurrence, de distribution et de consommation, dont un choisi sur proposition du ministre chargé de l'intérieur.

Ils exercent leurs fonctions à plein temps.

Art. 25. - Le président, le vice-président et les autres membres du Conseil de la concurrence sont nommés par décret présidentiel, pour une durée de cinq (5) années, renouvelable.

Il est mis fin à leurs fonctions dans les mêmes formes.

Art. 26. - Il est désigné auprès du Conseil de la concurrence un secrétaire général et des rapporteurs, nommés par décret présidentiel.

Le ministre chargé du commerce désigne par arrêté son représentant et un suppléant

auprès du Conseil de la concurrence.

Ils assistent aux travaux du Conseil de la concurrence sans voix délibérative.

Chapitre I

Du fonctionnement du Conseil de la concurrence

Art. 27. - Le Conseil de la concurrence adresse un rapport annuel d'activité à l'instance législative, au Chef du Gouvernement et au ministre chargé du commerce.

Le rapport est rendu public un mois après sa transmission aux autorités visées ci-dessus. Il est publié au *Journal officiel* de la République algérienne démocratique et populaire. Il peut également être publié en totalité ou par extraits sur tout autre support d'information.

Art. 28. - Les travaux du Conseil de la concurrence sont dirigés par le président ou le vice-président qui le remplace en cas d'absence ou d'empêchement.

Le Conseil de la concurrence ne peut siéger valablement qu'en présence de six (6) de ses membres au moins.

Les séances du Conseil de la concurrence ne sont pas publiques.

Les décisions du Conseil de la concurrence sont prises à la majorité simple; en cas de partage égal des voix, celle du président est prépondérante.

Art. 29. - Aucun membre du Conseil de la concurrence ne peut délibérer dans une affaire dans laquelle il a un intérêt ou s'il a un lien de parenté jusqu'au quatrième degré avec l'une des parties ou, s'il représente ou a représenté une des parties intéressées.

Les membres du Conseil de la concurrence sont tenus au secret professionnel.

La fonction de membre du Conseil de la concurrence est incompatible avec toute autre activité professionnelle.

Art. 30. - Pour les affaires dont il est saisi, le Conseil de la concurrence entend contradictoirement les parties intéressées qui doivent présenter un mémoire. Les parties peuvent se faire représenter ou se faire assister par leurs avocats ou par toute personne de leur choix.

Les parties intéressées et le représentant du ministre chargé du commerce ont droit à l'accès au dossier et à en obtenir copie.

Toutefois, le président peut refuser, à son initiative ou à la demande des parties intéressées, la communication de pièces ou documents mettant en jeu le secret des affaires. Dans ce cas, ces pièces ou documents sont retirés du dossier. La décision du Conseil de la concurrence ne peut être fondée sur les pièces ou documents retirés du dossier.

Art. 31. - L'organisation et le fonctionnement du Conseil de la concurrence sont fixés par décret.

Art. 32. - Le statut et le système de rémunération des membres du Conseil de la concurrence sont fixés par décret.

Art. 33. - Le budget du Conseil de la concurrence est inscrit à l'indicatif des services du Chef du Gouvernement.

Le président du Conseil de la concurrence est ordonnateur principal.

Le budget du Conseil de la concurrence est soumis aux règles générales de fonctionnement applicables au budget de l'Etat.

Chapitre II Des attributions du Conseil de la concurrence

Art. 34. - Le Conseil de la concurrence a compétence de décision, de proposition et d'avis qu'il exerce de son initiative ou à la demande, sur toute question ou toute action ou mesure de nature à assurer le bon fonctionnement de la concurrence et à favoriser la concurrence dans les zones géographiques ou les secteurs d'activité où la concurrence n'existe pas ou est insuffisamment développée.

Le Conseil de la concurrence peut faire appel à tout expert ou entendre toute personne susceptible de l'informer.

Il peut également saisir les services chargés des enquêtes économiques pour effectuer tout contrôle, enquête ou expertise portant sur des questions relatives aux affaires relevant de sa compétence.

Art. 35. - Le Conseil de la concurrence donne son avis sur toute question concernant la concurrence à la demande du Gouvernement et formule toute proposition sur les aspects de concurrence.

Il peut également être consulté sur les mêmes questions par les collectivités locales, les institutions économiques et financières, les entreprises, les associations professionnelles et syndicales, ainsi que les associations de consommateurs.

Art. 36. - Le Conseil de la concurrence est consulté sur tout projet de texte réglementaire ayant un lien avec la concurrence ou introduisant des mesures ayant pour effet notamment:

- de soumettre l'exercice d'une profession ou d'une activité, ou l'accès à un marché à des restrictions quantitatives;
- d'établir des droits exclusifs dans certaines zones ou activités;
- d'instaurer des conditions particulières pour l'exercice d'activités de production, de distribution et de services;
- de fixer des pratiques uniformes en matière de conditions de vente.

Art. 37. - Le Conseil de la concurrence peut effectuer des enquêtes sur les conditions d'application des textes législatifs et réglementaires ayant un lien avec la concurrence. Dans le cas où ces enquêtes révèlent que l'application de ces textes donne lieu à des restrictions à la concurrence, le Conseil de la concurrence engage toutes les actions pour mettre fin à ces restrictions.

Art. 38. - Pour le traitement des affaires liées aux pratiques restrictives, telles que définies par la présente ordonnance, les juridictions peuvent saisir le Conseil de la concurrence pour avis. L'avis n'est donné qu'après une procédure contradictoire, sauf si le Conseil a déjà examiné l'affaire concernée.

Les juridictions communiquent au Conseil de la concurrence, sur sa demande, les procès-verbaux ou les rapports d'enquête ayant un lien avec des faits dont le Conseil est saisi.

Art. 39. - Lorsque le Conseil de la concurrence est saisi d'une pratique relevant d'un secteur d'activité placé sous le contrôle d'une autorité de régulation, il transmet une copie du dossier, pour avis, à l'autorité concernée.

Dans le cadre de ses missions, le Conseil de la concurrence développe des relations de coopération, de concertation et d'échange d'informations avec les autorités de régulation.

Art. 40. - Sous réserve de réciprocité, le Conseil de la concurrence peut, dans les limites de ses compétences, et en relation avec les autorités compétentes, communiquer des informations ou des documents en sa possession ou qu'il peut recueillir, à leur demande, aux autorités étrangères de concurrence, dotées des mêmes compétences, à condition d'assurer le secret professionnel.

Art. 41. - Sous les mêmes conditions que celles prévues à l'article 40 ci-dessus, le Conseil de la concurrence peut, à la demande d'autorités étrangères de concurrence, conduire ou faire conduire des enquêtes liées à des pratiques restrictives de concurrence.

L'enquête est menée sous les mêmes conditions et procédures que celles prévues dans les attributions du Conseil de la concurrence.

Art. 42. - Les dispositions des articles 40 et 41 ci-dessus ne sont pas applicables dans le cas où les informations, les documents ou enquêtes demandés portent atteinte à la souveraineté nationale, aux intérêts économiques de l'Algérie ou à l'ordre public intérieur.

Art. 43. - Le Conseil de la concurrence peut, pour la mise en œuvre des articles 40 et 41 ci-dessus, conclure des conventions organisant ses relations avec les autorités étrangères de concurrence ayant les mêmes compétences.

Art. 44. - Le Conseil de la concurrence peut être saisi par le ministre chargé du commerce. Il peut se saisir d'office ou être saisi par toute entreprise ou, pour toute affaire dans laquelle ils sont intéressés, par les institutions et organismes visés à l'alinéa 2 de l'article 35 de la présente ordonnance.

Le Conseil de la concurrence examine si les pratiques et actions dont il est saisi entrent dans le champ d'application des articles 6,7,10,11 et 12 ci-dessus ou se trouvent justifiées par application de l'article 9 ci-dessus.

Il peut déclarer, par décision motivée, la saisine irrecevable s'il estime que les faits invoqués n'entrent pas dans le champ de sa compétence, ou ne sont pas appuyés d'éléments suffisamment probants.

Le Conseil de la concurrence ne peut être saisi d'affaires remontant à plus de trois (3) ans, s'il n'a été fait aucun acte tendant à leur recherche, leur constatation et leur sanction.

Art. 45. - Dans le cas où les requêtes et les dossiers dont il est saisi ou dont il se saisit relèvent de sa compétence, le Conseil de la concurrence fait des injonctions motivées visant à mettre fin aux pratiques restrictives de concurrence constatées.

Il peut prononcer des sanctions pécuniaires applicables soit immédiatement, soit en cas d'inexécution des injonctions dans les délais qu'il aura fixés.

Il peut également ordonner la publication, la diffusion ou l'affichage de sa décision ou d'un extrait de celle-ci.

Art. 46. - Le Conseil de la concurrence peut, sur demande du plaignant ou du ministre chargé du commerce, prendre des mesures provisoires destinées à suspendre les pratiques présumées restrictives faisant l'objet d'instruction, s'il est urgent d'éviter une situation susceptible de provoquer un préjudice imminent et irréparable aux entreprises dont les intérêts sont affectés par ces pratiques ou de nuire à l'intérêt économique général.

Art. 47.- Les décisions rendues par le Conseil de la concurrence sont notifiées pour exécution aux parties concernées par envoi recommandé avec accusé de réception et au ministre chargé du commerce qui veille à leur exécution.

Sous peine de nullité, les décisions doivent indiquer le délai de recours. Elles doivent également indiquer les noms, qualités et adresses des parties auxquelles elles ont été notifiées.

Art. 48. - Toute personne physique ou morale qui s'estime lésée par une pratique restrictive telle que prévue par la présente ordonnance, peut saisir pour réparation la juridiction compétente conformément à la législation en vigueur.

Art. 49. - Les décisions rendues par le Conseil de la concurrence et la Cour d'Alger en matière de concurrence sont publiées par le ministre chargé du commerce au bulletin officiel de la concurrence. Des extraits des décisions peuvent être publiés par voie de presse ou sur tout autre support d'information.

Chapitre III **De la procédure d'instruction**

Art. 50. - Le rapporteur instruit les demandes et les plaintes relatives aux pratiques restrictives que lui confie le président du Conseil de la concurrence.

S'il conclut à l'irrecevabilité, conformément aux dispositions de l'article 44 (alinéa 3) ci-dessus, il en informe par avis motivé le Conseil de la concurrence.

Les affaires relevant de secteurs d'activité placés sous le contrôle d'une autorité de régulation sont instruites en coordination avec les services de l'autorité concernée.

Art. 51. - Le rapporteur peut, sans se voir opposer le secret professionnel, consulter tout document nécessaire à l'instruction de l'affaire dont il a la charge.

Il peut exiger la communication en quelque main qu'ils se trouvent, et procéder à la saisie des documents de toute nature, propres à faciliter l'accomplissement de sa mission. Les documents saisis sont joints au rapport ou restitués à l'issue de l'enquête.

Le rapporteur peut recueillir tous les renseignements nécessaires à son enquête auprès des entreprises ou auprès de toute autre personne. Il fixe les délais dans lesquels les renseignements doivent lui parvenir.

Art. 52. - Le rapporteur établit un rapport préliminaire contenant l'exposé des faits ainsi que les griefs retenus. Le rapport est notifié par le président du Conseil aux parties concernées, au ministre chargé du commerce, ainsi qu'aux parties intéressées, qui peuvent formuler des observations écrites dans un délai n'excédant pas trois (3) mois.

Art. 53 . - Les auditions auxquelles procède, le cas échéant, le rapporteur, donnent lieu à l'établissement d'un procès-verbal signé par les personnes entendues. En cas de refus de signer, il en est fait mention par le rapporteur.

Les personnes entendues peuvent être assistées d'un conseil.

Art. 54. - Au terme de l'instruction, le rapporteur dépose auprès du Conseil de la concurrence un rapport motivé contenant les griefs retenus, la référence aux infractions commises et une proposition de décision ainsi que, le cas échéant, les propositions de mesures réglementaires conformément aux dispositions de l'article 37 ci-dessus.

Art. 55. - Le président du Conseil de la concurrence notifie le rapport aux parties et au ministre chargé du commerce qui peuvent présenter des observations écrites dans un délai de deux (2) mois. Il leur indique également la date de l'audience se rapportant à l'affaire.

Les observations écrites citées à l'alinéa 1 ci-dessus peuvent être consultées par les parties quinze (15) jours avant la date de l'audience.

Le rapporteur fait valoir ses observations sur les éventuelles observations écrites citées à l'alinéa 1 ci-dessus.

Chapitre IV

Des sanctions des pratiques restrictives et des concentrations

Art. 56. - Les pratiques restrictives, telles que visées à l'article 14 ci-dessus, sont sanctionnées par une amende ne dépassant pas 7% du montant du chiffre d'affaires hors taxes réalisé en Algérie au cours du dernier exercice clos. Si le contrevenant est une personne physique ou morale ou une organisation professionnelle n'ayant pas de chiffre d'affaires propre, le maximum de l'amende est de trois millions de dinars (3.000.000 DA).

Art. 57. - Est punie d'une amende de deux millions de dinars (2.000.000 DA), toute personne physique qui aura pris part personnellement et frauduleusement à l'organisation et la mise en œuvre de pratiques restrictives telles que définies par la présente ordonnance.

Art. 58. - Si les injonctions ou les mesures provisoires prévues aux articles 45 et 46 ci-dessus ne sont pas respectées dans les délais fixés, le Conseil de la concurrence peut prononcer des astreintes à raison d'un montant de cent mille dinars (100.000 DA) par jour de retard.

Art. 59. - Le Conseil de la concurrence peut décider, sur rapport du rapporteur, d'une amende d'un montant maximum de cinq cent mille dinars (500.000 DA) contre les entreprises qui, délibérément ou par négligence, fournissent un renseignement inexact ou incomplet à une demande de renseignements conformément aux dispositions de l'article 51 ci-dessus ou ne fournissent pas le renseignement demandé dans les délais fixés par le rapporteur.

Le Conseil peut en outre décider d'une astreinte de cinquante mille dinars (50.000 DA) par jour de retard.

Art. 60. - Le Conseil de la concurrence peut décider de réduire le montant de l'amende ou ne pas prononcer d'amende contre les entreprises qui, au cours de l'instruction de l'affaire les concernant, reconnaissent les infractions qui leur sont reprochées, collaborent à l'accélération de celle-ci et s'engagent à ne plus commettre d'infractions liées à l'application des dispositions de la présente ordonnance.

Les dispositions de l'alinéa 1 ci-dessus ne sont pas applicables en cas de récidive quelle que soit la nature de l'infraction commise.

Art. 61. - Les opérations de concentration soumises aux dispositions de l'article 17 ci-dessus et réalisées sans autorisation du Conseil de la concurrence, sont punies d'une sanction pécuniaire pouvant aller jusqu'à 7 % du chiffre d'affaires hors taxes réalisé en Algérie, durant le dernier exercice clos, pour chaque entreprise partie à la concentration ou de l'entreprise résultant de la concentration.

Art. 62. - En cas de non respect des prescriptions ou engagements mentionnés à l'article 19 ci-dessus, le Conseil de la concurrence peut décider une sanction pécuniaire pouvant aller jusqu'à 5 % du chiffre d'affaires hors taxes réalisé en Algérie durant le dernier exercice clos de chaque entreprise partie à la concentration, ou de l'entreprise résultant de la concentration.

Chapitre V

De la procédure de recours contre les décisions du Conseil de la concurrence

Art. 63. - Les décisions du Conseil de la concurrence peuvent faire l'objet d'un recours auprès de la Cour d'Alger, statuant en matière commerciale, par les parties concernées ou par le ministre chargé du commerce, dans un délai ne pouvant excéder un mois à compter de la date de réception de la décision. Le recours formulé contre les mesures provisoires visées à l'article 46 ci-dessus est introduit dans un délai de huit (8) jours.

Le recours auprès de la Cour d'Alger n'est pas suspensif des décisions du Conseil de la concurrence. Toutefois, le président de la Cour d'Alger peut décider, dans un délai n'excédant pas quinze (15) jours, de surseoir à l'exécution des mesures prévues aux articles 45 et 46 ci-dessus prononcées par le Conseil de la concurrence, lorsque des circonstances ou des faits graves l'exigent.

Art. 64 . - Le recours auprès de la Cour d'Alger contre les décisions du Conseil de la concurrence est formulé, par les parties à l'instance, conformément aux dispositions du code de procédure civile.

Art. 65 . - Dès le dépôt de la requête de recours, une copie est transmise au président du Conseil de la concurrence et au ministre chargé du commerce lorsque ce dernier n'est pas partie à l'instance.

Le président du Conseil de la concurrence transmet au président de la Cour d'Alger le dossier de l'affaire, objet du recours, dans les délais fixés par ce dernier.

Art. 66. - Le magistrat rapporteur transmet au ministre chargé du commerce et au président du Conseil de la concurrence pour observations éventuelles copie de toutes les pièces nouvelles échangées entre les parties à l'instance.

Art. 67. - Le ministre chargé du commerce et le président du Conseil de la concurrence peuvent présenter des observations écrites dans les délais fixés par le magistrat rapporteur.

Ces observations sont communiquées aux parties à l'instance.

Art. 68 . - Les parties en cause devant le Conseil de la concurrence et qui ne sont pas parties au recours, peuvent, se joindre à l'instance ou être mises en cause à tous les moments de la procédure en cours conformément aux dispositions du code de procédure civile.

Art. 69 . - La demande de sursis à exécution, prévue à l'alinéa 2 de l'article 63 ci-dessus, est formulée conformément aux dispositions du code de procédure civile.

La demande de sursis est introduite par le demandeur au recours principal ou par le ministre chargé du commerce. Elle n'est recevable qu'après formation du recours et doit être accompagnée de la décision du Conseil de la concurrence.

Le président de la Cour d'Alger requiert l'avis du ministre chargé du commerce sur la demande de sursis à exécution, lorsqu'il n'est pas partie à l'instance.

Art. 70 . - Les arrêts de la Cour d'Alger sont transmis au ministre chargé du commerce et au président du Conseil de la concurrence.

TITRE IV DISPOSITIONS TRANSITOIRES ET FINALES

Art. 71. - Le recouvrement des montants des amendes et des astreintes décidées par le Conseil de la concurrence s'effectue comme étant des créances de l'Etat.

Art. 72. - Les affaires introduites devant le Conseil de la concurrence et la Cour d'Alger avant l'entrée en vigueur de la présente ordonnance continuent d'être instruites conformément aux dispositions de l'ordonnance 95-06 du 23 Chaâbane 1415 correspondant au 25 janvier 1995 relative à la concurrence et aux textes pris pour son application.

Art. 73. - Sont abrogées toutes dispositions contraires à celles de la présente ordonnance, notamment les dispositions de l'ordonnance n 95-06 du 23 Chaâbane 1415 correspondant au 25 janvier 1995, susvisée.

A titre transitoire, demeurent en vigueur les dispositions relatives au titre IV, au titre V et au titre VI de l'ordonnance n 95 - 06 du 23 Chaâbane 1415 correspondant au 25 janvier 1995 susvisée ainsi que les textes pris pour son application, à l'exception:

- du décret exécutif n2000-314 du 16 Rajab 1421 correspondant au 14 octobre 2000 définissant les critères conférant à un agent économique la position dominante ainsi que ceux qualifiant les actes constituant des abus de position dominante;
- du décret exécutif n2000-315 du 16 Rajab 1421 correspondant au 14 octobre 2000 définissant les critères d'appréciation des projets de concentrations ou des concentrations, qui sont abrogés.

Art. 74. - La présente ordonnance sera publiée au *Journal officiel* de la République algérienne démocratique et populaire.

Fait à Alger, le 19 Jomada El Oula 1424 correspondant au 19 juillet 2003.

Abdelaziz BOUTEFLIKA.

**Décret exécutif No.05-175 du 3 Rabie Ethani 1426 correspondant au 12 mai 2005
fixant les modalités d'obtention de l'attestation négative relative
aux ententes et à la position dominante sur le marché.**

(Parue au journal officiel No. 35 du 18 mai 2005)

Le Chef du Gouvernement,

Sur le rapport du ministre du commerce,

Vu la Constitution, notamment ses articles 85-4 et 125 (alinéa 2);

Vu l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence, notamment son article 8;

Vu le décret présidentiel n04-136 du 29 Safar 1425 correspondant au 19 avril 2004 portant nomination du Chef du Gouvernement;

Vu le décret présidentiel n05-161 du 22 Rabie El Aouel 1426 correspondant au 1^{er} mai 2005 portant nomination des membres du Gouvernement;

Après avis du conseil de la concurrence;

Décrète :

Article 1er. - En application des dispositions de l'article 8 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée, le présent décret a pour objet de fixer les modalités d'introduction de la demande d'obtention de l'attestation négative relative aux ententes et à la position dominante sur le marché.

Art. 2. - L'attestation négative citée à l'article 1er ci-dessus est une attestation délivrée par le conseil de la concurrence, sur demande des entreprises intéressées, par laquelle le conseil constate qu'il n'y a pas lieu, pour lui, d'intervenir à l'égard des pratiques prévues aux articles 6 et 7 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée.

Art. 3. - La demande d'obtention de l'attestation négative est introduite par l'entreprise ou les entreprises concernées. Elle peut être introduite par les représentants de ces entreprises qui doivent présenter un mandat écrit attestant des pouvoirs de représentation qui leur sont conférés.

Les entreprises étrangères concernées ou leurs représentants mandatés doivent indiquer une adresse en Algérie.

Art. 4. - Le dossier relatif à la demande d'obtention de l'attestation négative est constitué des pièces suivantes :

- une demande datée et signée par les entreprises concernées ou leurs représentants dûment mandatés dont le modèle est annexé au présent décret;
- un formulaire de renseignements joint à la demande, intitulé "formulaire de renseignements pour obtention d'attestation négative" dont le modèle est annexé au

présent décret;

- une justification des pouvoirs conférés à la personne ou aux personnes mandatée (s) qui introduisent la demande d'obtention de l'attestation négative;
- une copie certifiée conforme des statuts de l'entreprise ou des entreprises parties à la demande d'obtention de l'attestation négative;
- des copies des trois (3) derniers bilans, visées et certifiées par le commissaire aux comptes ou, dans le cas où l'entreprise ou les entreprises concernée (s) n'a ou n'ont pas trois (3) années d'existence, une copie du dernier bilan.

En cas de demande conjointe, un seul dossier peut être présenté.

Art. 5. - Le dossier visé à l'article 4 ci-dessus est transmis en cinq (5) exemplaires. Les documents joints à la demande sont des originaux ou, s'il s'agit de copies, ils doivent être certifiés conformes aux originaux.

Le dossier de demande d'obtention d'attestation négative est déposé contre accusé de réception au secrétariat général du conseil de la concurrence ou transmis par envoi recommandé.

La demande reçoit un numéro d'inscription porté sur l'accusé de réception.

Art. 6. - Le rapporteur désigné pour l'instruction de la demande peut demander aux entreprises concernées ou à leurs représentants mandatés, la communication de renseignements ou de documents complémentaires qu'il juge nécessaires.

Art. 7. - Les entreprises concernées ou les représentants mandatés peuvent demander à ce que certaines informations ou certains documents fournis soient couverts par le secret des affaires. Dans ce cas, les informations et les documents concernés sont transmis séparément et doivent porter la mention "secret d'affaires" sur chaque page.

Art. 8. - Le présent décret sera publié au *Journal officiel* de la République algérienne démocratique et populaire.

Fait à Alger, le 3 Rabie Ethani 1426 correspondant au 12 mai 2005.

Ahmed OUYAHIA.

ANNEXE 1

Conseil de la concurrence
Secrétariat général

DEMANDE D'OBTENTION D'UNE ATTESTATION NEGATIVE

(Conformément aux dispositions de l'article 8 de l'ordonnance n03-03
du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003
relative à la concurrence)

La présente demande doit être accompagnée du formulaire contenant les renseignements demandés, les pièces exigées et les documents joints. Le dossier est transmis en cinq (5) exemplaires par dépôt, contre accusé de réception, au secrétariat général du conseil de la concurrence ou par envoi recommandé. La demande doit préciser:

1. L'identité du demandeur

1.1 Indiquer la dénomination ou la raison sociale complète, la forme juridique, et l'adresse complète de l'entreprise;

1.2 Si la demande est introduite par un représentant, indiquer le nom et le prénom, l'adresse et la qualité du représentant et joindre le mandat de représentation;

1.3 Indiquer une adresse en Algérie.

2. L'identité des autres participants à la demande

2.1 Indiquer la dénomination ou la raison sociale complète, la forme juridique et l'adresse complète de chaque participant;

2.2 Indiquer s'ils sont d'accord sur la totalité ou partie de l'objet de la demande.

3. L'objet de la demande Indiquer si la demande porte : 3.1 sur une entente;

3.2 sur une position dominante.

La demande doit être accompagnée de la déclaration des soussignés libellée comme suit :

Déclaration des soussignés

Les soussignés déclarent que les renseignements fournis ci-dessus, ainsi que les renseignements fournis dans toutes les pièces et documents joints à la présente sont sincères et conformes aux faits et que les estimations, chiffres et appréciations sont indiqués et fournis de la façon la plus proche de la réalité. Ils ont pris connaissance des dispositions de l'article 59 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence.

Lieu et date

Signature et qualité

ANNEXE 2

Conseil de la concurrence
Secrétariat général

FORMULAIRE DE RENSEIGNEMENTS POUR L'OBTENTION D'UNE ATTESTATION NEGATIVE

(Conformément aux dispositions de l'article 8 de l'ordonnance n03-03
du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003
relative à la concurrence)

1. Données relatives à l'entreprise ou aux entreprises parties à la demande

1.1 Position de l'entreprise ou des entreprises sur le marché;

- indiquer si l'entreprise a des liens, au sens de l'article 16 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence; dans l'affirmative, indiquer la dénomination complète ou la raison sociale de chaque entreprise et son dernier bilan.

1.2 Chiffre d'affaires

- indiquer le chiffre d'affaires réalisé au cours de l'exercice précédent de chaque entreprise partie à la demande, sur le marché algérien, et le cas échéant, sur les marchés extérieurs;
- indiquer pour chaque entreprise le chiffre d'affaires réalisé pour les biens et services concernés par la demande.

2. Marché concerné

2.1 Nature des biens ou des services concernés par la demande :

- indiquer les biens et services de substitution;
- indiquer si les biens et services sont soumis à une réglementation particulière;
- indiquer si les biens et services sont libres à l'importation;
- les noms et adresses des entreprises placées dans le même marché
- indiquer les facilités ou contraintes liées à l'accès au marché;
- indiquer les noms et adresses des clients sur le même marché;
- indiquer la dimension géographique.

3. Motifs de la demande

3.1 Indiquer l'objet précis de la demande au regard des dispositions des articles 6 et 7 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence;

3.2 Indiquer les avantages que procure l'objet de la demande au profit des entreprises concernées;

3.3 Indiquer la durée de la demande;

3.4 Indiquer les raisons pour lesquelles l'objet de la demande pourrait affecter la concurrence;

3.5 Indiquer les raisons pour lesquelles le comportement de l'entreprise ou des entreprises concernées n'a pas pour objet ou pour effet d'empêcher, de restreindre ou de fausser le libre jeu de la concurrence dans un même marché;

3.6 Indiquer les avantages que la demande est susceptible de procurer à la concurrence, aux utilisateurs et aux consommateurs.

Décret exécutif No. 05-219 du 15 Joumada El Oula 1426 correspondant au 22 juin 2005 relatif aux autorisations des opérations de concentration.

(Parue au journal officiel No. 43 du 22 juin 2005)

Le Chef du Gouvernement,

Sur le rapport du ministre du commerce,

Vu la Constitution, notamment ses articles 85-4 et 125 (alinéa 2);

Vu l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence, notamment son article 22;

Vu le décret présidentiel n04-136 du 29 Safar 1425 correspondant au 19 avril 2004 portant nomination du Chef du Gouvernement;

Vu le décret présidentiel n05-161 du 22 Rabie El Aouel 1426 correspondant au 1er mai 2005 portant nomination des membres du Gouvernement;

Après avis du conseil de la concurrence;

Décète:

Article 1er. - En application des dispositions de l'article 22 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée, le présent décret a pour objet de fixer les conditions et les modalités de demande d'autorisation des opérations de concentration.

Art. 2. - Les dispositions du présent décret s'appliquent à toutes les opérations de concentration susceptibles de porter atteinte à la concurrence au sens des dispositions des articles 17 et 18 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée.

Art. 3. - Les opérations de concentration visées à l'article 2 ci-dessus doivent faire l'objet d'une demande d'autorisation par leurs auteurs auprès du conseil de la concurrence, conformément aux dispositions fixées par le présent décret.

Art. 4. - La demande d'autorisation d'une opération de concentration portant sur une fusion ou sur la création d'une entreprise commune, au sens des dispositions des alinéas 1 et 3 de l'article 15 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée, est formulée conjointement par les parties à la concentration.

Dans le cas où l'opération de concentration vise la prise de contrôle au sens des dispositions de l'alinéa 2 de l'article 15 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée, la demande d'autorisation est formulée par la ou les personne (s) qui réalise(nt) la concentration.

Art. 5. - La demande est introduite par les entreprises concernées par l'opération de concentration ou par leurs représentants qui doivent présenter leurs mandats écrits attestant les pouvoirs de représentation qui leur sont conférés.

Les entreprises concernées ou leurs représentants dûment mandatés doivent indiquer une adresse en Algérie.

Art. 6. - Le dossier relatif à la demande d'autorisation est composé des pièces suivantes:

- la demande dont le modèle est annexé au présent décret, datée et signée par les entreprises concernées ou leurs représentants dûment mandatés;
- le formulaire de renseignements dont le modèle est annexé au présent décret;
- la justification des pouvoirs conférés à la personne ou aux personnes qui introduisent la demande;
- une copie certifiée conforme des statuts de l'entreprise ou des entreprises parties à la demande;
- les copies des trois (3) derniers bilans visées et certifiées par le commissaire aux comptes ou, dans le cas où l'entreprise ou les entreprises concernées n'ont pas trois (3) années d'existence, une copie du dernier bilan;
- le cas échéant, une copie légalisée des statuts de l'entreprise résultant de l'opération de concentration.

En cas d'une demande conjointe, un seul dossier est présenté.

Art. 7. - La demande et les annexes qui l'accompagnent sont transmises en cinq (5) exemplaires. Les documents joints à la demande sont des originaux ou doivent être certifiés conformes aux originaux lorsqu'il s'agit de copies.

La demande et les documents sont déposés contre accusé de réception au secrétariat général du conseil de la concurrence ou transmis par envoi recommandé.

La demande reçoit un numéro d'inscription qui est porté sur l'accusé de réception.

Art. 8. - Le rapporteur chargé de l'instruction de la demande peut exiger des entreprises concernées ou de leurs représentants mandatés, la communication de renseignements et/ou de documents complémentaires qu'il juge nécessaires.

Art. 9. - Les entreprises concernées ou leurs représentants mandatés peuvent demander à ce que certaines informations ou certains documents fournis soient couverts par "le secret des affaires". Dans ce cas, les informations et les documents concernés sont transmis séparément et doivent porter la mention "secret d'affaires" sur chaque page.

Art. 10. - Le présent décret sera publié au *Journal officiel* de la République algérienne démocratique et populaire.

Fait à Alger, le 15 Jomada El Oula 1426 correspondant au 22 juin 2005.

Ahmed OUYAHIA.

ANNEXE I

Conseil de la concurrence

Secrétariat général

Demande d'une autorisation d'une opération de concentration

La demande doit préciser les informations ci-après:

1. L'identité du ou des demandeur (s):

1.1 - dénomination ou raison sociale complète, forme juridique et adresse;

1.2 - si la demande est introduite par un représentant dûment mandaté, indiquer le nom et le prénom, l'adresse et la qualité du représentant et joindre le mandat de représentation;

1.3 - indiquer une adresse en Algérie.

2. L'identité des autres participants à la demande:

2.1 - indiquer la dénomination ou la raison sociale, la forme juridique et l'adresse complète;

2.2 - si la représentation est commune, indiquer le nom et le prénom, la qualité du représentant dûment mandaté et joindre le mandat de représentation.

3. L'objet de la demande:

3.1 - indiquer si la demande porte:

- sur une fusion;
- sur une création d'une entreprise commune;
- sur un contrôle;

3.2 - indiquer si la concentration porte sur l'ensemble ou sur des parties des entreprises concernées.

4. La déclaration des soussignés:

La demande doit être accompagnée de la déclaration des soussignés qui précise:

« Les soussignés déclarent que les renseignements fournis ci-dessus, ainsi que les renseignements fournis dans toutes les pièces et documents joints à la présente sont sincères et conformes aux faits et que les estimations, chiffres et appréciations sont indiqués et fournis de la façon la plus proche de la réalité. Ils ont pris connaissance des dispositions de l'article 59 de l'ordonnance n03-03 du 19 Jomada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence ».

Lieu et date

Signature et qualité.....

ANNEXE 2

Formulaire de renseignements relatif à une opération de concentration

1. Données relatives aux entreprises parties à la concentration:

1.1 Activité concernée:

- indiquer la nature précise de l'activité concernée par la demande;
- indiquer la nature des autres activités des entreprises;
- indiquer pour les trois (3) années précédentes le volume de production de l'activité concernée et le volume de production des autres activités.

1.2 Chiffre d'affaires de l'activité concernée:

- indiquer pour les trois (3) années précédentes le chiffre d'affaires de l'activité concernée;
- indiquer pour les trois (3) années précédentes le chiffre d'affaires global des entreprises concernées;
- le cas échéant, indiquer pour les trois (3) années précédentes le chiffre d'affaires réalisé à l'étranger de l'activité concernée et le chiffre d'affaires global des activités concernées de chacune des entreprises.

1.3 Structure du capital social de chaque entreprise:

- fournir la liste des dirigeants de chaque entreprise;
- indiquer s'il existe des liens personnels, financiers et économiques entre les entreprises concernées;
- indiquer si, durant les trois (3) dernières années, les entreprises concernées ont acquis des activités ou cédé des activités;
- indiquer les principaux fournisseurs et clients des entreprises concernées;
- indiquer s'il existe des liens personnels, économiques ou financiers entre les entreprises et leurs fournisseurs et clients.

2 Données relatives à la concentration:

2.1 Nature de la concentration:

- indiquer si la concentration porte sur l'ensemble ou sur des parties des entreprises en cause;
- indiquer la date de réalisation effective de la concentration.

2.2 Structure économique et financière de la concentration:

- indiquer la structure de propriété et de contrôle proposée après la réalisation de la concentration;
- indiquer si la concentration bénéficie d'un apport financier ou d'un crédit.

2.3 But de la concentration:

- indiquer les secteurs économiques concernés par la concentration.

3 Données relatives au marché.

3.1 Marchés des produits ou services en cause:

- indiquer les marchés des produits ou services de substitution;
- indiquer la zone géographique sur laquelle les entreprises concernées offrent leurs produits ou services.

3.2 Incidence de la concentration sur le marché des produits ou services en cause:

- indiquer les marchés sur lesquels la concentration aurait une incidence;
- indiquer la structure du marché des produits ou services en cause;
- indiquer s'il existe des barrières à l'accès au marché concerné;
- indiquer dans quelle mesure la concentration pourrait affecter la concurrence;
- indiquer les mesures à prendre pour atténuer les effets de la concentration sur la concurrence.

AUSTRIA

COMMENTARY BY THE GOVERNMENT OF AUSTRIA ON AUSTRIAN COMPETITION LEGISLATION

Summary of the latest reform of Austrian competition law:

I. The 2005 reform of the Austrian Cartel Act

On 1 May 2004 Council Regulation (EC) 1/2003 on the implementation of EC competition rules entered into force. Although there was no legal obligation to align Austrian national law to the new EC law for various reasons it was decided to reform and modernize the Austrian Cartel Act (Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen).

Major changes: The Austrian typology of cartels with its differentiated rules was replaced by a general prohibition of restrictive practices following the example of Article 81 EC Treaty. The national system of cartel notifications was abolished and a system of legal exception was implemented. Under certain conditions cartels are exempted from the above mentioned ban. The relevant provision adopts the wording of Article 81 para. 3 of the EC Treaty. There is still the possibility of block exemption regulations but they are only of declarative character. They ascertain what is allowed anyway by the law.

Mergers have to be notified to the Federal Competition Authority instead of the Cartel Court but the latter remains the institution which will take decisions in cartel matters. Two of the threshold levels which demand such a notification have been raised. Cooperative ventures are subject to merger control if they permanently fulfil all functions of an independent economic entity. The Cartel Court may not only rule that an infringement of the Cartel Act has to be stopped and give instructions to the concerned enterprises but instead also declare commitment declarations of the concerned enterprises binding if it can be expected that these commitment declarations will prevent further infringements. The reformed Cartel Act entered into force on 1 January 2006.

II. Amendments of the Austrian Competition Act

- (a) The 2005 amendment as a consequence of Regulation (EC) 1/2003 which introduced a new legal framework it was also decided to amend the Competition Act in order to allow a smooth execution of Austrian as well as of European competition law. One of the most important changes of the recent reform was the implementation of a leniency programme. The Federal Competition Authority may refrain from applying to impose an administrative fine on an undertaker or on an association of undertakings if the following conditions are met:

The enterprise has finished participating in a cartel in time. It has informed the FCA, before it found out about the facts of the case itself. It cooperates with the FCA without restrictions. It hasn't forced others to participate in the cartel.

If the FCA already has known the facts of the case it may apply for a reduced fine. For reasons of transparency the FCA laid down its practice in implementing the leniency programme in a manual. If an undertaker wants to call upon the leniency programme the authority has to tell him in a not binding notice if it will apply the programme in this case. To fulfil its duties the Federal Competition Authority may demand from undertakers and associations of undertakers to provide information within a reasonable time. Furthermore it may examine business documents and demand any information required for the investigation on site. The Cartel Court has to instruct the undertaker by judicial decree to provide the requested information and the business documents if the FCA submits an application to do so. If the Cartel Court rules a house search not only business premises may be searched but also private rooms. Due to transparency reasons the FCA has to publish its own and the Public Cartel Prosecutor's (PCP "Bundeskartellanwalt") applications to the Cartel Court concerning a suspected infringement of Austrian or European Cartel Law. Such a notice must not contain any business secrets.

The Competition Act provides that the FCA is the competent authority to exchange information and to cooperate with the European Commission and the other Competition Authorities within the European Competition Network. This amendment of the Federal Competition Act entered into force on 1 January 2006, at the same time as the reformed Cartel Act.

- (b) The 2006 amendments of the Unfair Competition Act and the Competition Act. The Austrian Unfair Competition Act (Bundesgesetz gegen den unlauteren Wettbewerb) provides that in some cases of unfair commercial practices not only competitors but also the Austrian Federal Chamber of Labour, the Austrian Federal Economic Chamber, the Austrian Chamber of Agriculture and the Austrian Trade Union Federation may file for injunctive relief. Frequently the FCA is confronted with cases in which provisions against cartels or against the abuse of dominant positions cannot be applied but there might be an infringement of the Unfair Competition Act. With the latest amendment of the Unfair Competition Act and the Competition Act the FCA too has been empowered to file for injunctive relief in the above mentioned cases. These amendments entered into force on 28 June 2006.

CARTEL ACT 2005 AND COMPETITION ACT 2002

The text of the Cartel Act 2005 (Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen) and the Competition Act 2002 (Bundesgesetz über die Einrichtung einer Bundeswettbewerbsbehörde) are available (in German) at the Internet website <http://www.bwb.gv.at/BWB/Gesetze/default.htm>

BRAZIL

COMMENTARY BY THE GOVERNMENT OF BRAZIL ON THE MAIN PROVISIONS OF LAW 8.884/94

The BCPS consists of three bodies:

(1) CADE, the Administrative Council for Economic Defence, an autonomous agency which has dispositive adjudicative authority in BCPS cases; (2) SDE, the Secretariat of Economic Law in the Ministry of Justice, which has the principal investigative role; and (3) SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in BCPS proceedings.

The substantive provisions of Brazil's competition law appear in Articles 20, 21, and 54 of Law 8.884/94. Articles 20 and 21 deal with all types of anticompetitive conduct, other than mergers, while mergers, acquisitions, and similar transactions are addressed in Article 54.

Article 20 contains general language providing that any act in any way intended or otherwise able to produce the effects listed therein, even if any such effects are not achieved, shall be deemed a violation of the economic order. The specified effects are (1) to limit, restrain or in any way injure open competition or free enterprise; (2) to control a relevant market of a certain product or service; (3) to increase profits on a discretionary basis; and (4) to abuse one's market control. The article specifies that the "market control" violation described in item (2) does not include control achieved by means of "competitive efficiency." Market control is "presumed" when a company or group of companies possesses a 20 per cent share, and vests CADE with authority to change the 20 per cent presumption with respect to specific sectors of the economy.

Article 21 contains a lengthy but non-exclusive list of acts that are considered unlawful if they produce the effects enumerated in Article 20. The listed practices include various kinds of horizontal and vertical agreements and unilateral abuses of market power. With respect to horizontal agreements, the list covers collusion among competitors, including agreements to fix prices or terms of sale, divide markets, rig bids, and limit research and development. The listed vertical agreements include resale price restraints and other restrictions affecting sales to third parties (including limits on sales volumes and profit margins), as well as price discrimination and tying.

As to unilateral conduct, the list specifies various actions to exclude or disadvantage new entrants or existing rivals, including refusals to deal and limitations on access to inputs or distribution channels. Other unilateral practices cited in Article 21 are actions to impose unreasonable contractual terms or conditions, bar the use of industrial or intellectual property, unreasonably sell products below cost, discontinue production or other business activities without good cause, affect third-party prices by deceitful means, hoard or destroy raw materials and intermediate or finished goods (including agricultural products), require or grant exclusivity in mass media advertisements, impair the operation of manufacturing or distribution equipment, impose abusive prices, or unreasonably increase the price of a product or service.

Enforcement guidelines for Articles 20 and 21 were issued in 1999 as attachments to CADE Resolution 20. This resolution establishes procedures applicable to the presentation of a proposed case to the Council by the assigned Reporting Commissioner, and requires that the commissioner verify whether the proceeding is duly supported in accordance with the guidelines. The Attachments to the resolution establish a standard analytic scheme for restrictive practices. According to Attachment I, a finding of illegality for either horizontal or vertical restrictions entails establishing the existence of market power in the relevant market of origin, as well as an effect on a substantial share of the market that is the target of such practices. Annex II elaborates on these themes by outlining the basic criteria for the analysis of restrictive trade practices, and describing the specific steps to be followed. They include:

(1) Identifying the precise practice at issue and assuring that there is an adequate evidentiary basis to conclude that the practice was implemented;

(2) Determining the existence of a dominant position, which involves (a) defining the relevant market in both product and geographic dimensions, by considering actual or potential product or service substitution by buyers; (b) determining market shares and measures of concentration, using either or both of the additive market share (CRx) or the Herfindahl-Hirschman (HHI) indices; (c) analysing barriers to entry; and

(3) Weighing the economic efficiencies likely to result from the practice against the actual or prospective competitive harm.

In making market power determinations, CADE always undertakes a case specific analysis, and has neither invoked the 20 per cent market control presumption in Article 20 nor exercised the power to alter that percentage for a specific market. As a practical matter, a market share below 20 per cent is presumed to reflect the absence of market power. With respect to cartels, although the guidelines do not establish a “per se rule,” they imply that cartels will be strictly scrutinised by noting that non-cartel agreements entail fewer anticompetitive effects and more pro-competitive benefits and therefore require “a more judicious application” of the rule of reason. In fact, in cartel cases, CADE assumes that anticompetitive effects exist once the existence of market power is demonstrated.

Law 8,884/94 vests SDE with primary responsibility for monitoring markets and identifying possible violations (Art. 14). The SDE Secretary may initiate a “preliminary investigation” either *ex officio* or upon a complaint or request of an interested party (including CADE, SEAE and regulatory agencies), where the available evidence does not warrant immediate commencement of more formal “administrative proceeding” (Art. 30). Within 60 days thereafter (a period which may be extended by requests for information), the Secretary must decide whether to close the preliminary investigation or initiate an administrative proceeding (Art. 31). A determination to close the investigation requires approval by CADE.

The “administrative proceeding,” which is essentially a process for developing a formal evidentiary record, must be instituted within eight days of closing the preliminary investigation or of receipt of a sufficiently well founded complaint (Art. 32). SEAE is notified when such a proceeding is initiated and may then elect to provide an opinion to SDE on the matter (Art. 38). The defendant party is formally advised of the nature of the alleged violation and is summoned to submit a defence within fifteen days (Art. 33).

After submission of the defence, a forty-five day period commences, during which the defendant may submit additional information and also request a hearing before SDE of up to three witnesses (Art. 37). Within five days after close of the investigative phase, the defendant presents its final arguments, and the SDE Secretary thereafter issues a written report containing findings and a recommendation that the Plenary either dismiss the case or find a violation of law (Art. 39). The case file, including any recommendation prepared by SEAE, is then forwarded to CADE for judgement.

All of SDE's information gathering powers may be invoked during both preliminary investigations and formal administrative proceedings (Art. 35 §1), which include the possibility to issue search warrants with 24 hours advance notice (Art. 35 §2), and the request by SDE and SEAE to the Federal Attorney to obtain a judicial warrant to execute unannounced search warrants ("dawn raids") (Art. 35-A). Further, Article 35-B authorises SDE to enter into leniency agreements under which individuals and corporations, in return for their cooperation in prosecuting a case, are excused from some or all of the penalties for unlawful conduct under Law 8884. The leniency provision is supplemented by new Article 35-C, which provides that successful fulfilment of a leniency agreement will also protect cooperating parties from criminal prosecution under Brazil's economic crimes law (Law 8137/90).

A leniency agreement may be executed if all of the following conditions are met: (1) the company or individual is the first to report with respect to the anti-competitive practice under investigation, (2) the company or individual ceases all involvement in the anti-competitive practice as of the date on which the agreement is proposed, (3) SDE does not already possess sufficient evidence to convict the company or the individual at the time the agreement is proposed, and (4) the company or individual confesses to having participated in the unlawful practice and effectively cooperates with the government's investigations (Art. 35-B, §2). Leniency is not available to the companies or individuals that instigated the illegal conduct (Art. 35-B, §1).

The degree of leniency accorded to a cooperating party depends on whether SDE was previously aware of the illegal conduct at issue. If SDE was unaware, the party is entitled to freedom from any penalty in the ensuing CADE proceeding. If SDE was previously aware, CADE is authorised to reduce the applicable penalty by one to two-thirds, depending on the effectiveness of the cooperation and the "good faith" of the party in complying with the leniency agreement (Art. 35-B, §4). In the latter instance, the penalty imposed cannot in any event be more severe than the mildest penalty imposed on any of the other participants in the illegal conduct (Art. 35-B, §5). A leniency agreement shelters the directors and managers of the cooperating firm if those individuals sign the agreement and fulfil the requisite obligations (Art. 35-B, §6).

Interim relief during the SDE proceedings is available under Law 8884. The SDE Secretary, either *ex officio* or upon the request of the CADE Attorney General, may issue a preventive order during an administrative proceeding if the Secretariat finds sound reason to believe that the defendant's conduct either caused or may cause irreparable or substantial damages to the market or may render the final outcome of the proceedings ineffective (Art. 52). The order is immediately effective, but may be appealed to CADE and thereafter to the courts. Once a case is before CADE, Article 52 also permits the Reporting Commissioner to issue a preventive order, again subject to review by the Council.

Consent settlements in conduct cases may be arranged under Article 53 of the law, which provides that either SDE (subject to approval by CADE) or CADE itself may enter into an agreement with a defendant to resolve an administrative proceeding. Under such a settlement, the case is suspended if the defendant agrees to cease and desist from the conduct at issue and to provide periodic compliance reports. The agreement does not constitute an admission of liability or guilt by the defendant, the case will be reopened and fines assessed if the settlement's terms are subsequently violated, as well as a fine will be applicable if, at the end of the process, the party is found guilty on economic infraction. The agreement applies for a specified period of time, at the end of which the underlying administrative case is dismissed if the agreement has been honoured. The SDE ordinance also requires that settlement agreements be posted for 15 days of public comment before acceptance by SDE and transmittal to CADE for review (Art. 41).

Nonetheless, such settlements may not be accepted with respect to horizontal violations involving price fixing, bid-rigging, market division, and similar conduct (Art. 53 §5). SDE regulations provide that an Article 53 settlement is not available if, at the time it is proposed, SDE already has sufficient evidence to convict the respondent of the violation under investigation.

When CADE receives the SDE report-recommending disposition of a matter, the case is assigned on a random basis to one of the six commissioners, who is designated as the Reporting Commissioner. The CADE Attorney General is required to provide an opinion on the case within 20 days (Art. 42). The Attorney General's opinion generally focuses on the legal aspects of the matter. Under CADE Resolution 20, which establishes certain features of the Plenary's deliberative procedures, the Reporting Commissioner must decide whether to institute a supplementary investigation within 60 days of receiving the case. If a supplementary inquiry is undertaken, CADE may employ the investigative powers of Article 35 to obtain the necessary information (Art. 43). As noted above, the Reporting Official, like the SDE Secretary during SDE's administrative proceeding, may invoke Article 52 to issue a preventive cease and desist order during the CADE proceeding. Such an order, issued to prevent irreparable harm or otherwise to ensure that the proceeding will not be rendered moot, is effective immediately but may be appealed to the CADE Plenary and thereafter to the courts.

Upon completion of the 60 day period or the supplemental investigation, the Reporting Commissioner places the matter on CADE's trial docket to be judged as soon as possible. The Reporting Commissioner must prepare a written report and a recommended resolution of the case and must provide that report to the other commissioners and the parties not less than five days before the judgment session.

The decision of the Council is rendered at a public meeting, during which the CADE Attorney General and the defendant (but not SDE or SEAE) are accorded an opportunity to speak (Art. 45). The minimum quorum is five members and a decision is taken by a majority of those participating (Art. 49). The President is one of the seven voting members and, in the event of a tie, may cast an additional vote (Art. 8 II). At the judgment session, any of the commissioners may request the opportunity to review the case file in detail, and may also propose that additional investigation be undertaken. Such additional investigation must be approved by the Plenary and, if approved, is undertaken by the Reporting Commissioner.

CADE is not bound by the recommendations of SEAE or SDE and is responsible for impartial adjudication of contested cases. A Council judgment finding a violation must be issued as a written decision, containing a detailed report of the defendant's conduct, an analysis of the basis for determining illegality, a discussion of the remedial order imposed, the amount of the monetary penalty assessed, and a specification of the daily fine to be assessed if the unlawful conduct continues (Art. 46). Under Article 24, CADE has broad remedial authority to order any necessary alteration in the defendant's structure or conduct, including asset divestiture, transfer of corporate control, and discontinuance of specified business activities. The order may also declare the defendant ineligible to bid on public contracts for up to five years, require the defendant to publish a newspaper notice summarising CADE's decision, and mandate entry of the defendant's name on Brazil's list of consumer protection violators.

The provisions of Law 8884/94 applicable to mergers appear in Article 54, according to which any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services shall be submitted to CADE for review.

This notification requirement applies to any "acts," and thus covers not merely mergers but all agreements. In August 2001, SDE and SEAE jointly issued Horizontal Mergers Guidelines that confirm the applicability of Article 54 to any transactions that may limit or otherwise harm free competition, or result in the domination of relevant goods and services markets, such as horizontal agreements among competitors. Article 54 paragraph 4 requires that notification must be made no later than fifteen business days after the occurrence of the transaction, while paragraph 5 empowers CADE to penalise a failure to comply with the filing requirement by imposing a fine in an amount ranging from 60,000 to 6 million tax reference units ("UFIR")(USD \$24,900 to USD \$2.49 million)¹. A fee of BRL 45,000 (USD 17,550) is imposed for notifications filed under Article 54.

Article 54 paragraph 3 establishes special notification thresholds for acts that constitute mergers, stating that notification is mandatory for any form of economic concentration where the resulting entity accounts for twenty per cent of a relevant market or where any of the transaction participants had total turnover in Brazil in the previous year of BRL 400 million (USD 156 million).

Paragraph 1 of Article 54 provides that a transaction submitted for review may be approved if it meets all four of the following conditions: (1) It is intended to increase productivity; improve product or service quality; or cause an increased efficiency, or foster technological or economical development. (2) It generates benefits that are equitably allocated between the merging parties and consumers. (3) It does not eliminate a substantial portion of the relevant market for a product or service. (4) Its provisions are no more restrictive than necessary to obtain the beneficial effects.

Paragraph 2 of Article 54 contains a special provision that permits mergers to be approved that satisfy only three of the four attributes enumerated in Paragraph 1, provided that the transaction is in the public interest or otherwise required to the benefit of the Brazilian economy, and provided no damages are caused to end consumers.

¹ All references to USD in this text were calculated at the exchange rate of USD 0.39 for BRL \$1.

The August 2001 Horizontal Merger Guidelines, issued jointly by SEAE and SDE, describe a five-step analytical process employing concepts found in similar guidelines published by other countries. The elements of the process include (1) defining the relevant product and geographic markets; (2) determining whether the market share of the merged entity is sufficiently large to permit the exercise of market power; (3) assessing the probability that market power will be exercised post-merger; (4) examining the efficiencies generated by the transaction; and (5) evaluating the net effect of the transaction on economic welfare.

Transactions notified to CADE under Article 54 may be resolved in three possible ways: unconditioned approval, approval with conditions, or denial. If a transaction is rejected outright, Article 54 paragraph 9 empowers CADE to take any action necessary to undo such damage as may have been caused to the economic order, including the issuance of orders requiring dissolution, spin off or sale of assets, and partial cessation of activities.

When transactions are approved conditionally, the conditions imposed fall into one of two categories, depending on the statutory provision invoked. Conditions requiring one-time acts (such as the divestiture of assets or the deletion of a noncompete clause from the acquisition contract) are imposed as an exercise of CADE's intrinsic authority to review transactions under Article 54. Conditions that mandate continuing but time-limited acts (such as the temporary obligation of an acquiring company to license a trademark or maintain a relocation program for terminated employees) are, in many cases, imposed under Article 58. That Article empowers CADE to require that one or more parties to a transaction comply with temporary conduct restrictions or requirements, termed "performance commitments" by the statute.

The statute provides that CADE may revoke a transaction approval in the event of default on obligations assumed by the parties, or if the intended benefits have not been attained (Art. 55). Revocation is also authorised, whether or not conditions or performance commitments are imposed, if the approval was based on false or misleading information submitted by the applicants.

As noted previously, Article 54 paragraph 3 requires notification for mergers that either produce an entity with twenty per cent of a relevant market, or involve a participant with total annual turnover of BRL 400 million (USD 156 million). Until recently, the BRL 400 million turnover threshold was applied to worldwide turnover. In an important decision rendered in January 2005, CADE determined that annual turnover would henceforth be measured with reference to Brazilian rather than worldwide sales.

An important feature of the merger notification scheme in Brazil is that notification, while mandatory, need not be filed in advance of consummation. Article 54 paragraph 4 requires only that notification must be made no later than fifteen business days after the occurrence of the transaction. According to Brazilian regulation, the period begins to run when (1) the first binding document is signed by the parties or (2) when there occurs a modification in the competition relations between the requesting parties or between at least one of them and a third agent.

The difficulties associated with undoing consummated mergers have led CADE to pursue other means for preventing the complete integration of business entities pending review. Although no provision in Law 8884 addresses this issue, Article 83 applies Brazil's Code of Civil Procedure and certain related procedural statutes to BCPS proceedings and CADE may therefore impose an injunction according to the standards applicable to temporary relief under Brazilian law.

To formalise the mechanisms by which the consummation of merger transactions can be suspended pending review on the merits, CADE issued Resolution 28 in August 2002. Under Article 2 of the Resolution, a *precautionary order* may be granted under civil law principles either by the Council, or by the Reporting Commissioner with subsequent ratification by the Council (Art. 7). The order can be issued either *ex officio* or in response to a petition by SEAE, SDE, the CADE Attorney General, or any third party interested in the concentration act under review. The Resolution establishes a procedure whereby the merging parties are given five day's notice of an impending preventive order and provided with an opportunity to present opposing arguments to CADE (Art. 4). Such orders, if granted, are subject to review in the courts. Resolution 28 also creates (in Article 8) a second mechanism, termed an Agreement to Preserve Reversibility of Transaction ("Acordo de Preservação de Reversibilidade da Operação" or APRO).

As its name suggests, an APRO reflects a consensual agreement between CADE and the merging parties designed to accomplish the same result as a precautionary order. Typically, preventive orders and APROs impose restrictions or conditions on the acquiring company's freedom to integrate activities; close stores or plants; dismiss workers; terminate brands or product lines; alter marketing, investment, or research plans; or liquidate assets. Both preventive orders and APROs include provisions that specify daily fines for failure to comply with the restrictions imposed.

The procedures established under the present law for reviewing notified transactions appear in Article 54. The notification is filed with SDE, which supplies copies immediately to SEAE and CADE (paragraph 4). Unlike conduct cases processed under Article 38, SEAE does not have the option to determine whether it will opine on merger transactions. Rather, Article 54 requires that SEAE provide to SDE, within 30 days, a technical report on the transaction. SDE, in turn, must provide a recommendation to CADE within 30 days of receipt of the SEAE report.

At that point, the case files are transferred to CADE, which must render a decision within 60 days (paragraph 6). CADE is not in any way bound by the recommendations of SEAE or SDE and is responsible for impartial adjudication of contested cases. If SEAE or SDE fail to meet their respective deadlines, no legal consequences result. If CADE does not issue a decision within its 60 day period, however, the merger is deemed to be approved (paragraph 7). Assuming deadline compliance by all three agencies, the maximum statutory period for merger review under Article 54 is 120 days. Each of the three agencies, however, also has the power to issue one or more requests for additional information, and in such circumstances the running of the statutory periods is suspended from the time of the request until the information is supplied (paragraph 8).

Although neither Article 54 nor CADE regulations establish any formal mechanism for settlement of merger cases by consent, conditional merger approvals may arise from negotiations between the parties and the BCPS. CADE Resolution 15, the implementing merger regulation, was adopted in 1998 as part of an effort to streamline the merger

review process within CADE. The Resolution introduced a “two stage” process involving an initial notification form (attached as Exhibit I to the Resolution) that was a simplified and shortened version of the form previously used. A second form (Exhibit II), requiring substantially more information, was designed for issuance to the merging parties if the Reporting Commissioner determined that supplementary investigation was required.

In February 2003, SDE and SEAE issued the Joint Ordinance No. 1, which establishes a “Fast Track Procedure” under which SEAE would prepare a short form report within 15 days of receiving the notification and SDE would likewise prepares a short form report within 15 days of receiving the SEAE report. This procedure is applicable to transactions involving (1) the purchase of franchisees by their franchisors, (2) cooperative joint ventures created to enter a new market, (3) corporate restructuring within a single business group that entails no change in control, (4) acquisition of a Brazilian firm by a foreign firm that has no (or insignificant) business interests in Brazil, (4) acquisition of a foreign firm that no (or insignificant) business interests in Brazil by a Brazilian firm, (6) replacement of an economic agent where the acquiring firm did not previously participate substantially in the target market or in vertically–related markets, and (7) acquisition of a firm with a market share small enough to be unquestionably irrelevant with respect to competition.

In January 2004, SEAE and SDE instituted a “Joint Procedure for Merger Review and Anticompetitive Conduct Analysis”, which was formalised by the issuance of the Joint Ordinance No. 33/2006, and that has further expedited merger analysis. Under this procedure, both Secretariats begin reviewing a notification immediately upon its receipt and send a joint recommendation to CADE, thus avoiding the delay inherent in referring a case to SEAE and awaiting its analysis before SDE commences work..

CADE has also developed some procedures to help expedite cases. Mergers processed under the “Fast Track” procedure precede all others on CADE’s decision docket, and CADE has also continued the practice of adopting as its own the report issued by SDE and SEAE, rather than preparing a separate decision.

Article 50 of law 8884 provides expressly that CADE decisions, once issued, are not subject to review elsewhere in the Executive Branch, and that such decisions shall be promptly executed. CADE decisions are, however, fully subject to review by the Judicial Branch at the instance of the affected parties, as discussed further below. The CADE Attorney General is responsible for taking appropriate legal action to assure implementation of the Plenary’s decision. CADE’s orders, as required by law, impose a fine for the violation found, and also specify a daily fine to accumulate in the event that the defendant does not comply with any conduct prohibitions or requirements established by the decision.

For cases involving conduct in violation of Article 20 (that is, for unlawful conduct not involving mergers), the statutory minimum fine is 1 per cent of gross pre-tax revenues for the previous year, provided that the amount assessed may not be less than the gain realised from the violation (Art. 23 I). The statute does not specify whether gross revenues are to be determined by reference to worldwide revenues of the defendant or only to revenues generated by sales in the Brazilian market affected by the violation. The maximum fine for Article 20 violations is 30 per cent of gross pre-tax revenue for the previous year (Art. 23 I). Individual managers responsible for unlawful corporate conduct may be fined an amount ranging from 10 to 50 per cent of the corporate fine (Art. 23 II).

Associations and other entities that do not engage in commercial activities, or for which gross revenue is not relevant, may be fined from 6 thousand to 6 million tax reference units (USD \$2,460 to USD \$2.46 million) (Art. 23 III). Fines for recurring violations are doubled (Art. 23, sole paragraph).

For failure to comply with a CADE remedial order, preventive measure, cease and desist commitment, or merger performance commitment, CADE may impose a daily fine ranging from 5,000 to 100,000 UFIR (USD 2,050 to 41,000) (Art. 25), accumulating for up to ninety days. As noted in the discussion of merger notification filings, Article 54 paragraph 5 empowers CADE to assess a fine ranging from 60,000 and 6,000,000 UFIR (USD 22,800 to USD 2.28 million) for failure to comply with the merger notification filing deadline.

Aside from such fines as may arise from untimely filing, no fine or other penalty is assessed for proposing a merger that CADE disapproves or approves conditionally, unless the defendant subsequently violates CADE's remedial order.

A daily fine ranging from 5,000 to 100,000 UFIR (USD 2,050 to 41,000), accumulating for up to ninety days, may be imposed for failing to produce (or for tampering with documents demanded in an investigation (Art. 26). A person who does not appear for oral examination may be fined from BRL 500 to 10,700 (USD 195 to 4175) (Art. 26 §5). These fines may be assessed by SDE, SEAE, or CADE, depending on which entity issues the investigative demand. Similarly, Article 26-A authorises imposition of a fine ranging from BRL 21,200 to 425,700 (USD 8270 to 166,000) for impeding an examination conducted at a firm's place of business under Article 35 §2.

Law 8884/94 provides that, in imposing fines, CADE must consider various factors, including the impact of the violation on the market and the amount of damage caused, the benefit to the violator, the violator's good faith, and the violator's economic resources (Art. 27). Article 84 requires that all fines collected be remitted to the Fund for the Defence of Diffused Rights ("Fundo Gestor de Defesa dos Direitos Difusos" or "CFDD"). The CFDD is administered by a Council, comprised of representatives from the government and the public. It disburses funds to support educational or scientific projects relating to protection of the environment, consumers, economic order, open competition, and the artistic, aesthetic, historical, tourism, and landscape heritage.

LAW # 8884 OF JUNE 11, 1994
(OFFICIAL GAZETTE OF THE FEDERAL EXECUTIVE, JUNE 13, 1994)

Changes the Administrative Council for Economic Defense - CADE into an independent agency, regulates antitrust measures, and makes other provisions.

THE PRESIDENT OF THE REPUBLIC:

I hereby make known that the Congress decrees and I sanction the following Law:

TITLE I
GENERAL PROVISIONS

Chapter I
Object

Article 1. This Law sets out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.

Sole Paragraph. Society at large is entrusted with the legal rights protected herein.

Chapter II
Territory

Article 2. Without prejudice to any agreements and treaties to which Brazil is a party, this Law applies to acts wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered therein.

Sole Paragraph. Foreign companies that operate or have a branch, agency, subsidiary, office, establishment, agent or representative in Brazil shall be deemed situated in the Brazilian territory.

TITLE II
THE ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE - CADE

Chapter I
INDEPENDENT AGENCY

Article 3. The Administrative Council for Economic Defense — CADE, an agency with authority throughout the Brazilian territory and created by Law # 4137 of September 10, 1962, shall henceforth become a federal independent agency (*autarquia federal*) reporting to the

Ministry of Justice, with headquarters and jurisdiction in the Federal District, and duly commissioned for performance of the duties set forth herein.

Chapter II
THE CADE BOARD

Article 4. The CADE Board shall be composed of a President and six Board Members

chosen from among citizens older than thirty years of age reputed for their legal or economic knowledge and unblemished reputation, duly appointed by the President of the Republic after their approval by the Senate.

Paragraph 1. The term of office of the President and Board Members shall be two years, one reelection being hereby permitted.

Paragraph 2. The President and Board Member duties shall be discharged on an exclusive basis; accordingly, no overlapping of positions will be permitted, unless otherwise provided for in the Constitution.

Paragraph 3. In the event of resignation, death or termination of a CADE President, the senior or eldest Board Member (in this order) will take office as President until further appointment thereof, without prejudice to his/her corresponding duties as Board Member.

Paragraph 4. In the event of resignation, death or termination of a CADE Board Member, a new Board Member shall be appointed for the remaining term of office of the replaced member.

Paragraph 5. In the events set forth in the preceding paragraph or upon expiration of the terms of office of the councilmembers, the Council shall be reduced to less than the number established in article 49, the time frames set out in articles 28, 31, 32, 33, 35, 37, 39, 42, 45, 46, sole paragraph, 52, paragraph 2, 54, paragraphs 4, 6, 7 and 10, and 59, paragraph 1 of this law shall be considered automatically interrupted, and the case development shall be suspended, and the new terms shall begin immediately after restructuring of the quorum. (Provisory Measure # 1465-7/96, Article 1).

Article 5. The CADE President or Board Members may only be ousted by a decision of the Senate, a request of the President of the Republic, as a result of unappealable criminal sentencing of any such member for malicious crime, or in light of disciplinary action as set forth in Law # 8112 of December 11, 1990 and Law # 8429 of June 2, 1992, as well as owing to violation of any of the limitations dealt with in article 6 hereof.

Sole Paragraph. Any CADE Member's absence at three consecutive ordinary meetings, or twenty intermittent ordinary meetings, shall cause automatic termination of his/her term of office, except for leaves of absence duly approved by the CADE Board.

Article 6. The President and Board Members shall not:

I - receive fees, percentages or other compensation in any way or on any pretext;

II - act as a self-employed workers;

III - participate--as controlling parties, officers, managers, agents or attorneys in fact--in any civil, commercial or like companies;

IV - render opinions on matters of their specialty, even if on a theoretical basis, or act as advisors to companies of any kind;

V - avail themselves of the media to render opinion on cases pending decision, or otherwise disparage orders, votes or sentences handed down by the courts, except for critique in case records, technical works or in the exercise of court duties; and

VI - carry out politics- or party-oriented activities.

Chapter III
AUTHORITY OF THE CADE BOARD

Article 7. The CADE Board shall:

I - ensure compliance with this Law and its regulations, as well as with the Board in-house rules;

II - resolve on purported violations of the economic order, and apply the penalties provided for by law;

III - resolve on proceedings instituted by the Economic Law Office - SDE of the Ministry of Justice;

IV - resolve on *ex officio* appeals from the SDE Secretary;

V - order that action be taken in restraint of violations of the economic order within the term scheduled therefor;

VI - approve both the cease-and-desist commitment (*compromisso de cessação de prática*) and the performance commitment, as well as order SDE to monitor compliance therewith;

VII - judge appeals against preventive action adopted by SDE or by the Board reporting official;

VIII - make its decisions known to interested parties;

IX - request information from individuals, agencies, authorities and other public or private entities, with due regard for the confidentiality ensured such information pursuant to law, if any, as well as determine the investigations required for performance of its duties;

X.- request from the Federal Executive Branch agencies and from state, municipal, the Federal District and territorial authorities the taking of all acts required for compliance with this Law;

XI - retain the performance of examinations, inspections and studies, approving the respective professional fees and other expenditures on a case-by-case basis, all of which shall be borne by the company if it is eventually punished under this Law;

XII - analyze acts or conducts under any circumstance, subject to approval thereof pursuant to article 54 below, and establish a performance commitment as the case may be;

XIII - request court execution of its decisions pursuant to this Law;

XIV - request services and staff from any federal public agencies or entities;

XV - determine the adoption of administrative and court action by the CADE Attorney General Office;

XVI - sign contracts and agreements with Brazilian agencies or entities, and advance to the Minister of Justice for approval any such documents that are to be signed with foreign or international organisms;

XVII - answer consultations on matters within its sphere of authority;

XVIII - make the forms of violation of the economic order known to the public;

XIX - draft and approve its in-house rules on operations, criteria for resolutions, and organization of in-house services, including for the purpose of establishing the recess of the Board and the Attorney General Office on account of vacation; during such period, the statute of limitations as well as the term set forth in article 54, paragraph 6 hereof shall be suspended;

XX - draft the structure applying to the CADE staff, with due regard for article 37, II of the Constitution;

XXI - draft budgetary proposals pursuant to this Law; and

XXII - appoint the possible substitute of the Attorney General in the event of absences, dismissal or impairment.

Chapter IV **AUTHORITY OF THE CADE PRESIDENT**

Article 8. The CADE President shall:

I - act as the CADE legal representative in and out of court;

II - preside over the CADE Board meetings, with the right to vote thereat, plus a casting vote;

III - distribute processes by lot at the Board meetings;

IV - call meetings and organize the corresponding agenda;

V - comply and cause compliance with the CADE decisions;

VI - determine that the CADE Attorney General Office take all court action required for execution of the CADE decisions and sentences;

VII - sign the cease-and-desist commitments, as well as performance commitments;

VIII - submit to the CADE Board for approval the budgetary proposal, as well as the intended assignment of the staff that is to render services to CADE; and

IX - guide, coordinate and supervise the CADE administrative activities.

Chapter V
AUTHORITY OF THE CADE BOARD MEMBERS

Article 9 - The CADE Board Members shall:

I - vote on cases and matters submitted to the CADE Board;

II - issue orders and decisions on the cases for which they act as reporting members;

III - submit to the CADE Board any requirements as to data and documents from individuals, agencies, authorities and other public or private entities, which data and documents are to be kept confidential pursuant to law, as the case may be, as well as order all investigations deemed required for performance of their duties;

IV - adopt preventive action, and establish a daily fine for noncompliance therewith;
and

V - discharge all further duties ascribed thereto under the applicable rules.

Chapter VI
THE CADE ATTORNEY GENERAL OFFICE

Article 10. An Attorney General Office shall be commissioned with CADE to:

I - render legal assistance to CADE, and provide for defense thereof in court;

II - arrange for judicial execution of CADE decisions and sentences;

III - subject to the CADE Board preliminary approval, request court measures with a view to curbing violations of the economic order;

IV - arrive at court settlements for cases involving violations of the economic order, subject to the CADE Board preliminary approval after hearing a representative of the Attorney General of the Republic;

V - render opinion on cases under the CADE authority;

VI - ensure compliance with this Law; and

VII - perform all further action incumbent thereon under the in-house rules.

Article 11. The Attorney General--appointed by the Minister of Justice, and duly commissioned by the President of the Republic after consultation and approval of the Senate--shall be a Brazilian citizen with unblemished reputation and renowned legal expertise.

Paragraph 1. The Attorney General shall attend the CADE meetings, with no right to vote thereat.

Paragraph 2. The Attorney General shall be subject to the same rules on term of office, reelection, disqualification, termination and replacement as those applying to the CADE Board Members.

Paragraph 3. In the event of absences, temporary separation or impairment of the Attorney General, the plenary body will indicate and the CADE President will appoint a possible substitute to act for a period not exceeding ninety (90) days, with no need for Federal Senate approval; such substitute shall be entitled to compensation for the position held during such substitution.

TITLE III **THE ATTORNEY GENERAL OF THE REPUBLIC AND CADE**

Article 12. The Attorney General of the Republic, after hearing the Higher Council, shall appoint a member of the Attorney General Office of the Republic to handle the cases submitted to CADE for review.

Sole Paragraph. CADE may request that the Attorney General Office of the Republic cause enforcement of the CADE decisions or of the cease-and-desist commitments, as well as that it adopt all court action provided for in article 6, XIV (b) of Supplementary Law No. 75 of May 20, 1993.

TITLE IV **THE ECONOMIC LAW OFFICE**

Article 13. The Economic Law Office of the Ministry of Justice — SDE, as structured pursuant to law, will be headed by a Secretary appointed by the Minister of Justice from among Brazilian citizens of renowned legal or economic expertise and unblemished reputation, duly commissioned by the President of the Republic.

Article 14. SDE shall:

I - ensure compliance with this Law by monitoring and following up on market practices;

II - provide for ongoing follow-up on business activities and practices from individuals or legal entities with overriding control over a relevant market for a certain product or service, in order to prevent violations of the economic order; for such purposes, all pertinent data and documents may be required, with due regard for the confidential status thereof pursuant to law, if any;

III - carry out preliminary investigations on purported violations of the economic order, for further instatement of administrative proceedings;

IV - acknowledge the lack of grounds or evidence, and shelve the preliminary investigation records;

V - request data from individuals, agencies, authorities and other public or private entities, with due regard for the confidential status thereof under the law, if any, as well as determine the action required for exercise of its duties;

VI - commence administrative proceedings intended to investigate and restrain violations of the economic order;

VII - appeal *ex officio* to CADE for shelving of preliminary investigations or administrative proceedings;

VIII - send on to CADE, for review, any cases commenced by SDE, if a violation of the economic order has been duly evidenced;

IX - sign a cease-and-desist commitment on the agreed conditions and submit it to CADE, as well as monitor compliance therewith;

X - advise CADE of certain conditions for signing of a performance commitment, and monitor compliance therewith;

XI - adopt preventive measures intended to cease the act characterized as a violation of the economic order, and establish the deadline for compliance therewith as well as a daily fine applying to default thereon;

XII - receive and substantiate cases to be judged by CADE, including consultations, and monitor compliance with the CADE decisions;

XIII - advise the public authorities as to the adoption of any action required for compliance herewith;

XIV - carry out studies and researches with a view to improving antitrust policies;

XV - advise the public of the various forms of violation of the economic order, as well as the means to curb such violations; and

XVI - perform other duties as provided for by law.

TITLE V VIOLATIONS OF THE ECONOMIC ORDER

Chapter I GENERAL PROVISIONS

Article 15 - This Law applies to individuals, public or private companies, as well as to any individual or corporate associations, established *de facto* and *de jure* - even on a provisional basis - irrespective of a separate legal nature, and notwithstanding the exercise of activities regarded as a legal monopoly.

Article 16. The company and each of its managers or officers shall be jointly liable to the various forms of violation of the economic order.

Article 17. The companies or entities within a same economic group *de facto* and *de jure* shall be jointly liable to violations of the economic order.

Article 18. The legal nature of any party charged with violation of the economic order may be disregarded whenever any such violation entails abuse of power and rights, violation of the law, illicit facts or acts, or any breach of bylaws or articles of association. This legal nature shall also be disregarded in the event of bankruptcy, insolvency, discontinuance or suspended operations of the underlying company owing to poor management thereof.

Article 19. The antitrust measures set forth herein do not exclude any punishment inflicted on other legal acts pursuant to law.

Chapter II VIOLATIONS

Article 20. Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:

I - to limit, restrain or in any way injure open competition or free enterprise;

II - to control a relevant market of a certain product or service;

III - to increase profits on a discretionary basis; and

IV - to abuse one's market control.

Paragraph 1. Achievement of market control as a result of competitive efficiency does not entail an occurrence of the illicit act provided for in item II above.

Paragraph 2. Market control occurs when a company or group of companies controls a substantial share of a relevant market as supplier, agent, purchaser or financier of a product, service or related technology.

Paragraph 3. The *dominant position* mentioned in the preceding paragraph is presumed when a company or group of companies controls twenty percent (20 %) of the relevant market; this percentage is subject to change by CADE for specific sectors of the economy.

Article 21. The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:

I - to set or offer in any way--in collusion with competitors--prices and conditions for the sale of a certain product or service;

II - to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors;

III - to apportion markets for finished or semi-finished products or services, or for supply sources of raw materials or intermediary products;

IV - to limit or restrain market access by new companies;

V - to pose difficulties for the establishment, operation or development of a competitor company or supplier, purchaser or financier of a certain product or service;

VI - to bar access of competitors to input, raw material, equipment or technology sources, as well as to their distribution channels;

VII - to require or grant exclusivity in mass media advertisements;

VIII - to agree in advance on prices or advantages in public or administrative biddings;

IX - to affect third-party prices by deceitful means;

X - to regulate markets of a certain product or service by way of agreements devised to limit or control technological research and development, the production of products or services, or to dampen investments for the production of products and services or distribution thereof;

XI - to impose on distributors, retailers and representatives of a certain product or service retail prices, discounts, payment conditions, minimum or maximum volumes, profit margins, or any other marketing conditions related to their business with third parties;

XII - to discriminate against purchasers or suppliers of a certain product or service by establishing price differentials or discriminatory operating conditions for the sale or performance of services;

XIII - to deny the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies;

XIV - to hamper the development of or terminate business relations for an indeterminate period, in view of the terminated party's refusal to comply with unreasonable or non-competitive clauses or business conditions;

XV - to destroy, render unfit for use or take possession of raw materials, intermediary or finished products, as well as destroy, render unfit for use or constrain the operation of any equipment intended to manufacture, distribute or transport them;

XVI - to take possession of or bar the use of industrial or intellectual property rights or technology;

XVII - to abandon of cause abandonment or destruction of crops or harvests, without provenly good cause;

XVIII - to unreasonably sell products below cost;

XIX - to import any assets below cost from an exporting country other than those signatories of the GATT Antidumping and Subsidies Codes;

XX - to discontinue or greatly reduce production, without provenly good cause;

XXI - to partially or fully discontinue the company's activities, without provenly good cause;

XXII - to retain production or consumer goods, except for ensuring recovery of production costs;

XXIII - to condition the sale of a product to acquisition of another or contracting of a service, or to condition performance of a service to contracting of another or purchase of a product; and

XXIV - to impose abusive prices, or unreasonably increase the price of a product or service.

Sole Paragraph. For the purpose of characterizing an imposition of abusive prices or unreasonable increase of prices, the following items shall be considered, with due regard for other relevant economic or market circumstances:

I - the price of a product or service, or any increase therein, vis-à-vis any changes in the cost of their respective input or with quality improvements;

II - the price of a product previously manufactured, as compared to its market replacement without substantial changes;

III - the price for a similiar product or service, or any improvement thereof, on like competitive markets; and

IV - the existence of agreements or arrangements in any way, which cause an increase in the prices of a product or service, or in their respective costs.

Article 22. (VETOED)

Sole Paragraph. (VETOED).

Chapter III **PENALTIES**

Article 23. The following antitrust penalties shall apply:

I - for companies: a fine from one to thirty percent of the gross pretax revenue thereof as of the latest financial year, which fine shall by no means be lower than the advantage obtained from the underlying violation, if assessable;

II - for managers directly or indirectly liable to their company's violation: a fine from ten to fifty percent of the fine imposed on said company, which shall be personally and exclusively imposed on the manager; and

III - in the case of other individuals and other public or private legal entities, as well as any *de facto* or *de jure* associations of entities or persons, even temporary ones, with or without legal identity, that do not engage in business activities, when it is not feasible to use the gross sales value, the fine will be 6,000 (six thousand) to 6,000,000 (six million) UFIR or any other index replacing it.

Sole Paragraph. Fines imposed on recurring violations shall be doubled.

Article 24. Without prejudice to the provisions of the preceding article, the fines listed below may be individually or cumulatively imposed on violations, whenever the severity of the facts or the public interest so requires:

I - at the violator's expense, half-page publication of the summary sentence in a court-appointed newspaper for two consecutive days, from one to three consecutive weeks;

II - ineligibility for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related entities, for a period equal to or exceeding five years;

III - annotation of the violator on the Brazilian Consumer Protection List;

IV - recommendation that the proper public agencies:

- (a) grant compulsory licenses for patents held by the violator; and
- (b) deny the violator installment payment of federal overdue debts, or order total or partial cancellation of tax incentives or public subsidies;

V - the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities, or any other antitrust measure required for such purposes.

Article 25. If any acts or situations detrimental to the economic order are not discontinued after a CADE Board decision to this effect, or in the event preventive measures or any cease-and-desist commitment set forth herein are not complied with, a daily fine equal to or higher than 5,000 (five thousand) Fiscal Reference Units - UFIR or replacing index shall apply, which fine may be increased as many as twenty times in accordance with the severity of the violation and the violator's economic status.

Article 26. In the event any data or documents requested by CADE, SDE, SEAE or other public entity acting under this Law are unreasonably denied, concealed, tampered with or delayed, this shall constitute a violation subject to a daily fine of 5,000 (five thousand) UFIR, which fine may be increased up to twentyfold in keeping with the violator's economic status.

Article 27. The penalties provided for in this Law shall apply with due regard for:

I - the severity of the violation;

II - the violator's good faith;

III - the advantages obtained or envisaged by the violator;

IV - actual or threatened occurrence of the violation;

V - the extent of damages or threatened damages to open competition, the Brazilian economy, consumers, or third parties;

VI - the adverse economic effects on the market;

VII - the violator's economic status; and

VIII - recurrences.

Chapter IV **STATUTE OF LIMITATIONS**

Article 28. Violations of the economic order become time-barred five years after the date of the corresponding violation or, in the event of repeated or ongoing violations, after the date in which any such act has ceased.

Paragraph 1. Any administrative or court action intended to investigate purported violations of the economic order stays the statute of limitations set forth herein.

Paragraph 2. This statute of limitations is stayed during the effectiveness of a cease-and-desist commitment or performance commitment.

Chapter V
CAUSE OF ACTION

Article 29. Injured parties may - for themselves or for the privies under article 82 of Law #. 8078 of September 11, 1990 - defend their individual or diffuse interests in court by way of antitrust measures and the awarding of losses and damages suffered in connection therewith, irrespective of the corresponding administrative proceeding which shall not be stayed in view of the court action.

TITLE VI
ADMINISTRATIVE PROCEEDINGS

Chapter I
PRELIMINARY INVESTIGATIONS

Article 30. SDE may carry out preliminary investigations *ex officio* or at the written and reasonable request of interested parties; no disclosure as to any such investigations shall be made whenever the evidence as to purported violation of the economic order does not suffice to immediate commencement of administrative proceedings.

Paragraph 1. During preliminary investigations, the SDE Secretary may adopt any of the steps set forth in article 35 hereof, including requests for clarification addressed to the defendant.

Paragraph 2. Commencement of administrative proceedings out of formal complaints addressed by the Senate or the House of Representatives is not conditioned to preliminary investigations.

Article 31. After conclusion of preliminary investigations within sixty days, the SDE Secretary shall order commencement of a corresponding administrative proceeding or the shelving thereof, subject to *ex officio* appeal to CADE in this latter case.

Chapter II
COMMENCEMENT AND DISCOVERY OF ADMINISTRATIVE PROCEEDINGS

Article 32. Administrative proceedings shall be instituted no later than eight days after cognizance of the underlying fact, formal complaint or closing of the preliminary investigations, as per order issued by the SDE Secretary providing for the facts to be verified thereunder.

Article 33. The defendant shall be summoned to file a defense within fifteen days.

Paragraph 1. The initial summons shall bear the entire tenor of the order providing for institution of the administrative proceeding and the corresponding formal complaint, as the case may be.

Paragraph 2. The defendant shall be first personally summoned by mail against receipt or, in case of failure thereof, by notice published in the Official Gazette of the Federal Executive and in a newspaper widely circulated in the state in which the defendant is

resident or headquartered, with due regard for the periods required for attachment of the receipt notice or publication, as the case may be.

Paragraph 3. Any summons under subsequent proceedings shall be made by publication in the Official Gazette of the Federal Executive, in which the name of the defendant and respective attorney shall be mentioned.

Paragraph 4. The defendant's holders, officers or managers, or duly appointed attorney, may follow up on administrative proceedings, with full access to the case records at SDE and CADE.

Article 34. Failure to file a defense in due course after duly notified to that effect will entail the defendant's judgment by default and acknowledgment of the charges against it/him, subject to all further terms irrespective of prior notice in that respect. The *in absentia* defendant may take part in any phase of the proceeding without recourse of preceding acts.

Article 35. Upon lapse of time for filing a defense, SDE will order investigations and the production of evidence required thereby; SDE may order that the defendant, any individuals or companies, public entities or agencies provide data, clarifications or documents within fifteen days, with due regard for the confidentiality applying thereto under the law, as the case may be.

Sole Paragraph. The investigations and evidence required by the SDE Secretary, including hearing of witnesses, shall be concluded within forty-five days, extendable for a like period with good cause.

Article 36. Federal authorities, as well as officers of independent agencies, federal government-owned companies and mixed-capital companies, shall render all assistance and collaboration required by CADE or SDE, including as regards preparation of technical reports on the matters under the authority thereof, under penalty of liability.

Article 37. The defendant shall produce any evidence within forty-five days after submission of defense, as well as put forth new documents at any time before the discovery phase lapses.

Sole Paragraph. The defendant may ask the SDE Secretary to set out a date, time and place for hearing of a maximum of three witnesses.

Article 38. The Economic Policy Secretariat of the Ministry of Finance (SEAE) shall be informed by official letter of the institution of any administrative proceedings, and the Secretariat may elect to render an opinion on the matters within its sphere of authority, before the discovery phase lapses.

Article 39. Upon conclusion of the discovery phase, the defendant will be summoned to put forth his/its final arguments within five days, after which the SDE Secretary will issue a substantiated report resolving on forwarding of the case records to CADE for review or shelving thereof, subject to an *ex officio* appeal to CADE in this latter case.

Article 40. The SDE Secretary, the CADE members, and their civil servants and officials shall exert their best efforts to develop and conclude preliminary investigations and administrative proceedings in the interest of proper expedition as required for clarification of the facts, under penalty of liability.

Article 41. The SDE Secretary decisions cannot be appealed to higher ranks.

Chapter III **CADE JUDGMENT ON ADMINISTRATIVE PROCEEDINGS**

Article 42. Once the proceedings have been found admissible, the CADE President will randomly distribute such proceedings to the Reporting Official, who will be afforded a twenty-day term to render an opinion thereon.

Article 43. The reporting official may order supplementary investigations or request further information pursuant to article 35 hereof, as well as allow for the production of new evidence to the case whenever he/she considers the existing data insufficient for a final determination on the case.

Article 44. Upon invitation of the CADE President in response to an indication of the reporting official, any person may provide CADE with clarifications on relevant matters.

Article 45. Upon board judgments--the date of which will be made known to the parties at least five days in advance--the Attorney General and the defendant, or his/its attorney, will be respectively offered the floor for fifteen minutes each.

Article 46. The CADE decision--which in any event shall be duly substantiated against violations of the economic order--shall contain:

I - a detailed report on the violating acts, and an indication as to the antitrust action to be taken by the proper authorities;

II - the terms for commencement and conclusion of the action referred to in the preceding item;

III - the applicable fine; and

IV - a daily fine to apply while the violation is in effect.

Sole Paragraph. The CADE decision shall be published within five days in the Official Gazette of the Federal Executive.

Article 47. CADE shall monitor compliance with its decisions.

Article 48. Total or partial noncompliance with the CADE decision shall be reported to the CADE President, who will ask the Attorney General to provide for execution thereof via court channels.

Article 49. The CADE decisions shall be taken by majority vote, with the attendance of a minimum of five members.

Article 50. The CADE decisions do not qualify for Executive Branch review;

accordingly, any such decisions shall be promptly executed, the Attorney General Office being then advised in this respect for the purpose of taking all legal action within its sphere of authority.

Article 51. The CADE regulations and in-house rules shall further regulate administrative proceedings.

Chapter IV

PREVENTIVE MEASURES AND CEASE-AND-DESIST ORDERS

Article 52. The SDE Secretary or reporting official may--upon his/her own initiative or at the request of the CADE Attorney General--adopt preventive measures in any instance of administrative proceedings, whenever there are signs or sound reasons to believe that the defendant directly or indirectly caused or may cause irreparable or substantial damages to the market, or that he/it may render the final outcome of the proceedings ineffective.

Paragraph 1. The preventive measures issued by the SDE Secretary or reporting official shall order prompt cessation of damaging acts and the resumption of the preceding situation, if reasonably feasible, as well as impose a daily fine pursuant to article 25 hereof.

Paragraph 2. The SDE Secretary or CADE reporting official decision on adoption of preventive measures may be voluntarily appealed to the CADE Board within five days, without suspensive effects.

Chapter V

CEASE-AND-DESIST COMMITMENTS

Article 53. CADE or SDE - *ad referendum* CADE - may agree on a commitment to cease acts under investigation in any instance of administrative proceedings, which commitment shall by no means entail a confession as to the matter under analysis nor acknowledgment of guilt for the acts thereunder.

Paragraph 1. The commitment shall provide for:

- (a) the defendant's commitment to cease the action under investigation in due course;
- (b) a daily fine to be imposed in the event of default under article 25 hereof; and
- (c) the defendant's commitment to issue periodical reports on the defendant's market performance, and an undertaking to make proper authorities aware of any changes in its corporate structure, control, activities and location.

Paragraph 2. The case will be on hold while the cease-and-desist commitment is duly complied with, and after a preestablished time this case will be shelved if all conditions set out in the corresponding commitment have been fully met.

Paragraph 3. The conditions spelled out in the commitment may be changed by CADE if they are provenly overburdensome for the defendant, provided that any such changes do not cause damages to third parties or to the society at large, and that the new conditions do not entail a violation of the economic order.

Paragraph 4. The cease-and-desist commitment constitutes an extrajudicial execution

instrument; accordingly, execution of this commitment shall be promptly petitioned in the event of default thereon or if monitoring thereof is in any way hampered, pursuant to articles 60 *et seq.* hereof.

TITLE VII.
MONITORING MECHANISMS

Chapter I.
MONITORING OF ACTS AND AGREEMENTS

Article 54. Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.

Paragraph 1. CADE may authorize any acts referred to in the main section of this article, provided that they meet the following requirements:

I - they shall be cumulatively or alternatively intended to:

- (a) increase productivity;
- (b) improve the quality of a product or service; or
- (c) cause an increased efficiency, as well as foster the technological or economic development;

II - the resulting benefits shall be ratably allocated among their participants, on the one part, and consumers or end-users, on the other;

III - they shall not drive competition out of a substantial portion of the relevant market for a product or service; and

IV - only the acts strictly required to attain an envisaged objective shall be performed for that purpose.

Paragraph 2. Any action under this article may be considered lawful if at least three of the requirements listed in the above items are met, whenever any such action is taken in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused end-consumers or -users.

Paragraph 3. The acts dealt with in the main section of this article also include any action intended for any form of economic concentration, whether through merger with or into other companies, organization of companies to control third companies or any other form of corporate grouping, when the resulting company or group of companies accounts for twenty percent (20%) of a relevant market, or in which any of the participants has posted in its latest balance sheets an annual gross revenue equivalent to R\$ 400,000,000 (four hundred million of Reais).

Paragraph 4. The acts dealt with in the main section of this article shall be submitted to SDE - duly accompanied by three counterparts of the corresponding documentation - in advance or no later than fifteen business days after the occurrence thereof, and SDE shall promptly forward one such counterpart to CADE and another to SEAE.

Paragraph 5. Noncompliance with the deadlines set forth in the preceding paragraph will be punishable with a fine in an amount between 60,000 (sixty thousand) UFIR and 6,000,000 (six million) UFIR, imposed by CADE without prejudice to the opening of an administrative proceeding pursuant to article 32 hereof.

Paragraph 6. Upon receipt of the SEAE technical report issued within thirty days, SDE shall pronounce thereon within this same period and then send the case and evidentiary documents on to the CADE Board, which shall resolve thereon within sixty days.

Paragraph 7. The effectiveness of any acts dealt with in this article will be conditioned to approval thereof, which approval shall be retroactive to the date of occurrence of such acts; if not looked into by CADE within the sixty-day period established in the preceding paragraph, the acts referred to above will be deemed automatically approved.

Paragraph 8. The terms set forth in paragraphs 6 and 7 hereof will be stayed while the clarifications and documents considered essential for review of the case by CADE, SDE or SEAE are not submitted as requested.

Paragraph 9. In the event the acts specified in this article are subject to suspensive conditions or have already caused fiscal or other effects to third parties, the CADE Board--if it elects to deny approval thereof--shall determine that all applicable action be taken to totally or partially revert — by way of dissolution, spin-off or sale of assets, partial cessation of activities, among others — any action or procedure damaging to the economic order, notwithstanding any civil liability for losses and damages caused third parties.

Paragraph 10. Without prejudice to the obligations of the parties involved, any change in the stock control of publicly-held companies or registration of amalgamations shall be reported to SDE by the Securities Commission - CVM and by the Brazilian Commercial Registry Department of the Ministry of Industry, Trade and Tourism - DNRC/MICT, respectively, within five business days for the SDE review, if applicable.

Article 55. The approval dealt with in the preceding article may be reviewed by CADE *ex officio* or at the SDE request, if this approval was based on false or misleading information rendered by the interested party, in the event of default on obligations assumed hereunder, or if the intended benefits have not been attained.

Article 56. The commercial registries or corresponding state entities cannot file any acts related to organization, transformation, amalgamation, merger or grouping of companies, as well as changes in incorporation acts, unless all such acts contain:

- I - a clear-cut and detailed statement as to the subject matter thereof;
- II - the interest of each partner, and the term for capitalization thereof;
- III - full name and identification of each partner;
- IV - the place where the headquarters is located and its respective address, including as regards any declared branches;

V - full name and identification of the company's officers;

VI - the term of duration of the company; and

VII - the number, type and value of the outstanding stock.

Article 57. Articles of dissolution shall state the reasons thereof, apart from a statement re the amount ascertained among the partners and an indication of the persons that are to assume the company's assets and liabilities.

Chapter II **PERFORMANCE COMMITMENT**

Article 58. The CADE Board will define performance commitments to be assumed by any interested parties that submitted acts for review pursuant to article 54 hereof, so as to ensure compliance with the conditions established in paragraph 1 thereof.

Paragraph 1. Performance commitments will take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances.

Paragraph 2. Performance commitments shall provide for volume or quality objectives to be attained within predetermined terms, compliance with which will be monitored by SDE.

Paragraph 3. Failure without good cause to comply with performance commitments shall cause the CADE approval to be revoked pursuant to article 55 hereof, followed by the opening of an administrative proceeding for the adoption of the applicable measures.

Chapter III **CONSULTATION**

Article 59. (REPEALED)

TITLE VIII **COURT EXECUTION OF CADE DECISIONS**

Chapter I **PROCESSING**

Article 60. The CADE Board decisions imposing fines, as well as obligations to do or not to do, constitute an extrajudicial execution instrument.

Article 61. Executions exclusively intended to collection of fines shall be carried out pursuant to Law # 6830 of September 22, 1980.

Article 62. In the event of executions intended to collection of fines and compliance with obligations to do or not to do, the courts shall order specific performance of any such obligations, or otherwise provide for acts that ensure an outcome equivalent to compliance therewith in practical terms.

Paragraph 1. An obligation to do or not to do can only lead into a suit for losses and

damages its specific performance or obtainment of an equivalent outcome in practical terms is not possible.

Paragraph 2. Losses and damages shall be paid without prejudice to any applicable fines.

Article 63. Execution shall be carried out by all means, including by way of intervention in the company, if necessary.

Article 64. The CADE decisions shall be executed at the federal courts of the Federal District, or at the courts with jurisdiction over the executed party's headquarters or domicile, at the CADE discretion.

Article 65. Motions or like action against an execution instrument shall not stay the execution itself, unless an amount corresponding to the fines imposed is deposited in court, and a bond is posted as determined by the courts to ensure compliance with a final decision on the case, including as regards daily fines.

Article 66. Depending on the severity of the violation of the economic order, and should there be sound reasons to believe in irreparable or substantial damages, the courts may order prompt adoption of all or a portion of the action required under the execution instrument, notwithstanding the deposit of fines in court or the posting of bonds.

Article 67. Daily fines on an ongoing violation shall be apply as from the deadline established by CADE for voluntary compliance with the CADE decision, up to the day of actual performance thereof.

Article 68. The execution of CADE decisions shall be afforded priority over other kinds of action, except for habeas corpus and writ of mandamus.

Chapter II **JUDICIAL INTERVENTION**

Article 69. The courts shall order intervention in a company whenever required to ensure specific performance hereunder, and appoint a receiver.

Sole Paragraph. The court decision on intervention shall be duly substantiated, as well as accurately establish the action to be taken by the appointed receiver.

Article 70. If the executed party rebuts a court-appointed receiver within forty-eight hours on the arguments of ineptitude or lack of good standing, and if this claim is duly evidenced in three days, the courts shall render a decision thereon within this same period.

Article 71. If the rebuttal is granted, the courts shall appoint another receiver within five days.

Article 72. The intervention may be terminated early if the obligation that gave rise thereto has been provenly complied with in full.

Article 73. The court intervention shall be limited to those acts required for compliance with the court decision that gave rise thereto, and shall be effective for a maximum period

of one hundred and eighty days; the receiver shall be held liable for his/her acts and omissions, especially in the event of abuse of power and departure from the original purposes of his/her appointment.

Paragraph 1. The receiver will be subject to articles 153 through 159 of Law # 6404 of December 15, 1976, to the extent applicable.

Paragraph 2. The receiver will be entitled to a compensation stipulated by the courts, which may replace him/her at any time and whenever the receiver becomes insolvent, is charged with active or passive corruption or malfeasance in office, or violation of his/her duties.

Article 74. The courts may withdraw the company's managers from their duties if they are provenly preventing performance of acts incumbent on the receiver. Any such managers shall be replaced as provided for in the company's bylaws or articles of association.

Paragraph 1. If any managers still prevent the receiver from taking proper action after adoption of the procedures set forth in the main section of this article, then the courts shall proceed as per paragraph 2 below.

Paragraph 2. If a majority of the company's managers deny assistance to the court-appointed receiver, the courts shall order that the receiver take over the company's management.

Article 75. The receiver shall:

I - perform or order performance of all acts required under the execution process;

II -advise the courts of any irregularities committed by the company's management and of which the receiver may become aware; and

III - submit to the courts a monthly report on his/her activities.

Article 76. The expenses arising from the intervention hereunder shall be borne by the executed party.

Article 77. Upon lapse of the intervention, the receiver shall provide the federal courts with a detailed report on his/her action, and either propose the dismissal or shelving of the case or ask for an extension of the intervention period should the execution decision have not been fully performed in due course.

Article 78. Whoever opposes or prevents any intervention or, after termination thereof, performs any acts that directly or indirectly annul its effects in whole or in part, or even fails to comply with legal orders from the court-appointed receiver, will be held criminally liable for resistance, disobedience or coercion under the execution process, pursuant to articles 329, 330 and 344 of the Penal Code.

TITLE IX FINAL AND TEMPORARY PROVISIONS

Article 79. (VETOED)

Sole Paragraph. (VETOED)

Article 80. The CADE Attorney shall henceforth become an Attorney General official duly commissioned to the independent agency created hereunder, jointly with the CADE President and Board Member positions.

Article 81. The Executive Branch shall send to the Congress within sixty days a bill of law on the permanent staff of the new independent agency, as well as on the duties and compensation applying to the CADE President, the Board Members, and the Attorney General.

Paragraph 1. While CADE is not provided with staff of its own, civil servants may be temporarily assigned to this independent agency by commission or otherwise, without prejudice to the remuneration and other benefits originally afforded thereto, including for the purpose of representing this independent agency in court.

Paragraph 2. The CADE President shall prepare and submit to the Board for approval a list of servants required for the independent agency, who may be placed at SDE disposal.

Article 82. (VETOED)

Article 83. The Code of Civil Procedure, as well as Laws # 7347 of July 24, 1985 and 8078 of September 11, 1990, also apply to the administrative and court proceedings set forth herein.

Article 84. The fines provided for herein shall be converted into Brazilian currency on the date of actual payment thereof, duly collected to the Fund dealt with in Law # 7347 of July 24, 1985.

Article 85. Article 4, VII of Law # 8137 of December 27, 1990 shall henceforth read as follows:

"Article 4. (...)

VII - increase without good cause the price of a certain product or service, in view of one's market control."

Article 86. Article 312 of the Code of Criminal Procedure shall henceforth read as follows:

"Article 312. - Preventive imprisonment may be decreed so as to safeguard public or economic order in the interest of the criminal process, or to ensure enforcement of criminal laws, whenever a crime was provenly committed, or if there is sufficient evidence as to its perpetrator."

Article 87. - Article 39 of Law # 8078 of September 11, 1990 shall henceforth read as follows, with the additional items below:

"Article 39. The supplier of a certain product or service cannot, among other abusive practices:

(...)

IX - refuse to sell products or render services directly to whomever is willing to purchase them against prompt payment, except for intermediation cases duly regulated by special laws; and

X - increase without good cause the price of a certain product or service."

Article 88. - Article 1 of Law # 7347 of July 24, 1985 shall henceforth read as follows, with the additional item below:

"Article 1. - Without prejudice to class actions, this Law applies to actions for moral and property damages arising from:

(...)

V - violation of the economic order."

Sole Paragraph. Article 5, II of Law # 7347 of July 24, 1985 shall henceforth read as follows:

"Article 5. (...)

II - include in its institutional purposes the protection to the environment, consumers, economic order, open competition, or the artistic, aesthetic, historical, tourism, and landscape heritage;

(...)"

Article 89. CADE shall be invited to take part as assistant in court actions involving application of this Law.

Article 90. The periods for consultations submitted under article 74 of Law # 4137 of September 10, 1962, as amended by article 13 of Law # 8158 of January 8, 1991, are hereby interrupted, with due regard for Title VII, Chapter I hereof.

Article 91. This Law does not apply to dumping and subsidies cases dealt with in the Accords for Implementation of Article VI of the General Agreement on Customs Tarrifs and Trade, duly enacted by Decrees # 93941 and 93962 of January 16 and 22, 1987, respectively.

Article 92. All provisions to the contrary are hereby revoked, as are Laws # 4137 of September 10, 1962; 8158 of January 8, 1991; and 8002 of March 14, 1990, except for article 36 of Law # 8880 of May 27, 1994, which remains effective.

Article 93. This Law takes effect on the date of its publication.

ITAMAR FRANCO
President of the Republic

ALEXANDRE DE PAULA DUPEYRAT MARTINS
Minister of Justice

BULGARIA

COMMENTARY BY THE GOVERNMENT OF BULGARIA ON THE BULGARIAN LAW ON THE PROTECTION OF COMPETITION

MAIN PROVISIONS OF THE LAW ON PROTECTION OF COMPETITION

The Law on Protection of Competition /LPC/ which is in force was adopted in 1998. The law contains the basic provisions of Community Competition law. The LPC was substantially amended in 2003.

The protection against collusive agreements, decisions and concerted practices is provided in Chapter III “Prohibited Agreements, Decisions and Concerted Practices” LPC. The Law prohibits any type of agreements between undertakings, decisions of association of undertakings, as well as concerted practices, which significantly restrict the competition at the market. The competition is significantly restricted when the agreements or decisions result in:

- Setting prices or other trade conditions;
- Allocating markets or sources of supply;
- Restricting or controlling the production, trade, technical development or investments;
- Applying different terms and conditions for one and the same type of contracts to partners, which represent competitive disadvantage for them as market;
- Binding the conclusion of a contract with undertaking additional commitments by the counterpart, which in its nature or in view of the common trade practice are not related to the subject of the Contract or the performance thereof.

Such agreements and decisions are deemed void.

The CPC may grant exemption to certain agreements, decisions and concerted practices if they have positive effects on the development of market competition, as a result of which the consumers get fair share of the generated profit. They should contribute to: a) increase and improve the production of goods and service delivery; b) enhance the technical and economic development.

Art.13 of the LPC provides the conditions for individual exemption. In any case it should be established that the agreements do not impose restriction to the undertakings, which are not necessary for achieving the preset goals and do not create a possibility to eliminate the competition for a substantial part of the market.

According to Art.14 of the law the Commission can adopt a decision for group exemption when a certain category of contracts meet the requirements for individual exemption.

Chapter IV “Monopoly and Dominant Position” of the law prohibits the actions of undertakings of monopoly or dominant position, as well as the actions of two or more undertakings of joint dominant position at the relevant market, aimed at or resulting in prevention, restriction or distortion of the competition and/or in prejudice to the interests

of the consumers. Art.16 states that monopoly is the position of an undertaking which, by law, has the exclusive right of carrying out definite type of economic activity. Dominant position exists when an undertaking, due to its market share, financial resources, possibilities to access the market, technological level of development and business relations with other undertakings is able to hinder the competition on the relevant market, being independent of its competitors, suppliers or customers. There is a disputable legal text, precluding that an undertaking has dominant position provided it owns more than 35 % of the relevant market.

The existence of dominant position at the market does not by itself constitute an infringement of LPC. Some of the most typical and frequent forms of abuse are listed in the law and they are:

- direct or indirect imposing of purchase/sales prices or other unfair trade conditions;
- restriction of the production, trade and technical development to the prejudice of the customers;
- application of different conditions to identical type of contracts with regard to certain partners, thereby placing them at a competitive disadvantage;
- binding the conclusion of a contract with acceptance by the other party of additional obligations or signing additional contracts, which by their nature or according to common trade practice have no connection with the subject of the main contract or the performance thereof;
- unjustifiable termination of established long-term relations or unsubstantiated refusal to sign a contract when the possibilities for production or supply are existing.

The actions listed above may bring about two types of abuses – structural and operational. Structural abuses are the abuses by which the undertaking of dominant position aims at changing the structure of the market by means of impact on the competitors, leading to exiting the market, distorting the demand and supply, etc. Operational are the abuses by which the undertaking of dominant position gets benefits from the customers, which would otherwise not be able to get in case it operates in normal competitive conditions. This can happen by imposing unfair and discriminatory trade conditions, limiting the choice of the customers, etc.

The legal framework for evaluation of concentrations is contained in Chapter VI “Concentration of economic activity” LPC.

Business concentrations occur where operations such as merger/acquisition, transfer of control or setting up of fully functional joint ventures lead to lasting changes in the undertakings operating at the relevant market and thus in the structure of the market. Operations or transactions, which do not change the quality of the control exercised on the target undertaking, can not be regarded as business concentrations. Those concentrations, which are consistent with the requirements of dynamic competition and can contribute to raising the competitiveness of the national industry by fostering growth and increasing living standards, are authorized unconditionally.

In certain cases concentrations can restrict competition within a certain market by significantly increasing the market power of the merging undertakings, in particular by creating or strengthening of dominant positions. Whenever the CPC establishes that a business concentration has occurred in contravention of the LPC, it imposes pecuniary

sanctions (fines) and may reinforce these by ordering appropriate remedies to restore the initial situation.

According to Art.24 LPC the undertakings are obliged to inform the CPC about a forthcoming business concentration when the total turnover for the preceding year of the participants on the respective market on the territory of the country exceeds BGN 15 million. The commission will authorize a business concentration where it does not result in the creation or strengthening of a dominant position that would significantly impede effective competition on the relevant market; or which, even though creating or strengthening a dominant position, aims at modernization of production or of economy as a whole, improvement of market structures, attraction of investments, increasing the competitiveness on external markets, creation of new jobs, better satisfying of the interests of the consumers, and on the whole outweighs the negative impact on competition on the relevant. In authorizing a concentration the CPC may also impose additional remedies relating to the behavior of the parties to the concentration and the structure of the relevant market (behavioral or structural remedies).

The amended in 2003 LPC included a new provision, according to which the CPC performs sector analyses of the competitive environment in various relevant markets. To facilitate the exercising of these new powers, in 2004 the Commission adopted Guidelines for performing sector analyses.

In 2007, as a consequence of the Bulgaria's membership in EU and the modernisation of community competition legislation, particularly Regulation 1/2003 and Regulation 139/2004, the CPC prepared a draft of a new Law on Protection of Competition. The purpose of the draft is to ensure the application of *acquis communautaire* and to enable CPC to take part in the decentralized application of the competition legislation. With the draft CPC aims at full harmonization of the national legislation with *acquis*.

In line with Art.35 of Regulation 1/2003 the CPC is defined as the national competition authority responsible for the application of Art.81 and Art.82 of the Treaty. Its powers are provided in accordance with Regulation 1/2003 and Regulation 139/2004. According to the draft law the commission shall apply in parallel the national legislation and Art.81 and Art.82 of the Treaty. The draft law enables CPC to impose interim measures and remedies, necessary for maintaining effective competition and mitigating the negative impact of the concentration on the relevant market. The commission may adopt commitment decisions.

With regard to the application of Regulation 1/2003 and Regulation 139/2004, the draft defines CPC's competences and the forms for cooperation between CPC on the one side and the European Commission and the NCAs on the other.

The draft settles rules for avoiding the conflict of interests and for the professional secret.

The law foresees an obligation for the commission to keep an electronic register of the issued decisions. Announcements for initiated proceeding for authorization of concentrations shall also be published.

The draft gives a definition for prohibited agreements, decisions and concerted practices and for agreements with negligible effect. The effect shall be negligible when the aggregate share of the undertakings participating on the market of goods or services within the scope of the agreement, decision or the concerted practice does not exceed:

- 10 % of the relevant market, in case the participants are competitors;
- 15% of each of the relevant markets, in case the participants are not competitors.

The draft provides rules for exemption from prohibition and for block exemption from prohibition. The draft provides that agreements, decisions or concerted practices shall not be prohibited, if they contribute to the improvement of the production or distribution of goods or provisions of services or to the promotion of technological and/or economic progress, while ensuring a fair share of the resulting benefits to the consumers and if they:

- a) do not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives set; and
- b) do not afford such undertakings the possibility of eliminating competition on a substantial part of the relevant market.

Certain categories of agreements, decisions and concerted practices which comply to the requirements of the law may be exempt from the prohibition.

The abuse of monopolistic or dominant position is provided in Chapter Four. The existing rebuttable presumption for dominant position (market share bigger than 35%) is not provided in the draft. The reason is that only the existence of high market share is not a proof for dominant position.

With regard to the control on concentrations, the draft settles the obligation for the undertakings to notify the commission for a forthcoming concentration if the aggregate turnover of all undertakings participating in the concentration on the territory of the Republic of Bulgaria in the preceding year exceeds BGN 30 million. The draft does not provide the rules for protection against unfair competition. The reason is that from September 2007 this is a subject of the Law on Protection of the Consumers.

The types of proceedings and the grounds for their initiation, suspension and termination are consistent with Regulation 1/2003 and Regulation 139/2004. The draft provides a new ground for initiation of a proceeding before the commission – a request of a national competition authority or of the European Commission under Art.20, paragraph (5) and Art.22 of Regulation 1/2003 as well as under Art.12 and 13, paragraph (5) of Regulation 139/2004.

CPC's powers for investigation are extended and fully correspond to the powers of the other NCAs. According to the draft during the proceeding the investigator has the right to:

1. request information, material, written, digital and electronic evidence, irrespective of the media on which they have been stored;
2. take oral or written explanations;
3. conduct inspections;
4. entrust the conducting of appraisals by external experts;
5. request information or assistance by the national competition authorities of the EU member-states and by the European Commission.

The commission may carry out all kinds of inspections at the premises of the undertakings and associations of undertakings following an authorization by a judge of the Administrative court- Sofia City.

The extended powers of the commission require the existence of guarantees for the protection of the parties and the stakeholders. They have a right to be heard in an open sitting of the commission before it takes a decision; to examine commission's objections and to give their statement of objections; to get acquainted with all the materials etc.

In compliance with *acquis* the procedure for assessment of a concentration is divided into two types – preliminary market investigation and in-depth investigation. In-depth investigation shall be carried out when, as a result of the assessment during the preliminary market investigation, it is established that the concentration raises serious doubts that its implementation may result in the creation or strengthening of a dominant position that would significantly impede effective competition on the relevant market.

A new method for determining the amount of the sanctions is provided. According to the draft the pecuniary sanctions are defined as a percentage of the total turnover in the preceding financial year on an undertaking or associations of undertakings. In certain cases CPC shall impose periodic pecuniary sanctions, which are a percentage of the average daily turnover in the preceding financial year. The periodic sanctions shall be imposed for each day until the unlawful action or inaction is terminated.

The draft law provides general rules for remission or reduction of sanctions for undertakings, which participate in a secret cartel. The sanction may be remitted or reduced, if the undertakings voluntarily cooperate with the commission by providing evidence, which is essential for proving the infringement and complies with all the conditions set out in the leniency programme. The CPC shall adopt a leniency programme, which is in compliance with the Model leniency programme, prepared by the European Commission.

LAW ON THE PROTECTION OF COMPETITION
(Promulgated in State Gazette No. 52 of 8 May 1998)

TITLE I
GENERAL PART

Chapter One
GENERAL PROVISIONS

Subject matter

Article 1

1. This Law aims at ensuring protection and conditions for the promotion of competition and free initiative in the sphere of the economy.
2. For the purposes stated in paragraph 1 [it] shall provide protection against agreements, decisions and concerted practices, abuse of monopolistic and dominant position on the market, concentration of economic activities, unfair competition and other activities which might result in the prevention, restriction or distortion of competition.

Scope of application

Article 2

1. This Law shall apply to:
 - all undertakings which carry on their activities within or out of the territory of the Republic of Bulgaria, if they expressly or tacitly prevent, restrict, distort or might prevent, restrict or distort competition in the country;
 - the authorities of the executive branch and of local government, if they expressly or tacitly prevent, restrict, distort or might prevent, restrict or distort the competition in the country;
 - undertakings to which the State has assigned the provision of services of public interest, in so far as the observance of the law does not render the fulfillment of those tasks impossible and the competition in the country is not affected to a significant extent;
 - natural persons who contribute to the creation of dominant position or to the practicing of unfair competition.
2. This law shall not apply to:
 - the relations falling within the scope of the legislation relating to the protection of industrial property, copyright and related rights, in so far as they are not used to restrict or distort competition;

- activities, the consequences of which restrict or might restrict the competition in another State, unless otherwise provided in an international treaty which has entered into force and to which the Republic of Bulgaria is a party.

Chapter II COMMISSION FOR THE PROTECTION OF COMPETITION

Status

Article 3

The Commission for the Protection of Competition, hereinafter referred to as “the Commission”, shall be an independent specialised State body financed through the State budget. The Commission shall be a legal person having its seat in Sofia.

Composition

Article 4

1. The Commission shall consist of eleven members – a chairman, two deputy chairmen and eight members, seven of which should be lawyers and four – economists, elected and dismissed by the National Assembly for a five-year term of office. They may be re-elected for another five-year period.
2. The chairman of the Commission must be a qualified lawyer, with practical experience in his specialty of not less than ten years and who meets the requirements under paragraph 3.
3. The members of the Commission shall be Bulgarian nationals who have a university degree in law or economics and practical experience in their specialty of not less than five years, with high professional and moral standing not sentenced to imprisonment for intentional indictable crimes. They may not occupy any other paid positions, save for the exercise of scientific or teaching activities.
4. Within one month following the election of the chairman and on his proposal the National Assembly shall elect the two deputy chairmen and the members of the Commission.
5. The chairman, the deputy chairmen and the members of the Commission shall give an oath before the National Assembly in accordance with Article 76, paragraph 2 of the Constitution of the Republic of Bulgaria.

Termination of powers

Article 5

1. The powers of the chairman, the deputy chairmen and the members of the Commission shall be terminated by the National Assembly prior to the expiry of their term of office:

- on their own application;

- when they have been sentenced to imprisonment for an intentional crime prosecuted on indictment;
 - when it is impossible for them to perform their duties for more than six months;
 - in case of a grave breach of this law and of the oath.
2. Under the provisions of paragraph 1, items 2, 3 and 4, the chairman shall submit to the National Assembly a motivated proposal for dismissal.
 3. In case of termination of powers under paragraph 1 the chairman shall submit, within one month, a proposal to the National Assembly for the election of a new member of the Commission for the remainder of the initial term of office.

Structure and activities

Article 6

1. The Commission shall adopt Implementing Rules for its structure and activities, which shall be published in the State Gazette.
2. In the performance of its activities, the Commission shall be assisted by an administration.

Competence

Article 7

1. The Commission on the Protection of Competition shall:
 - establish the offences and impose the penalties provided by the law;
 - issue the authorisations provided by the law;
 - submit proposals to the competent authorities of the executive branch and of local self-government to cancel secondary legislation, issued in violation of this law, or bring actions before the court for the reversal of individual administrative acts contravening to this law;
 - pronounce on other requests relating to this law;
 - order the termination of the offence and restoration of the initial situation;
 - declare void the agreements and decisions prohibited by this law. (*Repealed by Ruling No. 18/1998 of the Constitutional Court*)
2. In the performance of its activities, the Commission shall:
 - conduct studies and determine the position of undertakings on the relevant market according to guidelines adopted by the Commission;

- interact with other State authorities and institutions, with the bodies of local self-government, and with non-governmental organisations by means of participation in the elaboration of draft legal instruments, exchange of information and other forms of co-operation;
- give opinions, requested by the corresponding State and local authorities, about the projects for transformation and privatisation of undertakings or of parts of them, where this law might be violated;
- carry out and coordinate the international cooperation of the Republic of Bulgaria with international organisations or with organisations from other countries in the field of protection of competition;
- keep a register of the authorisations given;
- publish a periodic information bulletin.

Chairman of the Commission

Article 8

1. The chairman of the Commission shall:

- propose to the National Assembly to elect the deputy chairmen and the members of the Commission;
- represent the Commission or authorize persons who shall represent it;
- organize and manage the activities of the Commission;
- schedule and chair the sittings of the Commission;
- conclude, modify and terminate the employment relations with the employees from the administration;
- organize and enforce the decisions of the Commission which have come into effect;
- execute the budget;
- inform the public about the Commission's activities, through the media.

2. In the performance of his functions, the chairman shall be assisted by the deputy chairmen. He shall nominate the deputy chairman of the Commission who shall replace him in his absence.

TITLE II
RESTRICTION OF COMPETITION

Chapter III
PROHIBITED AGREEMENTS, DECISIONS AND CONCERTED PRACTICES

General prohibition

Article 9

1. The following shall be prohibited: all agreements between undertakings, decisions of connected or united undertakings, as well as concerted practices of two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition within the relevant market, and in particular those which:

- directly or indirectly fix prices or other trading conditions;
- share markets or sources of supply;
- limit or control production, trade, technical development or investments;
- apply different conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of supplementary contracts which, by their nature or according to commercial usage, have no connection with the subject of the main contract or with its performance.

2. Any agreements and decisions prohibited pursuant to paragraph 1 of this article shall be void. Their nullity may be invoked by any authority or person concerned even if it is not declared in accordance with Article 7, item 6.

Agreements with negligible effect

Article 10

1. The prohibition under Article 9, paragraph 1 shall not apply to agreements, decisions or concerted practices which have a negligible effect on competition.

2. The effect shall be insignificant when the aggregate share of the undertakings participating on the market for goods or services, forming the subject of the agreement, decision or concerted practice, does not exceed five per cent of the relevant market.

Obligation to notify

Article 11

1. Agreements, decisions or concerted practices of the kind described in Article 9, paragraph 1 which are in existence shall be notified to the Commission within thirty days following the day of their conclusion, adoption or application.

2. The notification under paragraph 1 should contain information about:
 - the participating undertakings;
 - the legal form of the agreement or decision, or the type of concerted practice;
 - the overall share of the participating undertakings on the relevant market.
3. The notification under paragraph 1 may also contain a request for exemption from the prohibition in accordance with Article 13.

Appraisal of agreements, decisions or concerted practices

Article 12

Within two months after the receipt of the notification, the Commission shall issue a decision whereby it shall declare:

- that no ground exists for the application of the prohibition under Article 9;
- a prohibition of the agreement, decision or concerted practice.

Exemption from prohibition

Article 13

1. The prohibition under Article 9, p. 1, may, however, with the authorisation of the Commission, be declared inapplicable in the case of agreements, decisions or concerted practices, which contribute to increasing or improving the production of goods and the provision of services, to promoting technical or economic progress or to increasing the competitiveness on external markets, while allowing consumers a fair share of the resulting benefits, and which do not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market.

2. The Commission may exempt from the prohibition under Article 9 agreements, decisions and concerted practices of small and medium-size enterprises, when they lead to enhancing their competitiveness.

3. The authorisations under paragraph 1 shall be issued in two months following the submission of the request under Article 11, paragraph 3. The authorisations may contain certain conditions with which the undertakings shall comply.

4. The Commission shall exercise control over the observance of the conditions under paragraph 3. It may revoke or amend its authorisation, as well as prohibit the agreement, decision or concerted practice, where:

- there has been a change in any of the facts which were basic to the giving of the authorisation;
 - the parties commit a breach of any obligation attached to the authorisation;
 - the authorization is based on incorrect information and facts supplied by the undertaking.
5. In case that in the process of investigation information indicating that the agreement, decision or concerted practice for which exemption is requested, seriously affects or might affect the interests of the trading parties or consumers, was found, the Commission may order by means of a decision an immediate termination or modification (*Repealed by Ruling No. 18/1998 of the Constitutional Court*) of the agreement, decision or concerted practice. That decision shall not be subject to appeal.

Block exemption from prohibition

Article 14

1. The Commission may adopt a decision that the prohibition under Article 9, paragraph 1 shall not apply to a certain type of contracts when they satisfy the requirements under Article 13, paragraph 1.
2. The decision under paragraph 1 shall enter into force after its publication in the State Gazette.
3. In its decision for block exemption from the prohibition under Article 9, paragraph 1 the Commission shall determine the clauses which the contracts may contain and those whose application is inadmissible.
4. The decision under paragraph 1 above may provide that the prohibition under Article 9, paragraph 1 shall not apply to contracts concluded prior to its entry into force in case that within 3 months they are brought in conformity with the requirements contained in the Commission's decision and the Commission is immediately notified of the modifications made.

Unification of general conditions

Article 15

1. Undertakings which offer the conclusion of identical contracts, containing general conditions, may unify those general conditions in advance provided that they do not restrict the free negotiation of prices and do not affect the interests of consumers.
2. The unification of general conditions is permitted only with an authorization of the Commission, which shall be given within two months following the submission of the request of the undertakings under paragraph 1.

Chapter IV
MONOPOLISTIC AND DOMINANT POSITION

Monopolistic position

Article 16

1. The position of an undertaking which has, by virtue of law, the exclusive right to carry on a certain type of economic activity shall be monopolistic.
2. A monopolistic position may only be granted by law where such a position is given to the State in accordance with Article 18, paragraph 4 of the Constitution of the Republic of Bulgaria.
3. Any other means of conferring of a monopolistic position shall be void.

Dominant position

Article 17

1. The position of an undertaking which, in view of its market share, financial resources, possibilities for access to the market, level of technology and economic relations with other undertakings may hinder competition in the relevant market, since it is independent of its competitors, suppliers or purchasers shall be dominant.
2. An undertaking shall be considered to have a dominant position if it has a market share higher than 35 per cent of the relevant market, unless the conditions under paragraph 1 are satisfied.

Prohibition against abuse of monopolistic or dominant position

Article 18

The following actions or undertakings, having a monopolistic or dominant position that have as their object or effect the prevention, restriction or distortion of competition shall be prohibited, and in particular those which:

- impose directly or indirectly inequitable prices for purchase or sale or other unfair trading conditions;
- limit production, trade and technical development to the prejudice of consumers, along with the creation of goods shortage through their detention, destruction, damaging or unjustified directing to processing;
- apply different conditions to identical type of contracts with regard to certain partners, thereby placing them at a competitive disadvantage;
- subject the conclusion of contracts to acceptance by the other party of supplementary obligations or to the conclusion of supplementary contracts which, by their nature or according to commercial usage, are not connected with the subject of the main contract or with its performance;

- use economic constraint, resulting into the transformation, merger, fusion, division, detachment and closure of other undertakings along with the inequitable termination of long-established business relations.

Chapter V STATE INTERVENTION

Compulsory pricing

Article 19

Provided that the prohibition under Article 18, paragraph 1 is violated by undertakings, having a monopolistic position, the Council of Ministers may, on a proposal from the Commission, establish minimum, fixed or ceiling prices for a given time that shall be compulsory on the infringing undertaking.

State aids

Article 20

1. State aid shall be the aid granted by the State either through State resources in any form whatsoever which distorts or might distort competition by putting in a more favourable position certain undertakings or the production of certain goods, or the provision of certain services.
2. State authorities and institutions which grant State aid and thereby affect or might affect the trade relations between the Republic of Bulgaria and the countries with which it has a State aid regime established by virtue of a treaty, shall be obliged to notify the Commission of the respective State aid project in advance, on the admissibility of which the Commission shall pronounce.
3. The obligation for notification under paragraph 2 shall not apply to aids:
 - being social by their nature and granted to individual consumers regardless of the origin of the goods or services;
 - for the repair of damages caused by natural calamities or other exceptional circumstances.
4. The Commission may deem admissible the aids:
 - designed to accelerate the economic development of areas with low standard of living or with unemployment rate exceeding the average level for the country;
 - designed to foster the economic development of certain economic activities or of certain areas, in as much as the conditions of trade are not changed contrary to the common interest of the parties;
 - which foster the execution of a project, being of a significant economic interest to the parties or the overcoming of serious difficulties in the economy of the Republic of Bulgaria;

- which foster the preservation of the cultural and historic heritage, provided that those aids do not affect trading conditions and competition to an extent that runs contrary to the mutual interests of the parties;
 - determined with the consent of the countries with which the Republic of Bulgaria has established a State aid-monitoring regime.
5. Where the Commission establishes that the project or the State aid granted are incompatible with the conditions under paragraphs 2 to 4 above and fall outside the scope of admissible exceptions, it shall propose to the corresponding authority or institution to cancel the project within a prescribed time-limit or demand that the aid be reimbursed. In that case the Commission may also propose that only the amounts or the conditions for granting the aid be modified to prevent the restriction and to restore effective competition.

Chapter VI CONCENTRATION OF ECONOMIC ACTIVITIES

Definition

Article 21

1. There shall be a concentration of economic activities:
 - in case of merger or fusion of two or more independent undertakings, or
 - where one or several persons already controlling one or more undertakings acquire by purchase of securities, stakes or property, by contract or by any other means, direct or indirect control over one or more undertakings or parts of them.
2. For the purposes of paragraph 1, item 2 **control** stands for any acquisition of rights, conclusion of contracts or other means which, separately or jointly, and with regard to the existing factual circumstances and the applicable law, confer a possibility for the exercise of a decisive influence on an undertaking through:
 - the acquisition of ownership or right to use the entirety or part of the assets of the undertaking;
 - the acquisition of rights, including under contract, which provide a possibility for a decisive influence on the composition, voting or decisions of the organs of the undertaking.

Joint venture

Article 22

The creation of a joint venture that performs on a lasting basis all the functions of an autonomous economic entity, where this does not lead to co-ordination of the competitive behaviour of the participating undertakings between themselves or between them and the joint venture, shall also constitute a concentration within the meaning of Article 21.

Exceptions

Article 23

The cases where:

credit institutions or other financial institutions or insurance companies, whose activities include transactions in securities for their own account or for the account of others, hold on a temporary basis securities of a given undertaking with the view to reselling them, but only provided that:

- (a) they do not exercise the voting rights in respect of those securities in order to influence the competitive behaviour of the undertaking, or
- (b) they exercise their voting rights only in order to prepare the disposal of the securities, which should be done in one year's term following their acquisition;

control is acquired by a person which, according to the legislation in force, performs certain functions related to the liquidation of the undertaking or to its bankruptcy procedure;

the operations under Article 21, paragraph 2 are carried out by financial holding companies provided however that the control in respect of the holding, is exercised solely to maintain the full value of the invested capital and not to determine directly or indirectly the competitive behaviour of the undertakings in which they have holdings, shall not be considered for concentrations.

Obligation for prior notification

Article 24

1. The undertakings shall notify the Commission prior to their intention to carry out the concentration under Article 21, when:

- the aggregate market share of the goods or services, to which the concentration relates, exceeds 20 per cent;
- the aggregate turnover of the participants in the concentration for the previous year exceeds 15 billion Levs.

2. When the concentration leads to the acquisition of control over parts of one or more undertakings, irrespectively whether those parts form autonomous legal entities, the turnover, related to the part that is the subject of control shall be considered.

3. In case of concentration of credit institutions and other financial institutions the assets on their balance sheet shall be taken into consideration, and for insurance undertakings – the value of gross premiums written.

Obligation of State or local authorities to notify

Article 25

Provided that the authorities of the central executive power or of the local self-government consolidate their undertakings, in the cases under Article 24, paragraph 1,

those authorities shall submit a notification before the Commission before the issuance of the respective act.

Contents of the notification

Article 26

1. The notification under Article 24 shall contain information about
 - the undertakings participating in the concentration;
 - the nature and the legal form of the concentration;
 - the type of goods and services covered by the notification;
 - the undertakings over which the participants in the concentration exercise control with respect to Article 21, paragraph 2;
 - the aggregate market share and the aggregate turnover of the undertakings participating in the concentration;
 - the main competitors, suppliers and purchasers.
2. The notification of the undertakings under paragraph 1 shall also contain a request to the Commission to authorize the concentration.

Appraisal of concentration

Article 27

1. Within one month after the receipt of the notification the Commission shall make an appraisal of the concentration, taking into consideration contingencies such as: the position of the undertakings on the relevant market before and after the concentration, their economic and financial power, access to supply of and markets for the respective goods and services, the legal or other barriers to entry to the markets.
2. On the basis of the assessment the Commission shall render a decision whereby it:
 - declares that the concentration does not fall within the scope of Article 24;
 - authorises the concentration;
 - starts an investigation under Article 29.
3. Where, during the investigation, facts, revealing that the concentration for which authorisation is sought seriously affects or might affect the interests of trading parties or consumers, are established, the Commission may order by a decision the immediate termination or modification (*Repealed by Ruling No. 18/1998 of the Constitutional Court*) of the actions relating to the concentration. The decision shall not be subject to appeal.

Authorisation for concentration

Article 28

1. The Commission shall authorize the concentration provided that the latter does not result in the creation or strengthening of a dominant position that would significantly impede effective competition on the relevant market. Authorisation may also be given under the condition that certain requirements should be met.
2. The Commission may authorize a concentration which, besides creating or strengthening a dominant position, aims at modernisation of production or of the economy as a whole, improvement of the market structures, attraction of investments, increasing the competitiveness on external markets, creation of new jobs, better satisfying of the interests of the consumers, and on the whole outweighs the negative impact on competition on the relevant market.
3. In the authorisation under paragraphs 1 and 2 the Commission may also impose additional requirements which guarantee the preservation of effective competition or the overall positive impact on the market.

Decision for investigation

Article 29

1. The Commission decides to initiate an investigation provided that the concentration falls within the scope of Article 21 and rises serious doubts that its carrying out would result in the creation or strengthening of an existing dominant position, and that effective competition in the relevant market would be prevented, restricted or distorted.
2. The decision under paragraph 1 shall be published in the State Gazette.
3. Within three months after the publication the Commission shall complete the investigation and issue a decision.
4. Until the issuing of the Commission's decision under Article 54 all operations relating to the envisaged concentration shall be prohibited.

Chapter VII UNFAIR COMPETITION

Definition

Article 30

1. Unfair competition shall be any action or inaction in the course of the performance of economic activities which contravenes to good-faith commercial usage and impairs or might impair the interests of competitors in their mutual relations or in their relations with consumers.
2. Unfair competition shall be prohibited.

Article 31. Damaging the reputation of competitors

1. The damaging of the reputation of and confidence in competitors, and of the goods and services offered by them by stating or disseminating untrue information, or by misrepresenting facts shall be prohibited.
2. It shall be prohibited to ascribe, by means of advertising or in any other manner, non-existing qualities to goods or services in comparison to the goods or services of competitors, and to ascribe non-existing defects to the goods or services of competitors.

Misleading

Article 32

1. It shall be prohibited to conceal or disguise material defects or dangerous characteristics of the goods or services offered.
2. It shall be prohibited to mislead in relation to essential characteristics or to the way of utilisation of the goods by means of making untrue statements or by the misrepresentation of facts.
3. The advertisement of goods or services which are not available to satisfy consumers' demand or which are of insufficient quantity shall be prohibited.
4. The use of misleading announcements of prices, price reductions or other trading conditions shall be prohibited when offering goods or services.

Imitation

Article 33

1. The offering or advertisement of goods or services with an appearance, packaging, marking, name or other characteristics which mislead or might mislead as to the origin, producer, seller, the way and place of production, the source and way of acquisition or utilisation, the quantity, quality, nature, consumer characteristics and other essential features of the good or service shall be prohibited.
2. The use of a firm, a trademark or an emblem identical or similar to those of other persons in a way which might result in impairing the interests of competitors and/or consumers shall be prohibited.

Unfair attracting of clients

Article 34

1. The carrying out of unfair competition aimed at attracting clients as a result of which contracts concluded with competitors are terminated or violated shall be prohibited.
2. The use of duress or other unlawful means to exert influence over the sellers, so that they would not sell goods or would refuse services to certain persons shall be prohibited.

3. The use of duress or other illegal means to influence the clients with the intent to make them purchase, refrain from purchasing or use a particular type of product or service shall be prohibited.
4. The announcement of sales in installments or similar legal transactions where the seller fails to clearly declare his firm, or to give accurate information about the number and amount of the separate installments, the interest rate due on the arrears and the total selling price shall be prohibited.
5. The offering or giving of supplements to the product or service sold free of charge or against a fictitious price for another good or service, with the exception of: advertising objects of insignificant value and bearing a clear indication of the advertiser; objects or services which, according to commercial usage, constitute accessories to the sold product or the service provided; goods or services as a rebate for the sale of bigger quantities, as well as printed matter in case of sale of or subscription to periodicals shall be prohibited.
6. The making of a sale where, together with it, something is offered or promised depending on: resolving problems, puzzles, questions, riddles; collection of series of coupons, etc.; gambling in games of fortune with cash or object prizes the value of which considerably exceeds the value of the product or of the service sold shall be prohibited.
7. The sales of significant quantities of goods on the domestic market for long periods of time at prices lower than the production and marketing costs for the purpose to attract clients unfairly shall be prohibited.

Prohibition to disclose industrial or trade secrets

Article 35

1. The learning, the use or disclosure of an industrial or trade secret in contravention to good-faith commercial usage shall be prohibited.
2. The learning of a industrial or trade secret runs contrary to good-faith commercial usage where it has been effected through tapping, penetration into a premise, opening of correspondence, photographing without the consent of the holder of documents or chattels safe-guarded in a way which restricts the access to them, and also by means of deceit or offering a benefit to persons who have access to the secret as a result of their official or contractual relations.
3. The use or disclosure of a industrial or trade secret where it has been learned or made known on condition that it should not to be used or disclosed shall also be prohibited.

TITLE III
PROCEEDINGS

Chapter VIII
GENERAL PROVISIONS

Grounds to initiate proceedings

Article 36

1. Proceedings before the Commission shall be initiated following:
 - a written application from the persons whose interests are affected or threatened by a violation of this law;
 - written requests to issue authorisations or allow harmonised general conditions or State aids;
 - a decision of the Commission;
 - a request from the public prosecutor.
2. Actions to compensate the persons affected by violations under this law shall be brought in accordance with the Code of Civil Procedure. The decision of the Commission, whereby the violation is established, shall be binding on the civil court. *(Repealed by Ruling No. 18/1998 of the Constitutional Court)*

Sittings of the Commission

Article 37

1. The sittings of the Commission shall be open or held *in camera*.
2. The parties may avail themselves of counsel defense.

Quorum and majority

Article 38

1. The sittings shall be regular where at least seven members of the Commission are present.
2. The Commission shall take its decisions by open vote and a majority of six votes.

Grounds for self-challenging

Article 39

1. A member of the Commission shall be obliged to challenge himself on one of the following grounds:
 - in case that he/she has been a representative of one of the parties;

- in case that he has had an employment or civil law relationship with one of the parties;
 - in case that, due to other circumstances, that member might be considered biased or directly or indirectly interested in the outcome of the proceedings.
2. In cases under paragraph 1 the parties may challenge a member of the Commission.

Securing of evidence

Article 40

1. In case of a threat for a proof to be lost or for its collection to be rendered difficult, the chairman of the Commission shall order its collection prior to the initiation of the proceedings.
2. The provisions of the Code of Civil Procedure shall apply accordingly to the securing of evidence.

Obligation for assistance

Article 41

1. The officials shall be obliged to assist the Commission in the fulfillment of the duties assigned thereto by the law, by providing access to premises, oral and written explanations, along with provision of documents and other information supports.
2. In case of refusal to access or failure to provide information the Commission shall seek the assistance of the bodies of public prosecution and of the Ministry of the Interior.
3. Where the Commission conducts an investigation or study the officials may not rely on official, industrial or trade secrets.
4. The National Statistics Institute shall collect, process and provide upon request information to the Commission on issues within the scope of its competence.

Use of documentation

Article 42

Any documentation and information received by the Commission in the course of an investigation may be used solely for the purposes of that investigation.

Appeals

Article 43

The decisions of the Commission shall be subject to appeal before the Supreme Administrative Court within fourteen days of their notification in accordance with the Code of Civil Procedure, except for those under Article 13, paragraph 5 and Article 27, paragraphs 2 and 3.

Entry of decisions into force

Article 44

The decisions of the Commission shall enter into force when:

- they are not subject to appeal;
- they have not been appealed against within the time limit under Article 43;
- the appeal lodged has not been granted.

Enforcement

Article 45

The pecuniary sanctions and fines imposed by decisions of the Commission which have come into force shall be subject to collection in accordance with the Law on the Collection of State Claims.

Statutory limitation

Article 46

No proceedings shall be initiated or the proceedings initiated shall be discontinued after the expiry of five years after the offence has been committed.

Article 47. Fees and costs

1. For the proceedings under this law State fees and costs shall be due. The State fees shall be approved by the Council of Ministers.
2. The State institutions shall be exempt from fees but not from costs for the proceedings.

Chapter IX PROCEEDINGS FOR INVESTIGATION OF OFFENCES AND ISSUING OF AUTHORISATIONS

Initiation of proceedings

Article 48

1. Proceedings before the Commission shall be initiated on an application from the parties concerned, on a request to issue an authorisation or to allow harmonisation of general conditions or of State aids or *ex officio*.
2. No proceedings shall be initiated and the proceedings initiated shall be discontinued, following a decision of the Commission, when:
 - the applicant – natural person – has deceased or the legal person has been wound up;

- the time limits prescribed for the lapse of liability under this law have expired;
- the Commission is not competent to pronounce.

Contents of application

Article 49

1. The application under Article 36, paragraph 1, item 1 must be written in Bulgarian and must contain:

- the name unified civic number and information about the court registration of the applicant and of the person against which the complaint is brought;
- address (residence and address of management) of the applicant;
- justification of the request and a presentation of the circumstances on which the application is grounded;
- evidence in support of the application;
- signature of the person who submits the application, or of his or her representative;
- the State fees paid, if due.

2. The requests under Article 36, paragraph 1, item 2 shall contain accordingly the data listed in Article 11, paragraph 2 and in Article 26, paragraph 1.

3. The requests for State aids to be allowed shall be accompanied by enclosed evidence about the existence of the circumstances under Article 20, paragraph 4.

4. The Commission shall not examine applications which are not signed or which are anonymous.

5. Provided that the application fails to satisfy the requirements under paragraphs 1 to 3, a notice to remove the irregularities within seven days shall be sent to the applicant.

6. Provided that the applicant fails to remove the irregularities within the time limit under paragraph 5, the application shall not be examined by the Commission.

Article 50

The chairman shall open a file for the application received, the request for an authorisation or decision of the Commission under Article 36, paragraph 1, item 3, and shall assign it to a member of the Commission – rapporteur.

Investigation and study

Article 51

1. The rapporteur shall conduct an investigation or study of the circumstances concerning the file, by:
 - requesting written or oral explanations from the applicant; from the person against which the complaint for violation of the law is brought from undertakings, and from State and local authorities. The written explanations shall be recorded and signed by the person who has given the explanations;
 - requesting copies of private and official documents;
 - requesting written opinions from State and local authorities.
2. During the conduct of the investigation or study, the rapporteur shall be assisted by the administration, as well as by external experts and specialists.
3. All facts and circumstances collected during the investigation or study shall be confidential, if they constitute a business or other protected secret of the parties.
4. The investigation shall be conducted within 60 days. In cases which raise complex points of fact and law the above time limit may be extended to no more than thirty days, by an order of the chairman of the Commission.
5. After the completion of the investigation or study the parties shall be given an opportunity to get acquainted with the materials collected in the file.

Drafting of conclusion

Article 52

1. The rapporteur shall draft a conclusion and present the file to the chairman.
2. Within two weeks the chairman shall schedule an open sitting.
3. The summoning of the parties and the notification of the persons concerned for the sitting shall be made in accordance with the Code of Civil Procedure.
4. The person against whom the complaint is brought or his or her representative, the person who suffered damages as a result of the offence or his or her representative, the applicant, representatives of State or local authorities, as well as other persons concerned shall be summoned for the sitting.

Evidence

Article 53

1. Written evidence shall be admitted and the explanations of the parties shall be heard at the sittings of the Commission
2. The chairman may order that a party appear in person in order to give explanations.

Proceedings for conducting the sitting

Article 54

1. The sitting of the Commission shall start with deciding on the preliminary issues of the file concerning the regularity of the proceedings.
2. The parties to the file may be asked questions following a procedure determined by the chairman.
3. Where he considers that the circumstances of the file are clarified, the chairman shall give the parties an opportunity for opinions.
4. After the dispute is clarified from the factual and legal point of view, the chairman shall close the sitting and announce the day on which the Commission shall pronounce, and the parties present shall be considered notified.

Decision of the Commission

Article 55

1. The Commission shall pronounce, in a sitting *in camera*, a decision whereby it shall:
 - establish the offence committed and the offender, and define the type and amount of the penalty provided in the law;
 - establish that the offence committed under the law has served as a ground to issue a vicious court judgement, and empower the chairman to bring an action under the Code of Civil Procedure for its reversal; (*Repealed by Ruling No. 18/1998 of the Constitutional Court*)
 - establish that no offence has been committed under the law or that the time limit under Article 45 has expired, and dismiss the application;
 - declare that no grounds exist to impose the prohibition under Article 9;
 - exempt certain agreements, decisions or concerted practices from the prohibition under Article 9;
 - prohibit a given agreement, decision or concerted practice;
 - allow or prohibit the unification of general conditions;

- allow or propose to the corresponding body or institution to cancel or modify the project for granting of State aid;
 - authorize or prohibit a concentration.
2. The decision shall be motivated and signed by the members of the Commission who have voted during the sitting *in camera*.

Dissenting opinion

Article 56

1. A member of the Commission who dissents with the decision shall sign it with a dissenting opinion.
2. The dissenting opinion shall be attached to the decision.

Contents of decision

Article 57

The decision of the Commission shall be written and shall indicate:

- the name of the authority which has issued it;
- the grounds of fact and law for its issuance;
- a disposition where the rights and obligations shall be determined, as well as the type and amount of the penalty where such is imposed;
- the body before which and the time limit in which the decision may be appealed against.

TITLE IV LIABILITY AND PENALTIES

Chapter X LIABILITY

Administrative liability

Article 58

1. In case of violation of the prohibitions and restrictions under this law, where the act does not constitute a crime, administrative liability shall be borne.
2. No acts for establishing the offences shall be drafted and the pecuniary sanctions and fines under the law shall be imposed by a decision of the Commission which shall be subject to appeal before the Supreme Administrative Court.

Chapter XI PENALTIES

Pecuniary sanctions

Article 59

1. For offences under Article 9, Article 18, Article 30 to Article 35, as well as for:
 - carrying on operations under Article 11, paragraph 1, Article 15, paragraph 2, Article 20, paragraph 2 and Article 24, paragraph 1 without authorisation, the Commission shall impose a pecuniary sanction on the undertaking, in favour of the State, to the amount of 5,000,000 to 300,000,000 Levs.
2. In case of a repeated offence the Commission may impose a pecuniary sanction on the undertaking to the amount of 100,000,000 to 500,000,000 Levs.
3. In case of failure to perform a decision of the Commission the latter may impose a pecuniary sanction on the undertaking, to the amount of 100,000,000 to 500,000,000 Levs.

Fines

Article 60

1. The natural persons who have committed or admitted the committing of offences under this law, where the act does not constitute a crime, shall be liable to a fine of 1,000,000 to 10,000,000 Levs.
2. Persons who fail to submit on time the evidence requested or accurate information, or fail to appear in person to give explanations before the Commission, shall be liable to a fine of 500,000 to 2,500,000 Levs.
3. In case of a repeated offence under paragraphs 1 and 2 the guilty person shall be liable to a fine of 2,000,000 to 20,000,000 Levs.
4. In case of minor offences the Commission may impose a fine below the established minimum threshold.

ADDITIONAL PROVISION

§1. For the purposes of this law:

- “Undertaking” means any natural or legal person, or association under civil law thereof which carries on economic activities in the relevant market, regardless of its legal and organisational form.
- “Connected undertakings” are those undertakings one of which has such a participation in the other which enables it to exercise effective control on its management or activities.

- “Associated undertakings” are those which carry on joint economic activities on the grounds of a contract or on the basis of associations of commercial companies, in accordance with the Commercial Code.
- “Concerted practices” consist in the coordinated acts or inaction of two or more undertakings.
- “Relevant market” consists of:
 - a) Product market including all goods or services which could be accepted by consumers as substitutable in respect of their characteristics, intended use and price;
 - b) Geographical market including a specific territory on which the corresponding substitutable goods or services are offered and on which the conditions of competition are the same, while differing from those in neighbouring areas.
- “Good-faith commercial usage” is the rules defining the market behaviour, which stem from the laws and normal trading relations, and which do not violate good morale.
- “Industrial or trade secret” is facts, information, decisions and data relating to the economic activities whose keeping in secret is in the interest of the right-holders and for which they have taken the necessary measures.
- “Repeated offence” is the offence committed within one year after the entry into force of the decision whereby the offender has been punished for the same type of offence.
- “Economic activities” are the activities of undertakings the results of which are designed for exchange on the market.

TRANSITIONAL AND FINAL PROVISIONS

§2. The chairman, the deputy chairmen and the members of the Commission elected by the National Assembly shall preserve their rights until the expiry of their term of office under this law.

§ 3. The agreements, decisions and concerted practices under Article 9 of this law which exist as at the date of its entry into force shall be brought in conformity with the requirements of this law within three months. Failing this, they shall be void.

§ 4. 1. The proceedings pending at the moment of entry into force of this law, initiated under files of the Commission which have not been completed, shall be completed in accordance with the rules laid down in this law.

2. The pending court cases brought in accordance with this law shall be completed in accordance with the rules in force at the moment of their initiation.

§ 5. In the Commercial Code (published, State Gazette, issue 48 of 1991, amended, issue 25 of 1992, amended and supplemented, issues 61 and 103 of 1993, issue 63 of

1994, amended, issue 63 of 1995, amended and supplemented, issue 42, amended, issue 59 of 1996, amended and supplemented, issue 83 of 1996, amended, issue 86 and 104 of 1996, issue 58 of 1997, amended and supplemented, issues 100 and 124 of 1997), an article 262a is inserted:

“S. 262a. The issuance of an authorisation for merger or fusion of companies shall be made in accordance with conditions and proceedings laid down in a separate law. The court shall enter the merger or fusion in the commercial register after the authorisation granted is submitted to the court, where the grant of such authorisation is compulsory.”

§ 6. The Law on Banks (published, State Gazette, issue 52 of 1997, amended, issue 15 of 1998, amended, issue 21 of 1998) is amended and supplemented as follows:

- In Article 19, paragraph 5, a second sentence is inserted:

“In cases under paragraph 2, item 3 the Central Bank shall examine the request if an authorisation for the merger or fusion has been granted by the Commission for the Protection of Competition, where the grant of such authorisation is compulsory.”

- In Article 20, after the words “the Central Bank”, a comma is inserted and the following words are added: “and in cases under item 3 – also the authorisation of the Commission for the Protection of Competition, where the grant of such authorisation is compulsory”.
- In Article 75, paragraph 1, after the words “the Central Bank”, the following words are added: “after submission of an authorisation from the Commission for the Protection of Competition, where the grant of such authorisation is compulsory”.
- In Article 78, a new paragraph 6 is inserted:

“(6) An authorisation for fusion under paragraph 5 shall be granted upon submission of an authorisation from the Commission for the Protection of Competition, where the grant of such authorisation is compulsory”.

§ 7. The Law on Insurance (published, State Gazette, issue 86 of 1996, supplemented, issue 1 of 1997, amended, issue 21 of 1997 – Judgement of the Constitutional Court of the Republic of Bulgaria, amended and supplemented, issue 58 of 1997, issue 21 of 1998) is supplemented as follows:

- In Article 17c, paragraph 1, item 2 in fine, the following words are added: “upon submission of an authorisation for merger or fusion by the Commission for the Protection of Competition, where the grant of such authorisation is compulsory”,
- In Article 22, item 1, after the words “between insurers” the following words are added: “after receipt of an authorisation for merger or fusion by the Commission for the Protection of Competition, where the grant of such authorisation is compulsory”.

§ 8. Article 35 of the Law on Privatisation Funds (published, State Gazette, issue 1 of 1996, amended and supplemented, issues 68 and 85 of 1996, issue 39 of 1998) is amended and supplemented as follows:

- A new paragraph 2 is inserted:

“(2) The Commission may issue an authorisation for the acquisition of shares issued by another privatisation fund, for merger and fusion of privatisation funds only upon submission of authorisation from the Commission for the Protection of Competition, where the grant of such authorisation is compulsory”.

- The now existing paragraph 2 becomes paragraph 3.

§ 9. In Article 2 of the Law on Cooperatives (published, issue 63 of 1991, amended, issues 34 and 55 of 1992, issue 63 of 1994, issue 59 of 1996, supplemented, issues 59 and 103 of 1996, amended, issue 52 of 1997) a paragraph 2 is inserted:

“(2) In case of merger of co-operatives the court shall register the new cooperative or the changes under Article 40, paragraph 1, after it has been provided with the corresponding authorisation, issued by the Commission for the Protection of Competition, where the grant of such authorisation is compulsory.”

§ 10. The Law on Securities, Stock Exchanges and Investment Companies (published, State Gazette, issue 63 of 1995, amended and supplemented, issues 68 and 85 of 1996, issues 52 and 94 of 1997, issue 42 of 1998) is amended and supplemented as follows:

- In Article 97, a paragraph 8 is inserted:

“(8) The offeror shall mandatory enclose to the draft bidding proposal an authorisation from the Commission for the Protection of Competition”.

- Article 98 is amended as follows:

- a) In paragraph 1, the words “Commission for the Protection of Competition” are deleted;
- b) paragraph 2 is repealed.

§ 11. The implementation of this law is entrusted to the Commission for the Protection of Competition.

§ 12. This law repeals the Law on the Protection of Competition (published, State Gazette, issue 39 of 1991, corrigendum, issue 79 of 1991, amended and supplemented, issue 53 of 1992).

The law was passed by the XXXVIIIth National Assembly on 29 April 1998 and the State seal has been affixed hereto.

President of the National Assembly:

(pp) Ivan Kurtev

BURKINA FASO

COMMENTARY BY THE GOVERNMENT OF BURKINA FASO ON THE MODIFICATION OF THE "LOI NO15/94/ADP DU 5 MAI 1994 PORTANT ORGANISATION DE LA CONCURRENCE AU BURKINA FASO"

Modification de la loi n°15/94/ADP du 5 mai 1994 portant organisation de la concurrence au Burkina Faso

Le Burkina Faso a adopté une loi sur la concurrence, la loi n°15/94/ADP du 5 mai 1994 portant organisation de la concurrence au Burkina Faso.

Cette loi comprend deux livres.

Le livre I traite de la liberté des prix et des règles applicables en matière de concurrence et définit les conditions dans lesquelles la concurrence s'exerce. Il contient cinq titres.

Le livre II quant à lui traite des pratiques illicites de la concurrence et de leurs sanctions. Il comprend trois titres consacrés respectivement aux infractions, à leur constatation, aux procédures et peines, et aux dispositions diverses.

Les modifications intervenues dans la loi n°15 du 5 mai 1994 concernent exclusivement les articles 2 et 3 consacrés à la Commission Nationale de la Concurrence et de la Consommation (CNCC). Ces articles ont été abrogés et remplacés par de nouveaux articles.

Ces changements répondent à un souci maintes fois exprimé par les opérateurs économiques, les consommateurs et l'administration de faire de la CNCC un organe plus opérationnel. Cela a donc entraîné la prise de la loi n° 033-2001/AN du 4 décembre 2001 portant modification de la loi n° 15/94/ADP du 5 mai 1994 portant organisation de la concurrence au Burkina Faso.

1/ Commentaire sur l'abrogation de l'article 2

Les dispositions de l'ancien article 2 stipulaient: « Il est institué une Commission Nationale de la Concurrence et de la Consommation. La Commission Nationale de la Concurrence et de la Consommation est un organe consultatif. »

Autrement dit, la loi en créant la CNCC en tant que organe purement consultatif à limité son champ d'action à une double mission à savoir :

- émettre des avis à la requête de l'administration sur les questions de concurrence, d'où son rôle de conseil juridique au profit de l'administration.
- jouer un rôle d'observatoire chargé du bon fonctionnement des règles de la concurrence dans l'économie et de la protection des consommateurs. C'est à ce titre qu'elle élabore un rapport annuel sur l'état de la concurrence et de la consommation au Burkina Faso.

A l'analyse, ces dispositions ont réduit l'efficacité de la CNCC dans la mesure où elle ne pouvait garantir une saine concurrence entre les opérateurs économiques ou intervenir directement dans la vie économique.

Les nouvelles dispositions de l'article 2 stipulent: « *Il est institué une Commission Nationale de la Concurrence et de la Consommation chargée de la régulation de la concurrence et de la consommation* ».

Ainsi d'un simple organe consultatif, la CNCC devient dès lors un organe de régulation de la concurrence. Autrement dit, elle acquiert, en plus de ses anciennes prérogatives, le pouvoir coercitif, de sanction vis à vis des contrevenants aux règles de la concurrence et de la consommation.

2/ Commentaire sur l'abrogation de l'article 3

L'article 3 disposait : «la Commission Nationale de la Concurrence et de la Consommation est saisie à l'initiative de l'administration

- Sur toutes les questions concernant la concurrence et la consommation notamment les textes pris en application de la présente loi.
- Sur les pratiques anticoncurrentielles et restrictives de la concurrence relevées dans les affaires dont les juridictions compétentes sont saisies.
- Sur les faits qui lui paraissent susceptibles d'infractions au sens de la présente loi.»

Ainsi cet article limitait la possibilité de saisine de la Commission à l'administration seule, l'autorité compétente étant le ministre chargé du commerce. Evidemment, cela n'était pas de nature à inciter les opérateurs économiques et les associations de consommateurs à requérir les avis de la Commission.

Cet article sera donc remplacé par de nouveaux articles à savoir les articles 3, 3 bis et 3 ter. Les dispositions de l'article 3 nouveau stipulent :

«La Commission Nationale de la Concurrence et de la Consommation est saisie à l'initiative de l'administration, des associations de consommateurs légalement reconnues et des opérateurs économiques ou leurs groupements professionnels pour donner son avis sur les faits susceptibles d'infractions au sens de la présente loi.

La Commission Nationale de la Concurrence et de la Consommation peut se saisir d'office».

Dorénavant, le pouvoir de saisine de la Commission est élargi outre l'administration, aux opérateurs économiques et aux groupements professionnels, aux associations de consommateurs légalement reconnues et à la Commission elle-même.

L'article 3 bis dispose : «*La Commission Nationale de la Concurrence et de la Consommation peut après avoir entendu toutes les parties intéressées, au besoin contradictoirement, ordonner qu'il soit mis fin aux pratiques incriminées au chapitre I du livre II de la présente loi, dans un délai déterminé ou imposer des conditions particulières. Elle peut infliger une sanction pécuniaire applicable soit immédiatement, soit en cas d'inexécution d'une injonction. Le montant maximum de la sanction est pour une entreprise de 1 % du chiffre d'affaires hors taxes réalisé au Burkina Faso au cours du dernier exercice clos et dans les autres cas de 2 000 000 de F CFA. La Commission*

peut en outre, ordonner la publication de sa décision dans les journaux qu'elle indique, aux frais du contrevenant».

Ainsi, cet article autorise la Commission à prononcer des injonctions et des sanctions pécuniaires vis à vis des contrevenants aux dispositions de la loi portant organisation de la concurrence au Burkina Faso.

Quant à l'article 3 ter, il dispose : *«les décisions de la Commission Nationale de la Concurrence et de la Consommation sont notifiées aux parties en cause et à l'administration compétente qui peuvent dans un délai de 6 jours à compter de la date de notification, interjeter appel devant la Chambre Commerciale de la Cour d'Appel. Cet appel n'est pas suspensif ».*

Cette disposition de l'article 3 ter instaure le contrôle judiciaire des sanctions prononcées par la Commission. En effet, le contrevenant a la possibilité de faire appel devant la Chambre Commerciale de la Cour d'Appel de Ouagadougou s'il n'est pas satisfait des décisions de la Commission.

Ainsi, les modifications de la loi sur la concurrence du Burkina Faso ont consisté à donner plus d'attributions à la Commission Nationale de la Concurrence et de la Consommation en lui conférant en plus de son pouvoir consultatif un pouvoir de sanction tout en élargissant son mode de saisine aux associations de consommateurs légalement reconnues, aux opérateurs économiques ou leurs groupements professionnels et à la Commission elle même.

**LOI NO 15/94/ADP DU 5 MAI 1994 PORTANT ORGANISATION
DE LA CONCURRENCE AU BURKINA FASO**

L'ASSEMBLEE DES DEPUTES DU PEUPLE

Vu la Constitution,

Vu la Résolution n° 01/92/ADP du 17 juin 1992, portant validation du mandat des Députés

A délibéré en sa séance du 5 mai 1994 et adopté la Loi dont la teneur suit :

LIVRE I

**DE LA LIBERTE DES PRIX ET DES REGLES APPLICABLES
EN MATIERE DE CONCURRENCE**

**TITRE I
DE LA LIBERTE DES PRIX**

Article 1^{er}: Les prix des produits, des biens et des services sont libres sur toute l'étendue du territoire et déterminés par le seul jeu de la concurrence.

Toutefois, dans les secteurs d'activité économique ou dans les localités du territoire où la concurrence par les prix est limitée en raison soit de situation de monopole ou de difficultés durables d'approvisionnement, soit de dispositions législatives ou réglementaires, le Ministre chargé du commerce peut réglementer les prix dans des conditions fixées par décret.

Les dispositions ci-dessus ne font pas obstacle à ce que sur décision du conseil des Ministres, le Ministre chargé du commerce adopte des mesures temporaires contre des hausses excessives de prix, lorsqu'une situation de crise, des circonstances exceptionnelles ou une situation anormale du marché dans un secteur économique donné les rendent nécessaires. Il en précise la durée de validité qui ne saurait excéder six (6) mois.

**TITRE II
DE LA COMMISSION NATIONALE DE LA CONCURRENCE
ET DE LA CONSOMMATION**

Article 2: Il est institué une Commission Nationale de la Concurrence et de la Consommation

La Commission Nationale de la Concurrence et de la Consommation est un organe consultatif.

Article 3: La Commission Nationale de la Concurrence et de la Consommation est saisie à l'initiative de l'administration pour les questions suivantes :

- Sur toutes les questions concernant la concurrence et la consommation

- notamment les textes pris en application de la présente loi ;
- Sur les pratiques anticoncurrentielles et restrictives de la concurrence relevées dans les affaires donc les juridictions compétentes sont saisies;
- Sur les faits qui lui paraissent susceptibles d'infractions au sens de la présente loi.

Article 4: La composition et les règles de fonctionnement de la Commission Nationale de la Concurrence et de la Consommation sont déterminées par décret.

TITRE III DES ENTENTES ET DES ABUS DE DOMINATION

Article 5: Toutes formes d'actions concertées, de conventions, d'ententes expresses ou tacites ou de coalitions ayant pour objet ou pouvant avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, sont prohibées, notamment lorsqu'elles tendent à :

1. limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises ;
2. faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse ;
3. limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique ;
4. répartir le marché ou les sources d'approvisionnement.

Article 6: Est prohibée dans les mêmes conditions que celles visées à l'article 5 ci-dessus, l'exploitation abusive par une entreprise ou groupe d'entreprises :

1. d'une position dominante sur le marché intérieur ou une part substantielle de celui-ci ;
2. de l'état de dépendance économique dans lequel se trouve à son égard, une entreprise cliente ou fournisseur qui ne dispose pas de solution équivalente.

Ces abus peuvent notamment consister en des refus de vente, en des ventes liées, en des conditions de vente discriminatoires ou en des pratiques de prix imposé ainsi que dans la rupture injustifiée de relations commerciales.

Article 7: Est nul de plein droit tout engagement, convention ou clause contractuelle se rapportant à une pratique prohibée par les articles 5 et 6 ci-dessus :

Article 8: Ne sont pas soumises aux dispositions des article 5 et 6 ci-dessus les pratiques:

1. qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris après consultation de la Commission Nationale de la Concurrence et de la Consommation.
2. dont les auteurs peuvent justifier qu'elles ont pour effet d'assurer un progrès économique et qu'elles réservent aux utilisateurs une partie équitable du profit qui en résulte, sans donner aux entreprises intéressées la possibilité d'éliminer la concurrence

pour une partie substantielle des produits en cause. Ces pratiques ne doivent imposer des restrictions à la concurrence que dans la mesure où elles sont indispensables pour atteindre cet objectif de progrès.

TITRE IV DE LA TRANSPARENCE DU MARCHE ET DES PRATIQUES RESTRICTIVES DE LA CONCURRENCE

Chapitre I DES PRIX IMPOSES

Article 9: Est interdite toute forme de pratique de prix imposé. La marge ou le prix de revente d'un bien, d'un produit, d'une prestation de service est présumé imposé dès lors qu'il lui est conféré un caractère minimal ou maximal.

Chapitre II DE LA REVENTE A PERTE

Article 10: Est interdite la revente de tout produit en l'état à un prix inférieur à son prix d'achat effectif

Le prix d'achat effectif est présumé être le prix porté sur la facture majoré de toutes les taxes afférentes à cette revente et le cas échéant, du prix du transport.

Ne sont pas concernées par cette disposition :

- la revente de produits périssables dès lors qu'ils sont menacés de détérioration rapide ;
- la revente volontaire ou forcée motivée par la cessation ou le changement d'activité commerciale sur autorisation administrative et les ventes effectuées sur décision de justice ;
- les ventes en fin de saison de produits dont la commercialisation présente un caractère saisonnier marqué ;
- les ventes de produits qui ne répondent plus à la demande générale en raison de l'évolution de la mode ou de l'apparition de perfectionnements techniques ;
- les ventes de produits dont le réapprovisionnement s'est effectué ou pourrait s'effectuer en baisse ;
- la vente de produits dont le prix de revente est aligné sur le prix légalement pratiqué pour les mêmes produits par un autre commerçant dans la même zone d'activité.

Chapitre III DE LA FACTURATION

Article 11: Tout achat de biens, de produits ou toute prestation de service pour une activité commerciale doit faire l'objet d'une facturation.

Le vendeur est tenu de délivrer la facture dès la réalisation de la vente ou la prestation de service. L'acheteur doit la réclamer. La facture doit être rédigée en deux exemplaires au moins : le vendeur remet l'original de la facture à l'acheteur et conserve le double.

Toute vente au détail donne lieu à remise de facture, de reçu ou de note de frais à la

demande du consommateur.

Article 12 : Sans préjudice de l'application de toute autre disposition législative ou réglementaire, la facture doit mentionner :

- le nom des parties contractantes et leurs adresses ;
- la date de la vente ou de la prestation de service ;
- la dénomination précise, la quantité et les prix unitaires et totaux hors taxes des produits vendus ou des services rendus ;
- le taux et le montant de la taxe sur la valeur ajoutée ;
- les rabais, remises, et ristournes dont le principe est acquis et le montant chiffrable lors de la vente ou de la prestation de service quelle que soit leur date de règlement ;
- la date à laquelle le règlement doit intervenir et les conditions d'escompte.

Les originaux et les copies des factures doivent être conservés par l'acheteur et le vendeur pendant un délai de cinq (5) ans à compter de la date de la transaction et en tout état de cause jusqu'à épuisement du stock.

Chapitre IV **DE LA COMMUNICATION DES BAREMES ET DES CONDITIONS DE VENTE**

Article 13: Tout industriel, grossiste ou importateur est tenu de communiquer à tout revendeur qui en fait la demande, son barème de prix et ses conditions de vente par tout moyen conforme aux usages de la profession.

Les conditions de vente s'entendent, des conditions de règlement et, le cas échéant, des rabais et ristournes qui sont accordés.

Les conditions de règlement doivent obligatoirement préciser les modalités de calcul et les conditions dans lesquelles des intérêts moratoires sont appliqués dans le cas où les sommes dues sont versées après la date de paiement figurant sur la facture.

Les conditions dans lesquelles un distributeur se fait rémunérer par ses fournisseurs en contrepartie de services spécifiques doivent également faire l'objet de communication.

Chapitre V **DES REFUS DE VENTE A L'EGARD DU CONSOMMATEUR**

Article 14: Sont prohibées à l'égard du consommateur les pratiques suivantes :

- le refus de vente d'un produit, d'un bien ou de la prestation d'un service sauf pour motif légitime ;
- la subordination de la vente d'un produit à l'achat d'une quantité imposée ou à l'achat d'un autre produit ou d'un autre service ;
- la subordination de la prestation d'un service à celle d'un autre service ou à l'achat d'un produit.

Chapitre VI
**DES PRATIQUES DISCRIMINATOIRES
ENTRE PROFESSIONNELS**

Article 15: Il est interdit à tout producteur, industriel, commerçant ou artisan :

1. de pratiquer à l'égard d'un partenaire économique ou d'obtenir de lui des prix, des délais de paiement, des conditions de vente ou d'achat discriminatoires et non justifiés par des contreparties réelles, en créant de ce fait pour ce partenaire un désavantage ou un avantage dans la concurrence ;

2. de refuser de satisfaire aux demandes des acheteurs de produits ou de biens ou aux demandes de prestation de service lorsque ces demandes ne présentent aucun caractère anormal, qu'elles sont faites de bonne foi et que le refus n'est pas justifié par les dispositions de l'article 8 ci-dessus ;

la demande d'un acheteur est présumée présenter un caractère anormal au sens de l'alinéa précédent lorsqu'il est notamment établi que ce dernier procède à une des pratiques déloyales visées par les articles 9,10 et 15 de la présente loi ;

3. de subordonner la vente d'un produit ou la prestation d'un service soit à l'achat d'une quantité imposée d'autres produits, soit à la prestation d'un autre service sous réserve que cette vente ne soit soumise à une réglementation spéciale.

Chapitre VII
DES VENTES SAUVAGES ET DU PARACOMMERCIALISME

Article 16: Il est interdit à toute personne d'offrir des produits à la vente ou de proposer des services en occupant, dans des conditions irrégulières le domaine public de l'Etat ou des collectivités locales.

Sans préjudice de l'application de toute autre disposition législative ou réglementaire, nul ne peut de façon habituelle, offrir des produits à la vente, les vendre ou fournir des services s'il ne remplit pas les conditions d'exercice de la profession de commerçant déterminées par les textes en vigueur.

Chapitre VIII
DE L'INFORMATION DU CONSOMMATEUR

Article 17: Tout vendeur de produit, tout prestataire de service doit par voie de marquage d'étiquetage, d'affichage ou par tout autre procédé approprié informer le consommateur sur les prix, les limitations éventuelles de la responsabilité contractuelle et les conditions particulières de la vente, selon des modalités et conditions fixées par voie réglementaire.

Article 18: Dans la désignation, l'offre, la présentation, le mode d'emploi ou d'utilisation, l'étendue et les conditions de garantie d'un bien ou d'un service, ainsi que dans les factures et quittances, l'emploi de la langue officielle est obligatoire. Le recours à tout autre terme ou expression nationale équivalente est autorisé.

La dénomination des produits typiques ou spécialités d'appellation étrangère ou nationale connue du plus large public est dispensée de l'application des dispositions de l'alinéa précédent.

Chapitre IX
**DE LA PUBLICITE MENSONGERE
OU TROMPEUSE**

Article 19: Est interdite toute publicité faite, reçue ou perçue au Burkina Faso comportant, sous quelque forme que ce soit, des allégations, indications ou présentations fausses ou de nature à induire en erreur, lorsqu'elles portent sur un ou plusieurs des éléments ci-après : existence, nature, composition, qualités substantielles, teneur en principes utiles, espèces, origine, quantité, mode et date de fabrication, propriété, prix et conditions de vente des biens, produits ou services qui font l'objet de la publicité, conditions de leur utilisation, résultats qui peuvent être attendus de leur utilisation, motifs ou procédés de la vente ou de la prestation de service, portée des engagements pris par l'annonceur, identité, qualités ou aptitudes du fabricant, des revendeurs, des promoteurs ou des prestataires.

Chapitre X
DE LA VENTE AU CONSOMMATEUR

Article 20: Les ventes directes au consommateur et la commercialisation des produits déclassés pour défaut, pratiquées par les industriels, sont soumises à une réglementation fixée par arrêté du Ministre chargé du commerce.

TITRE V
DES DISPOSITIONS ANNEXES A L'ORGANISATION DE LA CONCURRENCE

Chapitre I
DE LA LUTTE CONTRE LA FRAUDE

Article 21: Sont interdites :

- l'importation ou l'exportation sans titre ou sans déclaration en douane des biens et produits soumis à ce régime ;
- l'importation ou l'exportation de marchandises en violation de la réglementation du contrôle des marchandises avant expédition ;
- la détention et la vente desdits biens, produits et marchandises ;
- toute falsification pratiquée sur des documents d'importation ou d'exportation ;
- toute utilisation de faux documents à des fins d'importation ou d'exportation ;
- toute forme de cession de titre d'importation ou d'exportation.

Chapitre II
DE LA GARANTIE ET DU SERVICE APRES-VENTE

Article 22: Tout produit industriel, objet, appareil ou bien d'équipement destiné au commerce doit être garanti par le vendeur, le fabricant ou l'importateur pendant une durée minimale clairement précisée.

Des arrêtés du Ministre chargé du commerce fixent en tant que de besoin pour certains produits industriels, objets, appareils ou biens d'équipement :

- la durée minimale et les conditions d'application de la garantie ;
- l'obligation de fournir un service après-vente ;
- le niveau et la disponibilité des pièces de rechange.

Chapitre III DES CLAUSES ABUSIVES

Article 23: Dans les contrats de vente ou de prestation de service conclus d'une part entre professionnel et non professionnel et d'autre part entre professionnel et consommateur, les clauses tendant à imposer au non professionnel ou au consommateur un abus de la puissance économique de l'autre partie et à lui conférer un avantage excessif peuvent être interdites ou réglementées par décret pris après avis de la Commission Nationale de la Concurrence et de la Consommation lorsqu'elles portent sur:

- le caractère déterminé ou déterminable du prix ;
- le versement du prix ;
- la consistance de la chose ;
- les conditions de livraison ;
- la charge des risques ;
- l'étendue des responsabilités et garanties ;
- les conditions d'exécution, de résolution, de résiliation ou de reconduction des conventions.

De telles clauses abusives en contradiction avec les dispositions qui précèdent, sont réputées non écrites.

Ces dispositions sont applicables aux contrats quel que soit leur forme ou leur support.

Les décrets visés au premier alinéa du présent article peuvent, en vue d'assurer l'information du contractant non professionnel ou consommateur, réglementer la présentation des écrits constatant lesdits contrats.

Chapitre IV DES TROMPERIES ET DES FALSIFICATIONS

Article 24: En application des dispositions du présent chapitre, le responsable de la première mise sur le marché d'un produit ou d'un bien est tenu de vérifier que celui-ci est conforme aux prescriptions en vigueur.

A la demande des agents habilités pour appliquer la présente loi, il est tenu de justifier des vérifications et contrôles effectués.

Article 25: Il est interdit à toute personne, qu'elle soit ou non partie au contrat, de tromper ou tenter de tromper le contractant par quelque moyen ou procédé que ce soit, même par l'intermédiaire d'un tiers :

- soit sur la nature, l'espèce, l'origine, les qualités substantielles notamment les dates de production et les dates de consommation, la composition ou la teneur en principes utiles de toutes marchandises ;
- soit sur la quantité des choses livrées ou sur leur identité par la livraison d'une marchandise autre que la chose déterminée qui a fait l'objet du contrat;
- soit sur l'aptitude à l'emploi, les risques inhérents à l'utilisation du produit, les contrôles effectués, les modes d'emploi ou les précautions à prendre.

Article 26: Il est interdit à toute personne :

1. de falsifier des denrées servant à l'alimentation humaine ou animale, des substances médicamenteuses, des boissons et des produits agricoles naturels ou transformés destinés à la vente;
2. d'exposer, de détenir en vue de la vente, de mettre en vente ou de vendre des denrées servant à l'alimentation humaine ou animale, des boissons et des produits agricoles naturels ou transformés qu'il saura falsifiés, corrompus ou toxiques;
3. d'exposer, de détenir en vue de la vente, de mettre en vente ou de vendre des substances médicamenteuses falsifiées, corrompues ou toxiques;
4. d'exposer, de détenir en vue de la vente, de mettre en vente ou de vendre, connaissant leur destination, des produits, objets ou appareils propres à effectuer la falsification des denrées servant à l'alimentation humaine ou animale, des boissons ou des produits agricoles naturels ou transformés.

Il en est de même pour toute personne qui aura provoqué leur emploi par le moyen de brochures, circulaires, prospectus, affiches, annonces ou instructions quelconques.

Les dispositions du présent article ne sont pas applicables aux fruits et légumes frais fermentés ou corrompus.

Article 27 : Il sera statué par voie réglementaire sur les mesures à prendre pour assurer l'application des dispositions du présent chapitre notamment en ce qui concerne :

1. la fabrication et l'importation des marchandises ainsi que leur mise en vente, leur vente, leur exposition, leur détention et leur distribution à titre gratuit ;
2. les modes de présentation ou les inscriptions de toute nature sur les marchandises elles-mêmes, les emballages, les factures, les documents commerciaux ou documents de promotion commerciale, notamment en ce qui concerne les éléments visés à l'article 25 ci-dessus ;

La définition, la composition et la dénomination des marchandises de toute nature, les traitements licites dont elles peuvent faire l'objet, les caractéristiques qui les rendent impropres à la consommation ;

La définition et les conditions d'emploi des termes et expressions publicitaires, dans le but d'éviter une confusion ;

L'hygiène des établissements où sont préparées, conservées et mises en vente les denrées destinées à l'alimentation humaine ou animale ;

Les conditions d'hygiène et de santé des personnes travaillant dans ces locaux ;

Les conditions dans lesquelles les Ministres compétents déterminent les caractéristiques micro biologiques et hygiéniques des marchandises destinées à l'alimentation humaine ou animale.

3. les formalités prescrites pour opérer des prélèvements d'échantillons et des saisies ainsi que pour procéder aux expertises contradictoires sur les marchandises suspectes.

Article 28: Les dispositions du présent chapitre sont applicables aux prestations de service.

Chapitre V DE LA SECURITE DU CONSOMMATEUR

Article 29: Les produits et les services doivent, dans des conditions normales d'utilisation ou dans d'autres conditions raisonnablement prévisibles par le professionnel, présenter la sécurité à laquelle on peut légitimement s'attendre et ne pas porter atteinte à la santé des personnes.

Article 30: Les produits ne satisfaisant pas à l'obligation générale de sécurité prévue à l'article 29 ci-dessus sont interdits ou réglementés par décret pris après avis de la Commission Nationale de la Concurrence et de la Consommation.

Article 31: En cas de danger grave ou immédiat, le Ministre chargé du commerce et le ou les Ministres intéressés peuvent suspendre par arrêté pour une durée n'excédant pas un (1) an, la fabrication, l'importation, l'exportation, la mise sur le marché à titre gratuit ou onéreux d'un produit et faire procéder à son retrait en tous lieux où il se trouve ou à sa destruction lorsque celle-ci constitue le seul moyen de faire cesser le danger. Ils ont également la possibilité d'ordonner la diffusion de mises en garde ou de précautions d'emploi ainsi que la reprise en vue d'un échange ou d'une modification ou d'un remboursement total ou partiel.

Ils peuvent dans les mêmes conditions, suspendre par arrêté la prestation d'un service.

Ces produits et ces services peuvent être remis sur le marché lorsqu'ils ont été reconnus conformes à la réglementation en vigueur.

Le Ministre chargé du commerce et ou les Ministres intéressés entendent les professionnels concernés au plus tard dans les quinze (15) jours qui suivent la décision de suspension.

Article 32: En cas de danger grave ou immédiat, l'administration compétente prend les mesures d'urgence qui s'imposent. Elle en réfère aussitôt au ministre intéressé et au ministre chargé du commerce, qui se prononcent, par arrêté, dans un délai de quinze (15) jours. Elle peut dans l'attente de la décision ministérielle, faire procéder à la consignation des produits susceptibles de présenter un danger pour la santé ou la sécurité des personnes. Les produits consignés sont laissés à la garde de leur détenteur après inventaire. Elle peut, dans les mêmes conditions, suspendre la prestation d'un service.

Article 33: Le Ministre chargé du commerce ou le ou les Ministres intéressés peuvent adresser aux fabricants, importateurs, distributeurs ou prestataires de services, des mises en garde et leur demander de mettre les produits et services qu'ils offrent au public en conformité avec les règles de sécurité.

Ils peuvent prescrire aux professionnels concernés de soumettre au contrôle d'un organisme habilité, dans un délai déterminé et à leurs frais, leurs produits ou services

offerts au public quand pour un produit ou un service déjà commercialisé, il existe des indices suffisants d'un danger, ou quand les caractéristiques d'un produit ou d'un service nouveau justifient cette précaution.

Lorsqu'un produit ou service n'a pas été soumis au contrôle prescrit en application du présent article, il est réputé ne pas répondre aux exigences de l'article 29 ci-dessus, sauf si la preuve contraire en est rapportée.

Article 34: Les mesures prévues au présent chapitre ne peuvent être prises pour les produits et service soumis à des dispositions législatives particulières ou à des règlements spécifiques ayant pour objet la protection de la santé ou la sécurité des consommateurs, sauf en cas d'urgence, celles prévues aux articles 31 et 32 ci-dessus.

Lorsqu'elles sont prises en vertu du présent chapitre, ces mesures doivent être proportionnées au danger présenté par les produits et les services ; elles ne peuvent avoir pour but que de prévenir ou de faire cesser le danger en vue de garantir la sécurité à laquelle on peut légitimement s'attendre.

LIVRE II

A. DES PRATIQUES ILLICITES DE LA CONCURRENCE

B. ET DE LEURS SANCTIONS

TITRE I

DES INFRACTIONS ET DE LEUR CONSTATATION

Chapitre I

DES INFRACTIONS

Article 35: Sont soumises aux dispositions de présent livre, les infractions ci-après :

- les infractions qualifiées de pratiques anticoncurrentielles ;
- les infractions aux règles de la transparence du marché et aux pratiques restrictives de la concurrence ;
- les infractions aux dispositions annexes à l'organisation de la concurrence.

Article 36: Est qualifié de pratique anticoncurrentielle, le fait de contrevenir aux dispositions du livre I titre III de la présente loi.

Article 37: Au regard de la présente loi, sont considérées comme infractions aux règles de la transparence du marché et comme pratiques restrictives de la concurrence:

1. les pratiques de prix imposé et de revente à perte ;
2. la non observation des règles de facturation ;
3. la non communication des barèmes de prix et des conditions de vente ;
4. le refus de vente et la subordination de vente à l'égard du consommateur ;
5. les pratiques discriminatoires entre professionnels ;

6. les ventes sauvages et le paracommercialisme ;
7. la non observation des règles relatives à l'information du consommateur ;
8. la publicité mensongère ou trompeuse ;
9. la non observation de la réglementation relative aux ventes directes aux consommateurs.

Article 38: Est considéré comme infraction aux dispositions annexes à l'organisation de la concurrence, le fait de contrevenir aux dispositions du livre I, titre V de la présente loi.

Chapitre II DES POUVOIRS D'ENQUETE

Article 39: Les infractions ci-dessus énumérées sont constatées au moyen de procès verbaux ou par information judiciaire.

Article 40: Sont habilités à dresser les procès verbaux, les fonctionnaires et agents de l'Etat spécialement commissionnés à cet effet. Ils doivent être assermentés et porteurs d'une carte professionnelle.

Article 41: Les fonctionnaires et agents visés à l'article précédent sont astreints au secret professionnel sous peine de sanctions pénales prévues en la matière.

Article 42: Les enquêtes donnent lieu à l'établissement de procès verbaux et, le cas échéant, de rapports.

Les procès verbaux sont rédigés dans les plus courts délais et transmis à l'autorité compétente. Un double est laissé aux parties intéressées. Ils font foi jusqu'à inscription de faux des constatations matérielles qu'ils relatent lorsqu'ils sont rédigés par deux (2) agents au moins. Ils sont dispensés du droit de timbre et d'enregistrement.

Les procès verbaux peuvent porter déclaration de saisie des produits ayant fait l'objet de l'infraction ainsi que des instruments, véhicules ou moyens de transport ayant servi à la commettre.

Article 43: Les enquêteurs peuvent :

- accéder à tous locaux, terrains ou moyens de transport à usage professionnel. En ce qui concerne les visites des locaux d'habitation, les agents habilités à cet effet doivent obligatoirement se faire accompagner d'un officier de police judiciaire ou d'un représentant des autorités civiles locales. Ces visites ne peuvent être effectuées de nuit ;
- demander la communication des livres, factures et tous autres documents professionnels et en prendre copie ;
- exiger la communication des documents de toute nature, propres à faciliter l'accomplissement de leur mission entre quelques mains qu'ils se trouvent ;
- recueillir sur convocation ou sur place les renseignements et justifications ;
- demander à l'autorité dont ils dépendent de désigner un expert pour procéder à toute expertise contradictoire nécessaire ;
- prélever des échantillons ;

- effectuer des saisies directes et des consignations.

La saisie peut être réelle ou fictive. La saisie est réelle lorsqu'elle porte sur des biens qui peuvent être appréhendés. Elle est fictive lorsque les biens ne peuvent être appréhendés.

Article 44: Pour la constatation et la poursuite des infractions prévues à l'article 36 ci-dessus, les enquêteurs ne peuvent procéder aux visites en tous lieux ni à la saisie des documents que dans le cadre d'enquêtes demandées par le Ministre chargé du commerce et sur autorisation judiciaire donnée par ordonnance du Président du Tribunal dans le ressort duquel sont situés les lieux à visiter ou d'un juge délégué par lui. Lorsque ces lieux sont situés dans le ressort de plusieurs juridictions et qu'une action simultanée doit être menée dans chacun d'eux, une ordonnance unique peut être délivrée par l'un des présidents compétents.

Article 45: Toutes contestations relatives à une ou plusieurs caractéristiques techniques de tous produits, biens ou services, ou à tous documents, peuvent, à tout moment de la procédure administrative ou de l'enquête, être déférées par l'administration à l'examen d'experts désignés par les parties ou le tribunal dans des conditions déterminées par arrêté du Ministre chargé du commerce et du Ministre chargé de la justice.

Lorsqu'ils sont accompagnés d'un des agents visés à l'article 40 ci-dessus, ces experts peuvent, à l'exclusion des visites domiciliaires, exercer le droit de visite tel que défini à l'article précédent. Lorsque les experts sont désignés par les parties, leurs conclusions excluent tout recours à toute nouvelle expertise.

Les experts visés au présent article sont astreints au secret professionnel.

TITRE II DES PROCEDURES ET DES PEINES

Chapitre I DES PROCEDURES

Article 46: Sous réserve de l'application des dispositions des articles 49,50 et 51 ci-dessous les tribunaux connaissent des infractions en matière d'organisation de la concurrence.

Article 47: Les infractions relevées en application de la présente loi font l'objet de poursuites judiciaires. L'administration compétente transmet les procès verbaux au Procureur du Faso et lui fait connaître ses conclusions. Les dispositions du droit commun seront applicables en cas de flagrant délit.

Dans les cas où l'initiative des poursuites ne provient pas de cette administration, le parquet doit l'informer immédiatement des poursuites en cours. Celle-ci est tenue de donner son avis dans un délai de sept (7) jours.

Article 48: Préalablement à la transmission de tout procès verbal au parquet, l'administration compétente peut, si elle le juge utile, demander au Ministre chargé du commerce que soit requis l'avis de la Commission Nationale de la Concurrence et de la Consommation sur le caractère d'un agissement relevé par ses services.

Article 49: L'administration peut accorder au délinquant le bénéfice de la transaction. La transaction ne lie l'administration qu'à la condition d'avoir un caractère définitif, c'est-à-dire d'avoir été ratifiée par l'autorité compétente désignée par décret.

L'exécution de la transaction par le délinquant met fin à l'action publique et entraîne mainlevée de la saisie.

Si la transaction comporte abandon de tout ou partie des marchandises, il est procédé à leur vente aux enchères publiques.

Article 50: Lorsqu'il s'agit de commerçants ambulants ou forains en état d'infraction et que la transaction ne comporte ni versement d'une somme supérieure à cinq mille (5 000) francs CFA, ni abandon de marchandises, l'administration est dispensée d'établir un acte constatant la transaction. Un reçu tiré d'un carnet à souches est délivré au délinquant.

Article 51: La juridiction compétente peut tant que le jugement définitif n'est pas intervenu, faire droit à la requête des personnes poursuivies ou de l'une d'entre elles demandant le bénéfice de la transaction. Dans ce cas, le dossier est remis à l'administration compétente qui dispose d'un délai fixé par l'autorité judiciaire pour réaliser la transaction. Ce délai qui court du jour de la transmission du dossier ne peut excéder un (1) mois.

Après la réalisation définitive de la transaction, les dossiers sont renvoyés à l'autorité judiciaire qui constate que l'action publique est éteinte. En cas de non réalisation, l'action judiciaire reprend son cours.

Chapitre II DES PEINES

SECTION I DES ENTENTES ET DES ABUS DE DOMINATION

Article 53: Est passible d'une amende de un million (1 000 000) à vingt cinq millions (25 000 000) de francs CFA et d'un emprisonnement de deux (2) mois à deux (2) ans ou de l'une de ces deux peines seulement, toute personne qui commet une ou plusieurs infractions prévues à l'article 36 de la présente loi.

Article 54: Nonobstant les peines prévues à l'article 53 ci-dessus, la juridiction compétente peut ordonner aux frais du condamné la publication intégrale ou par extraits de sa décision dans un ou plusieurs journaux qu'elle désigne et l'affichage dans les lieux qu'elle indique.

En outre, elle peut prescrire l'insertion du texte intégral de sa décision dans le rapport établi sur les opérations de l'exercice par le gérant ou le conseil d'administration.

SECTION II DE LA TRANSPARENCE DU MARCHE ET DES PRATIQUES RESTRICTIVES DE LA CONCURRENCE

Article 55: Les infractions prévues à l'article 37 ci-dessus à l'exception des 2^{ème} et 8^{ème} sont punies d'une amende de cinq mille (5 000) à cinq millions (5 000 000) de francs

CFA et d'un emprisonnement de six (6) jours à six (6) mois ou de l'une de ces deux peines seulement.

En outre, le tribunal peut ordonner aux frais du condamné la publication de sa décision dans les journaux qu'il désigne.

De même est passible de la même peine le revendeur qui aura demandé à son fournisseur ou obtenu de lui des avantages quelconques contraires aux règles de la concurrence.

Sans préjudice des peines prévues à l'alinéa premier ci-dessus, le Ministre chargé du commerce peut en rapport avec le Ministre de tutelle concerné procéder à l'arrêt immédiat de l'exercice de la profession à l'occasion de laquelle l'infraction a été commise ou à l'évacuation du domaine public irrégulièrement occupé à des fins commerciales.

Article 56: Tout professionnel qui aura vendu ou revendu des produits, des biens ou offert des services sans délivrer de facture est passible d'une amende de cinq (5 000) à cinq millions (5 000 000) de francs CFA et d'un emprisonnement de six (6) jours à six (6) mois ou de l'une de ces deux peines seulement.

Est puni de la même peine tout professionnel qui, détenant des biens ou des produits pour les besoins de son activité, ne peut en justifier la détention par la présentation d'une facture ou de tout autre document en tenant lieu à première réquisition.

Il en sera de même lorsque:

- la facture délivrée comporte de faux renseignements sur une ou plusieurs des mentions visées à l'article 11 de la présente loi ;
- la facture est fautive ou falsifiée ;
- la facture ne comporte pas une ou plusieurs des mentions prévues à l'article 12 de la présente loi.

Sont également punies de la même peine, la non remise de facture, de reçu ou de note de frais à la demande du consommateur et la non conservation des factures conformément au délai visé à l'article 12 de la présente loi.

Article 57: Les infractions prévues à l'article 37 huitièmement (8^{ème}) de la présente loi sont passibles d'une amende de cinquante mille (50 000) à dix millions (10 000 000) de francs CFA et d'un emprisonnement de un (1) mois à un (1) an ou de l'une de ces deux peines seulement.

En outre, le tribunal peut ordonner la publication d'une annonce rectificative aux frais du condamné. Dans tous les cas, l'administration compétente peut, à titre de mesures conservatoires ordonner la cessation de la publicité en cause.

L'annonceur pour le compte duquel la publicité est diffusée, est responsable à titre principal de l'infraction commise.

SECTION III
DES DISPOSITIONS ANNEXES A L'ORGANISATION
DE LA CONCURRENCE

Article 58: Sont punies d'une amende de cinquante mille (50 000) à dix millions (10 000 000) de francs CFA et de un (1) mois à un (1) an d'emprisonnement ou de l'une de ces peines seulement ce, sans préjudice du paiement des droits et taxes dus :

- toute forme de cession de titre d'importation ou d'exportation ;
- toute importation ou exportation effectuée en violation de la réglementation du contrôle des marchandises avant expédition ;
- toute importation ou exportation sans titre ou sans déclaration en douane des biens, produits et marchandises soumis à ce régime ou leur détention ;
- toute utilisation de faux documents à des fins d'importation ou d'exportation.

En outre, la saisie de la marchandise ou de sa contre valeur peut être prononcée.

Article 59: Les infractions prévues à l'article 38 de la présente loi, relatives à la garantie et au service après vente sont punies d'une amende de cinq cent mille (500 000) à cinq millions (5 000 000) de francs CFA et d'un emprisonnement de un (1) mois à six (6) mois ou de l'une de ces deux peines seulement.

En outre, l'obligation d'exécuter le service après vente peut être ordonnée par le juge.

Article 60: Est puni d'une amende de cinquante mille (50 000) à cinq millions (5 000 000) de francs CFA et de un (1) mois à six (6) mois d'emprisonnement ou de l'une de ces deux peines seulement, tout professionnel qui aura inséré dans un contrat conclu avec un non professionnel ou un consommateur une ou plusieurs clauses interdites ou contraires aux dispositions de l'article 23 de la présente loi.

Article 61: Les infractions prévues à l'article 38 de la présente loi, relatives aux tromperies et falsifications et à la sécurité du consommateur sont punies d'une amende de cinquante mille (50 000) à cinq millions (5 000 000) de francs CFA et d'un emprisonnement de un (1) mois à six (6) mois ou de l'une de ces deux peines seulement.

Article 62: Les peines prévues à l'article 61 ci-dessus sont portées au double :

1) si la tromperie ou tentative de tromperie a eu pour conséquence de rendre l'utilisation de la marchandise dangereuse pour la santé de l'homme ou de l'animal ;

2) si lesdites tromperies ou tentatives de tromperie ont été commises :

- soit à l'aide de poids, mesures ou tous autres instruments faux ou inexacts;
- soit à l'aide de manœuvres tendant à fausser les opérations de l'analyse ou du dosage, du pesage ou du mesurage, ou tendant à modifier frauduleusement la composition, le poids ou le volume des marchandises, même avant ces opérations ;
- soit à l'aide d'indications frauduleuses tendant à faire croire à une opération antérieure et exacte.

Article 63: Les peines prévues à l'article 61 ci-dessus sont portées au double si la substance falsifiée, corrompue ou toxique est nuisible à la santé de l'homme ou de l'animal.

Ces peines seront applicables même au cas où la falsification nuisible serait connue de l'acheteur ou du consommateur.

Article 64: Les peines prévues à l'article 61 ci-dessus seront applicables à ceux qui, sans motif légitime, seront trouvés détenteurs dans tous les lieux de fabrication, de production, de conditionnement, de stockage, de dépôt ou de vente, dans les véhicules utilisés pour le transport des marchandises, ainsi que dans les lieux où sont abattus ou hébergés les animaux dont la viande ou les produits sont destinés à l'alimentation humaine ou animale:

- Soit de poids ou mesures faux ou autres appareils inexacts servant au pesage ou au mesurage des marchandises ;
- soit de denrées servant à l'alimentation humaine ou animale, de boissons, de produits agricoles naturels ou transformés qu'ils savent falsifiés, corrompus ou toxiques ;
- soit de substances médicamenteuses falsifiées, corrompues ou toxiques ;
- soit de produits, objets ou appareils propres à effectuer la falsification des denrées servant à l'alimentation humaine ou animale, des boissons ou des produits agricoles naturels ou transformés.

Article 65: Les peines prévues à l'article 64 ci-dessus sont portées au double si la substance falsifiée, corrompue ou toxique est nuisible à la santé de l'homme ou de l'animal.

Article 66: Nonobstant les dispositions des articles 61,62,63,64 et 65 ci-dessus les marchandises, objets ou appareils dont les vente, usage ou détention constituent des infractions au sens des dispositions de l'article 38 relatives aux tromperies et falsifications pourront être confisqués.

En cas de non lieu ou d'acquiescement, si les marchandises, objets ou appareils ont été reconnus dangereux pour l'homme ou pour l'animal, l'autorité compétente pour la saisie, procède à leur destruction ou leur donne une utilisation à laquelle ils demeureront propres.

Le tribunal pourra ordonner dans tous les cas que le jugement de condamnation soit publié intégralement ou par extraits dans les journaux qu'il désigne et affiché dans les lieux qu'il indique. Ces mesures se font aux frais du condamné.

Article 67: Est puni des peines prévues à l'article 61 de la présente loi, quiconque, au mépris des dispositions d'un arrêté pris en application des dispositions du livre I, titre V, chapitre V de la présente loi:

- 1) aura fabriqué, importé, exporté, mis sur le marché à titre gratuit ou onéreux un produit ou un service ayant fait l'objet de mesure de suspension provisoire ;
- 2) aura omis de diffuser les mises en garde ou précautions d'emploi ordonnées ;

- 3) n'aura pas, dans les conditions de lieu et de délai prescrites, échangé, modifié ou remboursé totalement ou partiellement le produit ou le service ;
- 4) n'aura pas procédé au retrait ou à la destruction d'un produit ;
- 5) n'aura pas respecté les mesures d'urgence prescrites pour faire cesser le danger grave ou immédiat présenté par le produit ou le service ;
- 6) n'aura pas respecté la mesure de consignation décidée pour les produits susceptibles de présenter un danger grave ou immédiat.
- 7) n'aura pas observé la mesure de suspension de la prestation de service.

Article 68: Le tribunal qui prononce une condamnation pour une infraction aux textes pris en application des dispositions du livre I, titre V, chapitre V de la présente loi peut ordonner aux frais du condamné:

- la publication de la décision de condamnation et la diffusion d'un ou de plusieurs messages informant le public de cette décision ;
- le retrait ou la destruction des produits sur lesquels ont porté l'infraction et l'interdiction de la prestation de service ;
- la confiscation du produit de la vente des produits ou de la prestation de service sur lesquelles a porté l'infraction.

Article 69: La juridiction compétente peut, dès qu'elle est saisie des poursuites pour infraction aux textes visés à l'article précédent, ordonner la suspension de la vente du produit ou de la prestation de service incriminées.

Ces mesures sont exécutoires nonobstant appel. Mainlevée peut en être ordonnée par la juridiction qui les a ordonnées ou qui est saisie du dossier. Elles cessent d'avoir effet en cas de décision de non-lieu ou de relaxe.

SECTION IV DES PEINES DIVERSES

Article 70: Est puni d'une amende de deux cent cinquante mille (250 000) à cinq millions (5 000 000) francs CFA et d'un emprisonnement de deux (2) mois à six (6) mois ou de l'une de ces deux peines seulement, quiconque se serait opposé de quelque façon que ce soit à l'exercice des fonctions dont sont chargés les agents désignés à l'article 40 de la présente loi.

Article 71: Pour les infractions constatées en matière de fraude, de tromperies et falsifications, de publicité mensongère ou trompeuse, d'entente et d'abus de domination et de manquement aux règles de sécurité du consommateur le Ministre chargé du commerce peut ordonner la fermeture de magasins et boutiques de vente pour une durée maximum de trois (3) mois.

Article 72: La récidive constitue une circonstance aggravante.

Sont réputés en état de récidive ceux qui, dans un délai de deux (2) ans, se seront

rendus coupables d'une seconde infraction de même nature.

Article 73: En cas de récidive pour les infractions énumérées à l'article 71 ci-dessus, le juge peut ordonner la cessation temporaire ou définitive de toute activité commerciale sur l'ensemble du territoire national.

Article 74: les complices convaincus d'infraction à la réglementation de la concurrence sont punis des mêmes peines que les auteurs principaux.

TITRE III DES DISPOSITIONS DIVERSES

Article 75: Les dispositions de la présente loi s'appliquent à toutes les activités de production, de distribution et de service y compris celles qui sont le fait de personnes morales de droit public.

Article 76: Le délai de prescription des infractions prévues par la présente loi est de trois (3) ans.

Article 77: La part attribuée au budget de l'Etat est de 50 % du produit des amendes et confiscations recouvrées en vertu des dispositions de la présente loi.

Le reste est réparti dans des conditions fixées par arrêté du Ministre chargé du commerce et du Ministre chargé des Finances.

Article 78: Sont abrogés toutes dispositions antérieures contraires.

A titre transitoire, les textes d'application de l'ordonnance n° 77-007/PRES du 1^{er} mars 1977 portant réglementation du régime des prix, ensemble ses modificatifs sont et demeurent en vigueur jusqu'à leur abrogation expresse.

Demeurant également valables, les actes de constatation et de procédure, établis antérieurement à la date d'entrée en vigueur de la présente loi et conformément aux dispositions de l'ordonnance n° 74-051/PRES du 09 août 1974 relative à la constatation, la poursuite et la répression des infractions en matière de prix, ensemble ses modificatifs.

Article 79: Des textes réglementaires détermineront les modalités d'application de la présente loi qui sera exécutée comme loi de l'Etat.

*Ainsi fait et délibéré en séance publique
à Ouagadougou, le 5 mai 1994*

Le Secrétaire de séance

Le Président

Robert Francis COMPAORE

Dr Bongnessan Arsène YE

**LOI NO 033 – 2001/AN PORTANT MODIFICATION DE LA LOI NO 15/94/ADP
DU 5 MAI 1994 PORTANT ORGANISATION DE LA CONCURRENCE AU
BURKINA FASO**

L'ASSEMBLEE NATIONALE

VU la Constitution ;

VU la résolution n° 01/97/AN du 7 juin 1997,

Portant validation du mandat des députés ;

VU la loi n° 15/94/ADP du 5 mai 1994, portant organisation de la
Concurrence au Burkina Faso ;

A délibéré en sa séance du 04 décembre 2001 et adopté la loi dont la teneur suit :

Article 1: Les dispositions des articles 2 et 3 de la loi n° 15/94/ADP du 5 mai 1994, portant organisation de la concurrence au Burkina Faso sont modifiées et complétées ainsi qu'il suit :

Au lieu de :

Article 2: Il est institué une Commission Nationale de la Concurrence et de la Consommation.

La Commission Nationale de la Concurrence et de la Consommation est un organe consultatif .

Lire :

Article 2: Il est institué une Commission nationale de la concurrence et de la consommation chargée de la régulation de la concurrence et de la consommation.

Au lieu de :

Article 3 : La Commission Nationale de la Concurrence et de la Consommation est saisie à l'initiative de l'Administration pour les questions suivantes:

- sur toutes les questions concernant la concurrence et la consommation notamment les textes pris en application de la présente loi ;
- sur les pratiques anticoncurrentielles et restrictives de la concurrence relevées dans les affaires dont les juridictions compétentes sont saisies;
- sur les faits qui lui paraissent susceptibles d'infractions au sens de la présente loi.

Lire :

Article 3: La Commission Nationale de la Concurrence et de la Consommation est saisie à l'initiative de l'administration, des associations de consommateurs légalement reconnues et des opérateurs économiques ou leurs groupements professionnels pour donner son avis sur les faits susceptibles d'infractions au sens de la présente loi.

La Commission Nationale de la Concurrence et de la Consommation peut se saisir d'office des mêmes faits.

Article 3 bis: La Commission Nationale de la Concurrence et de la Consommation peut, après avoir entendu toutes les parties intéressées au besoin contradictoirement, ordonner qu'il soit mis fin aux pratiques incriminées au Chapitre I du Titre I du Livre II de la présente loi, dans un délai déterminé, ou imposer des conditions particulières.

Elle peut infliger une sanction pécuniaire applicable soit immédiatement, soit en cas d'inexécution d'une injonction.

Le montant maximum de la sanction est, pour une entreprise, de 1% du chiffre d'affaires hors taxes réalisé au Burkina Faso au cours du dernier exercice clos et, dans les autres cas de 2 000 000 de FCFA.

La Commission peut, en outre, ordonner la publication de sa décision dans les journaux qu'elle indique, aux frais du contrevenant.

Article 3 ter: Les décisions de la Commission Nationale de la Concurrence et de la Consommation sont notifiées aux parties en cause et à l'administration compétente qui peuvent, dans un délai de dix jours à compter de la date de notification, interjeter appel devant la Chambre commerciale de la Cour d'Appel de Ouagadougou qui statue dans le mois de l'appel. Cet appel n'est pas suspensif.

Article 2: La présente loi sera exécutée comme loi de l'Etat.

Ainsi fait et délibéré en séance publique
a Ouagadougou, le 04 Décembre 2001.

Le Secrétaire de séance

Pour le Président de l'Assemblée
Nationale, le Cinquième Vice Président

CZECH REPUBLIC

COMMENTARY BY THE GOVERNMENT OF CZECH REPUBLIC ON THE ACT ON THE PROTECTION OF COMPETITION

In 2001 the new Act No. 143/2001 Coll., on the Protection of Competition (hereinafter referred to as “the Act”) came into force as of 1 July 2001 replacing the former Act No. 63/1991. The basic aim of the new legal regulation was to achieve compatibility of the Act with the competition law of the European Communities in all the areas of the public competition law, i.e. in the area of the prohibited agreements distorting competition, abuse of dominant position and control of concentrations of undertakings. The most important changes to the competition law of the Czech Republic introduced by this act are as follows:

- The Act explicitly regulates the application of the competition rules on undertakings, which provide the services of general economic interest. The Act fully applies to these undertakings with the exception of cases, when the application of the Act would obstruct the performance of the special tasks assigned to them.
- The undertakings, i.e. the subjects to which the Act applies may be not only the natural and legal persons, but also the associations of these persons regardless if it is an association with legal subjectivity or without, on the condition that they are participating in competition in the market or are able to influence the competition by their activities. The Act newly explicitly defines the concept of the relevant market as the market of a product, which is from the view of its characteristic, price and intended use identical, comparable and mutually interchangeable, on the territory where the conditions of competition are sufficiently homogenous and clearly distinguishable from the neighbouring territories.
- In the area of the agreements distorting competition the new Act maintains a general clause prohibiting all agreements between undertakings, decisions of their associations and concerted practices which lead or may lead to the distortion of competition, with a possibility of exemption in case conditions stipulated by the Act are fulfilled. Furthermore, a general (block) exemption may be granted by way of a decree of the Czech competition authority – the Office for the Protection of Competition (hereinafter referred to as “the Office”). In line with the EC legislation horizontal and vertical agreements are explicitly distinguished. This difference is important in particular in connection with the definition of the de minimis agreements, for which new thresholds are set, whereas under the fulfilment of the conditions provided for by the Act these agreements are not subject to the prohibition. The exemption from the prohibition for the de minimis agreements, nevertheless, does not apply to some hard-core restrictions defined by the Act.
- Conditions for individual exemption from the prohibition of anticompetitive agreements are exclusively of based on competition principles and mirror the conditions for exemption under Article 81(3) of the Treaty establishing European Community.
- In the area of abuse of dominance, dominant position is newly defined on the principle of market power of undertakings, which is based on more criteria than

just the market share. Thus the market share still remains important, but not the only criterion for the assessment of the position of the undertaking on the market. The broader concept of “market power” also comprises in particular economic and financial power of undertaking, barriers to entry into the market, the market structure etc. The Act newly introduces into the Czech competition law the institute of collective (joint) dominance of several subjects in line with the EC competition law.

- As regards the concentration of undertakings, the concept of concentration is newly defined. As one of its forms the Act explicitly stipulates the establishment of a new undertaking jointly controlled by several undertakings (jointly venture) provided that the undertaking in the long term performs all the functions of individual economic unit and the concentration does not aim at co-ordination of competitive behaviour of the founders of joint venture.
- The Act newly established the amount of turnover as the criterion whether the given concentration is subject to the approval by the Office. The Act is based on the principle that only such concentrations are subject to approval, which may significantly affect effective functioning of competition. The Act also defines the concept of net turnover and the method of calculating the combined net turnover of the undertakings.

The new Act has introduced a two phase proceeding on approval of concentration of undertakings: the first phase lasts one month and the eventual second phase of investigation, undertaken in complicated cases, lasts another four months. It means that maximum period for issuing a decision in case of concentration of undertakings is five months from the day of initiation of proceeding. Newly established is also the prohibition for undertakings to implement the concentration before the decision of the office on approval of concentration enters into force. The Act at the same time provides for the exemptions from this principle as well as for the fines in case of breach of this rule.

- According to the new Act the Office can impose a fine within three years from the day when it learned about the infringement of the Act (the deadline pursuant to the former act was 1 year). In line with the EC law the Act allows imposition of fine only on the basis of intentional or negligent behaviour of the undertaking.

In 2004, **the Act was amended as of 2 June 2004 by the Act No. 340/2004 Coll.**, which aimed in particular at ensuring implementation of principles of the modernised EC competition law after 1 May 2004 and enabling the Office to engage in the decentralised enforcement of the EC competition law within the framework of the European Competition Network. Apart from that, its objective was also to strengthen the Czech competition law compliance with the current EC competition rules and to respond to the changes in the Community law since the enactment of the competition act in 2001. This amendment to the Act includes in particular the following changes to the Czech competition law:

- The Office is empowered to apply Articles 81 and 82 of the EC Treaty in compliance with the Council Regulation 1/2003 and procedural rules for such proceedings before the Office are provided for.
- The effective co-operation of the Office with the European Commission and

national competition authorities of the EU Member States within the framework of the European Competition Network is ensured, including the assistance by the Office to the European Commission during its investigation in the territory of the Czech Republic.

- The rules for acquiring court permission for carrying out investigation in other than business premises are set.
- A system of notifications for agreements distorting competition is replaced by a direct applicability of the provisions concerning exemption from the prohibition of agreements. Similarly to the EC law undertakings need not ask the Office any more for issuing a decision on permission of exemption in the framework of administration proceedings but if their agreements fulfil conditions for exemption stipulated by the Act, they are exempted automatically.
- Maximum market shares for so-called de minimis agreements are increased to the level of 10% as far as horizontal agreements are concerned and 15% as far as vertical agreements are concerned (original thresholds were 5 and 10% respectively).
- A so-called negative clearance procedure relating to agreements and abuse of a dominant position is abolished.
- A new legal institute is introduced in the form of the decision that makes binding commitments offered by the participants to the proceedings. Such commitment decision enables termination of the proceedings and removal of competition concerns without being necessary to issue a decision on existence of a prohibited agreement or abuse of dominant position.
- The definition of an abuse of dominant position in the form of rejection of access to so-called essential facilities is made more precise and it newly includes not only cases where transmission networks and infrastructures are in ownership, but also under other type of control by a dominant undertaking.
- Merger notification thresholds are changed so that local nexus of the concentrations to be notified to the territory of the Czech Republic is strengthened.
- Time-limits for proposal of remedies in merger cases are introduced as well as an extension of deadlines for issuing decisions in case of mergers where remedies were proposed.

Furthermore, by the **Act was amended as of 7 September 2004 also by Act No. 484/2004 Coll.** adopted on the basis of an initiative of a member of the House of Deputies of the Parliament of the Czech Republic. This amendment, which was not recommended by the Office, concerned the application of the Act to the production of and trade in agricultural products and contains the following changes to the Czech competition law:

- The Act newly does not apply to actions of undertakings in the field of production of and trade in agricultural products provided they act in compliance with the law of the European Communities (the footnote to the relevant provision refers explicitly to

the Regulation No. 26/62 applying certain rules of competition to production of and trade in agricultural products).

- The de minimis rule newly contains, besides the exemption for horizontal and vertical agreements below specified market share thresholds, also a provision exempting from the prohibition agreements of sales organizations and associations of agricultural producers on sale of unprocessed agricultural commodities (again referring to Regulation No. 26/62). This exemption nevertheless does not apply to the hard-core restrictions specified in Article 6(2) of the Act.
- In the provision prohibiting abuse of dominance a new example of such an abuse is added consisting in direct or indirect requirement of pecuniary or non-pecuniary performance in exchange for listing by an undertaking in the position of a purchaser, for placement of goods in the business premises of an undertaking in the position of a purchaser, or direct or indirect requirement of special discounts and financial advantages in connection with opening of business premises or various promotional activities by an undertaking in the position of a purchaser.

In 2004, the Office also elaborated a **draft of another amendment to the Act** which was approved by the Government in January 2005. This draft amendment aims at ensuring further convergence of the Czech competition law with the Community law in particular in connection with adoption of the Council Regulation No. 139/2004 on the control of concentrations. It also proposes to incorporate the Community block exemptions directly into the Czech competition law so that they would be applied in the Czech Republic also to agreements with no effect on trade but falling under the prohibition pursuant to the national competition rules. The draft Amendment to the Act on the Protection of Competition will be discussed by the Parliament of the Czech Republic during the year 2005.

Block exemptions

The Act on the Protection of Competition empowered the Office to adopt a complex system of so-called block exemptions applied in the EU. On 5 June 2001 the Office has issued eight decrees (No. 198-205/2001 Coll.) on approval of general exemption from the prohibition of agreements distorting competition. These decrees have come into force on the same day as the new Act, i.e. on 1 July 2001. The general exemptions cover certain categories of vertical agreements, agreements on research and development, agreements on transfer of technologies, specialisation agreements, agreements in the area of insurance, agreements concerning consultations on prices allocation of slots in passenger air transport, agreements on distribution and servicing of motor vehicles and agreements in the area of rail, road and inland waterway transport. The block exemption concerning agreements on distribution and servicing of motor vehicles was revised in 2003 (decree of the Office No. 31/2003 Coll.) in order to incorporate changes made to the relevant EC block exemption.

Leniency programme

With the aim to strengthen its instruments to fight cartel agreements, the Office adopted on 1 July 2001 Communication on non-imposition or reduction of fines in cartel cases (so-called leniency programme), which was inspired by the successful leniency notice of the European Commission. The level of reduction of fine always depends on the

time of providing the co-operation to the Office and importance of the information provided by the undertaking – the party to collusive cartel agreement. In March 2002 the Office has revised its leniency programme in order to follow the principles of the new leniency programme of the European Commission.

Decree stipulating the details of requisites of the application for approval of the concentration of undertakings

Proceeding on approval of concentration pursuant to the Act is always initiated on the basis of an application (also called notification). The Act defines general requisites of the application and explicitly refers to the decree of the Office, which should stipulate these requisites in detail. The Office issued a Decree No. 368/2001 Coll., stipulating the details of the requisites of the application for approval of concentration of undertakings, which came into force as of 17 October 2001. Integral part of the decree is the questionnaire, which contains questions concerning the detailed information on the intended concentration.

**CONSOLIDATED ACT
ON THE PROTECTION OF COMPETITION**

**ACT No. 143/2001 Coll.
of 4 April 2001**

**on the Protection of Competition
and on Amendment to Certain Acts
(Act on the Protection of Competition)**

**as amended by
Act No. 340/2004 Coll. of 4 May 2004, Act No. 484/2004 Coll. of 5 August 2004,
Act No. 127/2005 Coll. of 22 February, Act No. 361/2005 Coll. of 19 August
2005**

The Parliament has enacted the following Act of the Czech Republic:

**PART ONE
PROTECTION OF COMPETITION**

**SECTION I
INTRODUCTORY PROVISIONS**

**Article 1
Introductory provisions**

(1) This Act regulates the protection of competition in the market of products and services (hereinafter referred to as “goods”) against its elimination, restriction, other distortion, or imperilment (hereinafter referred to as “distortion”) by:

- a) agreements between undertakings (Article 3 (1)),
- b) abuse of dominant position of undertakings, or
- c) concentration of undertakings.

(2) This Act further regulates the procedure for application of Articles 81 and 82 of the Treaty establishing the European Community (hereinafter referred to as “the Treaty”) by the authorities of the Czech Republic and certain issues of cooperation of these authorities with the Commission of the European Communities¹⁾ (hereinafter referred to as “the Commission”) and with the authorities of other Member States of the European Community in procedure pursuant to the Council Regulation (EC) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty^{1a)} (hereinafter referred to as “the Regulation”) and in the Council Regulation (EC) on the control of concentrations between undertakings^{1b)} (hereinafter referred to as “the Merger Regulation”).

¹⁾ Article 211 et seq. of the Treaty establishing the European Community.

^{1a)} Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

^{1b)} Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

(3) This Act shall apply to undertakings which provide, on the basis of a special act or on the basis of a decision issued pursuant to a special act, services of general economic interest^{1c)} in so far as its application does not obstruct the provision of these services.

(4) This Act shall be applied similarly also to the proceedings in cases of undertakings, whose actions may affect trade between Member States of the European Community pursuant to the Articles 81 and 82 of the Treaty.

(5) This Act shall also apply to actions of undertakings, occurred abroad, which distort or may distort competition in the territory of the Czech Republic.

(6) This Act shall not apply to actions pursuant to paragraph 1, whose effects take place solely in a foreign market, unless an international treaty, binding on the Czech Republic, provides otherwise.

(7) This Act shall further not apply to the protection of competition against unfair competition²⁾.

(8) This Act shall further not apply to actions of undertakings in the field of production of and trade in agricultural products provided they act in compliance with the law of the European Communities.^{3a)}

(9) This Act shall further not apply to actions of undertakings that constitute a breach of duty laid down in the Act on the electronic communication^{4a)} or in a decision issued pursuant to this Act.

Article 2 **Definition of certain terms**

(1) Undertakings under this Act shall be deemed to mean natural or legal persons, their associations, associations of such associations and other groupings, including where such associations and groupings are not legal persons, provided they take part in competition or may influence competition by their activities, although they are not entrepreneurs.

(2) Relevant market shall be deemed to mean the market of goods, which are identical, comparable or mutually interchangeable from the point of view of its characteristics, price and their intended use in the area, where the competition conditions are sufficiently homogenous and which can be clearly distinguished from neighbouring areas.

^{1c)} For instance the Act No. 29/2000 Coll., on Postal Services and on amendments to several Acts (the Postal Services Act), Article 23 of the Act No. 6/1993 Coll., on the Czech National Bank, as amended by the Act No. 442/2000 Coll., Article 9 of the Act No. 468/1991 Coll., on Operation of Radio and Television Broadcasting, as amended, the Act No. 151/2000 Coll., on Telecommunications and on amendment to other Acts.

²⁾ Article 44 and et seq. of the Commercial Code, as amended by the Act. No. 370/2000 Coll.

^{3a)} Regulation No. 26 applying certain rules of competition to production of and trade in agricultural products

^{4a)} Act No. 127/2005 Coll. on Electronic Communication and on Amendment to Further Acts (Act on Electronic Communication)

SECTION 11
AGREEMENTS DISTORTING COMPETITION

Article 3

(1) All agreements between undertakings, decisions by associations of undertakings and concerted practices (hereinafter referred to as “agreements”) which result or may result in the distortion of competition shall be prohibited and null and void,⁴⁾ unless this Act or a special act provides otherwise, or unless the Office for the Protection of Competition (hereinafter referred to as “the Office”) grants an exemption from this prohibition by its implementing regulation.

(2) Prohibited within the meaning of paragraph 1 shall be in particular agreements that result or may result in the distortion of competition due to the fact that they contain provisions on:

- a) direct or indirect fixing of prices or other business terms and conditions,
- b) limitation or control of production, sales, research and development or investments,
- c) division of markets or sources of supply,
- d) making the conclusion of a contract subject to acceptance of further performance, which by its nature or according to commercial usage and fair business practices has no connection with the object of such contracts,
- e) application of dissimilar conditions to identical or equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage,
- f) obligation of the parties to the agreement to refrain from trading or other economic co-operation with undertakings not being party to the agreement, or to otherwise harm such undertakings (group boycott).

(3) If the reason for prohibition relates only to a part of the agreement, only that particular part thereof shall be prohibited and null and void. Provided that it may be inferred from the nature, contents or purpose of the agreement, or the circumstances in which the agreement was concluded, that such part may not be severed from its remaining content, the whole such agreement shall be prohibited and null and void.

(4) The prohibition pursuant to paragraph 1 shall not apply to agreements, which

- a) contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit,
- b) do not impose on the undertakings restrictions which are not indispensable to the attainment of the objectives pursuant to letter a),
- c) do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the market of goods, the supply or purchase of which constitutes the object of the agreement

⁴⁾ Article 39 of the Civil Code, as amended by the Act No. 509/1991 Coll.

Article 4 **Block exemptions**

(1) The prohibition pursuant to Article 3(1) shall not apply to agreements that may not effect trade between Member States of the European Community pursuant to the Article 81 of the Treaty, which, however, fulfil other conditions laid down in block exemptions adopted on the basis of Article 83(1) of the Treaty in order to implement the Article 81(3) of the Treaty by relevant Commission or Council Regulations (hereinafter referred to as “the Community Block Exemptions”).

(2) The Office may also grant block exemptions to other categories of agreements, provided it is proved that the distortion of competition to which the block exemption would lead is prevailed by benefit for other participants of the market, in particular for consumers.

(3) The Office shall withdraw the benefit resulting from the exemption pursuant to the paragraph 1 or 2 provided that, as a consequence of the market development, an agreement subject to such exemption would not meet the conditions laid down in the Article 3(4).

Article 5 **Horizontal and vertical agreements**

(1) Agreements between undertakings operating on the same level of the goods market shall be deemed horizontal agreements.

(2) Agreements between undertakings operating on different levels of the goods market shall be deemed vertical agreements.

(3) Mixed agreements between undertakings operating on the same horizontal level as well as on different vertical levels of the goods market shall be deemed to constitute horizontal agreements; in case of doubts, any such agreement shall be deemed to be a horizontal agreement.

Article 6

(1) The prohibition of agreements pursuant to Article 3(1) shall not apply to:

- a) a horizontal agreement where the combined share in the relevant market of the parties to the agreement does not exceed 10%,
- b) a vertical agreement where the combined share in the relevant market of the parties to the agreement does not exceed 15%,
- c) agreements of sales organizations and associations of agricultural producers on sale of unprocessed agricultural commodities.^{3a)}

(2) The exemption from the prohibition of agreements pursuant to paragraph 1 shall not apply to the following agreements, even though they fulfil conditions laid down in paragraph 1:

- a) horizontal agreements on direct or indirect price fixing, restriction or control of production or sales or division of market or sources of supply or customers,
- b) vertical agreements on direct or indirect price fixing relating to resale of goods by the purchaser or granting the purchaser full protection for such resale in a defined market,
- c) individual agreements, forming a part of system of agreements pertaining to identical, comparable or substitutable goods, provided that
 - 1. the aggregate share in the relevant market of the parties to agreements forming such system, where at least one and the same undertaking is party to all these agreements, exceeds percentage limits set in paragraph 1 above, or
 - 2. the system of vertical or mixed agreements restricts access to the relevant market for undertakings which are not parties to such agreements and the competition in the relevant market is significantly restricted by the cumulative effect of parallel networks of similar vertical or mixed agreements entered into for the purpose of distribution of identical, comparable or substitutable goods provided the combined share of parties to the horizontal agreement or the share of any of the parties to the vertical agreement exceeds 5 % in the relevant market.

Article 7

(1) If the Office finds within the framework of proceedings concerning the matters pursuant to Articles 3 to 6, that a prohibited agreement has been concluded, it shall declare such fact in a decision, by means of which it shall prohibit performance of the agreement for the future.

(2) In proceedings pursuant to paragraph 1 the Office may impose on the parties the duty to fulfil measures, which they have jointly proposed, if such measures are sufficient for the protection of competition and if the harmful situation is eliminated by their fulfilment. Should the Office find such measures not sufficient, it shall communicate the reasons for such finding to the undertakings in writing and it shall continue with the proceedings; otherwise it shall impose fulfilment of such measures and terminate the proceedings.

(3) The parties to the proceedings may propose the measures pursuant to paragraph 2 to the Office in writing within 15 days following the day, on which the Office delivered to them its objections to the agreement; any proposal or changes in the proposed measures made after this period shall be taken into account by the Office only in cases deserving special attention. The parties to the proceedings are bound by their proposal vis-à-vis the Office and vis-à-vis each other, or vis-à-vis third parties, and following the proposal, until the decision of the Office pursuant to paragraph 2 is issued, they must not perform the agreement in its original wording.

(4) The Office may not issue a decision pursuant to paragraph 2, if the prohibited agreement has already been performed and if it resulted or could have resulted in a substantial distortion of competition.

(5) Following the termination of the proceedings pursuant to paragraph 2, the Office may reopen the proceedings pursuant to paragraph 1, where

- a) there has been a substantial change in circumstances on which the decision pursuant to paragraph 2 was based,
- b) the undertakings act contrary to the imposed measures, or
- c) the decision was issued on the basis of incorrect or incomplete documents, data or information.

Articles 8 and 9
Abolished.

SECTION III
DOMINANT POSITION AND ITS ABUSE

Article 10

(1) One or more undertakings jointly (joint dominance) shall be deemed to have a dominant position in the relevant market, if their market power enables them to behave to a significant extent independently of other undertakings or consumers.

(2) The Office shall assess the market power pursuant to paragraph 1 above on the basis of the amount of ascertained volume of sales or purchases in the relevant market for the goods in question (market share), achieved by the relevant undertaking or undertakings in joint dominant position during the period examined pursuant to this Act, and on the basis of other indices, in particular the economic and financial power of the undertakings, legal or other barriers to entry into the market by other undertakings, level of vertical integration of the undertakings, market structure and size of the market shares of their immediate competitors.

(3) Unless proven contrary by means of the indices pursuant to paragraph 2 above, an undertaking or undertakings in joint dominance shall be deemed not to be in dominant position, if its/their share in the relevant market achieved during the examined period does not exceed 40%.

Article 11

(1) Abuse of dominant position to the detriment of other undertakings or consumers shall be prohibited. Abuse of dominant position shall consist particularly of:

- a) direct or indirect enforcement of unfair conditions in agreements with other participants in the market, especially enforcement of performance, which is at the time of conclusion of contract conspicuously inadequate to the counter-performance provided,
- b) making the conclusion of contracts subject to acceptance by the other party of supplementary performance, which by its nature or according to commercial usage has no connection with the object of such contracts,
- c) application of dissimilar conditions to identical or equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
- d) termination or limitation of production, sales or research and development to the prejudice of consumers,

- e) consistent offer and sale of goods for unfairly low prices, which results or may result in distortion of competition,
- f) refusal to grant other undertakings access, for a reasonable reimbursement, to own transmission grids or similar distribution networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, if other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove, that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use; the same proportionately applies also to the refusal of access, for a reasonable reimbursement, of other undertakings to the use of the intellectual property or access to the networks owned or used on other legal grounds by the undertaking in a dominant position, if such use is necessary for participation in competition in the same market as the dominant undertakings or in any other market,

(2) The provision of paragraph 1(f) shall not apply to actions of undertakings constituting performance of the communication activity^{5a)} pursuant to Act on Electronic Communication.

(3) If the Office finds within the framework of proceedings concerning the matters pursuant to paragraph 1 that an abuse of a dominant position has been committed, it shall declare such fact in a decision and it shall by this decision prohibit such action for the future.

(4) In proceedings pursuant to paragraph 3 the Office may impose on the parties the duty to fulfil measures, which they have jointly proposed, if such measures are sufficient for the protection of competition and if the harmful situation is eliminated by their fulfilment. Should the Office find such measures not sufficient, it shall communicate the reasons for such finding to the undertakings in writing and it shall continue with the proceedings; otherwise it shall order fulfilment of such measures and terminate the proceedings.

(5) The parties to the proceedings may propose the measures pursuant to paragraph 4 to the Office in writing within 15 days following the day, on which the Office delivered to them its objections to their behaviour; any proposal or changes in the proposed measures made after this period shall be taken into account by the Office only in cases deserving special attention. The parties to the proceedings are bound by their proposal vis-à-vis the Office and vis-à-vis each other, or vis-à-vis third parties, and following the proposal, until the decision of the Office pursuant to paragraph 4 is issued, they must not perform the agreement in its original wording.

(6) The Office may not issue a decision pursuant to paragraph 4, if the abuse of dominant position has resulted in a substantial distortion of competition.

(7) Following the termination of the proceedings pursuant to paragraph 4, the Office may reopen the proceedings pursuant to paragraph 3, where

^{5a)} Article 6 of the Act No. 127/2005 Coll. on Electronic Communication and on Amendment to Further Acts (Act on Electronic Communication).

- a) there has been a substantial change in circumstances on which the decision pursuant to paragraph 4 was based,
- b) the undertakings act contrary to the imposed measures, or
- c) the decision was issued on the basis of incorrect or incomplete documents, data or information.

SECTION IV CONCENTRATIONS OF UNDERTAKINGS

Article 12 Definition of terms

(1) A concentration of undertakings shall originate from the merger of one or more undertakings previously independently operating in the market.

(2) A concentration of undertakings pursuant to this Act shall include the acquisition of an enterprise⁷⁾ of another undertaking or a part thereof on the basis of a contract, auction or by other means. For the purpose of this Act, a part of an enterprise shall be deemed to mean also a part of an enterprise of the undertaking, to which turnover achieved by sale of goods in the relevant market may be unequivocally assigned, even if it shall not form an independent organization unit of the enterprise^{7a)}.

(3) As a concentration of undertakings pursuant to this Act shall further be regarded a situation, when one or more persons who are not entrepreneurs, but already control at least one undertaking, or if one or more entrepreneurs acquire the possibility to control directly or indirectly another undertaking, in particular:

- a) by acquisition of equity shares, business or membership interests, or
- b) by a contract or by any other means, allowing them to control other undertaking.

(4) For the purpose of this Act, control shall be deemed to mean a possibility to perform, on the basis of matter of fact or of law, a decisive influence on the activity of another undertaking, particularly on the basis of

- a) property right or right to use towards an enterprise of the controlled undertaking or its part or
- b) right or other matters of law that provide decisive influence on composition, voting and decision-making of the controlled undertaking's bodies.

(5) A concentration within the meaning of paragraph 3 shall be constituted also by establishment of a joint control over an undertaking (hereinafter referred to as "joint venture") that performs on a lasting basis all functions of an autonomous economic entity.

(6) Establishment of a joint control over a joint venture, the purpose of which is coordination of competition behaviour of the persons controlling the undertaking, which remain independent competitors in the market, shall be assessed as an agreement of undertakings pursuant to Section II.

⁷⁾ Article 5 of the Commercial Code, as amended by the Act No. 370/2000 Coll.

^{7a)} Article 7 of the Commercial Code, as amended by the Act No. 370/2000 Coll.

(7) A qualified stake held by a bank in a legal entity by virtue of payment of the issue price of shares by a set-off of the bank's receivables from such legal entity shall not be deemed to constitute a concentration of undertakings, where such qualified stake is held for the duration of the rescue operation or financial restructuring of such legal entity for a maximum of 1 year. A situation where undertakings providing investment services acquire temporarily, for a period of up to 1 year, interests in another undertaking for the purpose of the sale thereof, provided they do not exercise the voting rights attached to such interests in order to determine or influence the competitive behaviour of such controlled undertaking, shall not be deemed to constitute a concentration between undertakings. The Office may extend the period of 1 year at a request of a bank or an undertaking providing investment services, provided the applicant proves that the purpose for which it acquired participation in another undertaking could not have been achieved during the original period for objective reasons.

(8) Further, delegation of certain powers of the statutory bodies of undertakings to persons engaged in activities pursuant to special legal regulations, e.g., a liquidator⁸⁾ or a bankruptcy trustee⁹⁾, shall not be deemed to constitute a concentration between undertakings.

Article 13

Concentrations of undertakings subject to approval by the Office

A concentration shall be subject to the approval by the Office, if:

- a) the total net turnover of all undertakings concerned achieved in the last accounting period in the market of the Czech Republic exceeds CZK 1.5 billion and each of at least two of the undertakings concerned achieved in the market of the Czech Republic in the last accounting period a net turnover exceeding CZK 250 million, or
- b) the net turnover achieved in the last accounting period in the market of the Czech Republic
 1. in case of a concentration pursuant to Article 12(1) at least by one of the parties to the merger,
 2. in case of a concentration pursuant to Article 12(2) by the acquired enterprise or a substantial part thereof,
 3. in case of a concentration pursuant to Article 12(3) by the undertaking, over whom the control is acquired, or
 4. in case of a concentration pursuant to Article 12(5) by at least one of the undertakings establishing a joint venture
is higher than CZK 1 500 000 000 and at the same time the worldwide net turnover achieved in the last accounting period by another undertaking concerned exceeds CZK 1 500 000 000.

Article 14

Calculation of turnover

(1) The net turnover¹⁰⁾ of undertakings concerned shall be deemed to mean the net turnover achieved by the individual undertakings solely by means of the activity,

⁸⁾ Article 70 et seq. of the Commercial Code, as amended by the Act No. 370/2000

⁹⁾ Article 14 et seq. of the Act No. 328/1991 Coll., on Bankruptcy and Settlement, as amended

¹⁰⁾ Article 20(2)(a) of the Act No. 563/1991 Coll., on Accountancy, as amended

which constitutes their object of business. Where the undertakings are not entrepreneurs, the net turnover shall be deemed to mean solely the turnover achieved by means of the activity, for which they were founded or which they usually practice.

- (2) Aggregate net turnover shall include net turnovers achieved by:
- a) all the undertakings concerned,
 - b) persons, which will controll undertakings concerned after implementation of the given concentration and persons, which are controlled by the undertakings concerned,
 - c) persons controlled by the person, which will control the undertakings concerned after implementation of the given concentration, and
 - d) persons controlled jointly by two or more persons referred to in (a) to (c) above.
- (3) The joint net turnover of the undertakings concerned shall not include the part of the turnover, which was achieved by sale of goods between the undertakings concerned and the persons referred to in paragraph 2, letters b),c) and d).
- (4) If only a part of an undertaking is subject to the concentration, only the portion of turnover achieved by such part shall be included in net turnover.
- (5) If within a two-year period two or more concentrations take place between the same undertakings, consisting in the transfer of a part of an enterprise to another undertaking, such concentrations shall be treated as one and the same concentration.
- (6) As regards banks¹¹⁾, net turnover shall be deemed to mean the sum of income items, especially interest income, income from securities and asset shares, fees and commissions and profits from financial operations. As regards insurance companies¹²⁾, net turnover shall be deemed to mean the sum of insurance premiums prescribed pursuant to all the insurance contracts concluded.

Article 15

Initiation of proceedings

- (1) Concentration approval proceedings shall be initiated on the basis of a notification.
- (2) In cases within the meaning of Article 12(1), (2) and (5), a concentration notification shall be filed jointly by the parties to the concentration, who intend to realise a concentration by merger or by acquisition of an enterprise or a part thereof on the basis of a contract, or acquire control over a joint venture; in cases within the meaning of Article 12(3), the undertaking which is to acquire the possibility to control directly or indirectly another undertaking shall be obliged to file a concentration notification.
- (3) The concentration notification:
- a) may be filed also prior to conclusion of the agreement establishing the concentration or prior to acquisition of control over another undertaking in any other way,

¹¹⁾ Article 1(1) of the Act No. 21/1992 Coll., on Banks, as amended

¹²⁾ Article 2 (a) of the Act No. 363/1999 Coll., on the Insurance Sector and amendments to certain related Acts (the Insurance Act)

- b) shall contain substantiation, documents certifying the facts decisive for the concentration and the requisites set out by the implementing legal regulation (Article 26(3)).

(4) The concentration approval proceedings shall be initiated on the day when the Office receives the concentration notification containing all requisites pursuant to paragraph 3. In case the notification does not contain such requisites, the Office may, on the basis of information received, issue only a written opinion specifying whether the concentration is subject to approval pursuant to this act and whether the notification is to be completed.

Article 16

Course of proceedings

(1) The Office shall without delay announce the initiation of concentration approval proceedings in the Commercial Bulletin and it shall stipulate therein a deadline for submission of objections against this concentration.

(2) After initiation of the proceedings, the Office shall assess whether the concentration is subject to its approval. If the concentration is not subject to approval by the Office, the Office shall issue a decision to that effect within 30 days of the initiation of proceedings. In cases, where the concentration is subject to approval but will not result in a substantial distortion of competition, the Office shall issue a decision approving the concentration within the aforementioned deadline. In the event that the Office finds that the concentration raises serious concerns as to a significant impediment to competition, in particular because it would create or strengthen a dominant position of the undertakings concerned or any of them, the Office shall inform the parties to the proceedings of this fact within the stipulated deadline and inform them that it is continuing the proceedings.

(3) If the Office does not issue a decision on the concentration notification within the deadline stipulated in paragraph 2, or fails to inform the parties in writing that it is continuing the proceedings for reasons pursuant to paragraph 2 above, the Office shall be deemed to have approved the concentration upon the elapse of the aforementioned deadline.

(4) The Office may in the terms referred to in the Merger Regulation¹³ request the Commission to conduct proceedings and assess a concentration by itself. Until the decision of the Commission, whether it will assess such concentration by itself, is issued, the Office shall suspend its proceedings. Provided the Commission decides that it will assess such concentration by itself, the Office shall terminate its proceeding.

(5) If the Office informs in writing the parties to the proceedings pursuant to paragraph 2 above that it is continuing the proceedings, it shall be obliged to issue a decision within 5 months of the initiation of proceedings. In the event that the Office fails to issue a decision on the concentration within the stipulated deadline, the Office shall be deemed to have approved the concentration upon the elapse of the aforementioned deadlines.

(6) The Office may request the party to the proceedings in writing to supply further facts necessary for issuing a decision on the concentration approval or to supply further evidence of such facts. The deadlines pursuant to paragraphs 2 and 5 shall

¹³ Article 22 (1) of the Council Regulation (EC) No. 139/2004.

be suspended for the period between the day on which the party to the proceedings receives such a request and the day on which this obligation is fulfilled. In the event that the concentration decision of the Office is annulled by the Court, the deadlines pursuant to paragraphs 2 and 5 shall start again from the date on which the Court judgement comes into force.

(7) The concentration may be registered in the Commercial Register only after the decision of the Office approving the concentration comes into force.

Article 17

Assessment of concentrations

(1) When deciding on concentration notification, the Office shall in particular assess the necessity of preservation and further development of effective competition, the structure of all markets affected by the concentration, the shares of the parties to the concentration in such markets, their economic and financial power, legal and other barriers to entry by other undertakings into the relevant markets, the alternatives available to suppliers and customers of the parties to the concentration, the development of supply and demand in the affected markets, the needs and interests of consumers and research and development provided that it is to the consumers' advantage and does not form an obstacle to effective competition.

(2) The decision on the concentration approval shall also apply to restrictions of competition declared by undertakings in their concentration notification and having direct connection with the concentration and indispensable to its implementation.

(3) The Office shall not approve a concentration provided it would result in a substantial distortion of competition in the relevant market particularly because it would result in or would strengthened a dominant position of the undertakings concerned or any of them. If the combined share of all undertakings concerned in the relevant market does not exceed 25 %, it is presumed that their concentration does not result in a substantial distortion of competition, unless proven contrary during the review of the concentration.

(4) The Office may make the concentration approval subject to fulfilment of commitments that are proposed by the undertakings concerned in favour of preservation of effective competition before initiation of the concentration approval proceedings or during its course, but not later than 15 days of the day when the last of the parties to the proceedings is informed pursuant to Article 16(2) that the Office continues the proceedings. Proposals of commitments made on a later date or changes to their content shall be taken into consideration by the Office only in cases deserving special attention, if they are submitted to the Office within 15 days following termination of the deadline pursuant to the first sentence of this paragraph. In case the parties to the proceedings propose these commitments within the first 30 days of the proceedings, the deadline pursuant to Article 16(2) shall be extended by 15 days. In case the parties to the proceedings propose these commitments after the information of the Office about continuation of the proceedings pursuant to Article 16(2), the deadline for issuing a decision pursuant to Article 16(5) shall be extended by 15 days. Provided parties to the proceedings do not propose such commitments or provided commitments proposed by the parties to the proceeding are not sufficient for preservation of effective competition, the Office may lay down, in its decision on the concentration approval, conditions and restrictions not proposed by parties to the proceedings, if the undertakings agree with their assumption. Provided the Office makes the concentration approval subject to fulfilment of commitments proposed by

undertakings, the Office may lay down conditions and obligations necessary to secure fulfilment of these commitments.

Article 18

Suspension of implementation of concentrations

(1) The undertakings must not implement the concentration before the day of filing concentration notification pursuant to Article 15(1) and before the day of entry into force of the Office's decision on the concentration approval.

(2) Prohibition pursuant to Article 1 shall not apply to implementation of concentration that should occur on the basis of a public bid to assume equity shares or on the basis of sequence of operations with lists, as the consequence of which the control shall be acquired from different entities, provided the application for initiation of proceedings pursuant to Article 15(1) was filed immediately and provided the voting rights attached to such lists are not exercised; the provisions of paragraphs 3 and 4 shall not be affected thereby.

(3) The Office may, upon application of the undertakings, decide on approval of an exemption from the prohibition of implementation of the concentration pursuant to paragraph 1, where there is a threat that the undertakings or third parties sustain a considerable damage or any other significant detriment. The undertakings may file the application for approval of an exemption together with the concentration notification or anytime during the proceedings. The application shall be substantiated and made in writing.

(4) The Office shall decide on the application for approval of an exemption pursuant to paragraph 3 without delay, not later than 30 days of the receipt thereof. In deciding on the application, the Office shall take into account, besides the damage or any other detriment, the consequences of such exemption on competition in the relevant market. In the event that the Office fails to issue a decision within the stipulated period of time, the exemption shall be deemed to have been approved. The Office may stipulate, in its decision on granting of exemption, conditions and restrictions in favour of preservation of effective competition.

(5) If the Office finds that the concentration was implemented contrary to the Office's decision in force, it shall decide on measures indispensable to re-establishing effective competition in the relevant market. For this purpose the Office in particular shall impose on the undertakings obligation to sale stakes, to transfer an enterprise or a part thereof acquired on a basis of the concentration or to discharge the contract, on the basis of which the concentration was realised, or to implement other adequate measures necessary for re-establishing effective competition in the relevant market. The Office may issue such decision also in a case, where it finds that a concentration was implemented without filing concentration notification pursuant to Article 15(1).

Article 19

Revocation of decision on concentration approval

(1) The Office may revoke the decision on concentration approval where it finds that the concentration approval was based on documents, data and information for the completeness, correctness and truthfulness of which the parties to the proceedings are responsible and which turn out to be incorrect or incomplete, in full or in part, or where the approval has been obtained by deceit or where the parties to the proceedings fail to fulfil the conditions, restrictions or commitments subject to which the Office made the approval.

(2) The Office may initiate proceedings for revocation of a decision on concentration approval within 1 year of learning about the facts referred to in paragraph 1, but not later than 5 years after such facts have occurred.

SECTION V THE OFFICE

Article 20

(1) The scope of competencies of the Office is governed by a special legal regulation¹⁴⁾. In addition to the powers stipulated by the other provisions of this Act, the Office:

- a) supervises whether and how the undertakings fulfil the obligations arising for them from this Act or the decisions of the Office adopted on the basis of this Act,
- b) publishes concentration notifications and its decisions which has come into force.

(2) When performing the supervision pursuant to paragraph 1(a), the Office may initiate proceedings of its own initiative. Article 21(5) to (9) shall apply *mutatis mutandis* to the performance of supervision by the Office.

Article 20a

(1) The Office shall be empowered to apply Articles 81 and 82 of the Treaty in individual cases, if the behaviour of undertakings may affect trade between Member States within the meaning of Articles 81 and 82 of the Treaty. For this purpose, it shall be entitled to:

- a) require that an infringement be brought to an end,
- b) order interim measures,
- c) accept commitments,
- d) impose fines.

(2) The Office may, by its decision, withdraw the benefit of a community block exemption from individual undertaking if the agreements have, in a particular case, effects incompatible with Article 81(3) of the Treaty in a territory of the Czech Republic or in a part thereof, which has all characteristics of a distinct geographic market.

(3) The Office shall furthermore be empowered

- a) to request the Commission to provide it with copies of documents necessary for the assessment of a case,
- b) to consult the Commission on any case involving the application of Community law,
- c) to exchange with the Commission and other competition authorities of the Member States and to use in evidence any matter of fact or of law, including confidential information,
- d) to request the Commission to include on the agenda of the Advisory Committee on Restrictive Practices a case it deals with,

¹⁴⁾ Act No. 273/1996 Coll., on the Scope of Activities of the Office, as amended by the Act No. 187/1999 Coll.

- e) to submit to courts observations on issues relating to the application of Articles 81 and 82 of the Treaty and to request the relevant court to transmit any documents necessary for the assessment of the case,
 - f) to conduct investigations on the basis of a request of a competition authority of any other Member State,
 - g) to present its opinions on proceedings that the Commission conducts pursuant to the Merger Regulation,
 - h) to issue decisions in cases, where Regulations of the European Communities adopted in compliance with Articles(83) to (86) of the Treaty empower the Office to adopt a decision,
 - i) to adopt remedies whose conditions and details were determined by the Commission and when the Commission authorised a Member State to adopt a necessary remedial measure pursuant to Article 85(2) of the Treaty.
- (4) The Office shall be obliged
- a) to provide the Commission with all information necessary for the Commission to be able to carry out the duties assigned to it by the Regulation and the Merger Regulation,
 - b) to afford the Commission the necessary assistance in case an undertaking opposes or obstructs an inspection pursuant to the Regulation or the Merger Regulation
 - c) to inform in writing the Commission and the competition authorities of other Member States about initiation of proceedings on the basis of Articles 81 or 82 of the Treaty,
 - d) to provide the Commission, no later than 30 days before the adoption of a decision pursuant to paragraph 1, with a summary of the case, the envisaged decision and any other documents necessary for the assessment of the case; the information may be also made available to the competition authorities of the other Member States,
 - e) to appoint its representative in the Advisory Committee on Restrictive Practices and in the Advisory Committee on Concentrations and in the Advisory Committee on State aid,
 - f) to conduct, at the request of the Commission, investigations which they consider to be necessary.
- (5) In a procedure pursuant to the Merger Regulation, the Office shall be empowered:
- a) to express itself concerning a proposal on referral of a case before its notification^{14a)},
 - b) to request the Commission to refer the case^{14b)},
 - c) to request the Commission to assess the case, on conditions referred to in the Merger regulation^{14c)},
 - d) to decide on a case referred to it by the Commission^{14d)}.

^{14a)} Article 4(4) and (5) of the Council Regulation No. 139/2004.

^{14b)} Article 9(2) of the Council Regulation No. 139/2004.

^{14c)} Article 22(1) of the Council Regulation No. 139/2004.

^{14d)} Article 9(3) of the Council Regulation No. 139/2004.

SECTION VI
PROCEEDINGS BEFORE THE OFFICE

Article 21

(1) Parties to the proceedings shall be deemed to be an applicant and those, whose rights and obligations shall be subject to the Office's dealing and decision-making within a proceeding.

(2) In proceedings concerning agreements distorting competition due to a cumulative effect of parallel networks of similar vertical agreements entered into with the purpose of the distribution of identical, comparable or substitutable goods pursuant to Article 6(2)(c), where one of the parties to such agreement is always one and the same undertaking who proposes conclusion of the contract to the other undertakings, the Office may limit the status of a party to the proceedings to this undertaking only.

(3) An application for initiation of proceedings against undertakings who are parties to the agreements distorting competition or undertakings who abuse dominant position or against the bodies of public administration, or an application filed with respect to matters falling outside the scope of this Act, shall be deemed to be an application for investigation about whose acceptance, rejection or referral to another body the Office shall inform the applicant in writing without issuing a decision. When the Office initiates proceedings of its own initiative in a matter forming the object of the application, the Office shall inform the applicant of the results of investigation or issuance of a decision only if such applicant is not party to proceedings pursuant to paragraph 1.

(4) Parties to the proceeding shall be obliged to specify the evidence proving the facts they claim, in accordance with the directly binding legal act of the European Communities^{14e)}. Provided a party to the proceeding proposes commitments pursuant to Article 17(4), it shall be obliged to specify the evidence to prove that fulfillment of these commitments shall be sufficient for the preservation of effective competition; before implementation of the concentration the party must specify the evidence necessary for proving that these commitments, or conditions and obligations imposed by the Office pursuant to Article 17(4), were fulfilled. The party to the proceeding shall be also obliged to specify the evidence necessary to prove the fulfillment of the obligations imposed by the Office pursuant to Article 18(5).

(5) In proceedings conducted by the Office pursuant to this Act, undertakings shall be obliged to submit to investigation by the Office. For the purpose of such investigations, the Office shall be authorised to request that undertakings and, unless a special legal regulation states otherwise, the bodies of public administration provide it with documents and information the Office needs for its activities, and to ascertain their completeness, truthfulness and correctness. For this purpose the Office's officials shall be empowered to enter any land, premises, rooms and means of transport, which are used by the undertakings in their business activities (hereinafter referred to as "business premises"), examine the books and other business records, take copies or extracts therefrom and ask for oral explanation on the spot. In order to secure the purpose of inspections, the Office's officials may seal business premises or cabinets, cases, business books and other business records situated in the business premises for the period and to the extent necessary for carrying out the inspection. If a reasonable suspicion exists that books or other business records are being kept in other than business premises, including

^{14e)} Article 2 of the Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

the homes of natural persons that are statutory bodies or their members or employees (hereinafter referred to as “other than business premises”), the investigation may be, with a prior authorisation from the court¹⁵⁾, conducted also in these premises.

(6) For the purpose of investigation in business or other than business premises, the Office shall be empowered to obtain access to these premises or to open any closed cabinets or cases. Any person, in the estate of which the business or other than business premises are situated, shall be obliged to abide the investigation in these premises; in case it fails to fulfil this obligation the Office’s officials shall be empowered to obtain access to the business or other than business premises.

(7) The undertakings shall be obliged to provide the Office at its request with complete, correct and truthful documents and information within the deadline stipulated by the Office and enable the Office to verify the same pursuant to paragraph 5. This obligation shall be applied *mutatis mutandis* also to the bodies of public administration unless a special legal regulation states otherwise.

(8) When requesting documents and information, the Office shall state the legal ground and purpose of the investigation and advise that the failure to provide them or to enable their verification may be subject to a fine imposed by the Office pursuant to Article 22.

(9) On the proposal of the party to the proceedings where it seems to be necessary with regard to the subject matter of the case, the Office shall order an oral hearing. The Office may also call to witness at the oral hearing other persons whose information may contribute to a complete, actual and reliably established state of affairs.

Article 21a **Proceedings with a Community element**

(1) In case the Office initiates proceedings concerning infringement of Article 81 or 82 of the Treaty, it shall proceed with its investigations pursuant to Article 21(5) to (9) and it shall take decisions pursuant to Articles 7 and 11(3) to (7).

(2) In case the Office conducts investigations pursuant to Articles 20(5), 21(4), 22(1) or (2) of the Regulation or Article 12(1) of the Merger Regulation, it shall proceed pursuant to Article 21(5) to (9).

(3) In case the Office has initiated proceedings concerning infringement of Article 81 or 82 of the Treaty and the Commission initiates in the same matter proceedings for adoption of a decision under Chapter III of the Regulation, the Office shall terminate its proceedings.

(4) In case the Office has initiated proceedings concerning infringement of Article 81 or 82 of the Treaty and the same matter is already dealt with or begins to be dealt with by a competition authority of another Member State, the Office shall terminate or, until a decision by this competition authority is adopted, suspend its proceedings.

(5) When imposing fines in investigations or proceedings pursuant to paragraphs 1 and 2, the Office shall proceed pursuant to Article 22.

¹⁵⁾ Article 200h of the Act No. 99/1963 Coll., Civil Court Proceedings Code, as amended

Article 21b
Investigations conducted by the Commission

In case the Commission by its decision orders an investigation to be conducted pursuant to Article 21 of the Regulation, the Commission or the Office shall apply to the court for initiation of proceedings in matters of the protection of competition¹⁵⁾.

SECTION VII
FINES AND REMEDIES

Article 22

- (1) The Office may by its decision impose fines
- a) of up to 300 000 CZK or up to 1 % of the net turnover achieved by the undertaking in the last accounting period on anyone who intentionally or negligently fails to provide the Office with the requested documents and information within the stipulated period of time, or provides incomplete, untruthful or incorrect documents and information, fails to submit requested books and other business records or fails to enable their review pursuant to Article 21(5), or otherwise refuses to submit to investigations pursuant to this Act, or if the seal affixed pursuant to Article 21(5) has been broken,
 - b) of up to CZK 100 000 on anyone who intentionally or negligently without serious reasons fails to appear at a scheduled oral hearing, refuses to testify or otherwise obstructs the proceedings.
- (2) The Office may impose on undertakings fines of up to CZK 10,000,000 or up to 10% of the net turnover achieved in the last expired accounting period where, either intentionally or negligently, they infringed the prohibitions stipulated in Article 3(1), Article 11(1) and Article 18(1), or fail to fulfil the measures imposed pursuant to Article 7(2) or Article 11(4) or pursuant to Article 18(5). When deciding on the amount of the fine, the Office shall take into account in particular the gravity, possible recurrence and duration of the infringement of this Act.
- (3) The Office may impose a fine of up to CZK 1,000,000 on undertakings that act contrary to the enforceable decision.
- (4) The fines provided for in paragraphs 1 and 3 may be imposed by the Office repeatedly.
- (5) The fines provided for in paragraphs 1 to 3 may be imposed no later than 3 years following the day on which the Office learned about the infringement of the prohibition or the nonfulfilment of the obligations stipulated pursuant to this Act, however, no later than 10 years after the infringement of the prohibition or nonfulfilment of the obligation occurred.
- (6) When collecting and enforcing the fines, the Office shall proceed pursuant to a special legal regulation¹⁷⁾. The revenues from fines are an income of the state budget.

¹⁷⁾ Act No. 337/1992 Coll., on Administration of Taxes and Charges, as amended

Article 23

(1) When the Office establishes an infringement of the prohibitions or nonfulfilment of the obligations provided for in Article 22(2), it may, within the deadline stipulated in Article 22(5), decide, according to the subject matter of the case, to impose remedial measures and to set a reasonable deadline for the compliance therewith.

(2) The content and scope of the remedial measures shall not exceed the purpose of this Act. The imposition of a remedial measure does not preclude the concurrent imposition of a fine pursuant to Article 22(2).

(3) The provision of Article 22(3) shall apply *mutatis mutandis* to the imposition of a fine for a failure to comply with an enforceable decision on the imposition of a remedial measure.

SECTION VIII PROFESSIONAL SECRECY AND THE PROTECTION OF BUSINESS SECRET

Article 24

A person employed by or in any other relationship with the Office, on the basis of which it performs an activity for the Office, shall not disclose any and all the facts which he/she learned during this activity and which constitute a business secret or a confidential information; this obligation shall continue after the termination of this relationship.

SECTION IX Abolished

Article 25 Abolished

SECTION X GENERAL, EMPOWERING, TRANSITIONAL AND REPEALING PROVISIONS

Article 25a Use of the Administrative Proceedings Code

Unless otherwise specified by this Act, the Administrative Proceedings Code shall be used in proceedings before the Office with the exception of the provision on solving the conflicts between the administrative agency that conducts the proceedings and the administrative agencies that are affected agencies, concerning the issue constituting the object of the decision-making¹⁸⁾, the provision stipulating who may be imposed a disciplinary fine and what amount the fine may reach^{18a)}, provision on prohibition of changes in an appealed decision to the detriment of the appealing party^{18b)}, provision on legal periods for issuing a decision^{18c)},

¹⁸⁾ Article 136(6) of the Administrative Code.

^{18a)} Article 62(1) and (2) of the Administrative Code

^{18b)} Article 90 (3) of the Administrative Code.

^{18c)} Article 71 of the Administrative Code.

^{18d)} Article 152 (3) and (5) of the Administrative Code.

^{18e)} Article 27 (1) and (2) of the Administrative Code.

furthermore, from among the provisions on the special features of the appellation proceeding conducted by the central administrative bodies, the provision on composition of the appellation committee of a central administrative body and on possible termination of an appellation proceeding conducted by a central administrative body^{18d)}, and furthermore provision on parties to the proceeding^{18e)} and provision on procedure in doubts on whether an entity is a party to a proceeding^{18f)}; the provisions of the Administrative Code on parties to a proceeding pursuant to a special Act^{18g)} will, however, be applied.

Article 26 Empowering provisions

The Office shall stipulate by its implementing legal regulation content and form of the concentration notification pursuant to Article 15(3).

Article 27 Transitory provision

- (1) The exemptions granted pursuant to the hitherto legal regulation are considered as the exemptions granted pursuant to this Act.
- (2) Proceedings initiated prior to the entry into force of this Act shall be completed in accordance with the hitherto regulations.

Article 28 Repealing provisions

The following legal regulations shall be repealed:

1. Act No. 63/1991 Coll., on the Protection of Competition.
2. Act No 495/1992 Coll., amending the Act No. 63/1991 Coll., on the Protection of Competition.

PART FOUR Entry into force

Article 31

The Act shall enter into force on 1 July 2001.

* * *

The Act No. 340/2004 Coll., amending the Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts (Act on the

^{18d)} Article 28 of the Administrative Code.

^{18g)} Article 27 (3) of the Administrative Code.

Protection of Competition), and some other acts, has entered into force on the day of its publication (2 June 2004).

The Act No. 484/2004 Coll., amending the Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts (Act on the Protection of Competition) as amended by the Act 340/2004 Coll., the Act No. 513/1991 Coll., Commercial Code, as amended, and the Act No. 526/1990 Coll., on Prices, as amended, has entered into force on the day of its publication (7 September 2004).

The Act No. 127/2005 Coll., on Electronic Communication and on Amendment to Further Related Acts (Act on Electronic Communication), entered into force on the first day of the second month following the day of its publication (1 May 2005).

The Act No. 361/2005 Coll., amending the Act No. 143/2004 Coll., on the Protection of Competition and on Amendment to Certain Acts (Act on the Protection of Competition) as amended by subsequent acts, and some other acts, entered into force on the 1 October 2005, with the exception of Part I. Article I Clause 49, as far as paragraph 25(a) is concerned, that part shall enter into force on the 1 January 2006.

ESTONIA

COMMENTARY OF THE GOVERNMENT OF ESTONIA ON THE ESTONIAN COMPETITION ACT

A. Description of the reasons for the introduction of the legislation

From the political and economic standpoint, the late 1980s and early 1990s saw a breakthrough in Estonia similar to the changes in all Central and Eastern European countries. The result was a need to establish competition policy and apply supervision of competition in practice, which in turn led to the first Competition Act and the formation of the Competition Board in 1993.

The first Act contained the traditional provisions of the competition law – prohibition of agreements that restrict competition and prohibition of abuse of dominant position in the market. It also contained provisions related to unfair competition. After a few years of rapid development of the competitive environment and law making (in connection with the restoration of the independence, all acts had to be adopted in a very short time), and after the State had gained experience in implementation of the Act, in 1998 the need became apparent for a new, more precise and amended Competition Act. In elaborating this Act, the need to fulfil the obligations deriving from the Europe Agreement was taken into consideration, as well as the need (arising from everyday practice) to establish more exact rules of procedure in the Act in order to ensure more effective implementation of the Act.

The second Competition Act, which entered into force in 1998, for the first time required merging companies to notify the Competition Board. A basis and procedure for granting state aid was also established in this act over which the Ministry of Finance exercises supervision. In 2001, the current competition act took effect, giving the competition Board additional responsibility for total merger concentration and supervision of competitive situations among credit institutions, securities brokers and insurance companies. In the second half of 2002, the Competition Act was amended several times because of the new Penal Code. According to the amendments all competition offences are of a criminal nature, and the Estonian Competition Board has the competence to conduct pre-trial criminal investigation.

B. Description of the practices, acts or behaviour subject to control

According to the Competition Act, agreements between undertakings, concerted practices and decisions by association of undertakings which have as their object or effect the restriction of competition (including fixing prices, limiting production or sharing relevant markets) are prohibited (Article 4). The Competition Board has the right to exempt agreements and to make proposals on block exemptions to the Government. So block exemption rules are being made in the form of Government Regulation and undertakings can use them directly, without asking permission from the Competition Board. There are block exemptions valid now, for example horizontal and vertical agreements, motor vehicle distribution and servicing agreements. If an undertaking wants to use an individual exemption, then the Competition Board can allow it in the circumstances described in §6. The procedure for grant of exemption appears in Chapter 3.

The undertaking in a *dominant position* in the meaning of the Competition Act is an undertaking that accounts for at least 40 per cent of the turnover in the product market or whose position enables the undertaking to operate in such market to an appreciable extent independently of competitors, suppliers and buyers (Article 13). This 40 per cent guideline was established because of the small scale of the Estonian market, and in most of the cases it has been used. The acts that are considered to constitute abuse of dominant position are described in Article 16, and they include directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, service or relevant market; unjustified refusal to sell or buy goods; and so on.

Now acquisition of control over part of an undertaking, as well as acquisition of joint control over the whole or a part of a third undertaking, is regarded as concentration. Pursuant to the current Competition Act, a concentration shall be subject to control if, during the previous financial year, the aggregate worldwide turnover of the parties to the concentration exceeded 500 million kroons and the aggregate worldwide turnover of each of at least two parties to the concentration exceeded 100 million kroons, and if the business activities of at least one of the merging undertakings or of the whole or part of the undertaking of which control is acquired are carried out in Estonia. The Competition Board has the authority to prohibit a concentration if it might create or strengthen a dominant position, as a result of which competition would be significantly restricted in the goods market. In order to avoid restriction of competition through creation or strengthening of a dominant position, the Competition Board may prescribe, in its decision on granting permission to concentrate, conditions and obligations directly related to the concentration for the parties to the concentration, taking into account the proposals of the parties.

C. Description of the scope of application of legislation

According to the Competition Act, the scope of the Act is to safeguard competition in the interest of free enterprise upon the extraction of natural resources, manufacture of goods, provision of services, and sale and purchase of products and services, and the preclusion and elimination of the prevention, limitation or restriction of competition in other economic activities. The Act applies to both products and services, which are named as goods in the Act. The Act also applies if an act directed at restricting competition is committed outside the territory of Estonia but restricts competition within the territory of Estonia.

D. Description of the enforcement machinery, indicating any notification and registration agreements and principal powers of body

The Competition Board was under the administration of the Ministry of Finance, and from 1 November 2002, the Ministry of Economy and Communications, which means that the Minister decides on the budget and appoints the Director General of the Competition Board. Currently there are over 40 officials working at the Competition Board, and it does not have any special council. The Competition Board has the authority to analyse the competitive situation; propose measures to promote competition; make recommendations to improve the competitive situation; make proposals for legislation to be passed or amended; and develop cooperation with the competition supervisory authorities of other states and associations of states. The Competition Board has the right to permit or prohibit concentrations; give exemptions from agreements; issue a precept to

a natural or legal person; conduct pre-trial investigation; and compile a summary of charges in criminal proceedings.

E. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices

In 1995, the Agreement on Association (the Europe Agreement) was ratified between the European Communities and their Member States and the Republic of Estonia, after which the implementing rules in the field of competition were also adopted with the purpose of guaranteeing sufficient exchange of information in order to exercise effective supervision of the competitive situation.

In 1996, the Competition Boards of Latvia, Lithuania and Estonia signed a Memorandum of Understanding that laid down general principles of information exchange.

We have taken advantage of the possibilities offered by both of the agreements.

F. Description of major decisions taken by administrative and/or judicial bodies, and the specific issues covered

Concerted practices by three taxi companies in Pärnu having harmful, limiting and restrictive effect on free competition

The Competition Board initiated, by order No. 32 (17 May 1999) of the Director General, proceedings for case 13/99 to investigate violation of Article 4(1)(1) of the Competition Act, based on the information published in newspapers concerning the alleged price fixing cooperation between the taxi companies in Pärnu, and pursuant to Article 39(2) of the Competition Act.

Pursuant to Article 4(1)(1) of the Competition Act, agreements or concerted practices that have as their object or effect the restriction, prevention, limitation or distortion of free enterprise and competition are prohibited. Such agreements or activities are deemed to restrict competition if they directly or indirectly fix pricing conditions, including selling prices of services, tariffs or rebates to be applied to a third person.

Proceedings and decision of the competition board

According to Article 3(1) of the Competition Act, a market is an area in the whole territory of Estonia or a part thereof in which goods that are regarded as interchangeable by the buyer by reason of price, quality, technical characteristics, conditions of sale or use, consumption or other characteristics are circulated.

The Competition Board established that in accordance with Regulation No. 7 titled "Arrangements for Granting Licences for the Provision of Taxi Services and Taxi Certificates" adopted by Pärnu City Government on 27 April 1998, the Traffic Management Service of the Municipal Engineering Services Department issues licences to natural persons applying to provide taxi services.

According to the Engineering Services Department of the Pärnu City Government, by 11 August 1999 it had issued 190 licences conferring on licensees the right to provide taxi services on the territory of Pärnu city.

136 persons of 190 licensees had declared to the Pärnu Municipal Services Department that they had concluded cooperation or employment contracts with legal persons arranging taxi services. These contracts were divided between legal persons providing dispatcher services as follows: OÜ Bristol Takso (hereinafter BT) - 38; OÜ Pärnu Takso (hereinafter PT) - 37; OÜ E-Takso (hereinafter ET) - 37; OÜ Tulika Pärnu (hereinafter TP) - 10; and MTÜ Ranna Takso (hereinafter RT) - 11.

Business Code Article 1 states that an entrepreneur is a natural person selling goods or providing services for payment under his/her name and that the sale of goods and services is his/her permanent activity and commercial undertaking as provided for by the law.

Since the sole proprietors who have concluded cooperation contacts with legal persons arranging taxi services are providing those services on behalf of and under the trade name of that legal person, the Competition Board, for the purposes of this case, defined the legal persons offering taxi services and the sole proprietors offering those same services under their own name as competitors in the market.

The market share of the legal persons competing in the market was determined on the basis of the share of the number of persons who had signed a contract with a particular taxi company in the total number of licences issued for the provision of taxi services.

The market shares of competing taxi companies thus determined by the Competition Board were as follows: BT - 20 %; PT - 19.5 %; ET - 19.5 %; RT - 5.8 %; and TP - 5.3 % of the total market providing taxi services in Pärnu. Having regard to the aforesaid and pursuant to Competition Act Article 3(2), the market as the Competition Board defined it for the purposes of this case covers the territory of Pärnu city, and the goods traded in that market were taxi services.

In order to establish all facts of significance to this case, the officials from the Competition Board collected information relevant for the proceedings of this case, taking oral explanations from the representatives of legal persons active in the market and from their employees, and requesting information from the entrepreneurs. They also requested the Pärnu City Government to submit data significant for the case.

Taking into consideration the specific feature of the case - potential violation of the Competition Act Article 4(1)(1) by legal persons providing taxi services - and bearing in mind that in such cases fast action is essential, the officials of the Competition Board interviewed representatives of the relevant legal persons in Pärnu on the first day after the proceedings had been initiated. In addition to explanations taken to establish possible violation of Competition Act Article 4(1)(1), the officials of the Competition Board investigated the development of regular taxi service rates and preferential prices during the period from May 1998 to May 1999.

Investigating the pricing principles, the Competition Board found out that although the mechanism for setting rates varied and the service providers were involved in pricing activities, the price valid in the market was established by legal persons organizing taxi services.

The Competition Board established in the course of the investigation that, during the period from May 1998 to late October/early November 1998, the rates adopted by companies providing taxi services varied. ET and PT charged 6 kroons/kilometre and BT, RT and TP provided the service for 5 kroons/kilometre. PT had established 4 kroons/kilometre as the preferential price.

During the period from October/November 1998 to April 1999, the rates in the market still varied: ET and BT charged 4 kroons/kilometre, and PT, RT and TP charged 5 kroons/kilometre. PT had introduced 3.80 kroons/kilometre as a preferential price for “loyal customer” card owners.

TP and RT did not adopt, in October/November 1998, the price reductions adopted by their competitors and provided services for 5 kroons/kilometre.

The price competition between the companies offering taxi services changed noticeably during the period from 1 to 6 April 1999, when PT, ET, BT and RT, whose total share of the market providing taxi services in Pärnu amounts to 65 per cent, set 6 kroons/kilometre as their regular tariff. Only TP and self-employed taxi drivers who had not concluded cooperation agreements with any of the companies continued to provide the service for 5 kroons/kilometre.

During the period from 1 to 6 May 1999, BT introduced for the first time, and ET and RT reintroduced, the loyal customer card providing price discounts; established similar preferential pricing - 5 kroons/kilometres - for loyal customer card owners; and agreed on cross-use of loyal customer cards. The total market share of the said legal persons formed 45 per cent of the Pärnu taxi services market. TP did not provide the service for a preferential price or introduce loyal customer cards providing favourable terms. PT did not accept the loyal customer cards of competitors and did not approve the idea of other companies' charging preferential prices to holders of PT loyal customer cards. It established a preferential price for holders of its loyal customer card - 5 kroons/kilometre - at the same time (i.e. one month before the competitors) also changing the regular price. As a result, the other companies lost customers.

The Chairman of the Board of BT, in his explanation to the Competition Board on 4 August 1999, said that the loyal customer card enabling purchase of services at the preferential price of 5 kroons/kilometre had been introduced because the company began to lose customers to PT, which had introduced the preferential price of 5 kroons/kilometre about a month earlier than its competitors. In Allar Tankler's article “Pärnu Takso Is Attacked by Three Taxi Companies”, published in the newspaper *Pärnu Postimees*, E. Hiis, Managing Director and Chairman of the Board of ET, commented on the cooperation and cross-use of client cards between ET, BT and RT as follows: “We, together with Bristol Takso and Ranna Takso, came to the conclusion that the people of Pärnu should have concessions.”

Thus, in order to attract the customers they had lost to PT, the three competitors RT, BT and ET, acting in the market providing taxi services in Pärnu, introduced cross-use of loyal customer cards providing the same preferential price. The ET Board member's statement that the cross-use of loyal customer cards providing similar preferential prices by three competing legal persons providing taxi services was advantageous to the consumer is incorrect. Contrary to the statement, in the long run it is advantageous to the customer to have service providers competing to provide preferential prices for the

service provided. Otherwise, it is quite probable that the businesses dominating the market (with over 40% of the relevant market) will try to use their comparative independence of customers and competitors to raise their preferential and regular tariffs to an economically unjustified high level. The companies with smaller market share will follow suit in order to earn higher profits. Thus, such a concerted action could result in weakening or even ending price competition and in adoption of economically unjustified high prices in the relevant product market.

Given the aforesaid and the fact that OÜ Bristol Takso, OÜ E-Takso and MTÜ Ranna Takso had set similar preferential prices, the introduction from May 1999 of the cross-use of their loyal customer cards was a practice whereby competing companies established similar preferential tariffs to be adopted for customers holding loyal customer cards of different companies. Such an activity can be qualified as an anticompetitive concerted practice deemed to restrict, harm and limit price competition and is prohibited pursuant to Article 4(1)(1) of the Competition Act.

Having regard to the aforesaid and acting in accordance with Articles 4(1)(1) and 40(3)(2) of the Competition Act, the Competition Board closed the proceedings on case 13/99 on 29 December 1999 by decision No. 29 by the Deputy Managing Director ascertaining the infringement, and, in compliance with Articles 40(5), (6) (1) and 4 of the Competition Act, issued the following mandatory precept: OÜ Bristol Takso, OÜ E-Takso and MTÜ Ranna Takso will have to end cross-use of their client cards granting similar preferential tariffs.

Mandatory notification of the Competition Board of compliance with the precept was to take place no later than 25 February 2000.

All aforementioned legal persons have complied.

Acting in accordance with the Competition Act Articles 45(2) and 45(4), an official of the Competition Board compiled official reports concerning the violation of administrative law and submitted them to Pärnu Administrative Court, since, as provided for by Article 45(4) of the Competition Act, administrative judges have the right to impose punishments for the infringement of Article 4(1)(1) of the Competition Act.

By the decision of a judge of Pärnu Administrative Court dated 4 April 2000, the proceedings were closed owing to the absence of essential elements of administrative offence. The Competition Board had the right to appeal to Tallinn District Court within 10 days of the date the court decision was received.

On 18 April 2000, the Competition Board submitted to Tallinn District Court an appeal to denounce the decision of Pärnu Administrative Court and to take a new decision to impose punishments on OÜ Bristol Takso, OÜ E-Takso and MTÜ Ranna Takso for the infringement of Article 4(1)(1) of the Competition Act.

On 6 November 2000, Tallinn District Court upheld the appeal of Competition Board. The Court imposed fines of 10,000 kroons each on OÜ Bristol Takso, OÜ E-Takso and MTÜ Ranna Takso. In reaching the decision, it was considered that the cross-use of client cards of competitors granting similar preferential tariffs had lasted a short period and that their cross-use was ended after the mandatory precept made by the Competition Board.

G. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof

The homepage of the Estonian Competition Board (www.konkurentsiamet.ee) has links to all the relevant legislation and decisions, as well as the annual reports (including in English).

COMPETITION ACT

Passed 5 June 2001

(RT¹ I 2001, 56, 332),

Entered into force 1 October 2001,

Amended by the following Acts:

09.10.2002 entered into force 23.10.2002 –RT I 2002, 87, 505;

18.09.2002 entered into force 24.10.2002 –RT I 2002, 82, 480;

19.06.2002 entered into force 01.09.2002 –RT I 2002, 63, 387;

19.06.2002 entered into force 01.08.2002 –RT I 2002, 61, 375;

14.11.2001 entered into force 01.02.2002 –RT I 2001, 93, 565.

Chapter 1 GENERAL PROVISIONS

1. Scope of application of Act

(1) The scope of application of this Act is the safeguarding of competition in the interest of free enterprise upon the extraction of natural resources, manufacture of goods, provision of services and sale and purchase of products and services (hereinafter goods), and the preclusion and elimination of the prevention, limitation or restriction (hereinafter restriction) of competition in other economic activities.

(2) This Act also applies if an act or omission directed at restricting competition is committed outside the territory of Estonia but restricts competition within the territory of Estonia.

(3) This Act does not regulate relationships in the labour market.

(4) The provisions of the Administrative Procedure Act (RT I 2001, 58, 354; 2002, 53, 336; 61, 375) apply to administrative proceedings prescribed in this Act, taking account of the specifications provided for in this Act.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

2. Undertaking

(1) For the purposes of this Act, an undertaking is a company, sole proprietor, any other person engaged in economic or professional activities, an association which is not a legal person, or a person acting in the interests of an undertaking.

(2) The provisions concerning undertakings apply to persons who perform functions in public law and to the state and local governments if they participate in a goods market.

The provisions of Chapter 9 of this Act do not extend to the state, local governments or the Bank of Estonia.

(3) For the purposes of this Act, undertakings which operate in the same goods market and belong to the same group of companies or other undertakings which are connected through control may be deemed to be one undertaking if there is no competition between such undertakings.

(4) Control is the opportunity for one undertaking or several undertakings jointly or for a natural person, by purchasing shares and on the basis of a contract, transaction or articles of association or by any other means, to exercise direct or indirect influence on another undertaking which may consist of a right to:

- 1) exercise significant influence on the composition, work or decision-making of the management bodies of the other undertaking;
- 2) use or dispose of all or a significant proportion of the assets of the other undertaking.

3. Goods market

(1) A goods market is an area covering the whole of the territory of Estonia or a part thereof where goods which are regarded as interchangeable or substitutable (hereinafter substitutable) by the buyer by reason of price, quality, technical characteristics, conditions of sale or use, consumption or other characteristics are circulated.

(2) In order to define a goods market, the turnover of substitutable goods shall, as a rule, be assessed in money. If this is not possible or expedient, the market size and the market shares of the undertakings participating in the goods market may be assessed on the basis of other comparable indicators.

Chapter 2

PROHIBITION ON AGREEMENTS, CONCERTED PRACTICES AND DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS

4. Prohibition on agreements, concerted practices and decisions by associations of undertakings which restrict competition

(1) The following are prohibited: agreements between undertakings, concerted practices, and decisions by associations of undertakings (hereinafter agreements, practices and decisions) which have as their object or effect the restriction of competition, including those which:

- 1) directly or indirectly fix prices or any other trading conditions, including prices of goods, tariffs, fees, mark-ups, discounts, rebates, basic fees, premiums, additional fees, interest rates, rent or lease payments applicable to third parties;
- 2) limit production, service, goods markets, technical development or investment;

- 3) share goods markets or sources of supply, including restriction of access by a third party to a goods market or any attempt to exclude the person from the market;
- 4) exchange information which restricts competition;
- 5) agree on the application of dissimilar conditions to equivalent agreements, thereby placing other trading parties at a competitive disadvantage;
- 6) make entry into an agreement subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such agreement.

(2) Clauses (1) 2)–6) of this section do not apply to agreements and practices of agricultural producers or to decisions by associations of agricultural producers, which concern the production or sale of agricultural products or the use of joint facilities, unless competition is substantially restricted by such agreements, practices or decisions.

5. Agreements, practices or decisions of minor importance

(1) The provisions of clauses 4 (1) 2)–6) of this Act do not apply to agreements, practices and decisions of minor importance.

(2) Agreements, practices or decisions are considered to be of minor importance if the combined market share of the total turnover of the undertakings which enter into the agreement, engage in concerted practices or adopt the relevant decision does not exceed:

- 1) 10 per cent in the case of a vertical agreement, practice or decision;
- 2) 5 per cent in the case of a horizontal agreement, practice or decision;
- 3) 5 per cent in the case of an agreement, practice or decision which includes concurrently the characteristics of both vertical and horizontal agreements, practices or decisions.

(3) Agreements by undertakings, concerted practices of undertakings or decisions by associations of undertakings are considered to be vertical if the undertakings operate at different levels of the production or distribution chain (for example, the production of raw materials or finished goods, or retail or wholesale distribution). Agreements by undertakings, concerted practices of undertakings or decisions by associations of undertakings are considered to be horizontal if the undertakings operate as competitors at the same level of the production or distribution chain.

(4) Agreements, practices or decisions are deemed to be of minor importance if the conditions provided for in subsection (2) of this section are fulfilled during the whole period of effect of the agreement, practice or decision.

6. Exemption

(1) An exemption is permission granted at the request of an undertaking by a decision of the Director General of the Competition Board or his or her deputy to enter into an agreement, engage in concerted practices or adopt a decision specified in § 4 of this Act.

(2) The permission specified in subsection (1) of this section may be granted if the agreement, practice or decision:

- 1) contributes to improving the production or distribution of goods or to promoting technical or economic progress or to protecting the environment, while allowing consumers a fair share of the resulting benefit;
- 2) does not impose on the undertakings which enter into the agreement, engage in concerted practices or adopt the decision any restrictions which are not indispensable to the attainment of the objectives specified in clause 1) of this subsection;
- 3) does not afford the undertakings which enter into the agreement, engage in concerted practices or adopt the decision the possibility of eliminating competition in respect of a substantial part of the goods market.

(3) In order to obtain the permission specified in subsection (1) of this section, all the conditions provided for in subsection (2) must be fulfilled.

7. Block exemption

(1) A block exemption is general permission granted by a regulation of the Government of the Republic on the proposal of the Minister of Economic Affairs and Communications to enter into a certain category of agreements, engage in a certain category of concerted practices or adopt a certain category of decisions which complies with the conditions provided for in § 6 of this Act and restricts or may restrict competition.

(09.10.2002 entered into force 23.10.2002 - RT I 2002, 87, 505)

(2) A block exemption is established for a specified term and may designate:

- 1) the name of the category of agreements, practices or decisions to which the block exemption applies;
- 2) restrictions or conditions which shall not be included in such agreements, practices or decisions;
- 3) conditions which must be included in such agreements, practices or decisions, and restrictions and conditions which may be included in such agreements, practices or decisions;
- 4) other conditions which such agreements, practices or decisions must comply with.

(3) A block exemption established on the basis of subsection (1) of this section does not apply:

- 1) to an undertaking in a dominant position;
- 2) if competition is virtually non-existent in the goods market affected by the agreement, practices or decision.

8. Invalidity of agreements or decisions

Any agreement or decision or a part thereof which has as its object or effect the consequences specified in § 4 of this Act and with regard to which permission has not been granted on the basis of § 6 or 7 of this Act is void unless it complies with § 5 of this Act.

Chapter 3 PROCEDURE FOR GRANT OF EXEMPTIONS

9. Submission of applications for exemption

(1) In order to obtain an exemption provided for in § 6 of this Act, an application for exemption shall be submitted to the Competition Board before entry into the relevant agreement, commencement of the concerted practices or adoption of the relevant decision. An application for exemption may also be submitted within six months after entry into an agreement or adoption of a decision which requires an exemption, and the corresponding agreement or decision or a part thereof which restricts competition shall be void until the grant of the exemption.

(2) An application for exemption with regard to an agreement, decision or a part thereof or practices which was not in conflict with this Act upon entry into the agreement, commencement of the practices or adoption of the decision shall be submitted within three months as of the appearance of circumstances due to which the agreement or decision or a part thereof or the practices becomes contrary to this Act or within three months as of the time such circumstances should have become evident. Such agreement or decision or a part thereof is invalid from the appearance of the circumstances until the grant of the exemption.

(3) An application for exemption shall be submitted jointly by the undertakings which entered into an agreement, engaged in concerted practices or adopted a decision, or by one of the undertakings.

(4) Persons specified in subsection (3) of this section may withdraw an application for exemption jointly or separately at any time before the grant of the exemption by submitting a corresponding written petition, and the person submitting the petition need not be the same as the person who submitted the application for exemption.

10. Requirements for applications for exemption

(1) The requirements for applications for exemption, the requirements for applications for extension of the term of an exemption, and the procedure for submission of applications shall be established by a regulation of the Minister of Economic Affairs and Communications. At the request of the Competition Board, an applicant for an exemption shall provide explanations and submit for examination original documents or true copies or transcripts thereof, certified by the signature of the person submitting the copies or transcripts.

(09.10.2002 entered into force 23.10.2002 - RT I 2002, 87, 505)

(2) If information contained in an application for an exemption or information relating to the application is incorrect, incomplete or misleading, the Competition Board shall set a deadline for the applicant to eliminate the deficiencies. After elimination of the deficiencies, the Competition Board shall send corresponding confirmation to the applicant for the exemption, and the running of the terms provided for in subsections 11 (2) and (3) of this Act shall commence as of the date on which the confirmation is sent.

(3) The person for whose benefit an exemption is granted and the person who applies for a decision on the grant of the exemption shall immediately give written notice to the Competition Board of any substantial changes in the information presented in the application for the exemption.

(4) An applicant for exemption or the other party to the agreement shall indicate any information which the applicant or other party deems to be a business secret.

11. Processing of applications for exemption

(1) The Director General of the Competition Board or his or her deputy shall make one of the following decisions concerning an application for an exemption:

- 1) to grant the exemption if he or she finds that the agreement, practice or decision which is the basis for the application complies with the conditions provided for in § 6 of this Act;
- 2) to refuse to grant the exemption if he or she finds that the agreement, practice or decision which is the basis for the application does not comply with the conditions provided for in § 6 of this Act;
- 3) to terminate the proceedings if the application for the exemption has been withdrawn, or if the applicant for the exemption has failed to eliminate the deficiencies in the application within the term specified by the Competition Board or to submit the information requested by the Competition Board;
- 4) to terminate the proceedings without granting the exemption and to declare that the agreement, practice or decision does not require an exemption as it does not fall within § 4 of this Act or does not require an exemption on the bases specified in § 5 of this Act or requires a group exemption;
- 5) to initiate supplementary proceedings concerning the application for the exemption if he or she finds that it is doubtful whether the agreement, practice or decision which is the basis for the application qualifies for an exemption pursuant to § 6 of this Act and if it is necessary to obtain additional information or conduct a supplementary examination in order to make the decision.

(2) The Director General of the Competition Board or his or her deputy shall make one of the decisions provided for in clauses (1) 1)–4) of this section within two months after receiving all the information.

(3) If the Director General of the Competition Board or his or her deputy decides to initiate supplementary proceedings on the basis of clause (1) 5) of this section, he or she shall have a corresponding written notice delivered to the applicant for the exemption and

make one of the decisions provided for in clauses (1) 1)–3) within six months after receiving all the information.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(4) The Competition Board may extend the terms provided for in subsections (2) and (3) of this section only with the written consent of the applicant for exemption.

12. Decision to grant exemption

(1) (Repealed - 19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(2) A decision to grant an exemption may contain conditions or obligations applicable to the undertakings which enter into the agreement, engage in the concerted practices or adopt the decision.

(3) The Director General of the Competition Board or his or her deputy may grant an exemption for up to five years, and upon expiry of the specified term, the term of the exemption may be extended by a decision to grant an exemption.

(4) An application for extension of the term of an exemption shall be submitted according to the regulation specified in subsection 10 (1) of this Act at least six months before the expiry of the term of the exemption specified in the decision.

(5) The Director General of the Competition Board or his or her deputy shall revoke a decision to grant an exemption or shall amend the decision depending on the competitive situation in each specific case if:

- 1) substantial changes have occurred in the information or conditions which were the basis for granting the exemption;
- 2) the conditions or obligations attached to the decision to grant the exemption have not been complied with;
- 3) the exemption was granted on the basis of incomplete or incorrect information and the agreement, practice or decision concerning which the exemption was granted does not comply with the conditions provided for in § 6 of this Act.

(6) The Competition Board shall make public all decisions made pursuant to clause 11 (1) 1) or subsection 11 (3) of this Act or subsection (5) of this section by publishing a corresponding notice in the official publication *Ametlikud Teadaanded*.³

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

³ *Official Notices.*

Chapter 4
UNDERTAKING IN DOMINANT POSITION

13. Definition of undertaking in dominant position

(1) For the purposes of this Act, an undertaking in a dominant position is an undertaking which accounts for at least 40 per cent of the turnover in the goods market or whose position enables the undertaking to operate in the market to an appreciable extent independently of competitors, suppliers and buyers.

(2) Undertakings with special or exclusive rights or in control of essential facilities specified in §§ 14 and 15 of this Act are also undertakings in a dominant position.

14. Undertaking with special or exclusive rights

(1) For the purposes of this Act, special or exclusive rights are rights granted to an undertaking by the state or a local government which enable the undertaking to have a competitive advantage over other undertakings in a goods market or to be the only undertaking in the market.

(2) The procedure for the organisation of public competitions for granting special or exclusive rights shall be established by the Government of the Republic. If legislation on the basis of which special or exclusive rights are granted does not provide the procedure for the grant of a special or exclusive right, a public competition for the grant of such right shall be organised pursuant to the procedure established by the Government of the Republic.

15. Undertaking controlling essential facility

An undertaking is deemed to control essential facilities or to have a natural monopoly if it owns, possesses or operates a network, infrastructure or any other essential facility which other persons cannot duplicate or for whom it is economically inexpedient to duplicate but without access to which or the existence of which it is impossible to operate in the goods market.

16. Abuse of dominant position

The following are prohibited: any direct or indirect abuse by an undertaking in a dominant position of his or her position in the goods market, including:

- 1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- 2) limiting production, service, goods markets, technical development or investment;
- 3) offering or applying dissimilar conditions to equivalent agreements with other trading parties, thereby placing some of them at a competitive disadvantage;
- 4) making entry into an agreement subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such agreement;

- 5) forcing an undertaking to concentrate, enter into an agreement which restricts competition, engage in concerted practices or adopt a decision together with the undertaking or another undertaking;
- 6) unjustified refusal to sell or buy goods;
- 7) failure by an undertaking with special or exclusive rights or in control of essential facilities to perform the obligation specified in clause 18 (1) 1) of this Act.

17. Restrictions on activities of undertakings with special or exclusive rights or in control of essential facilities

- (1) The state agency or local government which grants special or exclusive rights to an undertaking may designate the prices to be used or impose other conditions or obligations on the undertaking so that the buyers of the goods of such undertaking or sellers of goods to such undertaking are not placed in a substantially worse situation than they would be if competition were present in the corresponding area of activity.
- (2) A state agency prescribed by law, the Government of the Republic or, in the case of an undertaking in control of essential facilities which provides services within the territory of a local government, the local government may designate the prices to be used by an undertaking in control of essential facilities or impose other conditions or obligations on the undertaking so that the buyers of the goods of such undertaking or sellers of goods to such undertaking are not placed in a substantially worse situation than they would be if competition were present in the corresponding area of activity.
- (3) If the procedure for price regulation applicable to undertakings with certain categories of special or exclusive rights or in control of essential facilities has not been established by an Act or legislation established on the basis thereof, the Government of the Republic may establish the corresponding procedure.
- (4) If the procedure for price regulation applicable to undertakings with special or exclusive rights or in control of essential facilities which provide services within the territory of a local government has not been established by an Act or legislation established on the basis thereof or if the procedure does not extend to such undertakings, the local government may establish the corresponding procedure.

18. Obligations of undertakings with special or exclusive rights or in control of essential facilities

- (1) An undertaking with special or exclusive rights or in control of an essential facility shall:
 - 1) permit other undertakings to gain access to the network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods;
 - 2) draw a clear distinction in its accounts between primary and secondary activities (for example production, transportation, marketing and other activities of the undertaking), thereby ensuring accounting transparency.

(2) An undertaking with special or exclusive rights or in control of an essential facility may refuse to grant other undertakings access to the network, infrastructure or other essential facility if the refusal is based on objective reasons, including cases where:

- 1) the safety and security of the equipment connected with the network, infrastructure or other essential facility or the efficiency and security of the operation of such network, infrastructure or facility are endangered;
- 2) maintenance of the integrity or the inter-operability of the network, infrastructure or other essential facility is endangered;
- 3) equipment to be connected to the network, infrastructure or other essential facility is not in conformity with the established technical standards or rules;
- 4) the undertaking applying for access lacks the technical and financial capability and resources to provide services efficiently and safely to the necessary extent through or with the assistance of the network, infrastructure or other essential facility;
- 5) the undertaking applying for access does not hold the permit prescribed by law for the corresponding activity;
- 6) as a result of such access, data protection provided by law is no longer ensured.

Chapter 5

CONTROL OF CONCENTRATIONS

19. Concentration

(1) Concentration is deemed to arise where:

- 1) previously independent undertakings merge within the meaning of the Commercial Code (RT I 1995, 26/28, 355; 1998, 91/93, 1500; 1999, 10, 155; 23, 355; 24, 360; 57, 596; 102, 907; 2000, 29, 172; 49, 303; 55, 365; 57, 373; 2001, 24, 133; 34, 185; 56, 332; 336; 89, 532; 93, 565; 2002, 3, 6; 35, 214; 53, 336; 61, 375; 63, 387; 388);
- 2) an undertaking acquires control of the whole or part of another undertaking;
- 3) undertakings jointly acquire control of the whole or part of a third undertaking;
- 4) a natural person already controlling at least one undertaking acquires control of the whole or part of another undertaking;
- 5) several natural persons already controlling at least one undertaking jointly acquire control of the whole or part of another undertaking.

(2) The creation, by persons specified in clauses (1) 3) and 5) of this section, of a joint venture performing on a lasting and independent basis is also deemed to be acquisition of control within the meaning of clauses (1) 3) and 5) of this section.

(3) If the creation of a joint venture specified in subsection (2) of this section has as its object or effect the co-ordination of the competitive behaviour of the founders amongst

themselves or if the joint venture does not perform on a lasting and independent basis, the provisions of § 4 of this Act apply to the creation of the joint venture.

(4) For the purposes of this Chapter, a part of an undertaking is the assets of the undertaking or an organisationally independent part of the undertaking, including an enterprise which constitutes a basis for business activities and to which market turnover can be clearly attributed.

(5) Transactions specified in subsection (1) of this section are not deemed to be a concentration if the transactions are carried out as an internal restructuring of a group of undertakings.

20. Parties to concentration

The following are parties to a concentration:

- 1) the merging undertakings;
- 2) the natural person or undertaking who acquires control of the whole or part of another undertaking;
- 3) the natural persons or undertakings who jointly acquire control of the whole or part of a third undertaking;
- 4) the undertaking or a part thereof which is the subject of the acquisition of control.

21. Application of control of concentration

(1) A concentration shall be subject to control if, during the previous financial year, the aggregate worldwide turnover of the parties to the concentration exceeded 500 million kroons and the aggregate worldwide turnover of each of at least two parties to the concentration exceeded 100 million kroons and if the business activities of at least one of the merging undertakings or of the whole or part of the undertaking of which control is acquired are carried out in Estonia.

(2) A concentration shall not be subject to control if credit institutions, financial institutions, insurers or securities brokers whose normal business activities include transactions and dealing in securities for their own account or for the account of others, acquire securities in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of the undertaking which issued the securities and provided that they exercise such voting rights only with a view to preparing the sale of the securities and that any such sale takes place within one year of the date of acquisition.

(3) If sale of the securities specified in subsection (2) of this section is not possible within one year, the Director General of the Competition Board or his or her deputy may extend the term by a decision on the basis of a reasoned application made by the person concerned.

22. Appraisal of concentrations

(1) Appraisal of a concentration shall be based on the need to maintain and develop competition, taking into account the structure of goods markets and the actual and potential competition in the goods market, including:

- 1) the market position of the parties to the concentration and their economic and financial power and opportunities for competitors to access the goods market;
- 2) legal or other barriers to entry into the goods market;
- 3) supply and demand trends for the relevant goods;
- 4) the interests of the buyers, sellers and ultimate consumers.

(2) The Director General of the Competition Board or his or her deputy shall prohibit a concentration if it may create or strengthen a dominant position as a result of which competition would be significantly restricted in the goods market.

23. Turnover of parties to concentration

(1) The turnover of a party to a concentration is comprised of the realised net turnover of the goods sold or services provided by the party during the financial year preceding the concentration, calculated pursuant to the Accounting Act (RT I 1994, 48, 790; 1995, 26/28, 355; 92, 1604; 1996, 40, 773; 42, 811; 49, 953; 52/54, 993; 1998, 59, 941; 91/93, 1500; 96, 1515; 1999, 55, 584; 101, 903; 2001, 11, 49; 87, 527; 2002, 23, 131; 53, 336; 57, 355; 67, 405).

(2) The turnover of a credit or financial institution is deemed to comprise the total amount of the following income items after deduction of value added tax and income tax:

- 1) interest income and other similar income;
- 2) income from securities;
- 3) income from holdings in undertakings;
- 4) commissions and service charges;
- 5) net profit on financial operations;
- 6) other operating income.

(3) The turnover of an insurer is deemed to comprise the value of gross premiums written which comprises all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurer, including outgoing reinsurance premiums.

24. Calculation of turnover

(1) The turnover of a party to a concentration specified in subsection 21 (1) of this Act shall be calculated by adding the turnovers of the following undertakings to the turnover of the party:

- 1) undertakings controlled by the party to the concentration;

- 2) undertakings controlling the party to the concentration;
- 3) undertakings controlled by an undertaking specified in clause 2) of this subsection;
- 4) undertakings jointly controlled by undertakings specified in clauses 1)–3) of this subsection.

(2) If control over an undertaking is acquired in a manner provided for in clauses 19 (1) 2)–5) of this Act, the turnover of the undertaking shall be calculated by taking into account only the turnover of such undertaking and the turnovers of the undertakings controlled by the undertaking.

(3) If control over a part of an undertaking is acquired in a manner provided for in clauses 19 (1) 2)–5) of this Act, the turnover of the undertaking shall be calculated by taking into account the turnover of only such part of the undertaking which is the subject of the transaction.

(4) If control of the whole or part of an undertaking is acquired through two or more transactions, turnover shall be calculated by taking into account the turnovers of all such parts which were subject to transactions during the preceding two years.

(5) If within the preceding two years one and the same undertaking has acquired control of undertakings which operate in Estonia in one and the same sector of the economy, the turnover of the undertaking of which control is acquired shall include the turnover of the undertakings of which control has been acquired within the two years preceding the concentration.

(6) The guidelines for the calculation of turnover shall be established by a regulation of the Minister of Economic Affairs and Communications. The guideline may prescribe different methods for calculation of the turnover of parties to a concentration which operate in different sectors of the economy.

(09.10.2002 entered into force 23.10.2002 - RT I 2002, 87, 505)

25. Notification of concentrations

(1) A concentration subject to control shall be notified to the Competition Board within one week as of:

- 1) entry into the merger agreement;
- 2) acquisition of control;
- 3) acquisition of joint control;
- 4) announcement of the public bid for securities.

(2) Notification of a concentration shall be effected:

- 1) jointly by the parties to a concentration as specified in clause 19 (1) 1) of this Act;

- 2) by an undertaking acquiring control as specified in clause 19 (1) 2) of this Act;
- 3) jointly by undertakings acquiring joint control as specified in clause 19 (1) 3) of this Act;
- 4) by a person acquiring control as specified in clause 19 (1) 4) of this Act;
- 5) jointly by persons acquiring joint control as specified in clause 19 (1) 5) of this Act.

(3) Credit institutions, securities brokers and insurers shall give notification of a concentration within the term provided for in subsection (1) of this section or not later than within one week after obtaining permission from the state supervisory authority in the corresponding field of activity.

26. Notice of concentration

(1) A notice of concentration shall be submitted to the Competition Board in writing and shall set out:

- 1) information concerning the parties to the concentration, including business names, registry codes, contact details and areas of activity;
- 2) a description of the concentration;
- 3) data concerning the turnovers of the parties to the concentration during the preceding financial year;
- 4) information concerning control exercised or holdings owned in other undertakings by undertakings specified in clauses 24 (1) 1)–4) of this Act which belong to the same group as the parties to the concentration;
- 5) information concerning the goods markets, including information concerning the market shares, main competitors, clients and the market shares of the competitors and clients of the parties to the concentration, and concerning barriers to entry into or exit from the goods market;
- 6) a description of the effect of the concentration on the goods market, prepared by the person submitting the notice;
- 7) information concerning associations of undertakings in which at least one of the parties to the concentration is a member;
- 8) restrictions on competition, if any, which are directly related to and necessary for giving effect to the concentration, and the reasons for applying such restrictions;
- 9) information concerning other circumstances, if any, relating to the concentration, including proposals concerning the conditions and obligations directly related to the concentration.

(2) The following shall be annexed to a notice of concentration:

- 1) copies of the registration documents of the parties to the concentration who are entered in foreign registers from such registers;

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

- 2) the documents on the basis of which the concentration is put into effect;
- 3) the annual reports and annual accounts of the parties to the concentration for the financial year preceding the concentration;
- 4) a document certifying the authority of the person submitting the notice;
- 5) a document certifying payment of the state fee;
- 6) a list of the documents annexed to the notice of concentration.

(3) Documents annexed to a notice of concentration shall be originals or certified copies thereof.

(14.11.2001 entered into force 01.02.2002 - RT I 2001, 93, 565)

(4) A notice shall contain the date of submission of the notice and the signature of the person submitting the notice.

(5) The guidelines for the submission of notices of concentration shall be established by a regulation of the Minister of Economic Affairs and Communications.

(09.10.2002 entered into force 23.10.2002 - RT I 2002, 87, 505)

(6) If a notice does not meet the requirements provided for in subsections (1)–(4) of this section or the guideline specified in subsection (5) of this section, the notice shall be deemed not to have been submitted.

(7) The Director General of the Competition Board or his or deputy may establish a deadline for elimination of the deficiencies in a notice of concentration.

(8) The Director General of the Competition Board or his or her deputy may release a party to a concentration from the obligation to submit some of the documents or information specified in subsection (1) or (2) of this section if such documents or information are not necessary for the proceedings concerning the concentration.

(9) The person submitting a notice of concentration shall indicate information contained in the notice which the person deems to be a business secret. The fact of a concentration and the information provided for in clauses (1) 1) and 4) of this section shall not be deemed to be a business secret.

27. Proceedings concerning concentration

(1) Within thirty calendar days as of the submission of a notice of concentration, the Director General of the Competition Board or his or her deputy shall:

- 1) make a decision to grant permission to concentrate if the concentration subject to control does not involve circumstances specified in subsection 22 (2) of this Act;
- 2) make a decision to initiate supplementary proceedings in order to ascertain whether the concentration subject to control does or does not involve circumstances specified in subsection 22 (2) of this Act;
- 3) have a written notice delivered to the person who submitted the notice of concentration if the concentration does not fall within the scope of subsection 19 (1) or (2) of this Act or is not subject to control pursuant to § 21 of this Act.

(19.06.2002 entered into force 01.08.2002 – RT I 2002, 61, 375)

(1)⁴ In the course of concentration proceedings, the Competition Board shall verify information in registers concerning the parties to the concentration who are registered in Estonia.

(19.06.2002 entered into force 01.08.2002 – RT I 2002, 61, 375)

(2) In the course of supplementary proceedings, the Director General of the Competition Board or his or her deputy shall make one of the following decisions within four months:

- 1) to grant permission to concentrate;
- 2) to prohibit the concentration;
- 3) to terminate the proceedings if the parties to the concentration decide not to concentrate.

(3) In order to avoid restriction of competition through creation or strengthening of a dominant position, the Director General of the Competition Board or his or her deputy may, by a decision to grant permission to concentrate, attach conditions and obligations directly related to the concentration for the parties to the concentration, taking into account the proposals of the parties.

(4) A concentration is permitted if the Director General of the Competition Board or his or her deputy has not made one of the decisions provided for in subsection (1) and (2) of this section within the term specified in the same subsection.

(5) Before adoption of a decision specified in subsection (2) of this section, the parties to the concentration shall not perform any acts directed at giving effect to the concentration or do anything that would hinder execution of a decision prohibiting the concentration. Unless concentration is permitted pursuant to subsection (4) of this section, all such acts are void until permission is obtained.

(6) If the Director General of the Competition Board or his or her deputy sets a term for elimination of the deficiencies contained in a notice of concentration, the terms provided for in subsection (1) and (2) of this section begin to run as of the elimination of the deficiencies.

⁴ *Riigi Teataja (State Gazette)*.

(7) If the parties to a concentration fail to submit the necessary information or materials within the term set by the Director General of the Competition Board or his or her deputy, the running of the terms provided for in subsections (1) and (2) of this section shall be suspended until the information or materials is submitted.

(8) (Repealed - 19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(9) The Competition Board shall publish a notice concerning receipt of a notice of concentration, a decision made on the basis of subsection (1) or (2) of this section or a written notice sent on the basis of clause (1) 3) of this section in the official publication *Ametlikud Teadaanded*.

(10) Interested parties have the right to submit opinions and objections to the Competition Board within seven calendar days as of publication of a notice concerning receipt of a notice of concentration specified in subsection (9) of this section.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

28. Explanation obligation and oral hearings

(1) If the Competition Board finds that a concentration subject to proceedings involves the circumstances specified in subsection 22 (2) of this Act, a corresponding notice shall be delivered to the person who submitted the notice of concentration.

(2) At the request of the parties to a concentration or on the initiative of the Competition Board, a meeting may be held for the oral hearing of the parties to the concentration. A meeting shall be held at the time and place specified by the Director General of the Competition Board or his or her deputy, and the persons to be heard shall be notified of the hearing in the manner prescribed in § 26 of the Administrative Procedure Act not later than ten calendar days before the hearing. On the basis of a reasoned written request of a person summoned to a meeting, the Director General of the Competition Board or his or her deputy may change the term or the place of the meeting.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

29. Nullity of concentration

(1) The Director General of the Competition Board or his or her deputy may decide to revoke a decision to grant permission to concentrate if:

- 1) the parties to the concentration submitted false, misleading or incomplete information which was a determining factor for the decision;
- 2) the concentration was effected in violation of a term or other condition or obligation specified in this Act or the decision to grant permission to concentrate.

(2) Revocation of permission to concentrate does not deprive the parties to the concentration of the right to apply for new permission to concentrate.

Chapter 6
STATE AID

30. General provisions

(1) State aid is an advantage granted directly or indirectly in any form whatsoever by the state or a local government (hereinafter grantor of state aid) or from their resources which distorts or threatens to distort competition by favouring certain undertakings or the production or sale of certain goods. Such aid may be financial aid, postponement of the payment of tax arrears, debt write-offs and the grant of loans under more favourable terms than usually granted to other undertakings, and other forms of aid.

(2) The following shall also be deemed to be grantors of state aid:

- 1) foundations which directly or indirectly use the resources of the state or a local government;
- 2) non-profit associations which directly or indirectly use the resources of the state or a local government;
- 3) legal persons in public law which directly or indirectly use the resources of the state or a local government;
- 4) companies in which the state, a local government or any other legal person in public law holds more than one-half of the share capital or votes represented by shares;
- 5) companies belonging to the same group as a company specified in clause 4) of this subsection.

(3) This Act does not grant the right to receive state aid but provides for the right of a grantor of state aid to grant state aid to an undertaking if the provisions of this Act are complied with.

(4) Activities of a person specified in subsection (2) of this section are not deemed to be state aid in cases where the person operates as a rational undertaking would usually operate in a market economy.

(5) The provisions of this Chapter do not apply to aid granted as state aid to undertakings engaged in the production, processing or marketing of goods prescribed in Article 63 (5) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part (RT II 1995, 22–27, 120). The conditions and procedure for granting such aid shall be provided by separate Acts.

31. General and special conditions for granting state aid

(1) State aid may be granted only if it is compatible with the public interest and complies with the provisions of this Act and the special conditions established on the basis of subsection (6) of this Act.

(2) The following types of state aid are deemed to be compatible with the public interest:

- 1) state aid having a social character provided that such aid is granted without discrimination related to the origin of the goods concerned;
- 2) state aid to make good the damage caused by natural disasters or other exceptional occurrences.

(3) In addition to the provisions of subsection (2) of this section, the following may be considered to be compatible with the public interest:

- 1) state aid to promote the economic development of areas where the standard of living is very low or where there is serious unemployment;
- 2) state aid to promote the execution of a project of common European interest or to remedy a serious disturbance in the Estonian economy;
- 3) state aid to facilitate the development of certain economic activities or economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the public interest;
- 4) state aid to promote culture and heritage conservation.

(4) State aid shall be granted for a specified term and to the extent necessary to achieve an objective specified in subsection (2) or (3) of this section. The grant of such state aid shall be terminated if it no longer complies with the general conditions provided in subsections (2) and (3) of this section or the special conditions established on the basis of subsection (6) of this section.

(5) In calculating the total amount of state aid, state aid granted to an undertaking out of the resources of the European Communities or the Member States thereof shall also be taken into account unless otherwise provided by this Act or the special conditions established on the basis of subsection (6) of this section.

(6) The special conditions for granting state aid and the related definitions shall be established by the Government of the Republic separately for each area of activity, taking into account the provisions of subsection 63 (2) of the Europe Agreement.

32. State aid relating to export activities and aid to substitute imports

(1) State aid relating to export activities (hereinafter export aid) and aid to substitute imports are not compatible with the public interest.

(2) Export aid is any aid directly linked to the quantities of goods exported, to the establishment and operation of a distribution network or to any other current expenditure linked to the export activity.

(3) Aid to substitute imports is aid granted to an undertaking for using domestic goods instead of imported goods.

(4) Aid granted to an undertaking for participating in trade fairs or for studies or consultancy services needed for the launch of a new or existing product in a new market is not deemed to be export aid.

(5) Export guarantees and credits may be deemed to be compatible with the public interest if the guarantees or credits do not contradict the Europe Agreement or any other international agreement.

33. De minimis aid

(1) Aid granted during three consecutive years in an amount not exceeding 1.5 million kroons per undertaking is deemed to be de minimis aid. De minimis aid is deemed to be compatible with the public interest.

(2) The provisions of subsection (1) of this section do not apply in the case of state aid granted to transport, export aid or aid to substitute imports.

(3) It is not necessary to apply for permission to grant state aid, as provided in § 34 of this Act, in order to grant de minimis aid.

34. Permission to grant state aid

(1) State aid shall be granted only with the prior written permission of the Minister of Finance and the grant of state aid shall not commence before the Minister of Finance has granted permission to grant state aid or deemed the state aid to be permitted pursuant to subsection 36 (3) of this Act or before the Government of the Republic has granted permission to grant state aid pursuant to § 48 of this Act.

(2) Applications for permission to grant state aid (hereinafter applications for permission) shall be submitted to the Minister of Finance together with the necessary information taking into account the terms in the proceedings provided for in this Act. The format(s) of applications for permission and the instructions for completing the applications shall be established by the Minister of Finance.

(3) A decision concerning an application for permission to grant state aid shall be made by the Minister of Finance pursuant to § 36 or 38 of this Act. The Minister of Finance shall make the decision by his or her directive and the applicant for permission shall be notified thereof without delay by sending an unregistered letter by post.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

35. State aid scheme and individual state aid

(1) A grantor of state aid may apply for permission to grant state aid both in the case of a state aid scheme (hereinafter aid scheme) and in the case of individual state aid.

(2) A state aid scheme is based on any legal act or contract which provides for the possibility for state aid to be granted to undertakings not previously defined by the act or contract in order to promote achievement of one and the same objective or several similar objectives.

(3) Individual state aid is state aid which is not granted on the basis of an aid scheme, or state aid which is granted on the basis of an aid scheme and for which separate permission must be applied for from the Minister of Finance.

36. Proceedings concerning applications for permission to grant state aid

(1) The Minister of Finance shall examine the applications for permission submitted to him or her and make one of the following decisions:

- 1) to return the application if the measures set out in the application do not constitute state aid within the meaning of subsection 30 (1) of this Act;
- 2) to grant permission to grant state aid if the state aid specified in the application is compatible with the public interest;
- 3) to initiate supplementary proceedings concerning the application for permission to grant state aid if doubts are raised as to the compatibility of the state aid with the public interest.

(1) The Minister of Finance shall make one of the decisions provided for in subsection (1) of this section within two months after all the necessary information is submitted by the person applying for permission to grant state aid or the beneficiary of the state aid or a notice specified in subsection 37 (3) of this Act is received. The above term may be altered with the mutual written consent of the Minister of Finance and the applicant for permission.

(2) If, within the term provided for in subsection (2) of this section, an applicant for permission has not received a written notice concerning a decision made by the Minister of Finance pursuant to subsection (1), the person shall notify the Minister of Finance thereof. If, within fifteen working days after receipt of the abovementioned notice, the Minister of Finance has not notified the applicant for permission of a decision made pursuant to subsection (1) of this section, the grant of state aid is deemed to be permitted by the Minister of Finance.

37. Requests for information

(1) The Minister of Finance has the right to request an applicant for permission to grant state aid, the beneficiary and third parties to submit information necessary for the proceedings concerning the application within two months after the date of receipt of the application or any additional information requested. The above term shall be altered according to how the term provided for in subsection 36 (2) of this Act is altered.

(2) If information set out in an application submitted pursuant to subsection 34 (2) of this Act by an applicant for permission to grant state aid is incorrect, incomplete or misleading or if additional information is necessary in order to examine the application, the applicant for permission, the beneficiary of the aid or third parties shall be notified thereof by sending an unregistered letter by post or using electronic means and requested to eliminate the deficiencies or submit the information within a specified term.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(3) An application for permission shall not be reviewed if the deficiencies have not been eliminated or the applicant has not submitted all the information requested by the end of the term specified in subsection (2) of this section or if the applicant has not given notice by then that the additional information requested is not available or has already been submitted. The unavailability of information shall be reasoned. Notice of the fact that the application shall not be reviewed shall be given to the applicant by sending an unregistered letter by post or using electronic means.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(4) The Minister of Finance may, with good reason, extend the term specified in subsection (2) of this section on the basis of a corresponding petition from the applicant for permission.

38. Termination of supplementary proceedings

(1) The Minister of Finance shall terminate supplementary proceedings initiated on the basis of clause 36 (1) 3) of this Act by making one of the following decisions:

- 1) to grant permission to grant state aid if the state aid is compatible with the public interest;
- 2) to return the application if, after amendment of the planned aid scheme or individual state aid by the applicant, the Minister of Finance finds that the measures set out in the application do not constitute state aid within the meaning of subsection 30 (1) of this Act;
- 3) to grant permission to grant state aid if, after amendment of the aid scheme or the planned individual state aid by the applicant, the Minister of Finance finds that the state aid is compatible with the public interest;
- 4) to refuse to grant permission to grant state aid if the state aid is incompatible with the public interest.

(2) The Minister of Finance may attach to a decision provided for in clause (1) 1) or 3) of this section conditions corresponding to the special conditions established on the basis of subsection 31 (6) of this Act subject to which an aid may be deemed compatible with the public interest and may lay down obligations to enable compliance with the decision to be monitored.

(3) The Minister of Finance shall make the decisions provided for in subsection (1) of this section within six months after receipt of all the necessary information. If necessary, the above term may be altered with the mutual written consent of the Minister of Finance and the applicant for the permission.

39. Withdrawal of application for permission to grant state aid

(1) An applicant for permission to grant state aid provided for in subsection 34 (2) of this Act may withdraw the application before the Minister of Finance has made a decision pursuant to § 36.

(2) If supplementary proceedings have been initiated on the basis of clause 36 (1) 3) of this Act and the applicant for permission withdraws the application before the Minister of Finance makes a decision pursuant to § 38, the Minister of Finance shall, by a directive, make a decision to terminate the proceedings and to return the application.

40. Publication of decisions

Decisions made by the Minister of Finance on the basis of clause 36 (1) 2) or 3), clause 38 (1) 1), 3) or 4), subsection 39 (2) or subsection 43 (1) of this Act shall be made public in the official publication *Ametlikud Teadaanded*.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

41. Revocation of decisions retroactively

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(1) The Minister of Finance may retroactively revoke a decision made pursuant to clause 36 (1) 1) or 2) or subsection 38 (1) of this Act if the decision was based on incorrect information submitted during the proceedings which was a determining factor for the decision. Before revoking a decision retroactively and making a new decision, the Minister of Finance shall initiate supplementary proceedings pursuant to clause 36 (1) 3) of this Act.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(2) If the Minister of Finance makes a decision provided for in clause 38 (1) 4) of this Act after termination of the supplementary proceedings specified in subsection (1) of this section, he or she may demand recovery of the state aid pursuant to § 43.

42. Proceedings concerning unlawful state aid and misuse of state aid

(1) Unlawful state aid is state aid which is granted after the entry into force of this Act and for which the corresponding permission has not been granted by the Minister of Finance or which is not deemed to have been permitted pursuant to subsection 36 (3) of this Act or concerning which permission to grant state aid has not been obtained from the Government of the Republic pursuant to § 48 of this Act.

(2) Misuse of state aid is the use of state aid for purposes other than the intended use or purpose specified in the information submitted concerning the state aid, or non-compliance with the conditions or obligations provided for in subsection 38 (2) of this Act.

(3) All interested parties may notify the Minister of Finance of unlawful state aid or the misuse of state aid.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(4) If the Minister of Finance receives information concerning alleged unlawful state aid or alleged misuse of state aid, he or she shall issue a precept:

- 1) to the grantor of the state aid or the beneficiary of the state aid requiring information to be submitted within a specified term;
- 2) to the grantor of the state aid requiring an application for permission to grant state aid to be submitted within a specified term;
- 3) to the grantor of the state aid requiring suspension of the grant of unlawful state aid or alleged misused state aid until the Minister of Finance has made a decision provided for in clause 36 (1) 1) or 2) or subsection 38 (1) of this Act concerning the matter.

(5) The course of proceedings concerning unlawful state aid or the misuse of state aid, the Minister of Finance shall make a decision pursuant to § 36 of this Act. If a grantor of state aid or a beneficiary of state aid fails to comply with a precept provided for in subsection (4) of this section or to submit the additional information requested, the decision shall be made on the basis of the existing information. Supplementary proceedings initiated on the basis of clause 36 (1) 3) of this Act shall be terminated by making one of the decisions provided for in subsection 38 (1).

(6) If the Minister of Finance makes a decision provided for in clause 38 (1) 4) of this Act after termination of supplementary proceedings, he or she may demand that the state aid is recovered pursuant to § 43.

43. Recovery of state aid

(1) If a decision provided for in clause 38 (1) 4) is made after supplementary proceedings conducted on the basis of § 41 or 42 of this Act, the Minister of Finance has the right to issue a precept to the grantor or beneficiary of the state aid requiring revocation of the decision to grant state aid retroactively or recovery of the state aid.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(2) In calculating the amount of state aid to be recovered, the size of the aid and expenses before the deduction of direct taxes shall be taken into account. If aid was granted in a form other than monetary support, the aid shall be converted into financial support of an equal value. Aid granted in instalments shall be discounted to the present value. The reference interest rate applicable to the state aid at the time when the aid was made available shall be used as the discount rate.

(3) The Minister of Finance has the right to demand recovery of state aid specified in subsections 41 (2) and 42 (1) and (2) of this Act within ten years. The term begins to run as of the date when the state aid is made available. The running of the term shall be suspended for the period during which proceedings are conducted by the Minister of Finance or the matter is heard by a court.

(4) If a beneficiary of state aid fails to comply with a precept concerning recovery of the state aid, the Minister of Finance has the right of recourse to the courts.

44. Demand of interest

In each case of the recovery of state aid, the Minister of Finance has the right to demand interest to be paid on the amount of state aid recovered on the basis of subsection 43 (1) of this Act. The interest collected shall be transferred to the revenue of the state budget. Interest shall be calculated as of the date when the state aid was made available, using the average interest rate applied by Estonian banks to loans granted to undertakings in non-financial sectors during the month preceding the date of the decision to permit the grant of the state aid or, in the absence of such decision, the month preceding the grant of the state aid.

45. Precepts

(1) A precept specified in subsection 42 (4) or 43 (1) of this Act shall set out:

- 1) the name and position of the person preparing the precept;
- 2) the date of issue of the precept;
- 3) the name and address of the recipient of the precept;
- 4) the bases for issuing the precept together with references to the provisions of relevant Acts;
- 5) in the case provided for in clause 42 (4) 1) of this Act, an indication of the information requested;
- 6) the term for compliance with the precept;
- 7) the amount of the penalty payment applied upon failure to comply with the precept;
- 8) the procedure and term for appeal against the precept.

(2) A precept of the Minister of Finance may prescribe obligatory acts to be performed upon suspension of the grant of the state aid.

46. Imposition of penalty payment

(1) In the case of failure to comply with a precept provided for in § 45 of this Act, the Minister of Finance may impose, pursuant to the procedure provided for in the Substitutive Enforcement and Penalty Payment Act (RT I 2001, 50, 283; 94, 580), a penalty payment of up to 50 000 kroons on natural persons and up to 100 000 kroons on legal persons.

(18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)

(2) A penalty payment provided for in subsection (1) of this section may be imposed several times until the corresponding precept is complied with.

47. State aid committee

(1) The Government of the Republic shall form a state aid committee (hereinafter committee) whose function is to submit proposals to the Government of the Republic concerning applications for revocation of a decision of the Minister of Finance submitted on the basis of subsection 48 (1) of this Act.

(2) The procedure for the formation of and the organisation of the work of the committee shall be established by the Government of the Republic.

48. Proceedings concerning disputable cases of state aid

(1) If the Minister of Finance attaches to his or her decision conditions or obligations on the basis of subsection 38 (2) of this Act or makes a decision provided for in clause 38 (1) 4) of this Act to which the applicant for permission does not consent, the applicant for permission has the right to address the committee and apply for the decision of the Minister of Finance to be revoked and a new decision to be made, and the committee shall examine the matter and send the materials together with its proposals to the Government of the Republic for a decision.

(2) All materials submitted to the Minister of Finance by an applicant for permission, the beneficiary or third parties and the decision made by the Minister of Finance concerning the case shall be submitted to the committee.

(3) The Government of the Republic shall examine applications submitted thereto and shall make one of the following decisions:

- 1) to revoke the decision of the Minister of Finance and to grant permission to grant state aid by an order of the Government of the Republic;
- 2) to deny the application submitted to the Government of the Republic.

49. Reporting on state aid

(1) The format of a report on the grant and use of state aid and the due date for the submission of the report shall be established by the Minister of Finance. Grantors of state aid shall submit reports on the grant and use of state aid to the Minister of Finance. Reports shall also be submitted on the grant and use of de minimis state aid.

(2) Within twelve months as of the end of a calendar year, the Minister of Finance shall prepare a report on all state aid granted during the given year. The report shall be submitted to the Government of the Republic for approval.

Chapter 7

UNFAIR COMPETITION

50. Prohibition on unfair competition

(1) Unfair competition is taken to mean dishonest trading practices and acts which are contrary to good morals and practices, including:

- 1) publication of misleading information, presentation or ordering of misleading information for publication, or disparagement of a competitor or the goods of the competitor;
- 2) misuse of confidential information or of an employee or representative of a competitor.

(2) Unfair competition is prohibited.

(3) The provisions of the Advertising Act (RT I 1997, 52, 835; 1999, 27, 388; 30, 415; 2001, 23, 127; 50, 284; 2002, 13, 81; 53, 336; 61, 375; 63, 387) apply to misleading, offensive or denigratory information as a method of advertising.

51. Publication of misleading information, presentation or ordering of misleading information for publication, or disparagement of competitor or goods of competitor

(1) Misleading information is incorrect information which, given ordinary attention on the part of the buyer, may leave a misleading impression of an offer or which harms or may harm the reputation or economic activities of another undertaking

(2) Publication, or presentation or ordering for publication, of misleading information concerning either oneself or another undertaking participating in a goods market or concerning the goods or work equipment of such undertaking is prohibited, except in cases where publication of such information has been ordered from the publisher of the information or the publisher is not responsible for the correctness of the information presented thereto.

(3) Information specified in subsection (1) of this section primarily refers to information concerning the origin, qualities, method of production, means or sources of supply, prices, tariffs, discounts, awarding as a prize, reasons for sale and the size of the stock of the goods offered, as well as the preferential rights, financial status and other qualities of the undertaking.

52. Misuse of confidential information or of employee or representative of another undertaking

(1) Misuse of confidential information is the use of confidential information regarding a competitor where the corresponding information was obtained illegally.

(2) Misuse of an employee or representative of a competitor is the exertion of influence on him or her to act in the interests of the influencing party or a third party.

53. Ascertainment of unfair competition

The existence or absence of unfair competition shall be ascertained in a dispute between parties held pursuant to civil procedure.

Chapter 8
STATE SUPERVISION

54. Organisation of state supervision

(1) The Competition Board shall exercise state supervision over implementation of this Act, except implementation of the provisions of Chapters 6 and 7.

(2) The Minister of Finance shall exercise state supervision over implementation of the provisions of Chapter 6.

55. Competence of Competition Board

(1) The Competition Board is competent to perform all acts assigned to it by this Act and to take measures to protect competition.

(2) The Competition Board shall analyse the competitive situation, propose measures to promote competition, make recommendations to improve the competitive situation, make proposals for legislation to be passed or amended, and develop co-operation with the competition supervisory authorities of other states and associations of states.

56. Co-operation with European Commission

Pursuant to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part and decision No. 1/99 of the Association Council between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part adopting the necessary rules for the implementation of Article 63 (1) i), (1) ii) and (2) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part (RT II 1999, 15, 94), co-operation between the European Commission and the Competition Board shall be effected pursuant to the general principles provided for in Article 1 of the above rules.

57. Right of Competition Board to request information

(1) The Competition Board has the right to request all natural and legal persons and the representatives thereof and all state agencies and local governments and the officials thereof to submit information necessary for:

- 1) analysing the competitive situation;
- 2) defining a goods market;
- 3) inspecting an agreement, activity or decision;
- 4) deciding on the grant of exemptions;
- 5) monitoring the activities of an undertaking in a dominant position;
- 6) monitoring a concentration;
- 7) (Repealed - 18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)
- 8) (Repealed - 18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)
- 9) exercising state supervision over the implementation of this Act.

(18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)

(2) The information provided for in subsection (1) of this section shall be requested in a written request wherein the purpose of and the legal basis for the request for information shall be specified and the possibility of issue of a precept upon failure to provide

information or provision of incomplete, incorrect or misleading information shall be referred to. The term for submission of the information shall be not less than ten calendar days.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(3) The Competition Board has the right to request natural persons, including representatives or employees of legal persons or associations which are not legal persons and officials or representatives of state agencies or local governments, to provide explanations at the Competition Board or on site. Explanations shall be prepared in writing and the person requesting an explanation and the person providing the explanation shall sign each page of the explanation. If a person providing an explanation refuses to sign the explanation, an entry indicating refusal to sign the explanation and the reasons for the refusal shall be made in the explanation.

58. Summoning to Competition Board

(1) Natural persons, including representatives or employees of legal persons or associations which are not legal persons and officials or representatives of state agencies or local governments, shall be summoned to the Competition Board by a summons which sets out:

- 1) the name or official title of the person summoned;
- 2) the reason and legal basis for summoning the person;
- 3) (Repealed - 18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)
- 4) the place and time of appearance;
- 5) the rights of the person summoned, including the right to submit a written explanation;
- 6) the obligation to give notice of good reasons for failure to appear.

(2) A summons shall be served against signature or sent by post with advice of delivery (hereinafter service) and the person summoned or his or her representative shall be granted a term of not less than ten calendar days to appear. By agreement of the parties, the term may be altered and the summons may be delivered orally.

(3) (Repealed - 19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(4) (Repealed - 19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(5) (Repealed - 19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(6) (Repealed - 19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

59. Right of Competition Board to request submission of materials

(1) The Competition Board has the right to request all natural and legal persons and the representatives thereof and all state agencies and local governments and the officials and

representatives thereof to submit the originals of documents, drafts or other materials, or true copies thereof, certified by the signature of the person submitting the copies. Upon submission of a copy, the Competition Board has the right to request submission of the original document to verify the authenticity of the copy.

(2) At the request of a person who submits materials or the representative of such person, the Competition Board shall issue confirmation concerning receipt of the materials and the person or the representative has the right to the return of the originals of the documents, drafts and other materials by the Competition Board after completion of the supervisory operations.

60. Inspection of seat or place of business of undertaking

(1) In order to establish a violation or possible violation of this Act, an official or representative of the Competition Board authorised by a directive of the Director General of the Competition Board or his or her deputy (hereinafter person conducting an investigation) has the right, without prior warning or special permission, to inspect the seat and place of business of an undertaking, including the enterprises, territory, buildings, rooms and means of transport of the undertaking, both during working hours and at any time the place of business is used. With the consent of the undertaking, the seat, place of business or enterprises of the undertaking may also be inspected at any other time.

(2) An inspection provided for in subsection (1) of this section shall be conducted with the knowledge of the undertaking, or a representative or employee thereof, and they have the right to be present during the inspection.

(3) At the seat of the undertaking or the location of the activities of an undertaking under inspection, the person conducting such inspection shall present to the undertaking, its representative or employee the directive issued by the Director General of the Competition Board or his or her deputy concerning the authorisation of the person conducting the inspection.

(18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)

(4) During an inspection provided for in subsection (1) of this section, the person conducting the inspection has the right to:

- 1) immediately examine documents relating to the activities of the undertaking, drafts thereof and other materials and to obtain, at the expense of the person under inspection, copies or transcripts thereof, the authenticity of which shall be certified by the signature of the person submitting them;
- 2) immediately examine data or databases kept in electronic form on computer at the seat or place of business of the undertaking under inspection and electronic data media held at the seat or place of business and to make printouts and electronic copies thereof at the expense of the undertaking under inspection, the authenticity of which shall be certified by the signature of the person under inspection or his or her representative or employee on the printout or on a separate page;

- 3) request the undertaking or a representative or employee thereof to submit explanations which shall be documented pursuant to subsection 57 (3) of this Act.

(5) The person conducting an inspection is required to prepare a report of the results of the inspection.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(6) A report specified in subsection (5) of this section shall set out:

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

1) the time and place of preparation of the report;

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

2) the name and position of the person preparing the report;

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

3) in the case of a natural person under inspection, the name and position of the person or his or her representative or employee or, in the case of a legal person, the name of the legal person and the name and position of the representative or employee of the legal person;

4) a description of the course of the inspection;

5) a notation concerning presentation of the directive specified in subsection (3) of this section to the undertaking under inspection or the representative or employee thereof;

(18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)

6) a list of the explanations received from the undertaking under inspection or the representative or employee thereof;

7) a list of the materials obtained in the course of the inspection;

8) a notation concerning the participation of an interpreter or translator if one is involved;

9) the notes of the undertaking under inspection or the representative or employee thereof concerning the inspection;

10) a notation indicating that the undertaking under inspection or the representative or employee thereof has received one copy of the report.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(7) If an undertaking or the representative or employee thereof interferes with an inspection, a corresponding entry shall be made in the report indicating the reasons for such interference, if possible.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(8) A report shall be prepared in two copies which shall be signed by the person preparing the summary and the representative or employee of the undertaking under inspection. Each page of the report shall be signed and the undertaking under inspection and the Competition Board shall each receive one copy of the report. All materials obtained in the course of the inspection shall be annexed to the copy held by the Competition Board.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

(9) If an undertaking under inspection or the representative or employee thereof refuses to sign the report, a corresponding entry shall be made in the report indicating the reasons for such refusal.

(19.06.2002 entered into force 01.08.2002 - RT I 2002, 61, 375)

61. Making of recommendations

The Director General of the Competition Board or his or her deputy may make recommendations to state agencies, local governments and natural and legal persons as to improvement of the competitive situation.

(18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)

62. Precepts and imposition of penalty payment

(1) The Director General of the Competition Board or his or her deputy has the right to issue a precept to a natural or legal person if the person:

- 1) fails to submit information or materials within the term specified in a written request of the Competition Board;
- 2) interferes with an inspection at the seat or place of business of the undertaking;
- 3) fails to appear at an oral hearing or when requested to provide explanations;
- 4) puts into effect a concentration which is subject to control but concerning which a decision has not been made on the basis of clause 27 (1) 1) or (2) 1) of this Act or if a decision prohibiting the concentration has been made on the basis of clause 27 (2) 2) of this Act or the permission for the concentration has been revoked by the Director General of the Competition Board or his or her deputy or violates the conditions of the permission for the concentration;
- 5) abuses a dominant position;
- 6) violates a prohibition against agreements, practices or decisions restricting competition.

(2) An obligation to perform the following may be imposed by a mandatory precept provided for in subsection (1) of this section:

- 1) perform the act required by the precept;
- 2) refrain from a prohibited act;
- 3) terminate or suspend activities which restrict competition;
- 4) restore the situation prior to the offence.

(3) In the case of failure to comply with a precept, the Director General of the Competition Board or his or her deputy may impose, pursuant to the procedure provided for in the Substitutive Enforcement and Penalty Payment Act, a penalty payment of up to 50 000 kroons on natural persons and up to 100 000 kroons on legal persons.

(18.09.2002 entered into force 24.10.2002 - RT I 2002, 82, 480)

63. Obligation to maintain business secrets

(1) Unless otherwise provided by law, the Competition Board does not have the right to disclose the business secrets, including information subject to banking secrecy, of an undertaking which have become known to the Competition Board in the course of performance of its official duties to other persons nor publish them without the consent of the undertaking.

(2) Information subject to disclosure to the public, decisions made by the Director General of the Competition Board or his or her deputy and documents prepared by the Director General of the Competition Board or his or her deputy or any other official of the Competition Board from which business secrets have been excluded are not deemed to be business secrets.

(19.06.2002 entered into force 01.09.2002 - RT I 2002, 63, 387)

(3) Upon preparation of a document, the Competition Board shall not use any information against an undertaking which, in accordance with the provisions of this Act, may not be disclosed to the undertaking.

(19.06.2002 entered into force 01.09.2002 - RT I 2002, 63, 387)

(4) The Competition Board shall exclude business secrets from the texts of decisions subject to disclosure.

[64–73 repealed – 18.09.2002 entered into force 24.10.2002 – RT I 2002, 82, 480]

73.1 Interference with exercise of state supervision

A legal person who refuses to submit or fails to submit documents or information necessary for supervision to the Minister of Finance or the Competition Board on time, submits false information to the Minister of Finance or the Competition Board or submits documents or information to the Minister of Finance or the Competition Board in a manner which does not permit exercise of supervision shall be punished by a fine of up to 50 000 kroons.

(19.06.2002 entered into force 01.09.2002 – RT I 2002, 63, 387)

73.2 Misuse of state aid

(1) Misuse of state aid is punishable by a fine of up to 300 fine units.

(2) The same act, if committed by a legal person, is punishable by a fine of up to 50,000 kroons.

(19.06.2002 entered into force 01.09.2002 – RT I 2002, 63, 387)

§ 73.3 (Repealed – 18.09.2002 entered into force 24.10.2002 – RT I 2002, 82, 480)

73.4 Proceedings

(1) The provisions of the General Part of the Penal Code (RT I 2001, 61, 364; RT I 2002, 86, 504) and of the Code of Misdemeanour Procedure (RT I 2002, 50, 313) apply to the misdemeanours provided for in §§ 73¹–73² of this Act.

(18.09.2002 entered into force 24.10.2002 – RT I 2002, 82, 480)

(2) The Ministry of Finance shall conduct extra-judicial proceedings in the matters of the misdemeanours provided for in §§ 73¹ and 73² of this Act.

(3) The Competition Board shall conduct extra-judicial proceedings in the matters of the misdemeanours provided for in § 73¹ of this Act.

(19.06.2002 entered into force 01.09.2002 – RT I 2002, 63, 387; 18.09.2002 entered into force 24.10.2002 – RT I 2002, 82, 480)

Chapter 9 LIABILITY

§ 74. (Repealed – 19.06.2002 entered into force 01.09.2002 – RT I 2002, 63, 387)

§ 75. (Repealed – 19.06.2002 entered into force 01.09.2002 – RT I 2002, 63, 387)

§ 76. (Repealed – 19.06.2002 entered into force 01.09.2002 – RT I 2002, 63, 387)

§ 77. (Repealed – 19.06.2002 entered into force 01.09.2002 – RT I 2002, 63, 387)

§ 78. Compensation for damage

Proprietary or other damage caused by acts prohibited by this Act shall be subject to compensation by way of civil procedure.

Chapter 10 IMPLEMENTING PROVISIONS

79. Amendment of Criminal Code

Sections 148¹⁶–148¹⁹ are added to the Criminal Code (RT 1992, 20, 288; RT I 1999, 38, 485; 57, 595, 597 and 598; 60, 616; 97, 859; 102, 907; 2000, 10, 55; 28, 167; 29, 173; 33, 193; 40, 247; 49, 301 and 305; 54, 351; 57, 373; 58, 376; 84, 533; 92, 597; 104, 685; 2001, 21, 115 and 116; 31, 174) in the following wording:

“§ 148¹⁶. Abuse of dominant position

A member of the management board, of a body substituting for the management board or of the supervisory board of a legal person who establishes unfair trading conditions, limits production, services, the market, technical development or investment to the prejudice of consumers or who engages in other activities causing a direct or indirect abuse of a dominant position shall be punished by a fine or up to three years' imprisonment.

§ 148¹⁷. Agreements, practices or decisions restricting competition

A member of the management board, of a body substituting for the management board or of the supervisory board of a legal person who violates a prohibition on an agreement, practice or decision restricting competition or who enters into an agreement, engages in practices or makes a decision requiring an exemption without obtaining such exemption or who violates the conditions of an exemption shall be punished by a fine or up to three years' imprisonment.

§ 148¹⁸. Failure to perform obligations relating to concentration

A member of the management board, of a body substituting for the management board or of a supervisory board of a legal person who fails to give notice of a concentration within the specified term or who violates a prohibition on concentration or the conditions of permission to concentrate shall be punished by a fine or up to three years' imprisonment.

§ 148¹⁹. Failure to draw clear distinction between primary and secondary activities in accounts of legal person with special or exclusive rights or in control of essential facilities

A member of the management board, of a body substituting for the management board or of a supervisory board of a legal person with special or exclusive rights or in control of essential facilities who engages in activities resulting in failure to draw a clear distinction between primary and secondary activities in the accounts of the legal person shall be punished by a fine or up to three years' imprisonment.”

80. Amendment of Price Act

Sections 9 and 10 of the Republic of Estonia Price Act (ENSV ÜVT³ 1989, 39, 610; RT 1992, 30, 400; RT I 1996, 49, 953; 1997, 52, 833; 1998, 60, 951) are repealed.

81. Amendment of Geographical Indications Protection Act

Clause 49 1) of the Geographical Indications Protection Act (RT I 1999, 102, 907; 2000, 40, 252; 2001, 27, 151; 56, 332; 335; 2002, 53, 336; 63, 387) is repealed.

82. Amendment of Trade Marks Act

Clause 36⁴ (1) 1) of the Trade Marks Act (RT 1992, 35, 459; RT I 1998, 15, 231; 91/93, 1500; 1999, 93, 834; 102, 907; 2001, 27, 151; 56, 332; 335; 2002, 63, 387) is repealed.

83. Amendment of State Fees Act

The State Fees Act (RT I 1997, 80, 1344; 2001, 55, 331; 56, 332; 64, 367; 65, 377; 85, 512; 88, 531; 91, 543; 93, 565; 2002, 1, 1; 9, 45; 13, 78; 79; 81; 18, 97; 23, 131; 24, 135; 27, 151; 153; 30, 178; 35, 214; 44, 281; 47, 297; 51, 316; 57, 358; 58, 361; 61, 375; 62, 377) is amended as follows:

1) Clause 20¹ is added to subsection 3 (2) worded as follows:

“20¹) Acts performed by the Competition Board;”;

2) Division 13¹ is added to Chapter 7 of the Act worded as follows:

“Division 13¹

Acts of Competition Board

§ 147²⁰. Proceedings concerning concentration

A state fee of 20 000 kroons shall be paid for proceedings concerning a concentration.

§ 147²¹. Proceedings concerning application for exemption

A state fee of 10 000 kroons shall be paid for proceedings concerning an application for exemption.”

84. Amendment of Consumer Protection Act

Clause 11 (2) 1¹) of the Consumer Protection Act (RT I 1994, 2, 13; 1999, 35, 450; 102, 907; 2000, 40, 252; 59, 379; 2001, 50, 283; 289; 56, 332; 2002, 13, 81; 18, 97; 35, 214; 53, 336; 61, 375; 63, 387) is repealed.

85. Amendment of Commercial Code

The Commercial Code (RT I 1995, 26/28, 355; 1998, 91/93, 1500; 1999, 10, 155; 23, 355; 24, 360; 57, 596; 102, 907; 2000, 29, 172; 49, 303; 55, 365; 57, 373; 2001, 24, 133; 34, 185; 56, 332; 336; 89, 532; 93, 565; 2002, 3, 6; 35, 214; 53, 336; 61, 375; 63, 387; 388) is amended as follows:

1) Subsection 393 (2) is amended and worded as follows:

“(2) A merger report need not be prepared if all the shares of the company being acquired are held by the acquiring company, or if this is agreed to by all the partners or shareholders of the merging company, unless the aggregate worldwide realised net turnover of the merging companies during the previous financial year exceeded 500 million kroons and the aggregate worldwide realised net turnover of each of at least two of the merging companies exceeded 100 million kroons or if the business activities of at least one of the merging undertakings are carried out in Estonia.”;

2) Clause 400 (1) 9) is amended and worded as follows:

“9) A decision of the Director General of the Competition Board or his or her deputy concerning the grant of permission to concentrate, if the aggregate worldwide realised net turnover of the merging companies during the previous financial year exceeded 500 million kroons and the aggregate worldwide turnover of each of at least two of the merging companies exceeded 100 million kroons and if the business activities of at least one of the merging undertakings are carried out in Estonia, except in cases of mergers within groups.”

86. Amendment of Rural Municipality and City Budgets Act

Subsection 11 (3) of the Rural Municipality and City Budgets Act (RT I 1993, 42, 615; 1995, 17, 234; 1997, 40, 619; 2000, 7, 40; 2001, 56, 332; 2002, 64, 393) is amended and worded as follows:

“(3) Before a draft budget is presented to the council, the government shall submit an application for permission to grant state aid concerning the state aid prescribed in the draft budget to the Minister of Finance pursuant to the Competition Act.”

87. Implementation of Act

(1) This Act applies to all agreements, concerted practices and decisions which restrict competition and are in force at the moment of the entry into force of this Act and which are carried out thereafter.

(2) Proceedings initiated before the entry into force of this Act shall be conducted pursuant to the Act in force at the time of initiation of the proceedings concerning the case.

(3) Permission granted in any form or pursuant to any procedure to an undertaking by the state or a local government before 1 October 1998 which enables the undertaking to have a competitive advantage over other undertakings in a goods market or to be the only undertaking in the market shall also be deemed to be a special or exclusive right.

(4) The Government of the Republic and its ministers shall bring the regulations passed on the basis of the Competition Act (RT I 1998, 30, 410; 1999, 89, 813; 2000, 53, 343; RT III 2000, 21, 232) into conformity with this Act within three months after the entry into force of this Act.

88. Proceedings concerning existing state aid

(1) Existing state aid is taken to mean aid schemes and individual state aid the grant of which commenced between 1 January 1995 and the entry into force of this Act and continued after the entry into force of this Act, state aid for the grant of which permission has been granted by the Minister of Finance or the Government of the Republic, and state aid which is deemed to be permitted pursuant to subsection 36 (3) of this Act.

(2) Existing state aid shall be assessed in accordance with the general requirements provided for in this Act and pursuant to the special requirements established on the basis of subsection 31 (6) of this Act.

(3) If the Minister of Finance finds that existing state aid is not or is no longer compatible with the public interest, he or she shall notify the grantor of the state aid in writing of his or her preliminary view and give the grantor the opportunity to submit its comments within one month. In duly justified cases, the Minister of Finance may extend the term.

(4) If the Minister of Finance, on the basis of the comments submitted by a grantor of state aid pursuant to subsection (3) of this section, makes a decision that the existing state aid is compatible with the public interest, the Minister of Finance shall notify the grantor of state aid of the decision.

(5) If the Minister of Finance, on the basis of the comments submitted by a grantor of state aid pursuant to subsection (3) of this section, makes a decision that the existing state aid is not compatible with the public interest, the Minister of Finance has the right to request substantive amendment of the aid scheme and submission of a new application for permission within a specified term or termination of the grant of the state aid within a specified term.

(6) Proceedings concerning applications for permission to grant state aid submitted on the basis of subsection (5) of this section shall be conducted pursuant to § 36 of this Act.

(7) If a grantor of state aid fails to comply with the requirements set by the Minister of Finance pursuant to subsection (5) of this section within the specified term, the state aid granted after the expiry of the term is deemed to be unlawful state aid and the Minister of Finance has the right to initiate proceedings pursuant to § 42 of this Act.

89. Repeal of Act

The Competition Act (RT I 1998, 30, 410; 1999, 89, 813; 2000, 53, 343; RT III 2000, 21, 232) is repealed as of the entry into force of this Act.

90. Entry into force of Act

This Act enters into force on 1 October 2001.

¹ RT = *Riigi Teataja* = *State Gazette*

² *Ametlikud Teadaanded* = *Official Notices*

³ ENSV ÜVT = *ENSV Ülemnõukogu ja Valitsuse Teataja* = *ESSR Supreme Council and Government Gazette*

EUROPEAN COMMISSION

COMMENTARY BY THE EUROPEAN COMMISSION ON THE ADOPTION OF NON-HORIZONTAL MERGER GUIDELINES

In November 2007, the European Commission has adopted guidelines for the assessment of mergers between companies that are in a so-called vertical or conglomerate relationship (also known as "non-horizontal mergers"). Such mergers are aimed at broadening a company's activities either by merging with a company at another level of the supply chain (vertical merger) or with a company active in a different but related market (conglomerate merger). The Guidelines provide guidance to companies as to how the Commission will analyse the impact of such mergers on competition.

The non-horizontal merger Guidelines complement the existing Guidelines on horizontal mergers, which deal with mergers of companies competing on the same market. Horizontal mergers can lead to a loss of direct competition between the merging firms. By contrast, vertical and conglomerate mergers do not immediately change the number of competitors active in any given market. As a result, the main potential source of anti-competitive effects in horizontal mergers is absent from vertical and conglomerate mergers. Therefore, vertical and conglomerate mergers are less likely than horizontal mergers to create competition concerns. In addition, vertical and conglomerate mergers may also improve a company's efficiency by improving the coordination between different production stages.

As a threshold matter, the Guidelines set up certain market share and market concentration levels below which the Commission is unlikely to find competition concerns (so-called "safe harbours").

The Guidelines provide examples, based on established economic principles, of specific situations in which vertical and conglomerate mergers may significantly impede effective competition in the markets concerned, and explain the analytical framework for the evaluation of these mergers.

The Guidelines identify two basic scenarios in which non-horizontal mergers (both vertical and conglomerate mergers) can significantly impede effective competition: they can either produce non-coordinated effects, or coordinated effects. Non-coordinated effects are essentially the same as foreclosure of actual or potential competitors from the market.

In the case of vertical merges, foreclosure can aim at restricting access to goods or services that serve as input to the merged company's downstream competitors; (this is called input foreclosure). Whether or not this type of foreclosure will occur, will depend on the merged company's upstream market power, its ability and incentive to foreclose competitors as well as on whether the foreclosure effect is likely. By acquiring a customer, a vertically merging company can also aim at making it difficult for its upstream competitors to have access to sufficient customer base; (this is called customer foreclosure). In the evaluation of this scenario, the Commission will look at whether the customer has market power in the downstream market, whether the merged entity will have

the ability and the incentive to foreclose the market and whether the foreclosure effect is likely.

In the case of conglomerate mergers, foreclosure can occur if the merged company tries to leverage a significant market power from one market to another, related, market by means of tying or bundling. Again, the questions to be answered focus on whether or not the merged company has the ability and the incentive to foreclose its rivals and whether the strategy will have a significant detrimental effect on competition.

As pointed out above, vertical and conglomerate mergers can also give rise to coordinated effects. This is because a merger can create market conditions in which firms are significantly more likely to coordinate and raise prices or otherwise harm competition than prior to the merger, without entering into agreement or resorting to concerted practice within the meaning of Article 81. The likelihood of such coordinated effects is higher if the market shows the following characteristics: 1) it is easy to reach a common understanding on the terms of the coordination, 2) the coordinating firms can monitor adherence to the terms of the coordination, 3) there is a credible mechanism to retaliate deviation from the common terms, and 4) outsiders cannot jeopardise the results of the coordination. The non-horizontal merger Guidelines explain the circumstances on which the Commission will focus in its evaluation of these factors.

The text of the Guidelines is available on the Commission's website at:
<http://ec.europa.eu/comm/competition/mergers/legislation/legislation.html>

GUIDELINES ON THE ASSESSMENT OF NON-HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS

Official Journal C 265 , 18/10/2008 P. 0006 - 0025

Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07)

I. INTRODUCTION

1. Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1] (hereinafter: the "Merger Regulation") provides that the Commission has to appraise concentrations within the scope of the Merger Regulation with a view to establishing whether or not they are compatible with the common market. For that purpose, the Commission must assess, pursuant to Article 2(2) and (3), whether or not a concentration would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position in the common market or a substantial part of it.

2. This document develops guidance as to how the Commission assesses concentrations [2] where the undertakings concerned are active on different relevant markets [3]. In this document, these concentrations will be called "non-horizontal mergers".

3. Two broad types of non-horizontal mergers can be distinguished: vertical mergers and conglomerate mergers.

4. Vertical mergers involve companies operating at different levels of the supply chain. For example, when a manufacturer of a certain product (the "upstream firm") merges with one of its distributors (the "downstream firm"), this is called a vertical merger [4].

5. Conglomerate mergers are mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers) [5]. In practice, the focus of the present guidelines is on mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or products that belong to the same product range).

6. The general guidance already given in the Notice on horizontal mergers is also relevant in the context of non-horizontal mergers. The purpose of the present document is to concentrate on the competition aspects that are relevant to the specific context of non-horizontal mergers. In addition, it will set out the Commission's approach to market shares and concentration thresholds in this context.

7. In practice, mergers may entail both horizontal and non-horizontal effects. This may for instance be the case where the merging firms are not only in a vertical or conglomerate relationship, but are also actual or potential competitors of each other in one or more of the relevant markets concerned [6]. In such a case, the Commission will

appraise horizontal, vertical and/or conglomerate effects in accordance with the guidance set out in the relevant notices [7].

8. The guidance set out in this document draws and elaborates on the Commission's evolving experience with the appraisal of non-horizontal mergers under Regulation (EEC) No 4064/89 since its entry into force on 21 September 1990, the Merger Regulation presently in force as well as on the case-law of the Court of Justice and the Court of First Instance of the European Communities. The principles contained here will be applied and further developed and refined by the Commission in individual cases. The Commission may revise the notice on non-horizontal mergers from time to time in the light of future developments and of evolving insight.

9. The Commission's interpretation of the Merger Regulation as regards the appraisal of non-horizontal mergers is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. OVERVIEW

10. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. An "increase in market power" in this context refers to the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise negatively influence parameters of competition [8].

11. Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers.

12. First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market [9]. As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical and conglomerate mergers.

13. Second, vertical and conglomerate mergers provide substantial scope for efficiencies. A characteristic of vertical mergers and certain conglomerate mergers is that the activities and/or the products of the companies involved are complementary to each other [10]. The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive. In vertical relationships for instance, as a result of the complementarity, a decrease in mark-ups downstream will lead to higher demand also upstream. A part of the benefit of this increase in demand will accrue to the upstream suppliers. An integrated firm will take this benefit into account. Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits. This is often referred to as the "internalisation of double mark-ups". Similarly, other efforts to increase sales at one level (e.g. improve service or stepping up innovation) may provide a greater reward for an integrated firm that will take into account the benefits accruing at other levels.

14. Integration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in which the products are sold. Similarly, mergers which involve products belonging

to a range or portfolio of products that are generally sold to the same set of customers (be they complementary products or not) may give rise to customer benefits such as one-stop-shopping.

15. However, there are circumstances in which non-horizontal mergers may significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. This is essentially because a non-horizontal merger may change the ability and incentive to compete on the part of the merging companies and their competitors in ways that cause harm to consumers.

16. In the context of competition law, the concept of "consumers" encompasses intermediate and ultimate consumers [11]. When intermediate customers are actual or potential competitors of the parties to the merger, the Commission focuses on the effects of the merger on the customers to which the merged entity and those competitors are selling. Consequently, the fact that a merger affects competitors is not in itself a problem. It is the impact on effective competition that matters, not the mere impact on competitors at some level of the supply chain [12]. In particular, the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns.

17. There are two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects [13].

18. Non-coordinated effects may principally arise when non-horizontal mergers give rise to foreclosure. In this document, the term "foreclosure" will be used to describe any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. As a result of such foreclosure, the merging companies — and, possibly, some of its competitors as well — may be able to profitably increase the price [14] charged to consumers. These instances give rise to a significant impediment to effective competition and are therefore referred to hereafter as "anticompetitive foreclosure".

19. Coordinated effects arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate to raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.

20. In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger [15]. In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission will take into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison. The Commission may take into account future market developments that result from impending regulatory changes [16].

21. In its assessment, the Commission will consider both the possible anti-competitive effects arising from the merger and the possible pro-competitive effects stemming from substantiated efficiencies benefiting consumers [17]. The Commission examines the various chains of cause and effect with a view to ascertaining which of them is the most likely. The more immediate and direct the perceived anti-competitive effects of a merger, the more likely the Commission is to raise competition concerns.

Likewise, the more immediate and direct the pro-competitive effects of a merger, the more likely the Commission is to find that they counteract any anti-competitive effects.

22. This document describes the main scenarios of competitive harm and sources of efficiencies in the context of vertical mergers and, subsequently, in the context of conglomerate mergers.

III. MARKET SHARE AND CONCENTRATION LEVELS

23. Non-horizontal mergers pose no threat to effective competition unless the merged entity has a significant degree of market power (which does not necessarily amount to dominance) in at least one of the markets concerned. The Commission will examine this issue before proceeding to assess the impact of the merger on competition.

24. Market shares and concentration levels provide useful first indications of the market power and the competitive importance of both the merging parties and their competitors [18].

25. The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % [19] and the post-merger HHI is below 2000.

26. In practice, the Commission will not extensively investigate such mergers, except where special circumstances such as, for instance, one or more of the following factors are present:

(a) a merger involves a company that is likely to expand significantly in the near future, e.g. because of a recent innovation;

(b) there are significant cross-shareholdings or cross-directorships among the market participants;

(c) one of the merging firms is a firm with a high likelihood of disrupting coordinated conduct;

(d) indications of past or ongoing coordination, or facilitating practices, are present.

27. The Commission will use the above market share and HHI thresholds as an initial indicator of the absence of competition concerns. However, these thresholds do not give rise to a legal presumption. The Commission is of the opinion that it is less appropriate in this context to present market share and concentration levels above which competition concerns would be deemed to be likely, as the existence of a significant degree of market power in at least one of the markets concerned is a necessary condition for competitive harm, but is not a sufficient condition [20].

IV. VERTICAL MERGERS

28. This Section sets out the Commission's framework of analysis in the context of vertical mergers. In its assessment, the Commission will consider both the possible anti-competitive effects arising from vertical mergers and the possible pro-competitive effects stemming from efficiencies substantiated by the parties.

A. Non-coordinated effects: foreclosure

29. A merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: It is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of its competitors as well — are as a result able to profitably increase the price charged to consumers [21].

30. Two forms of foreclosure can be distinguished. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (customer foreclosure) [22].

1. Input foreclosure

31. Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. This may lead the merged entity to profitably increase the price charged to consumers, resulting in a significant impediment to effective competition. As indicated above, for input foreclosure to lead to consumer harm, it is not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. Any efficiencies resulting from the merger may, however, lead the merged entity to reduce price, so that the overall likely impact on consumers is neutral or positive. A graphical presentation of this mechanism is provided in Figure 1.

Figure 1

(Figure 1 is available at the following website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF>)

32. In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream [23]. In practice, these factors are often examined together since they are closely intertwined.

A. Ability to foreclose access to inputs [24]

33. Input foreclosure may occur in various forms. The merged entity may decide not to deal with its actual or potential competitors in the vertically related market. Alternatively, the merged firm may decide to restrict supplies and/or to raise the price it charges when supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the merger [25]. Further, the merged entity may opt for a specific choice of technology within the new firm which is not compatible with the technologies chosen by rival firms [26]. Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied [27]. In its assessment, the Commission may consider a series of alternative or complementary possible strategies.

34. Input foreclosure may raise competition problems only if it concerns an important input for the downstream product [28]. This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market [29], or it may represent a significant source of product differentiation for the downstream product [30]. It may also be that the cost of switching to alternative inputs is relatively high.

35. For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market. It is only in these circumstances that the merged firm can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.

36. The merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality. This may be the case where the remaining upstream suppliers are less efficient, offer less preferred alternatives, or lack the ability to expand output in response to the supply restriction, for example because they face capacity constraints or, more generally, face decreasing returns to scale [31]. Also, the presence of exclusive contracts between the merged entity and independent input providers may limit the ability of downstream rivals to have adequate access to inputs.

37. When determining the extent to which input foreclosure may occur, it must be taken into account that the decision of the merged entity to rely on its upstream division's supply of inputs may also free up capacity on the part of the remaining input suppliers from which the downstream division used to purchase before. In fact, the merger may merely realign purchase patterns among competing firms.

38. When competition in the input market is oligopolistic, a decision of the merged entity to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors. In essence, input foreclosure by the merged entity may expose its downstream rivals to non-vertically integrated suppliers with increased market power [32]. This increase in third-party market power will be greater

the lower the degree of product differentiation between the merged entity and other upstream suppliers and the higher the degree of upstream concentration. However, the attempt to raise the input price may fail when independent input suppliers, faced with a reduction in the demand for their products (from the downstream division of the merged entity or from independent downstream firms), respond by pricing more aggressively [33].

39. In its assessment, the Commission will consider, on the basis of the information available, whether there are effective and timely counter-strategies that the rival firms would be likely to deploy. Such counterstrategies include the possibility of changing their production process so as to be less reliant on the input concerned or sponsoring the entry of new suppliers upstream.

B. Incentive to foreclose access to inputs

40. The incentive to foreclose depends on the degree to which foreclosure would be profitable. The vertically integrated firm will take into account how its supplies of inputs to competitors downstream will affect not only the profits of its upstream division, but also of its downstream division. Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.

41. The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream [34]. Other things constant, the lower the margins upstream, the lower the loss from restricting input sales. Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals [35].

42. The incentive for the integrated firm to raise rivals' costs further depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated firm can capture [36]. This share will normally be higher the less capacity constrained the merged entity will be relative to non-foreclosed downstream rivals and the more the products of the merged entity and foreclosed competitors are close substitutes. The effect on downstream demand will also be higher if the affected input represents a significant proportion of downstream rivals' costs or if the affected input represents a critical component of the downstream product [37].

43. The incentive to foreclose actual or potential rivals may also depend on the extent to which the downstream division of the integrated firm can be expected to benefit from higher price levels downstream as a result of a strategy to raise rivals' costs [38]. The greater the market shares of the merged entity downstream, the greater the base of sales on which to enjoy increased margins [39].

44. An upstream monopolist that is already able to fully extract all available profits in vertically related markets may not have any incentive to foreclose rivals following a vertical merger. The ability to extract available profits from the consumers does not follow immediately from a very high market share [40]. Such a finding would require a more thorough analysis of the actual and future constraints under which the monopolist operates. When all available profits cannot be extracted, a vertical merger — even if it involves an upstream monopolist — may give the merged entity the incentive to raise the

costs of downstream rivals, thereby reducing the competitive constraint they exert on the merged entity in the downstream market.

45. In its assessment of the likely incentives of the merged firm, the Commission may take into account various considerations such as the ownership structure of the merged entity [41], the type of strategies adopted on the market in the past [42] or the content of internal strategic documents such as business plans.

46. In addition, when the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. Conduct may be unlawful *inter alia* because of competition rules or sector-specific rules at the EU or national levels. This appraisal, however, does not require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them [43]. Moreover, the illegality of a conduct may be likely to provide significant disincentives for the merged entity to engage in such conduct only in certain circumstances. In particular, the Commission will consider, on the basis of a summary analysis: (i) the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law [44], (ii) the likelihood that this illegal conduct could be detected [45], and (iii) the penalties which could be imposed.

C. Overall likely impact on effective competition

47. In general, a merger will raise competition concerns because of input foreclosure when it would lead to increased prices in the downstream market thereby significantly impeding effective competition.

48. First, anticompetitive foreclosure may occur when a vertical merger allows the merging parties to increase the costs of downstream rivals in the market thereby leading to an upward pressure on their sales prices. Significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market. The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein [46]. Despite a relatively small market share compared to other players, a specific firm may play a significant competitive role compared to other players [47], for instance because it is a close competitor of the vertically integrated firm or because it is a particularly aggressive competitor.

49. Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors [48]. A vertical merger may foreclose potential competition on the downstream market when the merged entity would be likely not to supply potential downstream entrants, or only on less favourable terms than absent the merger. The mere likelihood that the merged entity would carry out a foreclosure strategy post-merger may already create a strong deterrent effect on potential entrants [49]. Effective competition on the downstream market may be significantly impeded by raising barriers to entry, in particular if input foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. The concern of raising entry barriers is particularly

relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future [50].

50. If there remain sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated [51] or they are capable of switching to adequate alternative inputs, competition from those firms may constitute a sufficient constraint on the merged entity and therefore prevent output prices from rising above pre-merger levels.

51. The effect on competition on the downstream market must also be assessed in light of countervailing factors such as the presence of buyer power [52] or the likelihood that entry upstream would maintain effective competition [53].

52. Further, the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties [54]. The Commission may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.

53. When assessing efficiencies in the context of non-horizontal mergers, the Commission applies the principles already set out in Section VII of the Notice on Horizontal Mergers. In particular, for the Commission to take account of efficiency claims in its assessment of the merger, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative [55].

54. Vertical mergers may entail some specific sources of efficiencies, the list of which is not exhaustive.

55. In particular, a vertical merger allows the merged entity to internalise any pre-existing double mark-ups resulting from both parties setting their prices independently pre-merger [56]. Depending on the market conditions, reducing the combined mark-up (relative to a situation where pricing decisions at both levels are not aligned) may allow the vertically integrated firm to profitably expand output on the downstream market [57].

56. A vertical merger may further allow the parties to better coordinate the production and distribution process, and therefore to save on inventories costs.

57. More generally, a vertical merger may align the incentives of the parties with regard to investments in new products, new production processes and in the marketing of products. For instance, whereas before the merger, a downstream distributor entity might have been reluctant to invest in advertising and informing customers about the qualities of products of the upstream entity when such investment would also have benefited the sale of other downstream firms, the merged entity may reduce such incentive problems.

2. Customer foreclosure

58. Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market [58]. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete. In turn, this may raise downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. This may allow the merged entity profitably to establish higher prices on the downstream market. Any efficiencies resulting from the merger, however, may lead the merged entity to reduce price, so that there is overall not a negative impact on consumers. For customer foreclosure to lead to consumer harm, it is thus not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. A graphical presentation of this mechanism is provided in Figure 2.

Figure 2

(Figure 2 is available at the following website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF>)

59. In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines, first, whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals, second, whether it would have the incentive to reduce its purchases upstream, and third, whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market [59].

A. Ability to foreclose access to downstream markets

60. A vertical merger may affect upstream competitors by increasing their cost to access downstream customers or by restricting access to a significant customer base. Customer foreclosure may take various forms. For instance, the merged entity may decide to source all of its required goods or services from its upstream division and, as a result, may stop purchasing from its upstream competitors. It may also reduce its purchases from upstream rivals, or purchase from those rivals on less favourable terms than it would have done absent the merger [60].

61. When considering whether the merged entity would have the ability to foreclose access to downstream markets, the Commission examines whether there are sufficient economic alternatives in the downstream market for the upstream rivals (actual or potential) to sell their output [61]. For customer foreclosure to be a concern, it must be the case that the vertical merger involves a company which is an important customer with a significant degree of market power in the downstream market [62]. If, on the contrary, there is a sufficiently large customer base, at present or in the future, that is likely to turn to independent suppliers, the Commission is unlikely to raise competition concerns on that ground [63].

62. Customer foreclosure can lead to higher input prices in particular if there are significant economies of scale or scope in the input market or when demand is

characterised by network effects [64]. It is mainly in such circumstances that the ability to compete of upstream rivals, be they actual or potential, can be impaired.

63. For instance, customer foreclosure can lead to higher input prices when existing upstream rivals operate at or close to their minimum efficient scale. To the extent that customer foreclosure and the corresponding loss of output for the upstream rivals increases their variable costs of production, this may result in an upward pressure on the prices they charge to their customers operating in the downstream market.

64. In the presence of economies of scale or scope, customer foreclosure may also render entry upstream by potential entrants unattractive by significantly reducing the revenue prospects of potential entrants. When customer foreclosure effectively results in entry deterrence, input prices may remain at a higher level than otherwise would have been the case, thereby raising the cost of input supply to downstream competitors of the merged firm.

65. Further, when customer foreclosure primarily impacts upon the revenue streams of upstream rivals, it may significantly reduce their ability and incentive to invest in cost reduction, R & D and product quality [65]. This may reduce their ability to compete in the long run and possibly even cause their exit from the market.

66. In its assessment, the Commission may take into account the existence of different markets corresponding to different uses for the input. If a substantial part of the downstream market is foreclosed, an upstream supplier may fail to reach efficient scale and may also operate at higher costs in the other market(s). Conversely, an upstream supplier may continue to operate efficiently if it finds other uses or secondary markets for its input without incurring significantly higher costs.

67. In its assessment, the Commission will consider, on the basis of the information available, whether there are effective and timely counter-strategies, sustainable over time, that the rival firms would be likely to deploy. Such counterstrategies include the possibility that upstream rivals decide to price more aggressively to maintain sales levels in the downstream market, so as to mitigate the effect of foreclosure [66].

B. Incentive to foreclose access to downstream markets

68. The incentive to foreclose depends on the degree to which it is profitable. The merged entity faces a trade-off between the possible costs associated with not procuring products from upstream rivals and the possible gains from doing so, for instance, because it allows the merged entity to raise price in the upstream or downstream markets.

69. The costs associated with reducing purchases from rival upstream suppliers are higher, when the upstream division of the integrated firm is less efficient than the foreclosed suppliers. Such costs are also higher if the upstream division of the merged firm is capacity constrained or rivals' products are more attractive due to product differentiation.

70. The incentive to engage in customer foreclosure further depends on the extent to which the upstream division of the merged entity can benefit from possibly higher price levels in the upstream market arising as a result of upstream rivals being foreclosed. The incentive to engage in customer foreclosure also becomes higher, the more the downstream division of the integrated firm can be expected to enjoy the benefits of higher price levels downstream resulting from the foreclosure strategy. In this context,

the greater the market shares of the merged entity's downstream operations, the greater the base of sales on which to enjoy increased margins [67].

71. When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful [68].

C. Overall likely impact on effective competition

72. Foreclosing rivals in the upstream market may have an adverse impact in the downstream market and harm consumers. By denying competitive access to a significant customer base for the foreclosed rivals' (upstream) products, the merger may reduce their ability to compete in the foreseeable future. As a result, rivals downstream are likely to be put at a competitive disadvantage, for example in the form of raised input costs. In turn, this may allow the merged entity to profitably raise prices or reduce the overall output on the downstream market.

73. The negative impact on consumers may take some time to materialise when the primary impact of customer foreclosure is on the revenue streams of upstream rivals, reducing their incentives to make investments in cost reduction, product quality or in other competitive dimensions so as to remain competitive.

74. It is only when a sufficiently large fraction of upstream output is affected by the revenue decreases resulting from the vertical merger that the merger may significantly impede effective competition on the upstream market. If there remain a number of upstream competitors that are not affected, competition from those firms may be sufficient to prevent prices from rising in the upstream market and, consequently, in the downstream market. Sufficient competition from these non-foreclosed upstream firms requires that they do not face barriers to expansion e.g. through capacity constraints or product differentiation [69]. When the reduction of competition upstream affects a significant fraction of output downstream, the merger is likely, as with input foreclosure, to result in a significant increase of the price level in the downstream market and, therefore, to significantly impede effective competition [70].

75. Effective competition on the upstream market may also be significantly impeded by raising barriers to entry to potential competitors. This may be so in particular if customer foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. In such a context, customer foreclosure and input foreclosure may thus be part of the same strategy. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future [71].

76. The effect on competition must be assessed in light of countervailing factors such as the presence of countervailing buyer power [72] or the likelihood that entry would maintain effective competition in the upstream or downstream markets [73].

77. Further, the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties [74].

D. Other non-coordinated effects

78. The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals [75]. For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers [76]. It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.

E. Coordinated effects

79. As set out in Section IV of the Notice on Horizontal Mergers, a merger may change the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger [77].

80. Market coordination may arise where competitors are able, without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 of the Treaty, to identify and pursue common objectives, avoiding the normal mutual competitive pressure by a coherent system of implicit threats. In a normal competitive setting, each firm constantly has an incentive to compete. This incentive is ultimately what keeps prices low, and what prevents firms from jointly maximising their profits. Coordination involves a departure from normal competitive conditions in that firms are able to sustain prices in excess of what independent short term profit maximisation would yield. Firms will refrain from undercutting the high prices charged by their competitors in a coordinated way because they anticipate that such behaviour would jeopardise coordination in the future. For coordinated effects to arise, the profit that firms could make by competing aggressively in the short term ("deviating") has to be less than the expected reduction in revenues that this behaviour would entail in the longer term, as it would be expected to trigger an aggressive response by competitors ("a punishment").

81. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination [78].

Reaching terms of coordination

82. A vertical merger may make it easier for the firms in the upstream or downstream market to reach a common understanding on the terms of coordination [79].

83. For instance, when a vertical merger leads to foreclosure [80], it results in a reduction in the number of effective competitors in the market. Generally speaking, a reduction in the number of players makes it easier to coordinate among the remaining market players.

84. Vertical mergers may also increase the degree of symmetry between firms active in the market [81]. This may increase the likelihood of coordination by making it easier to reach a common understanding on the terms of coordination. Likewise, vertical integration may increase the level of market transparency, making it easier to coordinate among the remaining market players.

85. Further, a merger may involve the elimination of a maverick in a market. A maverick is a supplier that for its own reasons is unwilling to accept the co-ordinated outcome and thus maintains aggressive competition. The vertical integration of the maverick may alter its incentives to such an extent that co-ordination will no longer be prevented.

Monitoring deviations

86. Vertical integration may facilitate coordination by increasing the level of market transparency between firms through access to sensitive information on rivals or by making it easier to monitor pricing. Such concerns may arise, for example, if the level of price transparency is higher downstream than upstream. This could be the case when prices to final consumers are public, while transactions at the intermediate market are confidential. Vertical integration may give upstream producers control over final prices and thus monitor deviations more effectively.

87. When it leads to foreclosure, a vertical merger may also induce a reduction in the number of effective competitors in a market. A reduction in the number of players may make it easier to monitor each other's actions in the market.

Deterrent mechanisms

88. Vertical mergers may affect coordinating firms' incentives to adhere to the terms of coordination. For instance, a vertically integrated company may be in a position to more effectively punish rival companies when they choose to deviate from the terms of coordination, because it is either a crucial customer or supplier to them [82].

Reactions of outsiders

89. Vertical mergers may reduce the scope for outsiders to destabilise the coordination by increasing barriers to enter the market or otherwise limiting the ability to compete on the part of outsiders to the coordination.

90. A vertical merger may also involve the elimination of a disruptive buyer in a market. If upstream firms view sales to a particular buyer as sufficiently important, they may be tempted to deviate from the terms of co-ordination in an effort to secure their business. Similarly, a large buyer may be able to tempt the co-ordinating firms to deviate from these terms by concentrating a large amount of its requirements on one supplier or by offering long term contracts. The acquisition of such a buyer may increase the risk of co-ordination in a market.

V. CONGLOMERATE MERGERS

91. Conglomerate mergers are mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as supplier and customer). In practice, the focus is on mergers between companies that are active in closely related markets [83] (e.g. mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use).

92. Whereas it is acknowledged that conglomerate mergers in the majority of circumstances will not lead to any competition problems, in certain specific cases there may be harm to competition. In its assessment, the Commission will consider both the possible anti-competitive effects arising from conglomerate mergers and the possible pro-competitive effects stemming from efficiencies substantiated by the parties.

A. Non-coordinated effects: foreclosure

93. The main concern in the context of conglomerate mergers is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage [84] a strong market position from one market to another by means of tying or bundling or other exclusionary practices [85]. Tying and bundling as such are common practices that often have no anticompetitive consequences. Companies engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways. Nevertheless, in certain circumstances, these practices may lead to a reduction in actual or potential rivals' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.

94. In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers [86]. In practice, these factors are often examined together as they are closely intertwined.

B. Ability to foreclose

95. The most immediate way in which the merged entity may be able to use its market power in one market to foreclose competitors in another is by conditioning sales in a way that links the products in the separate markets together. This is done most directly either by tying or bundling.

96. "Bundling" usually refers to the way products are offered and priced by the merged entity. One can distinguish in this respect between pure bundling and mixed bundling. In the case of pure bundling the products are only sold jointly in fixed proportions. With mixed bundling the products are also available separately, but the sum of the stand-alone prices is higher than the bundled price [87]. Rebates, when made dependent on the purchase of other goods, may be considered a form of mixed bundling.

97. "Tying" usually refers to situations where customers that purchase one good (the tying good) are required to also purchase another good from the producer (the tied good). Tying can take place on a technical or contractual basis. For instance, technical tying occurs when the tying product is designed in such a way that it only works with the tied product (and not with the alternatives offered by competitors). Contractual tying entails that the customer when purchasing the tying good undertakes only to purchase the tied product (and not the alternatives offered by competitors).

98. The specific characteristics of the products may be relevant for determining whether any of these means of linking sales between separate markets are available to the merged entity. For instance, pure bundling is very unlikely to be possible if products are not bought simultaneously or by the same customers [88]. Similarly, technical tying is only an option in certain industries.

99. In order to be able to foreclose competitors, the new entity must have a significant degree of market power, which does not necessarily amount to dominance, in one of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging parties' products is viewed by many customers as particularly important and there are few relevant alternatives for that product, e.g. because of product differentiation [89] or capacity constraints on the part of rivals.

100. Further, for foreclosure to be a potential concern it must be the case that there is a large common pool of customers for the individual products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary.

101. Generally speaking, the foreclosure effects of bundling and tying are likely to be more pronounced in industries where there are economies of scale and the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future. Notably, where a supplier of complementary goods has market power in one of the products (product A), the decision to bundle or tie may result in reduced sales by the non-integrated suppliers of the complementary good (product B). If further there are network externalities at play [90] this will significantly reduce these rivals' scope for expanding sales of product B in the future. Alternatively, where entry into the market for the complementary product is contemplated by potential entrants, the decision to bundle by the merged entity may have the effect of deterring such entry. The limited availability of complementary products with which to combine may, in turn, discourage potential entrants to enter market A.

102. It can also be noted that the scope for foreclosure tends to be smaller where the merging parties cannot commit to making their tying or bundling strategy a lasting one, for example through technical tying or bundling which is costly to reverse.

103. In its assessment, the Commission considers, on the basis of the information available, whether there are effective and timely counter-strategies that the rival firms may deploy. One such example is when a strategy of bundling would be defeated by single-product companies combining their offers so as to make them more attractive to customers [91]. Bundling is further less likely to lead to foreclosure if a company in the market would purchase the bundled products and profitably resell them unbundled. In addition, rivals may decide to price more aggressively to maintain market share, mitigating the effect of foreclosure [92].

104. Customers may have a strong incentive to buy the range of products concerned from a single source (one-stop-shopping) rather than from many suppliers, e.g. because it saves on transaction costs. The fact that the merged entity will have a broad range or portfolio of products does not, as such, raise competition concerns [93].

C. Incentive to foreclose

105. The incentive to foreclose rivals through bundling or tying depends on the degree to which this strategy is profitable. The merged entity faces a trade-off between the possible costs associated with bundling or tying its products and the possible gains from expanding market shares in the market(s) concerned or, as the case may be, being able to raise price in those market(s) due to its market power.

106. Pure bundling and tying may entail losses for the merged company itself. For instance, if a significant number of customers are not interested in buying the bundle, but instead prefers to buy only one product (e.g. the product used to leverage), sales of that product (as contained in the bundle) may significantly fall. Furthermore, losses on the leveraging product may arise where customers who, before the merger, used to "mix and match" the leveraging product of a merging party with the product of another company, decide to purchase the bundle offered by rivals or no longer to purchase at all [94].

107. In this context it may thus be relevant to assess the relative value of the different products. By way of example, it is unlikely that the merged entity would be willing to forego sales on one highly profitable market in order to gain market shares on another market where turnover is relatively small and profits are modest.

108. However, the decision to bundle and tie may also increase profits by gaining market power in the tied goods market, protecting market power in the tying goods market, or a combination of the two (see Section C below).

109. In its assessment of the likely incentives of the merged firm, the Commission may take into account other factors such as the ownership structure of the merged entity [95], the type of strategies adopted on the market in the past or the content of internal strategic documents such as business plans.

110. When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful [96].

D. Overall likely impact on prices and choice

111. Bundling or tying may result in a significant reduction of sales prospects faced by single-component rivals in the market. The reduction in sales by competitors is not in and of itself a problem. Yet, in particular industries, if this reduction is significant enough, it may lead to a reduction in rivals' ability or incentive to compete. This may allow the merged entity to subsequently acquire market power (in the market for the tied or bundled good) and/or to maintain market power (in the market for the tying or leveraging good).

112. In particular, foreclosure practices may deter entry by potential competitors. They may do so for a specific market by reducing sales prospects for potential rivals in that market to a level below minimum viable scale. In the case of complementary products, deterring entry in one market through bundling or tying may also allow the

merged entity to deter entry in another market if the bundling or tying forces potential competitors to enter both product markets at the same time rather than entering only one of them or entering them sequentially. The latter may have a significant impact in particular in those industries where the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future.

113. It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the merger that the merger may significantly impede effective competition. If there remain effective single-product players in either market, competition is unlikely to deteriorate following a conglomerate merger. The same holds when few single-product rivals remain, but these have the ability and incentive to expand output.

114. The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power [97] or the likelihood that entry would maintain effective competition in the upstream or downstream markets [98].

115. Further, the effect on competition needs to be assessed in light of the efficiencies substantiated by the merging parties [99].

116. Many of the efficiencies identified in the context of vertical mergers may, *mutatis mutandis*, also apply to conglomerate mergers involving complementary products.

117. Notably, when producers of complementary goods are pricing independently, they will not take into account the positive effect of a drop in the price of their product on the sales of the other product. Depending on the market conditions, a merged firm may internalise this effect and may have a certain incentive to lower margins if this leads to higher overall profits (this incentive is often referred to as the "Cournot effect"). In most cases, the merged firm will make the most out of this effect by means of mixed bundling, i.e. by making the price drop conditional upon whether or not the customer buys both products from the merged entity [100].

118. Specific to conglomerate mergers is that they may produce cost savings in the form of economies of scope (either on the production or the consumption side), yielding an inherent advantage to supplying the goods together rather than apart [101]. For instance, it may be more efficient that certain components are marketed together as a bundle rather than separately. Value enhancements for the customer can result from better compatibility and quality assurance of complementary components. Such economies of scope however are necessary but not sufficient to provide an efficiency justification for bundling or tying. Indeed, benefits from economies of scope frequently can be realised without any need for technical or contractual bundling.

E. Co-ordinated effects

119. Conglomerate mergers may in certain circumstances facilitate anticompetitive co-ordination in markets, even in the absence of an agreement or a concerted practice within the meaning of Article 81 of the Treaty. The framework set out in Section IV of the Notice on Horizontal Mergers also applies in this context. In particular, co-ordination is more likely to emerge in markets where it is fairly easy to identify the terms of co-ordination and where such co-ordination is sustainable.

120. One way in which a conglomerate merger may influence the likelihood of a coordinated outcome in a given market is by reducing the number of effective competitors to such an extent that tacit coordination becomes a real possibility. Also when rivals are not excluded from the market, they may find themselves in a more

vulnerable situation. As a result, foreclosed rivals may choose not to contest the situation of co-ordination, but may prefer instead to live under the shelter of the increased price level.

121. Further, a conglomerate merger may increase the extent and importance of multi-market competition. Competitive interaction on several markets may increase the scope and effectiveness of disciplining mechanisms in ensuring that the terms of co-ordination are being adhered to.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

[2] The term concentration used in the Merger Regulation covers various types of transactions such as mergers, acquisitions, takeovers, and certain types of joint ventures. In the remainder of this Document, unless otherwise specified, the term "merger" will be used as a synonym for concentration and therefore cover all the above types of transactions.

[3] Guidance on the assessment of mergers involving undertakings which are actual or potential competitors on the same relevant market ("horizontal mergers") is given in the Commission Notice: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5) ("Notice on Horizontal Mergers").

[4] In the present document, the terms "downstream" and "upstream" are used to describe the (potential) commercial relationship that the merging entities have with each other. Generally the commercial relationship is one where the "downstream" firm purchases the output from the "upstream" firm and uses it as an input in its own production, which it then sells on to its customers. The market where the former transactions take place is referred to as the intermediate market (upstream market). The latter market is referred to as the downstream market.

[5] The distinction between conglomerate mergers and horizontal mergers may be subtle, e.g. when a conglomerate merger involves products that are weak substitutes for each other. The same holds true for the distinction between conglomerate mergers and vertical mergers. For instance, products may be supplied by some companies with the inputs already integrated (vertical relationship), whereas other producers leave it to the customers to select and assemble the inputs themselves (conglomerate relationship).

[6] For instance, in certain markets upstream or downstream firms are often well-placed potential entrants. See e.g. in the electricity and gas sector, Case COMP/M.3440 — EDP/ENI/GDP (2004). The same may hold for producers of complementary products. See e.g. in the liquid packaging sector, Case COMP/M.2416 — TetraLaval/Sidel (2001).

[7] Guidance on the assessment of mergers with a potential competitor is given in the Notice on horizontal mergers, in particular at paragraphs 58 to 60 thereof.

[8] In this document, the expression "increased prices" is often used as shorthand for these various ways in which a merger may result in competitive harm. The expression should also be understood to cover situations where, for instance, prices are decreased less, or are less likely to decrease, than they otherwise would have without the merger and where prices are increased more, or are more likely to increase, than they otherwise would have without the merger.

[9] Such a loss of direct competition can, nevertheless, arise where one of the merging firms is a potential competitor in the relevant market where the other merging firm operates. See paragraph 7 above.

[10] In this document, products or services are called "complementary" (or "economic complements") when they are worth more to a customer when used or consumed together than when used or consumed separately. Also a merger between upstream and downstream activities can be seen as a combination of complements which go into the final product. For instance, both production and distribution fulfil a complementary role in getting a product to the market.

[11] See Article 2(1)(b) of the Merger Regulation and paragraph 84 of the Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

[12] One example of this approach can be found in the case COMP/M.3653 — Siemens/VA Tech (2005), in which the Commission assessed the effect of the transaction on the two complementary markets for electrical rail vehicles and electrical traction systems for rail vehicles, which combine into a full rail vehicle. While the merger allegedly reduced the independent supply of electrical traction systems, there would still be several integrated suppliers which could deliver the rail vehicle. The Commission thus concluded that even if the merger had negative consequences for independent suppliers of electrical rail vehicles "sufficient competition would remain in the relevant downstream market for rail vehicles".

[13] See Section II of the Notice on Horizontal Mergers.

[14] For the meaning of the expression "increased prices" see footnote 8.

[15] By analogy, in the case of a merger that has been implemented without having been notified, the Commission would assess the merger in the light of the competitive conditions that would have prevailed without the implemented merger.

[16] This may be particularly relevant in cases where effective competition is expected to arise in the future as a result of market opening. See e.g. Case COMP/M.3696 — E.ON/MOL (2005), at points 457 to 463.

[17] See Section VII on efficiencies in the Notice on Horizontal Mergers.

[18] See also Section III of the Notice on Horizontal Mergers. The calculation of market shares depends critically on market definition (see Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997)). Special care must be taken in contexts where vertically integrated companies supply products internally.

[19] In analogy to the indications given in Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21). Where a merged entity would have a market share just above the 30 % threshold on one market but substantially below on other, related, markets competition concerns will be less likely.

[20] See Sections IV and V.

[21] For the meaning of the expression "increased prices" see footnote 8. For the meaning of "consumers", see footnote 16.

[22] See Merger Regulation, Article 2(1)(b), referring to "access to supplies" and "access to [...] markets", respectively.

[23] See e.g. Case COMP/M.4300 — Philips/Intermagnetics, COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, COMP/M.4389 — WLR/BST, COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space and Telespazio, COMP/M.4494 — Evraz/Highveld, and COMP/M.4561 — GE/Smiths Aerospace.

[24] The term "inputs" is used here as a generic term and may also cover services, access to infrastructure and access to intellectual property rights.

[25] See e.g. Case COMP/M.1693 — Alcoa/Reynolds (2000), Case COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space/Telespazio, points 257-260.

[26] See e.g. Case COMP/M.2861 — Siemens/Drägerwerk/JV (2003), Case COMP/M.3998 — Axalto, point 75.

[27] See e.g. Case COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, points 127-130.

[28] See e.g. Case COMP/M.3868 — Dong/Elsam/Energi E2, Case COMP/M.4094 — Ineos/BP Dormagen, points 183-184, Case COMP/M.4561 — GE/Smiths Aerospace, points 48-50.

[29] For instance, an engine starter can be considered a critical component to an engine (Case T-210/01, *General Electric v Commission* [2005] ECR II-000); see also, e.g. Case COMP/M.3410 — Total/GDF, points 53-54 and 60-61.

[30] For instance, personal computers are often sold with specific reference to the type of microprocessor they contain.

[31] See e.g. Case COMP/M.4494 — Evraz/Highveld, point 92 and points 97-112.

[32] The analysis of the likely effect of the removal of a competitive constraint is similar to the analysis of non-coordinated effects with horizontal mergers (see Section IV of the Notice on Horizontal Mergers).

[33] Also the nature of the supply contracts between upstream suppliers and the downstream independent firms may be important in this respect. For instance, when these contracts use a price system combining a fixed fee and a per-unit supply price, the effect on downstream competitors' marginal costs may be affected less than when these contracts involve only per-unit supply prices.

[34] See e.g. Case COMP/M.4300 — Philips/Intermagetics, points 56-62, Case COMP/M.4576 — AVR/Van Gansewinkel, points 33-38.

[35] It has to be considered that upstream and downstream margins may change as a result of the merger. This may impact upon the merged entity's incentive to engage in foreclosure.

[36] See e.g. Case COMP/M.3943 — Saint-Gobain/BPB (2005), point 78. The Commission noted that it would be very unlikely that BPB, the main supplier of plaster board in the UK, would cut back on supplies to rival distributors of Saint-Gobain, in part because expansion of Saint-Gobain's distribution capacity was difficult.

[37] Conversely, if the input accounts only for a small share of the downstream product and is not a critical component, even a high market share upstream may not give the merged entity the incentive to foreclose downstream rivals because few, if any, sales would be diverted to the integrated firm's downstream unit. See e.g. Case COMP/M.2738 — GEES/Unison; Case COMP M.4561 — GE/Smiths Aerospace, points 60-62.

[38] See e.g. Case COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, points 131-132.

[39] It must be noted that the less the merged firm can target a specific downstream market, the less it is likely to raise its prices for the input it supplies, as it would have to incur opportunity costs in other downstream markets. In this respect, the extent to which the merged entity can price discriminate when the merged entity supplies several

downstream markets and/or ancillary markets may be taken into account (e.g. for spare parts).

[40] One situation in which this may not be the case would be when the monopolist has a so-called commitment problem which it is unable to solve. For example, a downstream buyer may be willing to pay a high price to an upstream monopolist if the latter does not subsequently sell additional quantities to a competitor. But once the terms of supply are fixed with one downstream firm, the upstream supplier may have an incentive to increase its supplies to other downstream firms, thereby making the first purchase unprofitable. Since downstream firms will anticipate this kind of opportunistic behavior, the upstream supplier will be unable to fully exploit its market power. Vertical integration may restore the upstream supplier's ability to commit not to expand input sales as this would harm its own downstream division. Another case in which the monopolist cannot obtain all available monopoly profits may arise when the company cannot differentiate its prices among customers.

[41] For instance, in cases where two companies have joint control over a firm active in the upstream market, and only one of them is active downstream, the company without downstream activities may have little interest in foregoing input sales. In such cases, the incentive to foreclose is smaller than when the upstream company is fully controlled by a company with downstream activities. See e.g. Case COMP/M.3440 — EDP/ENI/GDP (2004), Case COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space/Telespazio, points 121 and 268.

[42] The fact that, in the past, a competitor with a similar market position as the merged entity has stopped supplying inputs may demonstrate that it is commercially rational to adopt such a strategy (see e.g. COMP/M.3225 — Alcan/Pechiney (2004), at point 40).

[43] Case C-12/03 P, *Commission v Tetra Laval BV* [2003] ECR I-000, paragraphs 74-76. Case T-210/01, *General Electric v Commission* [2005] ECR II-000, at paragraph 73.

[44] Case T-210/01, *General Electric v Commission* [2005] ECR II-000, specifically at points 74-75 and 311-312.

[45] For instance, in Case COMP/M.3696 — E.ON/MOL (2005), points 433 and 443-446, the Commission attached importance to the fact that the national Hungarian regulator for the gas sector indicated that in a number of settings, although it has the right to control and to force market players to act without discrimination, it would not be able to obtain adequate information on the commercial behaviour of the operators. See also Case COMP/M.3440 — EDP/ENI/GDP (2004), point 424.

[46] See e.g. Case COMP/M.4494 — Evraz/Highveld, points 97-112.

[47] See e.g. Case COMP/M.3440 — EDP/ENI/GDP (2004).

[48] See e.g. Case COMP/M.4180 — Gaz de France/Suez, points 876-931, Case COMP/M.4576 — AVR/Van Gansewinkel, points 33-38.

[49] See Case COMP/M.3696 — E.ON/MOL (2005), at point 662 et seq.

[50] See paragraph 20. It is important that regulatory measures aimed at opening a market are not rendered ineffective through vertically-related incumbent companies merging and thereby closing off the market, or eliminating each other as potential entrants.

[51] See e.g. Case COMP/M.3653 — Siemens/VA Tech (2005), at point 164.

[52] See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

[53] See Section VI on entry in the Notice on Horizontal Mergers.

[54] See Section VII on efficiencies in the Notice on Horizontal Mergers.

[55] See, more specifically, paragraphs 79 to 88 of the Notice on Horizontal Mergers.

[56] See also paragraph 13 above.

[57] It is important to recognise, however, that the problem of double mark-ups is not always present or significant pre-merger, for instance because the merging parties had already concluded a supply agreement with a price mechanism providing for volume discounts eliminating the mark-up. The efficiencies associated with the elimination of double mark-ups may thus not always be merger specific because vertical cooperation or vertical agreements may, short of a merger, achieve similar benefits with less anti-competitive effects. In addition, a merger may not fully eliminate the double mark-up when the supply of the input is limited by capacity constraints and there is an equally profitable alternative use for the input. In such circumstances, the internal use of the input entails an opportunity cost for the vertically integrated company: using more of the input internally to increase output downstream means selling less in the alternative market. As a result, the incentive to use the input internally and increase output downstream is less than when there is no opportunity cost.

[58] See footnote 4 for the definition of "downstream" and "upstream".

[59] See e.g. Case COMP/M.4389 — WLR/BST.

[60] For instance, in cases involving distribution, the merged entity may be less likely to grant access to its outlets under the same conditions as absent the merger.

[61] The loss of the integrated firm as a customer is normally less significant if that firm's pre-merger purchases from non-integrated firms are a small share of the available sales base for those firms. In that case, sufficient alternative customers are more likely to be available. The presence of exclusive contracts between the merged entity and other downstream firms may limit the ability of upstream rivals to reach a sufficient sales volume.

[62] See e.g. Case COMP/M.2822 — ENBW/ENI/GVS (2002) at points 54-57.

[63] See e.g. Case COMP/M.81 — VIAG/Continental Can (1991), point 51, see e.g. Case COMP/M.4389 — WLR/BST, points 33-35.

[64] Economies of scale or scope exist when an increase in scale or scope of production leads to a reduction in average unit cost. Network effects occur when the value of a product for a customer increases when the number of other customers also using it increases. Examples include communication devices, specific software programmes, products requiring standardisation, and platforms bringing together buyers and sellers.

[65] An input supplier foreclosed from an important customer may prefer to stay out of the market if it fails to reach some minimum viable scale following the investment. Such minimum viable scale may be achieved, however, if a potential entrant has access to a broader customer base including customers in other relevant markets. See Case COMP/M.1879 — Boeing/Hughes (2000); Case COMP/M.2978 — Lagardère/Natexis/VUP (2003).

[66] For instance, in Case COMP/M.1879 — Boeing/Hughes (2000), point 100, it was considered, among several other factors, that in view of the high fixed costs involved, if competing satellite launch vehicle providers were to become less cost-competitive relative to the merged entity, they would try to cut prices in order to salvage volume and recoup at least part of their fixed costs rather than accept losing a contract and incur a higher loss. The most likely impact would therefore be greater price competition rather than market monopolisation.

[67] If the vertically integrated firm partially supplies inputs to downstream competitors it may benefit from the ability to expand sales, or as the case may be, to increase input prices.

[68] The analysis of these incentives will be conducted as set out in paragraph 46 above.

[69] The analysis of such non-coordinated effects bears similarities with the analysis of non-coordinated effects in horizontal mergers (see Section IV of the Notice on Horizontal Mergers).

[70] See paragraph 47-50 of the present Notice.

[71] It is important that regulatory measures aimed at opening a market are not rendered ineffective through vertically-related incumbent companies merging and thereby closing off the market, or eliminating each other as potential entrants.

[72] See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

[73] See Section VI on entry in the Notice on Horizontal Mergers.

[74] For the assessment of efficiencies in a vertical context, see Section V.A.1 above.

[75] See Case COMP/M.1879 — Boeing/Hughes (2000); Case COMP/M.2510 — Cendant/Galileo, point 37; Case COMP/M.2738 — Gees/Unison, point 21; Case COMP/M.2925 — Charterhouse/CDC/Telediffusion de France, point 37-38; Case COMP/M.3440 — EDP/ENL/GDP (2004).

[76] See e.g. Case COMP/M.2822 — ENBW/ENI/GVS (2002), at point 56; Case COMP/M.3440 — EDP/ENI/GDP (2004), points 368-379; Case COMP/M.3653 — Siemens/VA Tech (2005) points 159-164.

[77] See Case COMP/M.3101 — Accor/Hilton/Six Continents, points 23-28.

[78] See Case T-342/99, *Airtours v Commission* [2002] ECR II-2585, paragraph 62.

[79] See e.g. Case COMP/M.3314 — Air Liquide/Messer Targets, points 91-100.

[80] Foreclosure would have to be shown by the Commission along the lines of Part A of this Section.

[81] See Case COMP/M.2389 — Shell/DEA; Case COMP/M.2533 — BP/EON. Alternatively, vertical integration may also decrease the degree of symmetry between firms active in the market, rendering coordination more difficult.

[82] For instance, in a case that was subsequently withdrawn (Case COMP/M.2322 — CRH/Addtek (2001)) the merger involved an upstream dominant supplier of cement and a downstream producer of pre-cast concrete products, both active in Finland. The Commission provisionally took the view in the administrative procedure that the new entity would be able to discipline the downstream rivals by using the fact that they would be highly dependent on cement supplies of the merged entity. As a result, the downstream entity would be able to increase the price of its pre-cast concrete products

while making sure that the competitors would follow these price increases and avoiding that they turn to cement imports from the Baltic States and Russia.

[83] See also Form CO, Section IV, 6.3(c).

[84] There is no received definition of "leveraging" but, in a neutral sense, it implies being able to increase sales of a product in one market (the "tied market" or "bundled market"), by virtue of the strong market position of the product to which it is tied or bundled (the "tying market" or "leveraging market").

[85] These concepts are defined further below.

[86] See Case T-210/01, *General Electric v Commission* [2005] ECR II-000, paragraphs 327, 362-363, 405; Case COMP/M.3304 — *GE/Amersham* (2004), point 37, and Case COMP/M.4561 — *GE/Smiths Aerospace*, points 116-126.

[87] The distinction between mixed bundling and pure bundling is not necessarily clear-cut. Mixed bundling may come close to pure bundling when the prices charged for the individual offerings are high.

[88] See e.g. Case COMP/M.3304 — *GE/Amersham* (2004), point 35.

[89] For instance, in the context of branded products, particularly important products are sometimes referred to as "must stock" products. See e.g. Case COMP/M.3732 — *Procter&Gamble/Gillette* (2005), point 110.

[90] When a product features network externalities, this means that customers or producers derive benefit from the fact that other customers or producers are using the same products as well. Examples include communication devices, specific software programmes, products requiring standardisation, and platforms bringing together buyers and sellers.

[91] See e.g. Case COMP/M.3304 — *GE/Amersham* (2004), point 39.

[92] See e.g. Case COMP/M.1879 — *Boeing/Hughes* (2000), point 100; Case COMP/M.3304 — *GE/Amersham* (2004), point 39. The resulting loss of revenues may, however, in certain circumstances, have an impact on the ability of rivals to compete. See Section C.

[93] See e.g. Case COMP/M.2608 — *INA/FAG*, point 34.

[94] See e.g. Case COMP/M.3304 — *GE/Amersham* (2004), point 59.

[95] For instance, in cases where two companies have joint control over a firm active in one market, and only one of them is active on the neighbouring market, the company without activities on the latter market may have little interest in foregoing sales in the former market. See e.g. Case T-210/01, *General Electric v Commission* [2005] ECR II-000, paragraph 385 and Case COMP/M.4561 — *GE/Smiths Aerospace*, point 119.

[96] The analysis of these incentives will be conducted as set out in paragraph 46 above.

[97] See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

[98] See e.g. Case COMP/M.3732 — *Procter&Gamble/Gillette* (2005), point 131. See also Section VI on entry in the Notice on Horizontal Mergers.

[99] See Section VII on efficiencies in the Notice on Horizontal Mergers.

[100] It is important to recognise however that the problem of double mark-ups is not always present or significant pre-merger. In the context of mixed bundling, it must

further be noted that while the merged entity may have an incentive to reduce the price for the bundle, the effect on the prices of the individual products is less clear cut. The incentive for the merged entity to raise its single product prices may come from the fact that it counts on selling more bundled products instead. The merged entity's bundle price and prices of the individually sold products (if any) will further depend on the price reactions of rivals in the market.

[101] See e.g. Case COMP/M.3732 — Procter&Gamble/Gillette (2005), point 131.

GEORGIA

COMMENTARY BY THE GOVERNMENT OF GEORGIA ON THE LEGISLATION ON FREE TRADE AND COMPETITION OF GEORGIA

The legislation on Free Trade and Competition consists of: Georgian constitution, international agreements and law of the free trade and competition of Georgia and other depended standard acts.

According of the main principles of constitution, the main law of the state (which was adopted in 24th August 1995), Georgia is the country, which shares western values, it is oriented on the market economy, which has obligation to support free industry and development of competition and forbids monopoly activities in the country, beside only cases allowed by law. also, state comes as guarantee for protection of users rights.

Besides constitution as we have mentioned, the main containing part of competition legislation nowadays it presents, in 3 June 2005 adopted by the parliament of Georgia the law (entered force from 12 June 2005) of free trade and competition, this law consists of VII chapters and 16 Articles. In the first chapter of law there is common enactment, in 2nd chapter there is presented mechanism, which forbids competition limitation, in 3rd chapter there are mechanisms regulating of state aids and release and receive of purposeful programs, and the 4th chapter presents regulating economy spheres, 5th chapter consists of the power of free trade and competition agency and the main obligations of the activities, and in the last 7th and 8th chapters there are presented ultimate conclusion charter.

The purpose of the Georgian law of free trade and competition is to cancel Georgian free trade and competition barriers for the physical and juridical persons. In particular:

- a) Non encumbrance for the competition of the economic agents
- b) Prevention of the administrative barriers in market and free excess of the economic agents in market
- c) Cancellation of the existing of discrimination barriers from the state or local authority organs.
- d) Protection of interests of economy society In limited competition situation in the regulative economic sphere
- e) Forbid of getting such international obligations from the state or local authorities organs, which disturbs free trade in and out of country.

It is fact that the Georgian law of „free trade and competition” spreads on: a) the relations, that effects on the market goods of state, free trade, services of market competition, where take parts juridical and physical persons or state or local organs of government; also b) the decisions and movements of the state or local organs of government, which can effect by all kind of forms on the competition environment and free trade, and about authors rights, trading marks, the relations regarding of the industrial marks, they are regulating by another legislation norms.

According to the article 6 of the law control performance is provided by Agency of free trade and economy-depended institution of ministry of economic development of Georgia.

Besides, it must be mentioned, that in regulating legislative norms of Georgian

separate branches (financial, stocks, insurance, transport, energetic and communication service markets) are placed in particular branches forming mechanisms of competition environment (antimonopoly regulation mechanisms). Particular institutes (national bank, national commission of stocks, state service of insurance control, transport regulating national commission, energetic regulating national commission, agency oil and natural gas, and communication national commission) are determined with the same norms, which represents the regulating antimonopoly organs for appropriate branches.

Article 30 of the Constitution of Georgia concerning labour law

1. Labour is free.
2. The state is obliged to promote the development of free business undertakings and competition. Monopolized business activities are prohibited except cases allowed by law. Consumer rights are protected.
3. In compliance with the international agreements on regulated labour relations the Georgian state protects labour rights of its citizens abroad.
4. The law provides for protection of the rights to work, to get fair remuneration of labour and safe, healthy labour conditions as well as female and under-aged labour rights.

Administrative Code of Georgia on the infringement of law

Article 159² . Non-fulfillment of instructions destined for executives of the Free Trade and Competition Agency (03.06.2005, No. 1555)

Non-fulfillment of instructions issued by the Free Trade and Competition Agency aimed at termination of violation of laws on free trade and competition by natural persons shall be punished by a fine from 300 to 500 GEL, by high-ranking officials of enterprises, institutions and organizations by a fine of not less than 1000 GEL nor more than 3000 GEL.

Article 159³. Non-submission to the Free State and Competition Agency of information provided for by the relevant legislation (03.06.2005, No. 1555)

A fine of not less than 500 GEL nor more than 1000 GEL shall punish non-submission to the Free Trade and Competition Agency of information provided for by the relevant legislation.

Order No. 4

Issued by the Head of the Free Trade and Competition Agency February 6, 2006, Tbilisi

On the approval of the protocol of administrative offences and forms of directions connected with the violations of the Georgian law on free trade and competition

In compliance with the Georgian law entitled “Free Trade and Competition” and Articles 1592, 1593, and clause 16 of Article 239 of the Georgian Administrative Code, I do hereby order:

1. The attached form (Appendix No. 1) of the administrative offence protocol to be approved.
2. The attached form (Appendix No. 2) of directions of the Free Trade and Competition Agency's officials to be approved.
3. The said administrative offence protocol and form of directions to be promulgated in accordance with relevant protective mechanisms.
4. This order shall enter into force from the date of its promulgation.

Georgian Law “On Free Trade and Competition”

Chapter I General Provisions

Article 1

The Georgian Law “On Free Trade and Competition” consists of the Georgian Constitution, international agreements, the Georgian laws, this law and other statutory normative acts.

Article 2

The terms defined in this law shall have the following meaning:

- a) “Economic agent” means a juridical or natural person who irrespective of residency, form of legal enterprise and property follows business activities. This term also refers to non-profit-oriented unions, funds and other associations, which are market participants or act in the interests of businessmen, charity organizations or professional unions.
- b) “Economic competition” means rivalry in which economic agents try to excel their competitors in the execution of their business practices, which offer consumers better standards of prices, quality, packaging, services and other economic characteristics.
- c) “Substitutional goods” shall be deemed to include commodities or a group of commodities, which by their function, application, quality and technical characteristics can substitute other commodities or a group of commodities.
- d) “State assistance” shall provide for one-time, any form of assistance rendered by the government for a certain period of time; particularly – tax exemption or prolongation of the terms of tax payment, writing off debts, restructuring, granting concessionary loan terms, favorable loan guarantees, providing special conditions for buying immovable property, preferential conditions in the process of state purchases and profitability guarantees, or granting other exclusive right, which allow to restrict competition or provide conditions of its restriction offering advantages to certain economic agents or to production of certain commodities.
- e) “Public purpose-oriented program” means a complex of social and economic measures worked out on well-grounded technical and economic basis aimed at active governmental control over economic processes provided with resources, responsible executive state offices, terms of implementation and consumers.
- f) “Non-competitive environment” means a commodity market where competition may exist, but it is restricted and/or prohibited by the state or local authorities.
- g) “Monopoly situation” means such market situation when there is only one seller of goods and there are no substitutional goods.
- h) “Regulated economic spheres” mean types of economic activities, which protecting consumer interests are guided by tariff regulations and/or state-owned enterprises functioning in the infrastructural sphere.
- i) “Infrastructural sphere” means a field in which non-freely circulated commodities are produced, supplied and serviced.
- j) “Specific property” means one or several means of transportation (custom clearance) of non-freely circulated commodities.

- k) “Specific property owner” shall be deemed to be an economic agent who is considered as owner (owners) or leaseholder (leaseholders) of one or several means of transportation (custom clearance) of non-freely circulated commodities.
- l) “Non-freely circulated commodities” mean goods production, import, delivery and use of which are done under limited (specific), special conditions.
- m) “Tariff regulation” means prices (tariffs) fixed by the administrative authority for products and services in the conditions of restricted competition.
- n) “Administrative barrier” means abuse of powers vested by the relevant legislation practiced by the state or local authorities (such as: demand of additional documents, ungrounded impediment when issuing documents necessary for the initiation of economic activities, and etc.).
- o) “Discriminative barrier” refers to cases when state or local authorities using proprietary, residency or any other criteria demand from an economic agent ungrounded, specific and unfair requirements or grant privileges.

Article 3

This law is aimed at breaking barriers for the development of free trade and competition in Georgia whatever organizational, legal and proprietary form any judicial or natural person may possess. In particular:

- a) promoting competition between economic agents;
- b) removing any administrative barriers to enter the market and providing economic agents free access to the market;
- c) breaking down any discrimination barriers set up by the state or local authorities and elimination of any grounds for their appearance;
- d) protection of vital and economic interests of society in the conditions of restricted competition in the regulated economic spheres;
- e) not allowing state or local authorities to assume such international obligations which could impede free trade within and outside Georgia.

Article 4

This law applies to:

- a) such interrelations which influence competition and free trade in commodity and services’ markets, and which incorporate participation of juridical and/or natural persons and/or state or local authorities;
- b) such actions and/or decisions made by state or local authorities which in this or other form affect (or may affect) competition environment and free trade.

Article 5

This law does not apply to copyrights and closely related rights, and relations connected with trademarks, industrial standards.

Article 6

Control over due execution of requirements of this law shall be exercised by the Free Trade and Competition Agency (hereafter referred to as the “Agency”) acting as a state subdivision under the Ministry of Economic Development of Georgia.

Chapter II Prohibition of Competition Restriction

Article 7

Any state or local authorities are prohibited:

- a) to impose such taxes or other privileges for economic agents which can appear more advantageous than those for their rivals (potential competitor) and may lead accordingly to restriction of competition;
- b) to ban, cease or otherwise infringe in the business activities and independence of economic agents, except for the cases stipulated by the Georgian legislation;
- c) to set up any state or local administrative authority or entrust the existing authorities with powers which may cause restriction of competition by means of monopolization of production and realization of goods;
- d) to make decisions which create monopolized situation for economic agents that essentially restricts competition and the process of free pricing, except for the cases stipulated by the Georgian legislation.

Chapter III State Assistance and Purpose-Oriented Programs

Article 8

- 1) Any form of state assistance, which affects competition or creates risks of such interference shall be prohibited, except for the cases stipulated by paragraph 2 of this Article.
- 2) State assistance shall be allowed in:
 - a) force majeure circumstances stipulated by the Georgian legislation;
 - b) cases aimed at development of certain economic activities or economic zone and/or preservation of cultural heritage.
- 3) The Agency shall work out and approve with respective statutory normative acts general rules specifying the cases when state assistance can be granted.
- 4) In compliance with the rules mentioned in paragraph 3 of this Article the state and local authorities shall establish state assistance granting procedure, which shall specify its necessity, forms and assistance-receiving objects.
- 5) Assistance-receiving procedure established in compliance with the statutory normative acts drawn up by the Agency is to be submitted to the Agency for coordination.
- 6) The Agency shall be notified on the plan of assistance rendering, change of assistance and/or any assistance rendered.

Article 9

- 1) Any state purpose-oriented program, which may in any way affect competition or create risks of such interference, is prohibited.
- 2) By means of statutory normative acts the Agency shall approve general rules concerning authorization of state purpose-oriented programs of economic character.
- 3) State purpose-oriented programs of economic character provided for by the Georgian legislation and drawn up in compliance with statutory normative acts drawn up by the Agency are to be submitted to the Agency for coordination.
- 4) The Agency shall be notified on the plan concerning state purpose-oriented programs and/or change of the program.

Article 10

- 1) The Agency is entitled to approve the submitted state assistance and/or state purpose-oriented program within 30 days otherwise the approval is considered as given.
- 2) In case of contradictions revealed in the actions of the state or local authorities or fulfillment of provisions stipulated by relevant laws, or in case of their improper application, the Agency is entitled to demand substantiation from the relevant state or local authorities.
- 3) On the basis of the information submitted the Agency determines conformity of provided state assistance and/or state purpose-oriented program to the regulations stipulated in this law and within 30 days makes recommendation on the conformity of the said assistance to the relevant law.
- 4) A state authority having received information specified in paragraph 3 of Article 10 of this law makes decision within 10 days on the abrogation, amendment or not to change the said assistance and/or state purpose-oriented program.
- 5) A state authority is obliged to notify the Agency on its decision pertaining to the recommendation submitted.

Chapter IV

Regulated Economic Spheres

Article 11

1. Specific property owner in case of purchase and/or sale is obliged to provide access to his network or infrastructure to economic agents on non-discriminative conditions.
2. Specific property owner is authorized to refuse economic agents in access to his network if the refusal is conditioned by the following objective reasons:
 - a) if the established technical requirements and norms are not satisfied, which accordingly threatens the integrity of the whole network or safety of user interactions;
 - b) if the economic agent who claims the access to the network does not possess enough financial resources to carry out necessary works in order to satisfy the relevant technical requirements and norms.
3. On the basis of the claims submitted by the economic agents the Agency shall check up whether the reason of refusal in access to the network of specific property owner conforms to this law.

4. Provisions stipulated in paragraphs 1, 2 and 3 of this Article shall not apply to the means of transportation (custom clearance) of non-freely circulated commodities produced in the infrastructural sphere by private investments.
5. Aimed at fulfillment of provisions of this law the Agency shall analyze the activities of economic agents acting in the regulated economic spheres, and work out and promulgate the relevant recommendations.
6. Should the economic agent acting in the regulated economic sphere violate any provision of this law, the Agency shall provide the violator its recommendations aimed to bring the relevant agreement (decision) in conformity with the legislation in force.
7. In 10 days after the receipt of recommendations the economic agent acting in the regulated economic sphere makes decision whether to bring the agreement (decision) in conformity with the legislation or leave it unchanged.
8. The economic agent acting in the regulated economic sphere is obliged to notify the Agency on his decision pertaining to the recommendations submitted.
9. Paragraphs 1, 2, 3 and 4 of this Article shall not apply to relations connected to the cases when a specific property owner allows a third party to access his network, if the reasons of such access are stipulated by a separate law and the consequent relations are regulated by a relevant independent national authority.

Chapter V

Free Trade and Competition Agency

Article 12

1. The head of the Free Trade and Competition Agency is appointed by the Georgian minister of economic development and removed by the Prime Minister of Georgia.
2. With respect to the state and local authorities the Agency is entitled to:
 - a) provide its directions to the state or local authority, violator of this law specifying illegal decisions of the latter;
 - b) demand documents connected with practices of the state or local authorities contradictory to provisions of this law;
 - c) raise the question of liability to a higher level authority or office should the state or local authorities fail to fulfil the instructions specified by the submitted directions;
 - d) raise the question of disciplinary, administrative and criminal liability of an official body for the violation of free trade and competition laws.
3. With respect to economic agents acting in the regulated economic sphere the Agency is entitled to:
 - a) demand documented substantiation from the agent pertaining to the actions which violate provisions of the present law;
 - b) act as intermediary in court in case the agent fails to submit the required documentation;
 - c) demand bringing of illegal actions to conformity with the present law;
 - d) appeal to the court with the claim to terminate practices or decisions contradicting the provisions of the present law.
4. The Agency is authorized to establish rules of state assistance procedure and/or state purpose-oriented program coordination, which will specify forms and terms of approval and other points of order.

Article 13

The major obligations of the Agency include:

- a) removal of administrative barriers which affect the development of free trade and competition;
- b) reveal and elimination of cases of discrimination, unsubstantiated government grants (direct or indirect) and privileges from the state or local authorities;
- c) examination and working out of relevant directions pertaining to the cases of violation of the Georgian laws on free trade and competition;
- d) should the state or local authority and economic agents acting in the regulated economic sphere fail to fulfill the requirements of the directions submitted;
 - d.a) appeal to the court and participate in the consideration of the case;
 - d.b) public declaration of lawfulness of actions of persons specified in subparagraph “d” of Article 13 of this law in case of motivated refusal;
- e) keeping and non-divulgence of governmental and commercial secrets;
- f) recovering of damages caused by disclosure of confidential information in compliance with the rules and amount stipulated by the legislation;
- g) annual submission of reports on the carried out works and relevant recommendations to the Georgian government:
 - g.a) on the fulfillment of provisions of the present law by the state and local authorities;
 - g.b) on the fulfillment of provisions of the present law in the regulated economic spheres.

Article 14

The violator of this law shall bear disciplinary, administrative or criminal liability.

Chapter VI **Transitional Provisions**

Article 15

- a) Following one month from the date this law enters into force the Georgian government shall terminate the process of liquidation of public offices, such as: the Georgian State Antimonopoly Department and State Price-Regulatory Inspection acting under the Ministry of Economic Development of Georgia.
- b) The Ministry of Economic Development of Georgia shall surrender the property to the Agency which was left after the liquidation of the Georgian State Antimonopoly Department and State Price-Regulatory Inspection acting under the Ministry of Economic Development of Georgia (11.04.2006, No. 2836).
- c) Within 9 months after this law enters into force the Georgian government shall submit for parliamentary consideration amendments to the legislation necessary for the setting up of the Free Trade and Competition Agency as a state subdivision of the Ministry of Economic Development of Georgia.

Chapter VII Final Provisions

Article 16

After this law enters into force the following orders shall be considered invalid:

- a) the Georgian law entitled “Monopoly and Competition” (parliamentary decree No. 22-23 of October 17, 1996, p. 19);
- b) the Georgian law entitled “Prices and principles of pricemaking” (parliamentary setting No. 9, 1993, Article 189);
- c) decree No. 596 of September 13, 1996 of the President of Georgia to the Georgia law entitled “Consumer Rights Protection” pertaining to the introduction of necessary normative acts;
- d) decree No. 95 of February 22, 1998 of the President of Georgia on “The mechanisms of governmental regulation of natural monopoly”;
- e) decree No. 262 of April 23, 1998 of the President of Georgia on the approval of regulations adopted by the antimonopoly council under the State Antimonopoly Department of Georgia;
- f) decree No. 314 of May 11, 1998 of the President of Georgia on the setting up of coordination council for consumer rights protection and approval of its regulations under the State Antimonopoly Department of Georgia;
- g) decree No. 426 of September 30, 2000 of the President of Georgia on the approval of regulations of state registration of economic agents acting in the conditions of monopolized commodity markets;
- h) decree No. 8 of January 10, 2002 of the President of Georgia on the approval of instructions pertaining to inspections carried out by the State Antimonopoly Department of Georgia;
- i) decree No. 145 of March 31, 1998 of the President of Georgia on the setting up of coordination council for consumer rights protection and approval of its regulations under the State Antimonopoly Department of Georgia;
- j) order No. 8/42 of December 12, 2000 of the head of the State Antimonopoly Department of Georgia under the Georgian Ministry of Economics, Industry and trade pertaining to the determination of monopoly situation for economic agents (business units) acting in a corresponding (definite) commodity market.

2. The present law shall enter into force following 15 days after its promulgation.

Mikheil Saakashvili
President of Georgia
Tbilisi
June 3, 2005
No. 1550-IS

INDONESIA

COMMENTARY BY THE GOVERNMENT OF INDONESIA ON THE COMPETITION LAW OF INDONESIA

Background

Indonesian economic development during the first long-term development produced a tremendous amount of progress. It was motivated by development in various sectors, including economic development policy stipulated in the broad outlines of the nation's direction and the five year development and various kinds of other economic policies as well. Although there were a lot of progress which was shown by high economic growth, there are also still many challenges or economic problems in Indonesia. In reality, business opportunities created during the past three decades have not been able to make the whole population to afford and to participate in the development of various economic sectors.

The development of private business during that period, on one hand was marred by all kinds of inefficient government policies that caused market distortion. On the other hand, the development of private business in reality occurred mostly due to the condition of unfair business competition. The above phenomena was developed and supported by a close relationship between the decision makers and business actors. Furthermore, the business actors having close relationship to ruling elite, acquired excessive facilities that created a social gap. The emergence of conglomerate and a small group of strong business actors without being supported by a spirit of true entrepreneurship was one of the factors that caused the economic stamina to become very fragile and unable to compete.

Due to the bad climate on business competition and the need to provide equal protection and to create a fair business competition, the government of Indonesia and the Indonesian parliament agreed to enact the Law number 5 of 1999 concerning the prohibition on monopolistic practices and unfair business competition.

Objectives

Indonesian business actors in doing their business shall be based on economic democracy with due attention to the equilibrium between the business actors' interest and the public interests. Considering the principle of the philosophy on Indonesian competition policy, the objectives of the Indonesian competition law are:

- a. to safeguard the interests of the public and to improve economic efficiency as one of the efforts to improve the people's welfare;
- b. to create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large, middle and small-scale undertakings in Indonesia;
- c. to prevent monopolistic practices and/or unfair/unhealthy business competition that may be committed by undertakings, and
- d. the creation of effectiveness and efficiency in business activities.

The Substance of the Act Number 5 of 1999

The substance of the Indonesian competition law which is under the coverage of the Act Number 5 of 1999 are:

A. Prohibited Agreements

This chapter covers Oligopoly, Price Fixing, Price Discrimination, Resale Price Maintenance, Market Allocation, Boycott, Cartels, Trust, Oligopsony, Vertical Integration, Exclusive Dealing or Closed Agreement.

Most of business practices are placed under the coverage of ride of reason approach. Only a few of the articles are considered as per se illegal; one of which is price fixing. Further more, agreement among business actors which may be considered as oligopoly is if two or three business actors or a group of business actors jointly control production and/or marketing of goods and/or services more than 75% of the market share of a certain type of goods or services. The 75% of the market share in this article is only a presumption.

B. Prohibited Activities

This chapter covers monopoly, monopsony, market control, predatory pricing, conspiracy. Like oligopoly, the criteria to decide whether there is a monopoly or monopsony are only presumption.

C. Dominant Position

This chapter covers interlocking directorate, share ownership, merger and acquisition. Business actors shall have a dominant position if a business actor or a group of business actors controls 50% of market share or more, or two or three business actors or group business actors control 75% or more of the market share.

D. Business Competition Supervisory Commission

This chapter covers the Commission status, membership, duties and its authority.

E. Procedure in Handling Business Competition Cases

F. Sanction/Punishment

This chapter covers administrative action, criminal penalties and additional criminal penalties.

G. Other Provisions

Exempted from the provisions of this act are:

- a. actions and/or agreements with the intention to implement the existing law;
- b. agreements related to intellectual property rights such as licence, patent, trademark, copyright, industrial product design, integrated circuit and trade secrets, and agreements related to franchise; or

- c. agreements on technical standardisation of products of goods and/or services which do not restrict and/or hamper competition; or
- d. agreements for a distribution purpose which do not stipulate to re-supply of goods and/or services with the price lower than the price agreed upon in the agreement; or
- e. agreement of research cooperation for the purpose of promoting or improving the living standards of the people in general; or
- f. international agreements which have been ratified by the government of the Republic of Indonesia; or
- g. agreement and/or actions intended to export which do not distract domestic trade and/or market supply; or
- h. undertakings categorized engaging in small-scale business; or
- i. co-operative business activities serving specifically only for its member

Sources of Legislation

Model Law on Restrictive Business Practices issued by UNCTAD (Rev 5) and other legislation from other countries.

INDONESIA

**THE PEOPLE'S LEGISLATIVE ASSEMBLY
OF THE REPUBLIC OF INDONESIA**

**LAW OF THE REPUBLIC OF INDONESIA
NUMBER.....YEAR.....
CONCERNING
PROHIBITION OF MONOPOLISTIC PRACTICES
AND UNFAIR BUSINESS COMPETITION**

**BY THE GRACE OF THE ALMIGHTY GOD
THE PRESIDENT OF THE REPUBLIC OF INDONESIA**

Considering:

- a. whereas development in the field of economy must be directed towards the achievement of social welfare based on Pancasila and the 1945 Constitution;
- b. whereas democracy in the field of the economy calls for equal opportunity for the every citizen to participate in the process of production and marketing of goods and/or services a fair, effective and efficient business environment, so as to be able to promote the growth of economy and the functioning of a reasonable market economy;
- c. whereas anyone engaging in business in Indonesia must exist in an atmosphere of fair and natural competition, hence there shall be no concentration of economic power in the hands of certain business actors, notwithstanding the commitments or conventions executed by the State of the Republic of Indonesia with regard to International Conventions;
- d. whereas in order to achieve the intentions mentioned in letters a, b and c herein, or DPR (People's Legislative assembly), a Law regarding the Prohibition of Monopolistic Practices and Unfair Business Competition needs to be set fourth;

In view of: Article 5 paragraph (1), Article 21 paragraph (1), Article 2 7 paragraph (2) and Article 33 of the 1945 Constitution,

With the approval of:

**THE PEOPLE'S LEGISLATIVE ASSEMBLY OF THE REPUBLIC OF INDONESIA
HAS DECIDED TO:**

**Stipulate: LAW REGARDING THE PROHIBITION OF MONOPOLISTIC
PRACTICES AND UNFAIR BUSINESS COMPETITION.**

CHAPTER 1
GENERAL PROVISIONS

Article 1

Referred to in this Law as:

1. Monopoly shall be the control over the production and/or marketing of goods and/or over the utilization of certain services by one business actor or by one group of business actors.
2. Monopolistic practices shall be the centralization of economic power by one or more business actors, resulting in the control of the production and/or marketing of goods and/or services by certain business actors thus resulting in unfair business competition and potentially harmful to the interests of the public.
3. The centralization of economic power shall be the actual control of a market by one or more business actors, enabling to determine prices of goods and/or services.
4. Dominant position shall be a situation in which a business actor has no substantial competitor in the market concerned in relation to the market segment controlled, or a business actor has the strongest position among its competitors in the market concerned in relation to financial capacity, access capacity to supply or sales, and the capability to adjust supply or demand of certain goods or services.
5. Business actors shall be any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field.
6. Unfair business competition shall be competition among business actors in conducting activities for the production and/or marketing of goods and/or services in an unfair or unlawful or anti-competition manner.
7. Agreement shall be the action of one or more business actors for binding themselves to one or more other business actors under whatever name, either in writing or not in writing.
8. Conspiracy or business conspiracy shall be a form of cooperation conducted by one business actor with another with the intention of controlling the market concerned in the interest of the conspiring business actors.
9. Market shall be an economic institution in which sellers and buyers, either directly or indirectly, can conduct trading transactions of goods/or services.
10. The market concerned shall be the market related to certain marketing scope or substitute of such goods and/or services.
11. Market structure shall be a market condition comprising of indicators concerning aspects with significant impact on business actors' behaviour and market performance, among other things the number of sellers and buyers, barriers to entering and leaving the market, product variety, distribution system and control of market segment.

12. Market behaviour shall be acts undertaken by business actors in their capacity as suppliers or buyers of goods and/or services in order to achieve the company's objectives among other things to achieve profits, growth of assets, sales targets and competition methods applied.
13. Market share shall be the percentage of the value of sales or purchase of certain goods or services controlled by a certain business actor on the market concerned in a certain calendar year.
14. Market price shall be the price paid in transactions of goods and/or services in accordance with the agreement reached among the parties concerned on the market concerned.
15. Consumers shall be every user of goods and/or services, both for personal use or well as for the interests of other people.
16. Goods shall be any physical objects, either tangible or intangible, movable or immovable, which may be traded, used, utilized or exploited by consumers or business actors.
17. Services shall be services in the form of work or performance traded in society to be utilized by consumers or business actors.
18. Business Competition Supervisory Committee shall be a committee formed to supervise business actors in conducting their business activities so that they do not conduct monopolistic practices and/or unfair business competition.
19. The District Court shall be a court as intended in prevailing laws and regulations, at the legal domicile of the business of the business actors concerned.

CHAPTER II PRINCIPLES AND PURPOSES

Article 2

Business activities of business actors in Indonesia must be based on economic democracy, with due observance of the equilibrium between the interests of business actors and the interests of the public.

Article 3

The purpose of enacting this Law shall be as follows:

- a. to safeguard the interests of the public and to improve economic efficiency as one of the efforts to improve the people's welfare;
- b. to create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large -, middle- as well as small-scale business actors in Indonesia;
- c. to prevent monopolistic practices and/or unfair business competition that may be committed by business actors; and
- d. the creation of effectiveness and efficiency in business activities.

CHAPTER III
PROHIBITED AGREEMENTS

Part One
Oligopoly

Article 4

- (1) Business actors shall be prohibited from entering into agreements with other business actors for jointly controlling the production and/or marketing of goods and/or services while may potentially cause the occurrence of monopolistic practices and/or unfair business competition.
- (2) Business actors may be suspected or denied to be jointly involved in the control of the production and/or marketing of goods and/or services, as intended in Article (1) herein, if two or three business actors or a group of business actors Control over 75 % (seventy-five percent) of the market segment of a certain type of goods or services.

Part Two
Price Determination

Article 5

- (1) Business actors shall be prohibited from entering into agreements with their business competitors for the determination of the price of certain goods and/or services payable by consumers or customers on the same market.
- (2) The provisions intended in paragraph (1) of this Article shall not be applicable to the following:
 - a. an agreement entered into the context of a joint venture; or
 - b. an agreement entered into based on prevailing laws.

Article 6.

Business actors shall be prohibited from entering into agreements forcing a buyer to pay a price which is different from that payable b), other buyers for the same goods and/or services.

Article 7

Business actor shall be prohibited from entering into agreements with their business competitors to determine prices below market prices, which may potentially result in unfair business competition.

Article 8

Business actors shall be prohibited from entering into agreements with other business actors setting forth the condition that parties receiving goods and/or services shall not sell or re-supply goods and/or services received by them, at a price lower than the contracted price, potentially causing unfair business competition.

Part Three
Division of Territory

Article 9

Business actors shall be prohibited from entering into agreements with their business competitors which have the purpose of dividing marketing territory or allocating the market for goods and/or services, potentially resulting in monopolistic practices and/or unfair business competition.

Part Four
Boycott

Article 10

- (1) Business actors shall be prohibited from entering into agreements with other business actors which could prevent other business actors from engaging in the same business, either for domestic or overseas market purposes.
- (2) Business actors shall be prohibited from entering into agreements with other business actors for refusing to sell any goods and/or services from other business actors, so that such act:
 - a. causes a loss or may be suspected of potentially causing a loss to other business actors; or
 - b. limits other business actors in selling and or buying any goods and/or services from the market concerned.

Part Five
Cartels

Article 11

Business actors shall be prohibited from entering into agreements with their competing business actors, with the intention of influencing prices by arranging production and/or marketing of certain goods and/or services, that may result in monopolistic practices and/or fair business competition.

Part Six
Trust

Article 12

Business actors shall be prohibited from entering into agreements with other competing business actors for cooperation by establishing a joint company or a larger company, by keeping and maintaining the continuity of each company or its member, with the aim of controlling production and/or marketing of goods and/or services, which may result in monopolistic practices and/or unfair business competition.

Part Seven
Oligopsony

Article 13

- (1) Business actors shall be prohibited from entering into agreements with other business actors with the aim of jointly controlling the purchase or acquisition of supplies for controlling prices of goods and/or services on the market concerned, which may result in monopolistic practices and/or unfair business competition.
- (2) Business actors shall be reasonably suspected or deemed to be jointly controlling the purchase or acquisition of supplies as intended in paragraph (1) of this Article if two or three business actors or a group of business actors control over 75 (seventy-five percent) of the market segment of a certain type of goods or services.

Part Eight
Vertical Integration

Article 14

Business actors shall be prohibited from entering into agreements with other business actors with the intention of controlling the production of several goods which are products included in the production chain of certain related goods and/or services where each product link is the end product of the production process or of further processing, either in one direct link or indirect link, which may potentially result in unfair business competition and/or harmful to society.

Part Nine
Closed Agreements

Article 15

- (1) Business actors shall be prohibited from entering into agreements with other business actors, stipulating that the party receiving the goods and/or services shall only re-supply or not re-supply the aforementioned goods and/or services to certain parties and/or at a certain place.
- (2) Business actors shall be prohibited from entering into agreements with other parties stipulating that the party receiving certain goods and/or services must be prepared to buy other goods and/or services of the supplying business actor.
- (3) Business actors shall be prohibited from entering into agreements concerning prices or certain price discounts for goods and/or services, stipulating that the business actor receiving goods and/or services from the supplying business actor:
 - a. must be prepared to buy other goods and/or services from the supplying business actor; or
 - b. shall not buy), the same or similar goods and/or services from other business actors, competitors of the supplying business actor.

Part Ten
Agreement With Foreign Parties

Article 16

Business actors shall be prohibited from entering into agreements with foreign parties setting forth conditions that may result in monopolistic practices and/or unfair business Competition.

CHAPTER IV
PROHIBITED ACTIVITIES

Part One
Monopoly

Article 17

- (1) Business actors shall be prohibited from controlling the production and/or marketing of goods and/or services which may result in monopolistic practices and/or unfair business competition.
- (2) Business actors may be reasonably suspected or deemed to control the production and/or marketing of goods and/or services as intended in paragraph (1) of this article in the following events:
 - (a) there is no substitute available yet for the goods and/or services concerned: or
 - (b) causing other business actors to be unable to enter into business competition for the same goods and/or services; or
 - (c) one business actor or a group of business actors controls over 50% (fifty per cent) of the market segment of a certain type of goods or services.

Part Two
Monopsony

Article 18

- (1) Business actors shall be prohibited from controlling the acquisition of supplies or from acting as sole buyer of goods and/or services on the market concerned which may potentially result in monopolistic practices and/or unfair business competition.
- (2) Business actor shall be reasonably suspected of controlling the acquisition of supplies or acting as sole buyer as intended in paragraph (I) of this article if a business actor controls over 50% (fifty per cent) of the market segment of a certain type of goods or services.

Part Three
Market Control

Article 19

Business actors shall be prohibited from engaging in one or more activities, either

individually or jointly with other business actors, which may result in monopolistic practices and/or unfair business competition, in the following forms:

- a. refuse and/or impede certain other business actors in conducting the same business activities on the market concerned; or
- b. bar consumers or customers of their competitors from engaging in business relationship with such of their competitors; or
- c. limit the distribution and/or sales of goods and/or services on the market concerned; or engage in discriminative practices towards certain business sectors.

Article 20

Business actors shall be prohibited from supplying goods and/or services by selling while making a loss or by determining extremely low prices with the aim of eliminating or ruining the business of their competitors on the market concerned which may potentially result in monopolistic practices and/or unfair business competition.

Article 21

Business actors shall be prohibited from engaging in unfair practices in determining production and other costs as part of the price component of goods and/or services which may potentially result in unfair business competition.

Part Four **Conspiracy**

Article 22

Business actors shall be prohibited from entering into conspiracies with other parties in order to determine awardees of tenders which may potentially result in unfair business competition.

Article 23

Business actors shall be prohibited from conspiring with other parties for obtaining information regarding the business activities of their competitors classified as company secret which may potentially result in unfair business competition.

Article 24

Business actors shall be prohibited from conspiring with other parties in order to impede the production and/or marketing of goods and/or services of their competitors with the aim of causing the goods and/or services offered or supplied to the market concerned to become less, either in quantity, quality or in timeliness required.

CHAPTER V
DOMINANT POSITION

Part One
General

Article 25

- (1) Business actors shall be prohibited from using dominant position either directly or indirectly to:
 - a. determine the conditions of trading with the intention of preventing and/or barring consumer from obtaining competition goods and/or services, both in terms of price and quality; or
 - b. limiting markets and technology developments; or
 - c. bar other potential business actor from entering the market concerned
- (2) Business actors shall have a dominant position as intended in paragraph (1) of this article in the following events:
 - d. if one business actor controls over 50% (fifty per cent) of the market segment of certain type of goods or services; or
 - e. if two or three business actors or a group of business actors control over 75% (seventy-five percent) of the market segment of a certain type of goods or services.

Part Two
Multiple Positions

Article 26

A person concurrently holding the position as a member of the Board of Directors or as a Commissioner of a company shall be prohibited from simultaneously holding position as a member of the Board of Directors or commissioner in other companies, in the event that such companies

- a. are in the same market segment; or
- b. have a strong bond in the field and/or type of business activities; or
- c. are jointly), capable of controlling the market share of certain goods and/or services which may potentially result in monopolistic practices and/or unfair business competition.

Part Three
Share Ownership

Article 27

Business actors shall be prohibited from owing majority shares in several similar companies conducting business activities in the same field on the same market, or establishing several companies with the same business activities in the same market, if

such ownership causes:

- a. one business actor or a group of business actors to control over 50% (fifty per cent) of the market segment of certain type of goods or services;
- b. two or three business actors or a group of business actors to control over 75 (seventy-five per cent) of the market segment of a certain type of goods or services.

Part Four
Mergers, Consolidations and Acquisitions

Article 28

- (1) Business actors shall be prohibited from conducting mergers or consolidations of business entities resulting in monopolistic practices and/or unfair business competition.
- (2) Business actors shall be prohibited from conducting the acquisition of shares in other companies if such action may result in monopolistic practices and/or unfair business competition.
- (3) Further provision regarding the prohibition of mergers or consolidations of business entities as intended in paragraph (1) of this article and provisions concerning the acquisition of shares in companies as intended in paragraph (2) of this article shall be set forth in a government regulation.

Article 29

- (1) The committee must be notified of mergers or consolidations of business entities, or acquisition of shares as intended in Article 28 resulting in the assets value and/or selling price thereof exceeding a certain amount, by no later than 30 (thirty) days from the date of such merger, consolidation or acquisition.
- (2) Provisions regarding the determination of assets value and/or the selling price as well as the procedure for giving notice as intended in paragraph (1) of this article shall be stipulated in a government regulation.

CHAPTER VI
BUSINESS COMPETITION SUPERVISORY COMMITTEE

Part One
Status

Article 30

- (1) For the supervision of the implementation of this law, a Business Competition Supervisory Committee shall be formed, hereinafter referred to as the Committee.
- (2) The Committee shall be an independent institution free from the Government's and other parties' influence and authority.
- (3) The Committee shall be responsible to the President.

Part Two

Membership

Article 31

- (1) The Committee shall consist of a Chairperson acting concurrently as member, and of not less than 7 (seven) members
- (2) Members of the Committee shall be appointed and dismissed by the President upon the approval of the People's Legislative Assembly.
- (3) The Members of the Committee shall be appointed for a term of office of 5 (five) and they shall be eligible for reappointment for 1 (one) subsequent term of office.
- (4) If due to the expiration of the term of office a vacancy occurs in the Committee's membership, the term of office of members may be extended until new members are appointed.

Article 32

Requirements for membership in the Committee shall be as follows:

- a. citizens of the Republic of Indonesia, at least 30 (thirty) years of age and not older than 60 (sixty) years at the time of appointment.
- b. Loyal to Pancasila and the 1945 Constitution;
- c. Believers in the devout to The Almighty God;
- d. Honest, fair and having good conduct;
- e. Residing with the territory of the Republic of Indonesia;
- f. Experienced in the field of business or possessing knowledge and expertise in the field of law and/or economics.
- g. Has never been imposed a criminal penalty;
- h. Has never been declared bankrupt by a court of justice; and
- i. Is not affiliated with a certain business entity.

Article 33

Membership in the Committee shall terminate due to the following reasons:

- a. demise; or
- b. resignation upon own request; or
- c. residing outside the territory of the State of the Republic of Indonesia; or
- d. continuous physical or mental illness; or
- e. expiration of term of membership in the committee; or
- f. dismissal.

Article 34

- (1) The formation of Committee and its organisational structure, duties and functions shall be stipulated by a Presidential decree.
- (2) For the uninterrupted implementation of its duties, the Committee shall be assisted by a secretariat.
- (3) The Committee may form a working group.
- (4) Provisions regarding the organisational structure, duties and functions of the secretariat and working Group shall be further regulated by a decision of the Committee.

Part Three **Duties**

The duties of the Committee shall include the following:

- a. Evaluate agreements that may potentially result in monopolistic practices and/or unfair business competition as set forth in Article 4 up to and including Articles 16;
- b. Evaluate business activities and/or actions of business actors which may potentially result in monopolistic practices and/or unfair business competition as stipulated in Article 17 up to and including Article 24;
- c. Evaluate the existence of misuse of dominant position which may potentially result in monopolistic practices and/or unfair business competition set forth in Article 25 up to and including Article 28;
- d. Undertake actions in accordance with the authority of the Committee as set forth in Article 36;
- e. Provide advice and opinion concerning Government policies related to monopolistic practices and/or publications related to this law;
- f. Prepare guidelines and/or publications related to this law;

Submit periodic reports on the results of the Committee's work to the President and the People's Legislative Assembly (DPR).

Part Four **Authority**

Article 36

The Committee's authority shall include the following;

- a. receive reports from the public and/or business actors regarding allegations of the existence of monopolistic practices and/or unfair business competition;
- b. conduct research concerning, the possibility of the existence of business activities and/or actions of business actors which may result in monopolistic practices and/or unfair business competition;

- c. Conduct investigation and/or inspection in allegations of cases of monopolistic practices and/or unfair business competition reported by the public or by business actors or discovered by the Committee as a result of its research;
- d. Make conclusion regarding the results of its investigation and/or inspection as to whether or not there are any monopolistic practices and/or unfair business competition;
- e. summon business actors suspected of having violated the provisions of this law;
- f. summon and invite witnesses, expert witnesses and any person deemed to have knowledge of violations of the provisions of this law;
- g. seek the assistance of investigator to invite business actors, witnesses, expert witnesses or any person as intended in Letters e and f of this article, who are not prepared to appear upon the Committee's invitation;
- h. request the statement of Government institutions related to the investigation and/or hearing of business actors in violation of the provisions of this law;
- i. obtain, examine and/or evaluate letters, documents or other instruments of evidence for investigation and/or hearing;
- j. determine and stipulate the existence or non-existence of losses on part of business actors or society;
- k. announce the Committee's decision to business actors suspected of having engaged in monopoly practices and/or unfair business competition;
- l. impose administrative sanctions on business actors violating the provisions of this law.

Part Five
Funding

Article 37

The expenses related to the performance of the duties of the Committee shall be charged to the State Revenues and Expenditures Budget and/or other sources permissible by virtue of the applicable laws and, regulations.

CHAPTER VII
DISPUTE SETTLEMENT PROCEDURE

Article 38

- (1) Any person having knowledge of the occurrence of or reasonably suspecting that a violation of this law has occurred, he can report it in writing to the Committee with a clear statement concerning the occurrence of violation, attaching the identity of the reporting party.
- (2) The party suffering losses as a result of violations of this law may file a written report to the Committee with a complete and clear statement regarding the

occurrence of violation and losses inflicted, attaching the identity of the reporting party.

- (3) The identity of the reporting party intended in paragraph (1) of this article must be kept confidential by the Committee.
- (4) The reporting procedure as intended in paragraph (1) and paragraph (2) of this article shall be further stipulated by the Committee.

Article 39

- (1) Based on the report as intended in Article 38 paragraph (1) and paragraph (2), the Committee shall be obligated to conduct a preliminary investigation, and within 30 (thirty) days after receiving the report concerned, the Committee shall be obligated to determine whether or not further investigation is required.
- (2) In further investigation the Committee shall be obligated to investigate the business actors against whom the report was submitted.
- (3) The Committee shall be obligated to keep confidential the information obtained from business actors classified as company secret.
- (4) If deemed necessary, the Committee may hear the testimony of witnesses, expert witnesses, and/or other parties.

In conducting activities as intended in paragraph (2) and paragraph (4) of this article, members of the Committee shall be provided with a warrant.

Article 40

- (1) The Committee may conduct investigation of business actors if there is an allegation of the occurrence of violation of this law even though no report is filed.
- (2) Investigation as intended in paragraph (1) of this article shall be conducted in compliance with the procedure stipulated in Article 39.

Article 41

- (1) Business actors and/or other parties examined shall be required to submit instruments of evidence required in the investigation and/or hearing.
- (2) Business actors shall be prohibited from refusing to be heard, from refusing to provide information required for investigation and/or hearing, or from impeding the investigation and/or hearing process.
- (3) Violations of the provisions of paragraph (2) of this article shall be submitted by the Committee to the investigator for conducting investigation in accordance with the prevailing provisions.

Article 42

Instruments of evidence in the investigation by the Committee shall be in the form of:

- a. witness testimonies
- b. experts testimonies

- c. letters and/or documents
- d. information
- e. statement by business actors

Article 43

- (1) The Committee shall be obligated to complete follow-up investigation within 60 (sixty) days from the time a follow-up investigation is conducted as intended in Article 39 paragraph (1).
- (2) If required, the time frame for follow-up investigation as intended in paragraph (1) of this article may be extended by not more than 30 (thirty) days.
- (3) The Committee shall be obligated to determine whether or not a violation of this law occurred within 30 (thirty) days from the completion of the follow-up investigation as intended in paragraph (1) or paragraph (2) of this article.
- (4) The decision of the Committee as intended in paragraph (3) of this article must be read out in a hearing open to the public and the business actor concerned must be notified forthwith thereof.

Article 44

- (1) Within 30 (thirty) days from the time business actor concerned receives notice about the Committee's decision as intended in Article 43 paragraph (4), the business actor concerned shall be obligated to implement such decision and to submit an implementation report to the Committee.
- (2) Business actors may appeal to the District Court by no later than 14 (fourteen) days after receive notification of the aforementioned decision.
- (3) Business actors not appealing within the time frame as intended in paragraph (2) of this article shall be deemed to have accepted the Committee's decision.
- (4) In the event that the provisions of paragraph (1) and paragraph (2) of this article are not implemented by the business actor concerned, the Committee shall submit such decision to the investigator for conducting investigation in accordance with the provisions of prevailing laws and regulations.
- (5) Decisions of the Committee as intended in Article 43 paragraph (4) shall serve as initial evidence sufficient for investigators to conduct investigation.

Article 45

- (1) The District Court concerned must examine appeals by business actors as intended in Article 44 paragraph (2) within 14 (fourteen) days from the time the filing of such appeal is received.
- (2) The District Court must make a decision within 30 (thirty) days from the commencement of the hearing of the aforementioned appeal.
- (3) The party filing an appeal in respect of the decision of the District Court as intended in paragraph (2) of this article, may appeal to the Supreme Court of the Republic of Indonesia within 14 (fourteen) days.

- (4) The Supreme Court must make a decision within 30 (thirty) days from the time the appeal is received.

Article 46

- (1) In the event that there are no appeals, the decision of the Committee as intended in Article 43 paragraph (3) shall have permanent legal force.
- (2) The executive enforcement of the decision of the Committee as intended in paragraph (1) of this article shall be requested of the District Court.

**CHAPTER VIII
SANCTIONS**

Part One

Administrative Measures

Article 47

- (1) The Committee shall be authorised to impose sanctions in the form of administrative measures against business actors violating the provisions of this law.
- (2) Administrative measures as intended in paragraph (1) of this article may be in the following forms:
- a. stipulations of declaring agreements intended in Article 4 up to and including Article 13, Article 15 and Article 16 as null and void; and/or
 - b. ordering business actors to stop vertical integration as referred to in Article 14; and/or
 - c. ordering business actors to stop activities proven to have been causing monopolistic practices and/or unfair business competition and/or being harmful to society; and/or
 - d. ordering business actors to stop the misuse of dominant position; and/or
 - e. determine the cancellation of mergers or consolidations of business entities and acquisition of shares as intended in Article 28; and/or
 - f. stipulation of compensation payment; and/or imposition of a minimum fine of Rp.1,000,000,000, (Rupiah one billion) and a maximum fine of Rp. 25,000,000,000, (Rupiah twenty-five billion).

Part Two

Basic Criminal Sanctions

Article 48

- (1) Violations of the provisions of Article 4, Article 9 up to and including Article 14, Article 1 G up to and including Article 19, Article 25, Article 27, and Article 28 of this law shall be subject to the criminal sanction of a fine of minimum Rp. 25,000,000,000, -(Rupiah twenty-five billion) and maximum Rp. 100,000,000,000.-

- (Rupiah one hundred billion), or the criminal sanction of imprisonment as a replacement of fine for no longer than 6 (six) months.
- (2) Violations of the provisions of Article 5 up to and including Article 8, Article 15, Article 20 up to and including Article 24, and Article 26 of this law shall be subject to the criminal sanction of a fine of minimum Rp. 5,000,000,000,- (Rupiah five billion) or Rp. 25,000,000,000,- (Rupiah twenty-five billion) or a criminal sanction of imprisonment as replacement of fine for no longer than 5 (five) months.
- (3) Violation of the provisions of Article 41 of this law shall be subject to a fine of minimum Rp, 1,000,000,000.- (Rupiah one billion) and maximum Rp.5,000,000,000,- (Rupiah five billion) or the criminal sanction of imprisonment as replacement of the fine no longer than 3 (three) months.

Part Three
Additional Criminal Sanctions

Article 49

In compliance with the provisions of Article 10 of the Criminal Code, in addition to the sanctions set forth in Article 48 additional criminal sanctions may be imposed in the following of:

- a. revocation of business license; or
- b. prohibiting business actors proven to have violated this law from filling the positions of director or commissioner for at least 2 (two) years and for no longer than 5 (five) years; or ordering to stop certain activities or actions resulting in losses to other parties.

CHAPTER IX
MISCELLANEOUS PROVISIONS

Article 50

Not included in the provision of this law shall be as follows:

- a. actions and or agreements intended to implement applicable laws and regulations; or
- b. agreements related to intellectual property rights, such as licenses, patents, trademarks, copyrights, industrial product design, integrated electronic circuits, and trade secrets as well as agreements related to franchise; or
- c. agreements for the stipulation of technical standards of goods and/or services which do not inhibit, and/or impede competition; or
- d. agency agreements which do not stipulate the re-supply of goods and/or services at a price level lower than the contracted price; or
- e. cooperation agreements in the field of research for the upgrading and improvement of the living standard of society at large; or
- f. international agreements ratified by the Government of the Republic of Indonesia; or

- g. export oriented agreements and/or actions not disrupting domestic needs and/or supplies; or
- h. business actors of the small-scale; or
- i. activities of co-operatives aimed specifically at serving their members.

Article 51

Monopoly and/or concentration of activities related to the production and/or marketing of goods and/or services affecting the livelihood of society at large and branches of production of strategic nature to the state shall be stipulated in a law and shall be implemented by State-Owned Enterprises and/or institutions formed or appointed by the Government.

CHAPTER X **TRANSITIONAL PROVISIONS**

Article 52

- (1) As from the effectiveness of this law, all laws and regulations stipulating or related to monopolistic practices and/or business competition shall be declared as remaining in effect in so far as not contradictory or not superseded by new ones by virtue of this law.
- (2) Business actors having entered into agreement and/or conducting activities and/or undertaking actions not complying with the provisions of this law shall be given 6 (six) months from this law's coming into effect to make adjustments.

CHAPTER XI
CLOSING PROVISIONS

Article 53

This law shall become effective within 1 (one) year as from its promulgation.

Stipulated in Jakarta

On.....

THE PRESIDENT OF THEE REPUBLIC OF INDONESIA
BACHARUDDIN JUSUF HABIBIE

Promulgated in Jakarta

On.....

STATE MINISTER SECRETARY OF STATE
OF THE REPUBLIC OF INDONESIA
AKBAR TANDJUNG

STATE GAZETTE OF THE REPUBLIC OF INDONESIA
YEARNUMBER.....

**THE PEOPLE'S LEGISLATIVE ASSEMBLY
OF THE REPUBLIC OF INDONESIA**

ELUCIDATION ON THE LAW OF THE REPUBLIC OF INDONESIA
CONCERNING THE PROHIBITION OF MONOPOLISTIC
PRACTICES AND UNFAIR BUSINESS COMPETITION

GENERAL

Economic development in the First Long Term Development has resulted in much progress, among other things with the improvement of social welfare. The aforementioned progress achieved in development has been supported by development policies in various fields including policies in the field of economy as set forth in the General State Policy and Five Year Development Plan, as well as in various other economic policies.

Despite the substantial progress achieved in the First Long Term Development, reflected in high economic growth. Many challenges or issues still remain, parallel to globalization trends in the economy and the dynamics and development of private businesses since the early 1990s.

The business opportunities created during the last three decades have in fact not enabled all levels of society to participate in development in various economic sectors. The development of the private sector during the above mentioned period has on the one hand been marked by various forms of inadequate Government policies leading to market distortion. On the other hand, the development of the private sector has in fact been mainly the result of unfair business competition conditions.

The above described phenomenon has developed and has been supported by the relationship between decision makers and business actors, either directly or indirectly,

leading to the further deterioration of the situation. The implementation of national economy has not quite adhered to the mandate of Article 33 or the 1945 Constitution, and has shown a very monopolistic tendency.

Businessmen close to the elite of power has obtained extreme facilities resulting in the creation of social gap. The emergence of conglomerates and a group of strong businessmen not supported by the spirit of real entrepreneurship has been one of the factors which caused the economic capacity to become extremely vulnerable and un-competitive:

The above situation and condition has caused us to have to study and rearrange business activities in Indonesia, so that businesses can grow and develop in a fair and appropriate way, leading to the creation of a fair business competition climate, and in order to avoid the concentration of economic power around one certain person or group, among other things in the form of monopolistic practices and unfair business competition harmful to society, which are contradictory to the ideals of social justice.

Therefore, it is necessary to stipulate the Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition intended for the enforcement of provisions of law and providing equal protection for every business actor in an effort to create fair business competition.

This law provides guarantee of legal certainty for stimulating further a rapid economic development in an effort to improve social welfare, as well in implementation of the spirit and intentions of the 1945 Constitution.

For an effective implementation of this law and implementing regulations thereof in accordance with its principles and objectives, it is necessary to form a Business Competition Supervisory Committee, i.e. an independent institution free front the influence of the Government and other parties, having the authority to conduct supervision of business competition and, to impose sanctions. Such sanctions shall be in the form of administrative measures, whereas criminal sanctions shall be under the authority of the court of justice.

In general, the substance of the Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition consists of 6 (six) regulatory parts such as:

1. prohibited agreements:
2. prohibited actions:
3. dominant position:
4. Business Competition Supervisory Committee:
5. Law enforcement
6. Miscellaneous provisions

This law has been drawn up based on the principles of Pancasila (State Philosophy) and the 1945 Constitution, and it has been based on economic democracy with due observance of equilibrium between the interests of business actors and public interest with the aim of: safe guarding public interest and protecting consumers; develop a conducive business climate through the creation of fair business competition, and ensure certainty in equal business opportunity for every person; preventing monopolistic practices and/or unfair business competition created by business actors; and creating effectiveness and efficiency in business activities in the context of improving the efficiency of national economy as one of the efforts for improving social welfare.

ARTICLE BY ARTICLE

Article 1

Self-explanatory

Article 2

Self-explanatory

Article 3

Self-explanatory

Article 4

Self-explanatory

Article 5

Self-explanatory

Article 6

Self-explanatory

Article 7

Self-explanatory

Article 8

Self-explanatory

Article 9

Agreements may be vertical or horizontal in nature. These agreements are prohibited because business actors eliminate or reduce competition by dividing the market or market allocation. Marketing territory may mean the territory of the state of the Republic of Indonesia, for example regency, province, or other regional territory. Dividing marketing territory or market allocation means dividing territory in order to obtain or supply goods, services, or goods and services, determining parties from which goods, services, goods and services may be obtained or supplied.

Article 10

Self-explanatory.

Article 11

Self-explanatory.

Article 12

Self-explanatory.

Article 13

Self-explanatory.

Article 14

Referred to as controlling the production of a number of products being part of a production series which can be referred to as vertical integration shall be the control of a production process series of certain goods upstream to downstream or a process continuing for certain services by certain business actors. Even though vertical integration practices can result in low priced goods and services, these can cause unfair business competition which are harmful to economic cells in society. Such practices are prohibited in so far as they cause unfair business competition and or are harmful to society.

Article 15

Paragraph (1)

Supplying means making supplies available, either in the form of goods or services in the context of trading, lease, lease purchase and leasing activities.

Paragraph (2)

Self-explanatory.

Paragraph (3)

Letter a

Self-explanatory.

Letter b

Article 16

Self-explanatory.

Article 17

Paragraph (1)

Self-explanatory.

Paragraph (2)

Letter a

Self-explanatory.

Letter b

Referred to as other business actors are business actors possessing significant competitive capacity in the market concerned..

Letter c

Self-explanatory.

Article 19

Letter a

Rejecting or impeding certain business actors may not be done unreasonably or for non-economic reasons, for example due to difference in ethnic group, race, social status, and others.

Self –explanatory

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

Self-explanatory.

Article 20

Self-explanatory.

Article 21

Unfair practices in determining production and other costs shall be violation of the prevailing laws and regulations for obtaining production factors lower than the actual.

Article 22

Tenders shall be bids submitted to contract certain work, for the procurement of goods, or the provisions of services.

Article 23

Self-explanatory.

Article 24

Self-explanatory.

Article 25

Self-explanatory.

Article 26

Letter a

Self-explanatory.

Letter b

Companies shall be closely related if such companies support each other or are directly related in the production, marketing, or production and marketing process.

Letter c

Self-explanatory.

Article 27

Self-explanatory.

Article 28

Paragraph (1)

Business entities shall be companies or forms of business, either incorporated as legal entities (e.g. limited liability companies) or not incorporated as legal entities, engaging in a type of business of permanent and continuous nature, with the aim of generating profits.

Paragraph (2)

Self-explanatory.

Paragraph (3)

Self-explanatory.

Article 29

Self-explanatory.

Article 30

Self-explanatory.

Article 31

Paragraph (1)

The Chairperson and the Deputy Chairperson of the Committee shall be elected from among and by Members of the Committee.

Paragraph (2)

Self-explanatory.

Paragraph (3)

Self-explanatory.

Paragraph (4)

Extension of the term of membership in the Committee in order to avoid vacancy may not exceed 1 (one) year.

Article 32

Letter a

Self-explanatory.

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

Self-explanatory.

Letter e

Self-explanatory.

Letter f

Self-explanatory.

Letter g

Not having been imposed with a criminal penalty means not having been imposed with a criminal penalty due to a capital criminal act or due to violation of moral.

Letter h

Self-explanatory.

Letter I

Not affiliated with a business entity means that as from the time the person concerned becomes member of the Committee, such person has not acted as:

1. Member of the Board of Commissioners or supervisors, or of the board of directors of a company.

2. Member of management or inspection body of a co-operative;
3. Party providing services to a company, such as consultant, public accountant and appraiser.
4. Majority shareholder in a company.

Article 33

Letter a

Self-explanatory.

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

To be stated in the form of a statement by an authorised physician.

Letter e

Self-explanatory.

Letter f

Terminated, among other things, for the reason of no longer meeting requirements for committee membership as intended in Article 32.

Article 34

Paragraph (1)

Self-explanatory.

Paragraph (2)

Secretariat shall be the organisational unit supporting or assisting the Committee in the implementation of its duties.

Paragraph (3)

Working unit shall be a professional team appointed by the Committee to assist in the implementation of certain tasks at a certain time.

Paragraph (4)

Self-explanatory.

Article 35

Self-explanatory.

Article 36

Self-explanatory.

Letter a

Self-explanatory.

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

Self-explanatory.

Letter e

Self-explanatory.

Letter f

Self-explanatory.

Letter g

Investigator shall be investigator as intended in Law Number 8 Year 1981.

Letter h

Self-explanatory.

Letter I

Self-explanatory.

Letter j

Self-explanatory.

Letter k

Self-explanatory.

Letter l

Self-explanatory.

Article 37

In principle the State is responsible for the operational implementation of the Committee's duties by providing support in the form of funding through the State Revenues and Expenditures Budget. However, bearing in mind the broad and various scope and field of the Committee's duties, the Committee may obtain funds from other sources not contradictory to the prevailing laws and regulations, which are not binding in nature and shall not have an impact on the Committee's independence.

Article 38

Self-explanatory

Article 39

Self-explanatory

Article 40

Self-explanatory

Article 41

Paragraph (1)

Self-explanatory.

Paragraph (2)

Self-explanatory:

Paragraph.(3)

Submitted by the Committee to the investigators for investigation shall not only be criminal acts or actions as intended in paragraph (2) of this article, but also principal cases under investigation and caring by the Committee.

Article 42

Self-explanatory

Article 43

Paragraph (1)

Self-explanatory

Paragraph (2)

Self-explanatory

Paragraph (3)

The Committee's decision making as intended in paragraph (3) of this Article shall be conducted in a Council meeting consisting of at least 3 (three) Committee members.

Paragraph (4)

Referred to as notification shall be forwarding an excerpt from the Committee's decision to the business actor concerned.

Article 44

Paragraph (1)

30 (thirty) days as from the receipt of the excerpt from the Committee's decision by the business actor concerned or his local proxy.

Paragraph (2)

Self-explanatory

Paragraph (3)

Self-explanatory

Paragraph (4)

Self-explanatory.

Paragraph (5)

Self-explanatory

Article 45

Self-explanatory

Article 46

Self-explanatory.

Paragraph (I)

Self-explanatory

Paragraph (2)

Letter a

Self-explanatory

Letter b

Stopping vertical integration shall be, among other things by cancelling the agreement, transferring a party of the company to another business sector, or changing the form of production series.

Letter c

The termination of certain activities or actions shall be ordered, and not be the entire business activities of the business actor concerned.

Letter d

Self-explanatory

Letter e

Self-explanatory

Letter f

Indemnity shall be granted to the business actor concerned and to other parties having suffered a loss.

Letter g

Self-explanatory

Article 48

Self-explanatory

Article 49

Self-explanatory

Article 50

Letter a

Self-explanatory.

Letter b

Self-explanatory

Letter c

Self-explanatory

Letter d

Self-explanatory

Letter e

Self-explanatory.

JAPAN

COMMENTARY BY THE GOVERNMENT OF JAPAN ON JAPANESE COPMPETITION LEGISLATION

A. Reasons for the Introduction of Antimonopoly Legislation in Japan

In pre-Second World War Japan, economic power was concentrated in the huge “zaibatsu” (family controlled combines) and lawful cartel organizations and the power was used to strengthen State control over economic activities. According to some commentators, this economic system impeded the sound development of the economy and society of Japan.

After the War, in order to develop the economic basis needed to support a democratic society, the industrial democratization policy, composed of specific measures including the dissolution of the zaibatsu, deconcentration of economic power and disbanding of private control bodies, was implemented. It was intended to create an institutional structure in which private firms would have equal opportunities to exercise their capabilities and engage in free competition. The Antimonopoly Act, proposed as a permanent measure for industrial democratization that would maintain fair and free competition among private firms for the future Japanese economy, was enacted in 1947.

B. Objectives of the Legislation

The Antimonopoly Act is aimed at promoting free and fair competition, stimulating the creative initiative of firms, encouraging the business activities of firms, raising employment levels and people's real income, and thereby promoting the democratic and wholesome development of the national economy as well as ensuring consumers' benefits. This Act sets forth the basic rules concerning business activities in order to maintain economic order in a free economic community (Section 1; hereinafter parenthesized numerals refer to pertinent sections and/or subsections of the Antimonopoly Act).

The Antimonopoly Act, to attain the above objectives, (1) prohibits private monopolization, unreasonable restraints of trade and unfair trade practices; (2) prevents excessive concentration of economic power; and (3) eliminates unjust restrictions of business activities.

C. Practices Subject to Control by the Antimonopoly Act

1. Unreasonable Restraint of Trade

The Antimonopoly Act provides that no firm shall carry out any unreasonable restraints of trade.

Unreasonable restraints of trade refer to cartels among firms. Cartels usually mean agreements or mutual understandings to fix prices and limit the volume of production and

sales, among others.

“Unreasonable restraint of trade” shall be found when a firm,

1. by contract, agreement, or any other concerted activities,
2. mutually restricts or conducts its business activities with other firms,
3. in such a manner as to fix, maintain, or increase prices, or limit production, technology, products, facilities, or customers or suppliers,
4. thereby substantially restrains competition,
5. in any particular field of trade,
6. contrary to the public interest.

The Antimonopoly Act, in addition to prohibiting cartels as “unreasonable restraints of trade”, has special provisions to prohibit unreasonable restraints of trade formed by trade associations and cartels between domestic and foreign firms (international cartels).

2. Monopoly and Oligopoly

If a small number of firms control almost the entire market, competition cannot function effectively. Consequently, regarding such monopoly or oligopoly, the Antimonopoly Act:

1. Prohibits conduct that excludes or controls the business activities of other firms and causes a substantial restraint of competition (prohibition of private monopolization) (Section 3);
2. Prevents the emergence of a situation whereby the effect of a merger and acquisition may be substantially to restrain competition in any particular field of trade (Sections 15-16); and
3. Provides for measures to restore competition when undesirable market performances exist in certain oligopolistic markets (Section 8-4).

3. Mergers and Acquisitions

Chapter IV of the Antimonopoly Act stipulates various restrictions on mergers and acquisitions. Thus, it prohibits stockholding, interlocking directorates, mergers, divisions and acquisitions of business if the effect of such actions is to restrain competition substantially. Furthermore, the Antimonopoly Act prohibits establishment of a company which may cause excessive concentration of economic power and limits rate of holding rights by a bank or an insurance company.

Filing of advance notifications with the Japan Fair Trade Commission (hereinafter referred to as “JFTC”) is mandatory regarding mergers, division and business acquisitions if they meet notification thresholds, and in the case of stockholdings,

postfactum notification and reporting are required if they meet notification thresholds.

See following JFTC Rules and Guidelines on Merger and Acquisitions etc.:

1. Rules Concerning Application for Authorization and Approval, Report and Notification as provided for in Article 9 to Article 16 Inclusive of the Antimonopoly Act (JFTC Rule No.1 of September 1, 1952)
2. [Guidelines Concerning Companies which Constitute an Excessive Concentration of Economic Power](#) (November 12, 2002)
3. [Guidelines Concerning Authorization of Acquisition and Holding of Voting Rights by Banking and Insurance Companies under the Provisions of Section 11 of the Antimonopoly Act](#) (November 12, 2002)
4. [Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination](#) (May 31, 2004) etc.

4. Unfair Trade Practices

For the market mechanism to function and enhance the efficiency of the national economy, fair competition must take place by offering goods and services of high quality and at reasonable prices. In the light of this need, the Antimonopoly Act prohibits conduct which might impede fair competition as “unfair trade practices”. Sixteen categories of conduct are defined as possible “unfair trade practices”. The JFTC may designate as “unfair trade practices” some activities in the categories which tend to impede fair competition (Section 2 (9)).

Some activities are designated under “general designation”, which applies to all industries, while others are designated under “specific designation”, which applies to specified industries such as the marine transportation industry and large scale retailers. The “general designation” cites the following 16 types of conduct as unfair trade practices (“Unfair Trade Practices”, JFTC Notification No. 15, 18 June 1982).

1. Concerted Refusal to Deal

Without proper justification, performing an act specified in one of the following paragraphs concertedly with another firm which is in a competitive relationship with oneself (hereinafter referred to as a “competitor”):

- (i) Refusing to deal with a certain firm or restricting the quantity or substance of a commodity or service involved in the transaction with a certain firm; or
- (ii) Causing another firm to perform an act which comes under the preceding paragraph.

2. Other Refusal to Deal

Unjustly refusing to deal, or restricting the quantity or substance of a commodity or service involved in the transaction with a certain firm, or causing another firm to perform any act which comes under one of these categories.

3. Discriminatory Pricing

Unjustly supplying or accepting a commodity or service at prices which discriminate between regions or between the other parties.

4. Discriminatory Treatment in Transaction Terms, etc.

Unjustly affording favourable or unfavourable treatment to a certain firm in regard to the terms or execution of a transaction.

5. Discriminatory Treatment in a Trade Association, etc.

Unjustly excluding a specific firm from a trade association or from a concerted activity, or unjustly discriminating against a specific firm in a trade association or a concerted activity, thereby causing difficulties in the business activities of the said firm.

6. Unjust Low Price Sales

Without proper justification, supplying a commodity or service continuously at a price which is excessively below the cost incurred in the said supply, or otherwise unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties for the business activities of other firms.

7. Unjust High Price Purchasing

Unjustly purchasing a commodity or service at a high price, thereby tending to cause difficulties for the business activities of other firms.

8. Deceptive Customer Inducement

Unjustly inducing customers of a competitor to deal with oneself by causing them to misunderstand that the substance of a commodity or service supplied by oneself, or terms of the transaction, or other matters relating to such transaction are much better or more favourable than the actual one or than those relating to the competitor.

9. Customer Inducement by Unjust Benefits

Inducing customers of a competitor to deal with oneself by offering unjust benefits in the light of normal business practices.

10. Tie-in Sales, etc.

Unjustly causing the other party to purchase a commodity or service from oneself or from a firm designated by tying it to the supply of another commodity or service, or

otherwise coercing the said party to deal with oneself or with a firm designated by oneself.

11. Dealing on Exclusive Terms

Unjustly dealing with the other party on condition that the said party shall not deal with a competitor, thereby tending to reduce transaction opportunities for the said competitor.

12. Resale Price Maintenance (Restriction)

Supplying a commodity to the other party which purchases the said commodity from oneself while imposing, without proper justification, one of the restrictive terms specified below:

- (i) Causing the said party to maintain the sales price of the commodity that one has determined, or otherwise restricting the said party's free decision on sales prices of the commodity; or
- (ii) Having the said party cause a firm which purchases the commodity from the said party to maintain the sales price of the commodity that one has determined, or otherwise causing the said party to restrict the said firm's free decision on the sales price of the commodity.

13. Dealing on Restrictive Terms

Other than any act coming under the preceding two paragraphs, dealing with the other party on conditions which unjustly restrict any transaction between the said party and the other transacting party or other business activities of the said party.

14. Abuse of Dominant Bargaining Position

Performing any act specified in one of the following paragraphs unjustly in the light of the normal business practices, by making use of one's dominant bargaining position in relation to the other party:

- (i) Causing the said party in continuous transaction to purchase a commodity or service other than the one involved in the said transaction;
- (ii) Causing the said party in continuous transaction to provide for oneself money, service or other economic benefits;
- (iii) Setting or changing transaction terms in a way disadvantageous to the said party;
- (iv) In addition to any act coming under the preceding three paragraphs, imposing a disadvantage on the said party regarding the terms or execution of a transaction; or

- (v) Causing a company which is one's other transacting party to follow one's direction in advance, or to secure one's approval, regarding the appointment of officers of the said company (meaning those as defined by Subsection 3 of Section 2 of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade [the Antimonopoly Act]).

15. Interference with a Competitor's Transaction

Unjustly interfering with a transaction between another firm which is in a competitive relationship in Japan with oneself or with the company of which one is a stockholder or an officer and its other party to such transaction, by preventing the formation of a contract, or by inducing the breach of a contract, or by any other means whatsoever.

16. Interference with the Internal Operation of a Competing Company

Unjustly inducing, abetting, or coercing a stockholder or an officer of a company which is in a competitive relationship in Japan with oneself or with a company of which one is a stockholder or an officer, to perform an act disadvantageous to such company by the exercise of voting rights, transfer of stock, divulging of secrets, or any other means whatsoever.

These conducts can be classified into three broad categories:

1. Conduct which may restrain free competition: refusal to deal, discriminatory pricing, discriminatory treatment in transaction terms, resale price maintenance, etc.
2. Competition which in itself cannot be considered fair: inducement of customers by deceptive methods or offers of excessive premiums, tying arrangements, etc.
3. Conduct of large firms forcing unreasonable demands on clients by taking advantage of dominant bargaining positions: abuse of dominant bargaining position, etc.

Some of these practices are illegal in principle, such as resale price maintenance, whereas in the case of others it is determined on a case-by-case basis whether they are impeding fair competition.

The “specific designation” activities are limited by their terms to particular industries and employed by the JFTC where very specific rules are warranted resulting from particular situations or other special factors in an industry.

5. Activities of Trade Associations

“Substantially restraining competition in any particular field of trade” by any trade association, which is a combination or federation of combinations of two or more firms, is prohibited (Section 8).

In addition, trade associations are prohibited from limiting the number of firms in any particular field of business, unjustly restricting the functions or activities of member firms, or having firms perform acts that constitute unfair trade practices (Section 8).

See the Antimonopoly Act Guidelines Concerning the Activities of Trade Associations. (JFTC, 30 October 1995)

6. Restrictive International Contracts, etc.

The Antimonopoly Act regulates anticompetitive conducts under agreements or contracts between Japanese and foreign firms (Section 6). First, it prohibits international agreements or contracts which involve unreasonable restraint of trade (i.e. participation in any international cartel). Also, it prohibits firms from entering into any international agreement or contract which contains matters that constitute unfair trade practices.

D. Exemptions

The Antimonopoly Act applies to all industries. However, the following fields and acts are exempted from application of the Act:

1. Acts under intellectual property rights (Section 21: “Such acts recognizable as the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act or the Trademark Act.”)
2. Certain acts of cooperatives (including a federation of cooperatives) such as the agricultural cooperative and the consumer cooperative (Section 22)
3. The JFTC may designate commodities by a notification as to which resale price maintenance can be permitted (Section 23(1)). Resale price maintenance for copyrighted works is also permitted in the Antimonopoly Act (Section 23(4)). In order for the JFTC to designate, commodities should be for daily use by consumers in general and of uniform quality that can be easily identifiable. Free competition should exist with regard to commodities (Section 23(2)).

E. Description of the enforcement machinery

1. Organization

The JFTC has exclusive authority to enforce the Antimonopoly Act. The JFTC is established as an administrative organ to implement the Antimonopoly Act and competition policy. The JFTC, which is an external organ of the Cabinet Office; however, it exercises its authority independently without being directed or supervised by anyone else. The JFTC is required to inform the Diet of its activities every year in an annual report.

The JFTC consists of a Chairman and four Commissioners. The Chairman and the Commissioners are appointed by the Prime Minister, for five-year terms, with the consent of both Houses of the Diet. The status of the Chairman and the Commissioners while in office is firmly guaranteed. The General Secretariat (staff office) executes the Commission's day-to-day operation.

2. Authority

As a administrative agency, the JFTC has the power to conduct investigations with respect to any suspected Antimonopoly Act violations, to render a cease and desist order or to issue a complaint to initiate a hearing procedure, and to file a criminal accusation with prosecutors. It has a duty to receive various reports filed by anyone.

The JFTC also has the character of a quasilegislative and quasijudicial organ.

As a quasilegislative power, the JFTC can establish the procedures for handling cases and for hearing procedures. It can determine the form of reports to be filed with it and any necessary attachments thereto. It also has a rulemaking power to designate unfair trade practices and designate commodities for which resale price maintenance is permissible.

As a quasijudicial power, the JFTC will issue a decision after hearing procedures. If an illegal cartel pertaining to price has been formed, the JFTC will impose surcharges to collect the unlawful gains from the firms involved, in addition to issuing an order to cease and desist. An appeal against the JFTC's decision goes directly and exclusively to the Tokyo High Court.

By the amended Antimonopoly Act which was put into practice in January 2006, the JFTC strengthened on administrative measures against cartels. The basic surcharge rate was increased to 10% of relevant turnover. Also, in order to give an incentive to withdraw from cartels, the JFTC introduced a leniency system and shall apply 30-100% reduction in surcharge payments to applicants for leniency.

The JFTC also has the power to accuse individuals and corporations that are involved in major offences against the Antimonopoly Act and to file the cases with the Public Prosecutor's Office for indictment. A criminal procedure against any major offence under the Antimonopoly Act (offence under any part of sections 89-91) can be initiated only after an accusation is filed by the JFTC with the Public Prosecutor General (section 96).

F. Description of Supplementary Legislations

1. Act Against Delay in Payment of Subcontract Proceeds, etc., to Subcontractors

This Act, abbreviated to the Subcontract Act, was enacted in 1956 as a special law to supplement the Antimonopoly Act. It aims at ensuring fair transactions between parent firms and subcontractors and protecting the interests of subcontractors, who are in weak positions economically, by promptly and effectively regulating the conduct of parent firms that abuse their dominant bargaining positions in subcontracting transactions.

The Subcontract Act regulates unfair trade practices in subcontracting transactions, such as refusing receipt of goods, payment arrears of subcontract proceeds, reducing the amount of subcontract proceeds, returning goods, beating down prices, coercing subcontractor into purchasing/using any goods or services, retaliation against subcontractor, settlement of earlier payment for raw materials, etc. supplied on a cost-charging basis to a subcontractor by a parental entrepreneur, issuance of bills difficult to be discounted, calling on subcontractor to provide unjustly economic benefits, and

unjustly changing contents of delivered goods, or unjustly calling on a subcontractor to remake or redo goods/services.

2. Act Against Unjustifiable Premiums and Misleading Representations

The Premiums and Representations Act (the Act Against Unjustifiable Premiums and Misleading Representations), a special law that supplements the Antimonopoly Act, was enacted in 1962 to protect the interests of general consumers by ensuring fair competition. It regulates offers of excessive premiums and misleading advertising promptly and effectively, among unjustifiable conduct to induce customers, as prohibited under the Antimonopoly Act as unfair trade practices.

This Act, besides prohibiting offers of excessive premiums which are harmful, forbids advertising which could mislead general consumers into believing that the contents of goods or services, or the conditions of transaction, are significantly good or advantageous to them (misleading advertising). If any such violation is detected, the JFTC will issue a cease and desist order.

From 1972 onwards, part of the authority to take measures against violations of the Act was entrusted to prefectural governors, and the Act is now partly enforced by prefectural governments. They may give the necessary instruction against violations of the Premiums and Representations Act.

Furthermore, to prevent violations such as sales with offers of excessive premiums or by misleading advertising, firms or trade associations can promulgate Fair Competition Codes, which become their autonomous rules, subject to approval by the JFTC.

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**ACT CONCERNING PROHIBITION OF PRIVATE MONOPOLY AND
MAINTENANCE OF FAIR TRADE (ANTIMONOPOLY ACT)**

TABLE OF CONTENTS

CHAPTER I GENERAL PROVISIONS (Articles 1 and 2)

**CHAPTER II PRIVATE MONOPOLIZATION AND UNREASONABLE
RESTRAINT OF TRADE(Articles 3 to 7-2 inclusive)**

CHAPTER III TRADE ASSOCIATIONS (Articles 8 to 8-3 inclusive)

CHAPTER III-II MONOPOLISTIC SITUATIONS (Articles 8-4)

**CHAPTER IV STOCKHOLDINGS, INTERLOCKING DIRECTORS, MERGERS,
DEMERGERS, AND ACQUISITIONS OF BUSINESS(Articles 9 to 18 inclusive)**

CHAPTER V UNFAIR TRADE PRACTICES (Articles 19 and 20)

CHAPTER VI EXEMPTIONS (Articles 21 to 23 inclusive)

CHAPTER VII INJUNCTIONS AND DAMAGES (Articles 24 to 26 inclusive)

CHAPTER VIII FAIR TRADE COMMISSION

**Section I Establishment, Duty, Affairs under the Jurisdiction and
Organization, etc.(Articles 27 to 44 inclusive)**

Section II Procedures (Articles 45 to 70-22 inclusive)

Section III Miscellaneous Provisions (Articles 71 to 76 inclusive)

CHAPTER IX LAWSUITS (Articles 77 to 88 inclusive)

CHAPTER X MISCELLANEOUS PROVISIONS (Article 88-2)

CHAPTER XI PENAL PROVISIONS (Articles 89 to 100 inclusive)

**CHAPTER XII COMPULSORY INVESTIGATION OF CRIMINAL CASES, ETC
(Articles 101 to 118 inclusive)**

SUPPLEMENTARY PROVISIONS

CHAPTER I GENERAL PROVISIONS

Article 1

The purpose of this Act is, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, etc., and all other unjust restriction on business activities through combinations, agreements, etc., to promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.

Article 2

- (1) The term "entrepreneur" as used in this Act means a person, who operates a commercial, industrial, financial or any other business. Any officer, employee, agent, or any other person who acts for the benefit of any entrepreneur shall be deemed to be an entrepreneur with regard to the application of the provisions of the following paragraph and of Chapter III.
- (2) The term "trade association" as used in this Act means any combination or federation of combinations of two or more entrepreneurs having as its principal purpose the furtherance of their common interest as entrepreneurs and shall include the following; provided, however, that a combination or federation of combinations of two or more entrepreneurs, which has capital, or contribution made by the constituent entrepreneurs, and whose principal purpose is to operate and which is actually operating a commercial, industrial, financial or any other business for profit shall not be included:
 - (i) Any incorporated association or other association of which two or more entrepreneurs are members (including equivalent thereof);
 - (ii) Any incorporated foundation or other foundation of which two or more entrepreneurs control the appointment and dismissal of directors or managers, the management of affairs or continuation of its existence;
 - (iii) Any partnership of which two or more entrepreneurs are partners, or any contractual combination of two or more entrepreneurs.
- (3) The term "director" as used in this Act means a director, an executive officer, a management member with unlimited liability, an inspector, an auditor, or an equivalent thereof, a manager, or a business manager of the main or branch office.
- (4) The term "competition" as used in this Act means a state in which two or more entrepreneurs, within the normal scope of their business activities and without making any material change to the facilities for, or kinds of, such business activities, engage in, or are able to engage in, any act listed in the following items.

- (i) Supplying the same or similar goods or services to the same user;
 - (i) Receiving supplies of the same or similar goods or services from the same supplier.
- (5) The term "private monopolization" as used in this Act means such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.
- (6) The term "unreasonable restraint of trade" as used in this Act means such business activities, by which any entrepreneur, by contract, agreement or any other means irrespective of its name, in concert with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.
- (7) The term "monopolistic situation" as used in this Act means circumstances in which each of the following market structures and negative effect in the market exist in any particular field of business where the aggregate total value (this term refers to the prices of the relevant goods less an amount equivalent to the amount of taxes levied directly on such goods) of goods of the same description (including goods capable of being supplied without making any material change to the facilities for, or kinds of, such business activities; hereinafter referred to as "particular goods" in this paragraph) and those of any other goods having an extremely similar function and utility thereto, which are supplied in Japan (excluding those exported), or the total value (this term refers to the prices of the relevant services less an amount equivalent to the amount of taxes levied on the recipient of such services with respect thereto) of services of the same description which are supplied in Japan, during the latest one-year period designated by a Cabinet Order, exceeds hundred billion yen:
 - (i) Where the share of a field of business (this term refers to the ratio of the volume (in cases where calculation in terms of volume is not appropriate, volume shall be replaced with value; hereinafter the same shall apply in this item) of the said particular goods and any other goods having an extremely similar function and utility thereto, which are supplied in Japan (excluding those exported), or by the volume of the services, which are supplied in Japan, which are supplied by the relevant entrepreneur, to the aggregate total volume of the said particular goods and any other goods having an extremely similar function and utility thereto or services; hereinafter the same shall apply in this item) of an entrepreneur exceeds one-half or where the combined share of a field of business of two entrepreneurs exceeds three-fourths during the said one-year period;
 - (ii) Where there exist conditions which make it extremely difficult for any other entrepreneur to be newly engaged in the said particular field of business;
 - (iii) Where the increase in the price of the said particular goods or services supplied by the relevant entrepreneur has been remarkable or the decrease therein has been slight for a considerable period of time in light of the

changes in the supply and demand, or changes in the cost of supply, for such particular goods or services, and where, in addition thereto, the said entrepreneur falls under any of the following items during the said period:

- (a) That the said entrepreneur has made a profit at the rate far exceeding profit rate which is specified by a Cabinet Order as the standard for the type of business specified by a Cabinet Order to which the said entrepreneur belongs; or
 - (b) That the said entrepreneur has expended selling and general administrative expenses which are considered to be far exceeding the standard selling and general administrative expenses for the field of business to which the said entrepreneur belongs.
- (8) In the event any change has occurred in the economic conditions resulting in an extreme change in domestic shipments from producers and wholesale prices, the amount in the preceding paragraph may be revised, after reflecting such conditions, by virtue of a Cabinet Order.
- (9) The term "unfair trade practices" as used in this Act means any act falling under any of following items, which tends to impede fair competition and which is designated by the Fair Trade Commission:
- (i) Unjustly treat other entrepreneurs in a discriminatory manner;
 - (ii) Dealing with unjust consideration;
 - (iii) Unjustly inducing or coercing customers of a competitor to deal with oneself;
 - (iv) Dealing with another party on such conditions as will unjustly restrict the business activities of the said party;
 - (v) Dealing with another party by unjust use of one's bargaining position;
 - (vi) Unjustly interfering with a transaction between an entrepreneur in competition with it in Japan with oneself or a corporation of which oneself is a stockholder or an officer and another transaction counterparty; or, in case such entrepreneur is a corporation, unjustly inducing, instigating, or coercing a stockholder or an director of such corporation to act against the interests of such corporation.
- (10) The term "subsidiaries" as used in this Act means other corporations in Japan of which majority of voting rights (excluding voting rights pertaining to the stocks whose voting rights cannot be exercised as to all the matters regarding which a resolution can be passed at the stockholders' meeting, but including voting rights pertaining to the stocks which are deemed to have the voting rights pursuant to the provisions of paragraph 3 of Article 879 of the Corporation Act (Act No. 86 of 2005); hereinafter the same shall apply in Chapter IV) of all stockholders (including all members; the same shall apply hereinafter) is held by another corporation.

CHAPTER II PRIVATE MONOPOLIZATION AND UNREASONABLE RESTRAINT OF TRADE

Article 3

No entrepreneur shall effect private monopolization or unreasonable restraint of trade.

Article 4

Deleted.

Article 5

Deleted.

Article 6

No entrepreneur shall enter into an international agreement or an international contract which contains such matters as fall under unreasonable restraint of trade or unfair trade practices.

Article 7

- (1) In case there exists any act in violation of the provisions of Article 3 or the preceding Article, the Fair Trade Commission may, pursuant to the procedures as provided for in Section II of Chapter VIII, order the relevant entrepreneur to cease and desist from the said acts, to transfer a part of his business, or to take any other measures necessary to eliminate such acts in violation of the said provisions.
- (2) The Fair Trade Commission may, when it finds it particularly necessary, even when an act in violation of the provisions of Article 3 or the preceding Article has already ceased to exist, pursuant to the procedures as provided for in Section II of Chapter VIII, order the relevant entrepreneur, to take measures to make public that the said act has been discontinued and any other measures necessary to ensure elimination of the said act; provided, however, that this shall not apply to cases where three years have passed since the date of discontinuation of the said act.

Article 7-2

- (1) In case any entrepreneur effects an unreasonable restraint of trade or enters into an international agreement or an international contract containing such matters as fall under unreasonable restraint of trade, and such act falls under any of the following items, the Fair Trade Commission shall order the said entrepreneur, pursuant to the procedures as provided for in Section II of Chapter VIII, to pay to the national treasury a surcharge of an amount equivalent to an amount calculated by multiplying the sales amount of the relevant goods or services calculated pursuant to the method provided for by a Cabinet Order (in the case that the said act is

pertaining to the receipt of supply of goods or services, the purchase amount of the relevant goods or services calculated pursuant to the method provided for by a Cabinet Order), for the period from the date on which the entrepreneur effected the business activities constituting the said act to the date on which the business activities constituting the said act were discontinued (in case such period exceeds three years, the period shall be the three years preceding the date on which the business activities constituting the said act were discontinued; hereinafter referred to as "period of implementation") by ten percent (three percent in case of retail business, or two percent in case of wholesale business); provided, however, that in case the amount thus calculated is less than one million yen, the Commission shall not order the payment of such a surcharge.

- (i) Pertaining to consideration of goods or services;
 - (ii) Substantially restraining any of the following with respect to goods or services and thereby affecting the consideration:
 - (a) Supply or purchase volume;
 - (b) Market share;
 - (c) Transaction counterparties.
- (2) The provisions of the preceding paragraph shall apply mutatis mutandis to cases in which an entrepreneur effects private monopolization (limited to that arising from the control of the business activities of other entrepreneurs) that falls under any of the following items with respect to goods or services supplied by the said other entrepreneurs (hereinafter referred to as "controlled entrepreneurs" in this paragraph). In this case, the term "the sales amount of the relevant goods or services calculated pursuant to the method provided for by a Cabinet Order (in the case that the said act is pertaining to the receipt of supply of goods or services, the purchase amount of the relevant goods or services calculated pursuant to the method provided for by a Cabinet Order)" in the preceding paragraph shall be deemed to be replaced with "the sales amount of the relevant goods or services supplied by the said entrepreneur to the controlled entrepreneurs (including goods or services necessary for supply by the said controlled entrepreneurs of the said goods or services in any particular field of trade pertaining to the said act) and of the said goods or services supplied by the said entrepreneur in the said particular field of trade (excluding those supplied to the said controlled entrepreneurs) calculated pursuant to the method provided for by a Cabinet Order", and the term (three percent in case of retail business, or two percent in case of wholesale business)" shall be deemed to be replaced with "(three percent in the case that the said entrepreneur engages in retail business or two percent in the case that the said entrepreneur engages in wholesale business)".
- (i) Pertaining to the consideration;
 - (ii) Substantially restraining any of the following and thereby affecting the consideration:
 - (a) Supply volume;
 - (b) Market share;
 - (c) Transaction counterparties.
- (3) The term "market share" provided for in the preceding two paragraphs means the ratio of the volume of goods or services that one or two or more entrepreneurs supply or receive supply of, to the aggregate total volume of the said goods or

services supplied in any particular field of trade within a particular period, or the ratio of the value of goods or services that one or two or more entrepreneurs supply or receive supply of, to the aggregate total value of the said goods or services supplied in any particular field of trade within a particular period.

- (4) In the case referred to in paragraph 1, the term "ten percent" appearing in that paragraph shall be "four percent," the term "three percent" shall be "one point two percent," and the term "two percent" shall be "one percent" if the said entrepreneur falls under any of the following items:
- (i) Any corporation whose amount of capital or total amount of contribution is not more than three hundred million yen and any corporation or individual whose number of regular employees is not more than three hundred, which operates as its principal business belonging to manufacturing business, construction business, transportation business, or any other business (excluding the lines of businesses listed in items 2 to 4 inclusive and the lines of businesses provided for by a Cabinet Order pursuant to item 5);
 - (ii) Any corporation whose amount of capital or total amount of contribution is not more than one hundred million yen and any corporation or individual whose number of regular employees is not more than one hundred, which operates as its principal business belonging to wholesale business (excluding the lines of businesses provided for by a Cabinet Order pursuant to item 5) ;
 - (iii) Any corporation whose amount of capital or total amount of contribution is not more than fifty million yen and any corporation or individual whose number of regular employees is not more than one hundred, which operates as its principal business business belonging to service business (excluding the lines of businesses provided for by a Cabinet Order pursuant to item 5);
 - (iii) Any corporation whose amount of capital or total amount of contribution is not more than fifty million yen and any corporation or individual whose number of regular employees is not more than fifty, which operates as its principal business business belonging to retail business (excluding the lines of businesses provided for by a Cabinet Order pursuant to the following item);
 - (iv) Any corporation whose amount of capital or total amount of contribution is not more than the amount provided for by a Cabinet Order for a certain line of business and any corporation or individual whose number of regular employees is not more than the number provided for by a Cabinet Order for that line of business, which operates as its principal business business belonging to any of the lines of business provided for by such Cabinet Order;
 - (v) Of cooperative partnerships and other partnerships established pursuant to special acts with the principal purpose of cooperation in business (including federation of partnerships), any partnership which has a scale comparable to the
 - (vi) scale provided for in each of the preceding items for the individual line of business in the preceding items as provided for by a Cabinet Order.
- (5) In the case that an entrepreneur is ordered to pay a surcharge pursuant to the provisions of paragraph 1, the term "ten percent" appearing in paragraph 1 shall be "eight percent," the term "three percent" shall be "two point four percent", the term "two percent" shall be "one point six percent", the term "four percent" in the preceding paragraph shall be "three point two percent", the term "one point two

percent" shall be "one percent", and the term "one percent" shall be "zero point eight percent" if the said entrepreneur had discontinued the relevant violation (limited to cases where the period of implementation pertaining to the violation is less than two years, except for cases that fall under the next paragraph) by the day one month prior to the date when the measure listed in item 4 of paragraph 1 of Article 47 or the measure as provided for in paragraph 1 of Article 102 was first made in relation to the case pertaining to the said violation (hereinafter referred to as "investigation start date" in this Article) (f the said measure is not made, the day one month prior to the date when the said entrepreneur received the notice pertaining to the said violation pursuant to the provisions of paragraph 5 of Article 49, as applied mutatis mutandis pursuant to paragraph 6 of Article 50 after deemed replacement (hereinafter referred to as "advance notice" in next paragraph and paragraph 7).

- (6) In the case that an entrepreneur is ordered to pay a surcharge pursuant to the provisions of paragraph 1 (including the cases where it is applied mutatis mutandis pursuant to paragraph 2 after deemed replacement; hereinafter the same shall apply in this paragraph), the term "ten percent" appearing in paragraph 1 shall be "fifteen percent", the term "three percent" shall be "four point five percent", the term "two percent" shall be "three percent", the term "four percent" appearing in paragraph 4 shall be "six percent", the term "one point two percent" shall be "one point eight percent", and the term "one percent" shall be "one point five percent" if the said entrepreneur is a person falling under any of the following items:
 - (i) A person having received an order pursuant to the provisions of paragraph 1 (limited to cases where the said order has become final and binding; the same shall apply in the following item), or a person having received a notice pursuant to the provisions of paragraph 13 or 16, or a decision pursuant to the provisions of paragraph 2 of Article 51 within ten years counting retroactively from the investigation start date;
 - (ii) A person having received an order pursuant to the provisions of paragraph 1, or a person having received a notice pursuant to the provisions of paragraph 13 or 16, or a decision pursuant to the provisions of paragraph 2 of Article 51 within ten years counting retroactively from the date when the entrepreneur received the advance notice pertaining to the said violation in the case that neither the measure listed in item 4 of paragraph 1 of Article 47 nor the measure provided for in paragraph 1 of Article 102 was made.
- (7) Notwithstanding the provisions of paragraph 1, the Fair Trade Commission shall not order the entrepreneur to pay a surcharge if the relevant entrepreneur that is to pay a surcharge pursuant to the provisions of paragraph 1 falls under both of the following items:
 - (i) The entrepreneur is the first among the entrepreneurs that committed the relevant violation to individually submit reports and materials regarding the facts pertaining to the said violation to the Fair Trade Commission pursuant to the provisions of the Rules of the Fair Trade Commission (excluding cases where the said reports and materials are submitted on or after the investigation start date (the date when the entrepreneur received an advance notice pertaining to the said violation in the case that neither the measure listed in item 4 of paragraph 1 of Article 47 nor the measure provided for in paragraph 1 of Article 102 was made; the same shall apply in the following item and the following paragraph) in relation to the case pertaining to the said violation);

- (ii) The entrepreneur has not committed the relevant violation since the investigation start date in relation to the case pertaining to the said violation.
- (8) In the case of paragraph 1, the Fair Trade Commission shall reduce the relevant surcharge by the amount calculated by multiplying by fifty percent the surcharge calculated pursuant to the provisions of paragraph 1 or 4 to 6 inclusive in the case that the entrepreneur falls under items 1 and 3 of this paragraph, or by the amount calculated by multiplying by thirty percent the surcharge calculated pursuant to the provisions of paragraph 1 or 4 to 6 inclusive in the case that the entrepreneur falls under items 2 and 3 of this paragraph, respectively:
 - (i) The entrepreneur is the second among the entrepreneurs that committed the relevant violation to individually submit reports and materials regarding the facts pertaining to the said violation to the Fair Trade Commission pursuant to the provisions of the Rules of the Fair Trade Commission (excluding cases where the said reports and materials are submitted on or after the investigation start date in relation to the case pertaining to the said violation);
 - (ii) The entrepreneur is the third among the entrepreneurs that committed the violation to individually submit reports and materials regarding the facts pertaining to the said violation to the Fair Trade Commission pursuant to the provisions of the Rules of the Fair Trade Commission (excluding cases where the said reports and materials are submitted on or after the investigation start date in relation to the case pertaining to the said violation);
 - (iii) The entrepreneur has not committed the relevant violation since the investigation start date in relation to the said violation.
- (9) In the case of paragraph 1, the Fair Trade Commission shall reduce the relevant surcharge by the amount calculated by multiplying by thirty percent the surcharge calculated pursuant to the provisions of paragraph 1 or 4 to 6 inclusive in the case that the entrepreneur that committed the relevant violation falls under both of the following items if the number of entrepreneurs who submitted reports and materials regarding the relevant violation pursuant to the provisions of item 1 of paragraph 7 or item 1 or 2 of the preceding paragraph is fewer than three (limited to the cases where the sum of the number of entrepreneurs who submitted reports and materials pursuant to the provisions of item 1 of paragraph 7 or item 1 or 2 of the preceding paragraph and the number of entrepreneurs who submitted reports and materials pursuant to the provisions of item 1 below is three or fewer):
 - (i) The entrepreneur individually submitted reports and materials regarding the facts pertaining to the said violation (excluding reports and materials related to the facts already ascertained by the Fair Trade Commission through measures listed in the items of paragraph 1 of Article 47 or provided for in paragraph 1 of Article 102 or other means) to the Fair Trade Commission pursuant to the provisions of the Rules of the Fair Trade Commission, by the deadline set in the Rules of the Fair Trade Commission on or after the investigation start date in relation to the case pertaining to the said violation;
 - (ii) The entrepreneur has not committed the relevant violation since the date of submission of the reports and materials pursuant to the preceding item.
- (10) When the Fair Trade Commission receives the submission of reports and materials pursuant to the provisions of item 1 of paragraph 7, item 1 or 2 of paragraph 8, or item 1 of paragraph 9, the Fair Trade Commission shall promptly

- notify in writing the entrepreneur that submitted the said reports and materials of that fact.
- (11) Prior to issuing an order pursuant to the provisions of paragraph 1 or a notice pursuant to the provisions of paragraph 13 to an entrepreneur who falls under any of the provisions of paragraph 7 to 9 inclusive, the Fair Trade Commission may additionally request the said entrepreneur to submit reports or materials regarding the facts in relation to the relevant violation.
 - (12) If the Fair Trade Commission finds that a fact that falls under any of the following items exists before issuing an order pursuant to the provisions of paragraph 1 or a notice pursuant to the provisions of next paragraph to entrepreneurs that submitted reports and materials pursuant to the provisions of item 1 of paragraph 7, item 1 or 2 of paragraph 8, or item 1 of paragraph 9, these provisions shall not apply, notwithstanding the provisions of paragraphs 7 to 9 inclusive:
 - (i) The report or materials submitted by the relevant entrepreneur contained false information;
 - (ii) In the case of the preceding paragraph, the said entrepreneur fails to submit the requested reports or materials or submits false reports or materials;
 - (iii) In the case pertaining to the violation committed by the relevant entrepreneur, the said entrepreneur coerced another entrepreneur to commit the violation provided for in paragraph 1 or blocked another entrepreneur from discontinuing the said violation.
 - (13) If the Fair Trade Commission has decided not to order the payment of a surcharge pursuant to the provisions of paragraph 7, the Commission shall notify in writing the relevant entrepreneur of that decision at the time of issuing an surcharge payment order to entrepreneurs other than the said entrepreneur regarding the case pertaining to the violation committed by the entrepreneur that falls under the provisions of paragraph 7 (by the deadline provided for in the Rules of the Fair Trade Commission in the case that the Fair Trade Commission does not issue an order pursuant to the provisions of paragraph 1; the same shall apply in paragraph 16).
 - (14) In the case of paragraph 1 (including the cases where it is applied mutatis mutandis pursuant to paragraph 2 after deemed replacement; hereinafter the same shall apply in this paragraph and in paragraphs 17 and 18), if there is a final and binding decision regarding the same case sentencing the relevant entrepreneur to a fine, the Fair Trade Commission shall, instead of the amount calculated pursuant to the provisions of paragraphs 1, 4 to 6 inclusive, 8, or 9, deduct from the said amount the amount equivalent to one-half of the amount of the said fine; provided, however, that this shall not apply if the surcharge amount calculated pursuant to the provisions of paragraphs 1, 4 to 6 inclusive, 8, or 9 does not exceed the amount equivalent to one-half of the amount of the said fine, or if the surcharge amount after the said deduction is less than one million yen.
 - (15) In the case of the proviso in the preceding paragraph, the Fair Trade Commission shall not order payment of the surcharge.
 - (16) In the case that the Fair Trade Commission does not order payment of a surcharge pursuant to the provisions of the preceding paragraph, the Commission shall notify

in writing the fined entrepreneur of that fact at the time of issuing an order pursuant to the provisions of paragraph 1 (including the cases where it is applied mutatis mutandis pursuant to paragraph 2 after deemed replacement) to entrepreneurs other than the said entrepreneur regarding the case pertaining to the violation provided for in paragraph 1 or 2 committed by the said entrepreneur.

- (17) Any entrepreneur who has received an order pursuant to the provisions of paragraph 1 shall pay the surcharge calculated pursuant to the provisions of paragraphs 1, 4 to 6 inclusive, 8, 9, and 14.
- (18) In case the amount of surcharge calculated pursuant to the provisions of paragraphs 1, 4 to 6 inclusive, 8, 9, and 14 contains a fraction less than ten thousand yen, such fraction shall be disregarded.
- (19) In the case that the entrepreneur who has committed a violation provided for in paragraph 1 or 2 is a company and if the said company has ceased to exist by virtue of a merger with another company, a violation committed by the said company and an order pursuant to the provisions of paragraph 1 (including the cases where it is applied mutatis mutandis pursuant to paragraph 2 after deemed replacement), a notice pursuant to the provisions of paragraphs 13 and paragraph 16, and a decision pursuant to the provisions of paragraph 2 of Article 51, received by the said company (hereinafter referred to as "order, etc." in this paragraph) shall be deemed as a violation committed by the company surviving, or established as a result of, the merger, and an order, etc. received by the company surviving, or established as a result, of the merger, respectively, for the purpose of application of the provisions of the preceding paragraphs.
- (20) In the case of the preceding paragraph, matters necessary for the application of the provisions of paragraphs 7 to 9 inclusive shall be provided for by a Cabinet Order.
- (21) After three years have passed since the date on which a violation ended, the Fair Trade Commission may not order a payment of a surcharge pertaining to the said violation.

CHAPTER III TRADE ASSOCIATIONS

Article 8

- (1) No trade association shall engage in any act which falls under any of the following items:
 - (i) Substantially restraining competition in any particular field of trade;
 - (ii) Entering into an international agreement or an international contract as provided for in Article 6;
 - (iii) Limiting the present or future number of entrepreneurs in any particular field of business;
 - (iv) Unjustly restricting the functions or activities of the constituent entrepreneurs (meaning an entrepreneur who is a member of the trade association; the same shall apply hereinafter);

- (v) Inducing entrepreneurs to employ such act as falls under unfair trade practices.
- (2) Every trade association shall, pursuant to the provisions of the Rules of the Fair Trade Commission, within thirty days from the date of its formation, notify the Commission thereof; provided, however, that the trade associations listed in the following items are not so required.
- (i) Trade associations established pursuant to the provisions of special act and provided for by a Cabinet Order as falling under any of the following:
 - g. Trade associations that are not at risk of committing an act falling under any of the items in the preceding paragraph in light of the purposes, business, or activities, etc. provided for in the relevant act;
 - h. Trade associations which were founded with the purpose of mutual support among small-scale entrepreneurs or consumers or with the purpose of the wholesome development of them.
 - (ii) Trade associations which were founded with the purpose of mutual support among small-scale entrepreneurs and provided by a Cabinet Order as those that are at little risk of committing an act falling under any of the items in the preceding paragraph (excluding those listed in the preceding item) ;
 - (iii) Clearinghouses designated in the provisions of the Negotiable Instrument Act (Act No. 20 of 1932) or the Check Act (Act No. 57 of 1933).
- (3) Trade association (excluding those listed in the items of the preceding paragraph; hereinafter the same in the next paragraph) shall, in case of any change in the matters notified pursuant to the provisions of the preceding paragraph, pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Commission thereof, within two months from the end of the business year during which such change occurred.
- (4) Trade association shall, in case of dissolution, pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Commission thereof, within thirty days from the date of its dissolution.

Article 8-2

- (1) In case there exists any act in violation of the provisions of paragraph 1 of the preceding Article, the Fair Trade Commission may, pursuant to the procedures as provided for in Section II of Chapter VIII, order the relevant trade association to cease and desist from the said act, to dissolve itself, or to take any other measures necessary to eliminate the said act.
- (2) The provisions of paragraph 2 of Article 7 shall apply mutatis mutandis to any act in violation of the provisions of paragraph 1 of the preceding Article.
- (3) In the case of ordering a trade association to take measures provided for in paragraph 1 or paragraph 2 of Article 7, as applied mutatis mutandis pursuant to the preceding paragraph, the Fair Trade Commission may, when it finds it particularly necessary, pursuant to the procedures as provided for in Section II of Chapter VIII, also order an officer, manager, or constituent entrepreneur (including the relevant entrepreneur when an officer, employee, agent, or any other person acting for the

benefit of an entrepreneur is a constituent entrepreneur; the same shall apply in paragraph 1 of Article 26 and paragraph 2 of Article 59) of the said association to take measures necessary to ensure the measures provided for in paragraph 1 or paragraph 2 of Article 7, as applied mutatis mutandis pursuant to the preceding paragraph.

Article 8-3

The provisions of paragraphs 1, 3 to 5 inclusive, 7 to 13 inclusive, 17, 18 and 21 of Article 7-2 shall apply mutatis mutandis to cases where an act is committed in violation of the provisions of item 1 of paragraph 1 of Article 8 (limited to cases of committing an act which falls under unreasonable restraint of trade) or item 2 thereof (limited to cases of entering into an international agreement or an international contract which contains such matters as fall under unreasonable restraint of trade). In this case, in paragraph 1 of Article 7-2, the term "entrepreneur" shall be deemed to be replaced with "trade association"; and the term "order the said entrepreneur" shall be deemed to be replaced with "order the constituent entrepreneur of the said trade association (including the relevant entrepreneur when an officer, employee, agent, or any other person acting for the benefit of an entrepreneur is a constituent entrepreneur; hereinafter referred to as "specified entrepreneur" in this Article) "; in paragraph 4 of the said Article, the term "entrepreneur" shall be deemed to be replaced with "specified entrepreneur"; in paragraph 5 of the said Article, the term "entrepreneur" shall be deemed to be replaced with "specified entrepreneur"; the term "had discontinued the relevant violation (limited to cases where the period of implementation pertaining to the violation is less than two years, except for cases that fall under the next paragraph)" shall be deemed to be replaced with "had discontinued the business activities that constituted the relevant violation (limited to cases where the period of implementation of the business activities that constituted the relevant violation is less than two years) "; in paragraph 7 of the said Article, the term "entrepreneur" shall be deemed to be replaced with "specified entrepreneur"; the term "entrepreneurs that committed the relevant violation" shall be deemed to be replaced with "specified entrepreneurs of the trade association that committed the relevant violation"; and the term "has not committed" shall be deemed to be replaced with "has not effected the business activities that constituted"; in paragraph 8 of the said Article, the term "entrepreneur" shall be deemed to be replaced with "specified entrepreneur"; the term "paragraph 1 or 4 to 6 inclusive" shall be deemed to be replaced with "paragraph 1, 4, or 5"; the term "entrepreneurs that committed the relevant violation" shall be deemed to be replaced with "specified entrepreneurs of the trade association that committed the relevant violation"; and the term "has not committed" shall be deemed to be replaced with "has not effected the business activities that constituted"; in paragraph 9 of the said Article, the term "entrepreneur" shall be deemed to be replaced with "specified entrepreneur"; the term "entrepreneur that committed the relevant violation" shall be deemed to be replaced with "specified entrepreneur of the trade association that committed the relevant violation"; and the term "paragraph 1 or 4 to 6 inclusive" shall be deemed to be replaced with "paragraph 1, 4, or 5"; and the term "has not committed" shall be deemed to be replaced with "has not effected the business activities that constituted"; in paragraphs 10 and 11 of the said Article, the term "entrepreneur" shall be deemed to be replaced with "specified entrepreneur"; in paragraph 12 of the said Article, the term "entrepreneur" shall be deemed to be replaced with "specified entrepreneur"; the term "committed by the relevant entrepreneur" shall be

deemed to be replaced with "committed by the relevant trade association"; the term "commit the violation provided for in paragraph 1" shall be deemed to be replaced with "effect the business activities that constituted the relevant violation"; and the term "discontinuing" shall be deemed to be replaced with "discontinuing the business activities that constituted"; in paragraph 13 of the said Article, the term "entrepreneur" shall be deemed to be replaced with "specified entrepreneur"; and the term "violation committed" shall be deemed to be replaced with "report submitted pursuant to the provisions of item 1 of the same paragraph"; and in paragraphs 17 and 18 of the said Article, the term "paragraphs 1, 4 to 6 inclusive, 8, 9, and 14" shall be deemed to be replaced with "paragraphs 1, 4, 5, 8, and 9".

CHAPTER III-II MONOPOLISTIC SITUATIONS

Article 8-4

- (1) When a monopolistic situation exists, the Fair Trade Commission may order the relevant entrepreneur, pursuant to the procedures provided for in Section II of Chapter VIII, to transfer a part of its business or to take any other measures necessary to restore competition with respect to the relevant goods or services; provided, however, that this shall not apply to cases where it is found that such measures may, in relation to the said entrepreneur, reduce the scale of business to such an extent that the expenses required for the supply of goods or services which the said entrepreneur supplies will rise sharply, undermine its financial position, or make it difficult to maintain its international competitiveness, or where such alternative measures may be taken that is found sufficient to restore competition with respect to the relevant goods or services.
- (2) In issuing an order pursuant to the preceding paragraph, the Fair Trade Commission shall give consideration, based on the matters listed in the following items, to the smooth operation of business activities by the relevant entrepreneur and entrepreneurs affiliated therewith and the stabilization of life of those employed by the said entrepreneur:
 - (i) Assets, income and expenditures and other aspects of accounting;
 - (ii) Officers and employees;
 - (iii) Location and other locational conditions of factories, workplaces, and offices;
 - (iv) Facilities and equipment for the business;
 - (v) The substance of patent rights, trademark rights, and other intellectual property rights and other technological features;
 - (vi) Capacity for and situations of production and sales, etc.; (vii) Capacity for and situations of funding and procurement; (viii) Situations of supply and distribution of goods or services.

CHAPTER IV STOCKHOLDINGS, INTERLOCKING DIRECTORS, MERGERS, DEMERGERS, AND ACQUISITIONS OF BUSINESS

Article 9

- (1) Any corporation, which may be to cause excessive concentration of economic power through holding of the stocks (including shares held by a member; the same shall apply hereinafter) of other corporations in Japan, shall not be established.
- (2) A corporation (including a foreign corporation; the same shall apply hereinafter) shall not become a corporation which may be to cause excessive concentration of economic power in Japan through acquisition or holding of the stocks of other corporations in Japan.
- (3) The term "excessive concentration of economic power" in the preceding two paragraphs means a situation in which the extreme largeness of comprehensive business scale over a considerable number of fields of business of a corporation and its subsidiaries and other corporations in Japan whose business activities are controlled by the said corporation through holding of their stocks, the remarkably strong power of the said corporations to influence other entrepreneurs due to transactions pertaining to the funds of, or the occupancy of influential positions over a considerable number of interrelated fields of business by the said corporations, has a large effect on the national economy and impedes the promotion of fair and free competition.
- (4) Any other corporation in Japan of which majority of voting rights of all stockholders is held by a corporation and any one or more of its subsidiaries, or by any one or more subsidiaries of a corporation, shall be deemed as a subsidiary of the said corporation, for the purpose of application of the provisions of this Article.
- (5) Any corporation falling under any of the descriptions listed in the following items, when the sum of the total assets (meaning the amount of total assets calculated pursuant to the method provided for in the Rules of the Fair Trade Commission; hereinafter the same shall apply in this paragraph) of the corporation and its subsidiaries (limited to total assets of corporations in Japan), as aggregated pursuant to the method provided for in the Rules of the Fair Trade Commission, exceeds the amount provided for in a Cabinet Order, which shall be not less than the amount listed in the relevant item, shall submit, pursuant to the provisions of the Rules of the Fair Trade Commission, a written report on the business of the said corporation and its subsidiaries to the Fair Trade Commission within three months from the end of each business year, provided, however, that this shall not apply if the said corporation is a subsidiary of another corporation.
 - (i) A corporation whose ratio of the total acquisition value (or other value if it is so listed in the latest balance sheet) of the stocks of subsidiaries to the total assets of the said corporation exceeds fifty percent (referred to as "holding company" in the next item): Six hundred billion yen
 - (ii) A corporation that is engaged in banking, insurance, or securities businesses (excluding holding companies): Eight trillion yen
 - (iii) A corporation other than those listed in the preceding two items: Two trillion yen

- (6) A newly incorporated corporation that falls under the case provided for in the preceding paragraph shall, pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Commission thereof within thirty days from the date of its incorporation.

Article 10

- (1) No corporation shall acquire or hold stocks of any other corporations where the effect of such acquisition or holding of stocks may be substantially to restrain competition in any particular field of trade, or shall acquire or hold stocks of other corporations through unfair trade practices.
- (2) Every corporation whose total assets (meaning the amount of total assets appearing in the latest balance sheet; the same shall apply hereinafter) exceed the amount provided for in a Cabinet Order, which shall not be less than two billion yen, and whose total assets, coupled with total assets of subsidiaries of the said corporation, and a corporation in Japan which holds majority of voting rights of all stockholders of the said corporation (hereinafter referred to as "sum of the total assets"), exceed the amount provided for in a Cabinet Order, which shall not be less than ten billion yen (hereinafter referred to as "stockholding corporation" in this Article), in case that it acquires or holds the stocks (including the stocks held in monetary or security trust, where the stockholding corporation is a settlor or beneficiary and may exercise the voting rights or give instructions to the trustee regarding the exercise of such voting rights) of another corporation in Japan whose total assets exceed the amount provided for in a Cabinet Order, which shall not be less than one billion yen (hereinafter referred to as "issuing corporation" in this Article), so that the ratio of voting rights pertaining to the stocks acquired or held by the stockholding corporation to voting rights of all stockholders of the issuing corporation is to exceed the percentage figure provided for in a Cabinet Order (in the case that more than one percentage figures are provided for, any of such percentage figures pursuant to the provisions of such Cabinet Order), shall submit, pursuant to the provisions of the Rules of the Fair Trade Commission, a written report on such stocks within thirty days from the date of the relevant exceeding; provided, however, that this shall not apply to cases where the all the issued stocks of issuing corporation is acquired simultaneously with the incorporation, cases where a corporation engaged in banking or insurance business (excluding certain corporations engaged in insurance business as provided for in the Rules of the Fair Trade Commission; the same shall apply in paragraphs 1 and 2 of the next Article) acquires or holds stocks of other corporations in Japan (excluding those engaged in banking or insurance business and those as otherwise provided for in the Rules of the Fair Trade Commission; the same shall apply in paragraphs 1 and 2 of the next Article), or cases where a corporation engaged in securities business (excluding securities brokers) acquires or holds stocks in the course of its business.
- (3) The provisions of the preceding paragraph shall apply mutatis mutandis to cases where the stockholding corporation acquires or holds the stocks of a foreign corporation whose net sales appearing in the profit and loss statement prepared simultaneously with the latest balance sheet of its business offices (including the business offices of subsidiaries of the relevant foreign corporation) in Japan

(hereinafter referred to as "domestic sales") exceed the amount provided for in a Cabinet Order, which shall not be less than one billion yen.

Article 11

- (1) (1) No corporation engaged in banking or insurance business shall acquire or hold voting rights in another corporation in Japan if it results in its holding in excess of five percent (ten percent in the case of a corporation engaged in insurance business; the same shall apply in the next paragraph) of voting rights of all stockholders; provided, however, that this shall not apply to cases where approval of the Fair Trade Commission is obtained in advance pursuant to the provisions of the Rules of the Fair Trade Commission, or to cases falling under any of the following items:
- (i) Cases where voting rights are acquired or held by acquisition or holding of stocks as a result of the exercise of a security interest, or of receipt of substitute performance;
 - (ii) Cases where the ratio of the voting rights pertaining to the stocks already held to voting rights of all stockholders of the said corporation increases, as a result of acquisition by another corporation in Japan of its own stocks;
 - (iii) Cases where voting rights are acquired or held by acquisition or holding of the stocks in the form of trust property pertaining to monetary or security trust;
 - (iv) Cases where voting rights are acquired or held by a limited liability partner in an investment limited partnership (hereinafter referred to as "limited liability partner" in this item) as a result of acquisition or holding of stocks as partnership property; provided, however, that this shall not apply to cases where the limited liability partner may exercise the voting rights, cases where the limited liability partner may give instructions to an unlimited liability partner in the investment limited partnership regarding the exercise of such voting rights, and cases where the said voting rights are held in excess of the period provided for in a Cabinet Order from the date when the said voting rights were acquired;
 - (v) Cases where voting rights are acquired or held by a partner in a partnership that was established by a partnership contract provided for in paragraph 1 of Article 667 of the Civil Code (Act No. 89 of 1896) whose purpose is operation of business to make investments into corporations (limited to partnerships where management of business is delegated with one or more partners) excluding the partners delegated with the management of business; hereinafter referred to as "non-managing partner" in this item) as a result of acquisition or holding of stocks as partnership property; provided, however, that this shall not apply to cases where the non-managing partner may exercise the voting rights, cases where the non-managing partner may give instructions to a partner delegated with the management of business regarding the exercise of such voting rights, and cases where the said voting rights are held in excess of the period provided for in the Cabinet Order referred to in the preceding item from the date when the said voting rights were acquired; or
 - (vi) In addition to the cases listed in the preceding items, cases provided for in

the Rules of the Fair Trade Commission as cases where there is no danger of restriction on the business activities of another corporation in Japan.

- (2) Any corporation, in the cases of items 1 to 3 inclusive and 6 of the preceding paragraph (in the case of item 3 of the same paragraph, excluding cases where the settlor or the beneficiary may exercise the relevant voting rights and the settlor or beneficiary may instruct the trustee on the exercise of such voting rights), that attempts to hold the relevant voting rights of another corporation in Japan over a period of one year from the date of such acquisition resulting in holding in excess of five percent of total voting rights of all stockholders shall, pursuant to the provisions of the Rules of the Fair Trade Commission, obtain approval in advance from the Commission. The approval of the Fair Trade Commission in such cases shall, except for the case of item 3 of the same paragraph, be granted on the condition that the corporation engaged in banking or insurance business promptly dispose of the relevant voting rights.
- (3) When the Fair Trade Commission intends to grant approval under the provisions of the preceding two paragraphs, it shall, in advance, consult with the Prime Minister.
- (4) The authority of the Prime Minister set forth in the preceding paragraph shall be delegated to the Commissioner of the Financial Services Agency.

Article 12

Deleted.

Article 13

- (1) Neither an director nor an employee (meaning in this Article a person other than directors engaged in the business of a corporation on a regular basis) of a corporation shall hold at the same time a position as an director of another corporation where the effect of such an interlocking directorate may be substantially to restrain competition in any particular field of trade.
- (2) No corporation shall coerce another corporation in competition with it in Japan through unfair trade practices, to admit its directors concurrently to the position of director or employee of the latter corporation, or to admit its employee concurrently to the position of director of the latter corporation.

Article 14

No person other than corporations shall acquire or hold stocks of a corporation where the effect of such acquisition or holding of stocks may be substantially to restrain competition in any particular field of trade, or shall acquire or hold stocks of a corporation through unfair trade practices.

Article 15

- (1) No corporation shall effect a merger if any of the following items applies:

- (i) Where the effect of the merger may be substantially to restrain competition in a particular field of trade;
 - (ii) Where unfair trade practices have been employed in the course of the merger.
- (2) Every corporation in Japan which intends to become a party to a merger (hereinafter in this Article "merging corporation") shall, pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Fair Trade Commission in advance of their plan with regard to such merger, in case that the sum of the total assets of one corporation exceeds the amount, provided for in a Cabinet Order, which shall not be less than ten billion yen, and the sum of the total assets of another merging corporation exceeds the amount, provided for in a Cabinet Order, which shall not be less than one billion yen; provided, however, that this shall not apply to such cases falling under any of the following items:
 - (i) Any one of the merging corporations holds a majority of the voting rights of all stockholders of every other merging corporation;
 - (ii) The majority of the voting rights of all stockholders of each of the merging corporations is held by one and the same corporation.
- (3) The provisions of the preceding paragraph shall apply mutatis mutandis to any foreign corporation that intends to become a party to a merger. In this case, the term "sum of the total assets" in the same paragraph shall be deemed to be replaced with "domestic sales".
- (4) No corporation which has notified pursuant to the provisions of paragraph 2 (including the cases where it is applied mutatis mutandis pursuant to the preceding paragraph after deemed replacement) shall effect a merger until the expiration of the thirty-day waiting period from the date of acceptance of the said notification; provided, however, that the Fair Trade Commission may, when it finds it necessary, shorten the said period.
- (5) The Fair Trade Commission shall, where it intends to order necessary measures regarding the relevant merger pursuant to the provisions of paragraph 1 of Article 17-2, notify the merging corporations pursuant to the provisions of paragraph 5 of Article 49 before the expiration of the thirty-day waiting period provided for in the main clause of the preceding paragraph, or of any shortened period pursuant to the provisions of the proviso thereof (in case that the Fair Trade Commission requested at least one corporation among the merging corporations to submit necessary reports, information, or materials (hereinafter in this paragraph "Reports, etc.") pursuant to the provisions of the Rules of the Fair Trade Commission during the relevant period, the period up to the date on which one hundred-twenty days from the date of acceptance of the notification stipulated in the preceding paragraph have passed, or the date on which ninety days from the date of acceptance of all the Reports, etc. have passed, whichever is later); provided, however, that this shall not apply to such cases falling under any of the following items:
 - (i) Matters considered important in light of the provisions of paragraph 1 are not carried out by the deadline stipulated in the plan regarding the merger notified pursuant to the provisions of paragraph 2 (including the cases where it is applied mutatis mutandis pursuant to paragraph 3 after deemed

replacement; the same shall apply in the following item);

- (ii) There has been a false statement with respect to important matters in the plan regarding the merger notified pursuant to the provisions of paragraph 2.
- (6) In cases falling under the provisions of item 1 of the preceding paragraph, the Fair Trade Commission shall send a notification under the main clause of the preceding paragraph within one year from the deadline in the same item if it intends to order necessary measures relating to the relevant merger pursuant to the provisions of paragraph 1 of Article 17-2.

Article 15-2

- (1) No corporation shall effect a joint incorporation-type demerger (meaning an incorporation-type demerger that a corporation effects jointly with another corporation; the same shall apply hereinafter) or an absorption-type demerger if any of the following items applies:
- (i) The effect of the joint incorporation-type demerger or absorption-type demerger may be substantially to restrain competition in a particular field of trade;
 - (ii) Unfair trade practices have been employed in the course of the joint incorporation-type demerger or absorption-type demerger.
- (2) Every corporation in Japan which intends to become a party to a joint incorporation-type demerger shall, pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Fair Trade Commission in advance of their plan with regard to such joint incorporation-type demerger if any of the following items applies:
- (i) The sum of the total assets of any of the corporations which intends to become a party to the joint incorporation-type demerger (limited to a corporation that intends to have the corporation incorporated through such joint incorporation-type demerger acquire all of its business (hereinafter in this paragraph "total succession corporation")) exceeds the amount stipulated by a Cabinet Order, which is not less than ten billion yen, and the sum of the total assets of another corporation which intends to become a party to the same demerger (limited to a total succession corporation) exceeds the amount stipulated by a Cabinet Order, which is not less than one billion yen;
 - (ii) The sum of the total assets of any of the corporations which intends to become a party to the joint incorporation-type demerger (limited to a total succession corporation) exceeds the amount stipulated by a Cabinet Order, which is not less than ten billion yen, and the net sales recognized in the profit and loss statement which is made together with the latest balance sheet of another corporation which intends to become a party to the same demerger (limited to a corporation that intends to have the corporation incorporated through such joint incorporation-type demerger acquire a substantial part of its business (hereinafter in this paragraph "substantial part succession corporation")) in connection with the part of the business to be succeeded to, exceeds the amount stipulated by a Cabinet Order,

which is not less than one billion yen;

- (iii) The sum of the total assets of any of the corporations which intends to become a party to the joint incorporation-type demerger (limited to a total succession corporation) exceeds the amount stipulated by a Cabinet Order, which is not less than one billion yen, and the net sales recognized in the profit and loss statement which is made together with the latest balance sheet of another corporation which intends to become a party to the same demerger (limited to a substantial part succession corporation), in connection with the part of the business to be succeeded to, exceeds the amount stipulated by a Cabinet Order, which is not less than ten billion yen (excluding cases that fall under the previous item); (iv) The net sales recognized in the profit and loss statement which is made together with the latest balance sheet of any of the corporations which intends to become a party to the joint incorporation-type demerger (limited to a substantial part succession corporation), in connection with the part of the business to be succeeded to, exceeds the amount stipulated by a Cabinet Order, which is not less than ten billion yen, and the net sales recognized in the profit and loss statement which is made together with the latest balance sheet of another corporation which intends to become a party to the same demerger (limited to a substantial part succession corporation), in connection with the part of the business to be succeeded to, exceeds the amount stipulated by a Cabinet Order, which is not less than one billion yen.
- (3) Every corporation in Japan which intends to become a party to an absorption-type demerger shall, pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Fair Trade Commission in advance of their plan with regard to such absorption-type demerger if any of the following items applies:
- (i) The sum of the total assets of any of the corporations which intends to become a party to the absorption-type demerger (limited to a corporation that intends to alienate all of its business through such absorption-type demerger (referred to in the following item as "total succession corporation"))exceeds the amount stipulated by a Cabinet Order, which is not less than ten billion yen, and the sum of the total assets of the corporation which intends to succeed to the business through such demerger exceeds the amount stipulated by a Cabinet Order, which is not less than one billion yen;
 - (ii) The sum of the total assets of any of the corporations which intends to become a party to the absorption-type demerger (limited to a total succession corporation) exceeds the amount stipulated by a Cabinet Order, which is not less than one billion yen, and the sum of the total assets of the corporation which intends to succeed to the business through such demerger exceeds the amount stipulated by a Cabinet Order, which is not less than ten billion yen (excluding cases that fall under the previous item);
 - (iii) The net sales recognized in the profit and loss statement which is made together with the latest balance sheet of any of the corporations which intends to become a party to the absorption-type demerger (limited to a corporation that intends to alienate a substantial part of its business through such absorption-type demerger (referred to in the following item as "substantial part succession corporation")) in connection with the part of

the business to be alienated, exceeds the amount stipulated by a Cabinet Order, which is not less than ten billion yen, and the sum of the total assets of the corporation which intends to succeed to the business through such demerger exceeds the amount stipulated by a Cabinet Order, which is not less than one billion yen;

- (iv) The net sales recognized in the profit and loss statement which is made together with the latest balance sheet of any of the corporations which intends to become a party to the absorption-type demerger (limited to a substantial part succession corporation), in connection with the part of the business to be alienated, exceeds the amount stipulated by a Cabinet Order, which is not less than one billion yen, and the sum of the total assets of the corporation which intends to succeed to the business through such demerger exceeds the amount stipulated by a Cabinet Order, which is not less than ten billion yen (excluding cases that fall under the previous item).
- (4) The provisions of the preceding two paragraphs shall not apply to such cases falling under any of the following items:
- (i) Any of the corporations which intends to become a party to a joint incorporation-type demerger or an absorption-type demerger holds a majority of the voting rights of all stockholders of every other corporation that intends to become a party to the same demerger;
 - (ii) The majority of the voting rights of all stockholders of each and every corporation which intends to become a party to a joint incorporation-type demerger or an absorption-type demerger is held by one and the same corporation.
- (5) The provisions of the preceding three paragraphs shall apply mutatis mutandis to any foreign corporation which intends to become a party to a joint incorporation-type demerger or an absorption-type demerger. In this case, the terms "sum of total assets" and net sales recognized in the profit and loss statement which is made together with the latest balance sheet" in paragraphs 2 and 3 shall be deemed to be replaced with "domestic sales".
- (6) The provisions of paragraphs 4 to 6 inclusive of the preceding Article shall apply mutatis mutandis to the restriction of joint incorporation-type demergers and absorption-type demergers pertaining to the notification under paragraphs 2 and 3 (including the cases where they are applied mutatis mutandis pursuant to the preceding paragraph after deemed replacement) and to the orders made by the Fair Trade Commission pursuant to the provisions of paragraph 1 of Article 17-2. In this case, the term "merger" in paragraphs 4 and 6 of the preceding Article shall be deemed to be replaced with "joint incorporation-type demerger or absorption-type demerger"; the term "regarding the merger" appearing in paragraph 5 of the preceding Article shall be deemed to be replaced with "regarding the joint incorporation-type demerger or absorption-type demerger"; and the term "merging corporations" therein shall be deemed to be replaced with "corporations which intend to become parties to a joint incorporation-type demerger or an absorption-type demerger".

Article 16

- (1) No corporation shall perform an act falling under any of the following acts, where the effect of such act may be substantially to restrain competition in any particular field of trade, or through unfair trade practices:
 - (i) Acquiring the whole or a substantial part of the business of another corporation;
 - (ii) Acquiring the whole or a substantial part of the fixed assets used for the business of another corporation;
 - (iii) Taking on a lease of the whole or a substantial part of the business of another corporation;
 - (iv) Undertaking the management of the whole or a substantial part of the business of another corporation;
 - (v) Entering into a contract which provides for a joint profit and loss account for business with another corporation.
- (2) Any corporation whose sum of the total assets exceeds the amount provided for by a Cabinet Order, which is not less than ten billion yen (referred to in paragraph 4 as "acquiring corporation") shall pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Fair Trade Commission in advance of its plan with regard to the acquisition of the business or the fixed assets used for the business (hereinafter in this Article "business, etc.") if any of the following items applies:
 - (i) The corporation intends to acquire the whole business of another corporation in Japan whose total assets exceed the amount provided for by a Cabinet Order, which is not less than one billion yen;
 - (ii) The corporation intends to acquire a substantial part of the business or the whole or a substantial part of the fixed assets used for the business of another corporation in Japan, and the net sales recognized in the profit and loss statement which is made together with the latest balance sheet in connection with the subject of such acquisition exceeds the amount provided for by a Cabinet Order, which is not less than one billion yen.
- (3) The provisions of the preceding paragraph shall not apply if any of the following items applies:
 - (i) Any of the corporations which intends to acquire the business, etc. or transfer the said business, etc. holds a majority of the voting rights of all stockholders of every other corporation involved;
 - (ii) The majority of the voting rights of all stockholders of each of the corporations which intends to acquire the business, etc. and transfer the said business, etc. is held by one and the same corporation.
- (4) The provisions of the preceding two paragraphs shall apply mutatis mutandis to the cases where an acquiring corporation intends to acquire the business, etc. of other foreign corporations. In this case, the term "total assets" in item 1 of paragraph 2 and the term net sales recognized in the profit and loss statement which is made

together with the latest balance sheet" in item 2 of paragraph 2 shall be deemed to be replaced with "domestic sales".

- (5) The provisions of paragraphs 4 to 6 inclusive of Article 15 shall apply mutatis mutandis to the restriction of acquisition of business, etc. pertaining to the notification under paragraph 2 (including the cases where it is applied mutatis mutandis pursuant to the preceding paragraph after deemed replacement) and the orders made by the Fair Trade Commission pursuant to the provisions of paragraph 1 of Article 17-2. In this case, the term "merger" in paragraphs 4 and 6 of Article 15 shall be deemed to be replaced with "acquisition of the business or the fixed assets used for the business"; the term "regarding the merger" in paragraph 5 of Article 15 shall be deemed to be replaced with "regarding the acquisition of the business or the fixed assets used for the business"; and the terms at least one corporation among the merging corporations" and the merging corporations" therein shall be deemed to be replaced with the corporations that intend to acquire the business or the fixed assets used for the business".

Article 17

No acts in whatever form or manner shall be committed which evade such prohibitions or restrictions as provided for in the provisions of Articles 9 to 16 inclusive.

Article 17-2

- (1) Where there exists any act in violation of the provisions of paragraph 1 of Article 10, paragraph 1 of Article 11, paragraph 1 of Article 15, paragraph 1 of Article 15-2, paragraph 1 of Article 16, or the preceding Article, the Fair Trade Commission may, pursuant to the procedures prescribed in Section II of Chapter VIII, order the entrepreneur concerned to dispose of all or some of its stocks, to transfer a part of its business, or to take any other measures necessary to eliminate such acts in violation of the said provisions.
- (2) Where there exists any act in violation of the provisions of paragraph 1 or 2 of Article 9, Article 13, Article 14, or the preceding Article, the Fair Trade Commission may, pursuant to the procedures prescribed in Section II of Chapter VIII, order the person violating such provisions to dispose of all or some of his or her stocks, to resign from his or her position as an officer of the corporation, or to take any other measures necessary to eliminate such acts in violation of the said provisions.

Article 18

- (1) The Fair Trade Commission may, in cases where corporations have merged in violation of the provisions of paragraph 2 of Article 15 (including the cases where it is applied mutatis mutandis pursuant to paragraph 3 of Article 15 after deemed replacement) and paragraph 4 of Article 15, bring a lawsuit to have the said merger declared invalid.

- (2) The provisions of the preceding paragraph shall apply mutatis mutandis to the cases where corporations have effected a joint incorporation-type demerger or an absorption-type demerger in violation of the provisions of paragraphs 2 and 3 of Article 15-2 (including the cases where they are applied mutatis mutandis pursuant to paragraph 5 of Article 15-2) and paragraph 4 of Article 15, which is applied mutatis mutandis pursuant to paragraph 6 of Article 15-2. In this case, the term "the said merger" in the preceding paragraph shall be deemed to be replaced with "the said joint incorporation-type demerger or the said absorption-type demerger".

CHAPTER V UNFAIR TRADE PRACTICES

Article 19

No entrepreneur shall employ unfair trade practices.

Article 20

- (1) Where there exists any act in violation of the provisions of the preceding Article, the Fair Trade Commission may, pursuant to the procedures prescribed in Section II of Chapter VIII, order the ceasing and desisting from the said act, the deleting of the relevant clauses from the contract, or any other measures necessary to eliminate the said act.
- (2) The provisions of paragraph 2 of Article 7 shall apply mutatis mutandis to an act in violation of the provisions of the preceding Article.

CHAPTER VI EXEMPTIONS

Article 21

The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, or the Trademark Act.

Article 22

The provisions of this Act shall not apply to such acts of a partnership (including a federation of partnerships) which conforms to the requirements stipulated in each of the following items and which has been formed pursuant to the provisions of law; provided, however, that this shall not apply to the cases where unfair trade practices are employed, or where competition in any particular field of trade is substantially restrained, resulting in unjust increases of prices:

- (i) The purpose of the partnership is mutual support among small-scale entrepreneurs or consumers;
- (ii) The partnership is voluntarily formed; and the partners may voluntarily participate in and withdraw from the partnership;
- (iii) Each partner possesses equal voting rights; and
- (iv) If distribution of profits among partners is contemplated, the limits of the distributions are stipulated by laws and regulations or in the articles of partnership.

Article 23

- (1) The provisions of this Act shall not apply to legitimate acts performed by an entrepreneur who produces or sells a commodity, which is designated by the Fair Trade Commission and the uniform quality of which is easily identifiable, , in order to fix and maintain the resale price thereof with another entrepreneur who purchases such commodity (this term "resale price" means the price at which the latter entrepreneur or an entrepreneur who purchases such commodity from the latter entrepreneur for sales sells it; the same shall apply hereinafter); provided, however, that this shall not apply to the cases where the said act tends to unreasonably harm the interests of general consumers, or where it is done by an entrepreneur who sells the said commodity against the will of the entrepreneur who produces the said commodity.
- (2) The Fair Trade Commission shall not designate a commodity under the provisions of the preceding paragraph unless each of the following items applies:
 - (i) The commodity is for daily use by general consumers; and
 - (ii) Free competition exists with respect to the commodity.
- (3) The designation of a commodity under the provisions of paragraph 1 shall be made by a notice.
- (4) The same as is prescribed in paragraph 1 shall apply to legitimate acts performed by an entrepreneur who publishes works or an entrepreneur who sells such published works in order to fix and maintain the resale price thereof with another entrepreneur who purchases such works.
- (5) Organizations formed pursuant to the provisions of any of the following Acts shall not be included in another entrepreneur who purchases commodities or works prescribed in paragraph 1 or the preceding paragraph; provided, however, that this shall, in the case of organizations formed pursuant to the provisions of any of the Acts mentioned in items viii and viii-ii, only apply to the cases where a business cooperative, a minor business cooperative, a federation of cooperatives, a commercial and industrial partnership, or a federation of commercial and industrial partnerships purchases such commodities as prescribed in paragraph 2 or such works as prescribed in paragraph 4, for the consumption of persons directly or indirectly constituting the said business cooperative, federation of cooperatives, commercial and industrial partnerships, or a federation of commercial and industrial partnerships:
 - (i) National Public Officer Act;
 - (ii) Agricultural Cooperatives Act;
 - (iii) Act on Mutual Aid Association for National Public Officers
 - (iv) Act on Mutual Aid Association for Local Public Officers, etc.; (iv) Consumer Cooperatives Act;
 - (v) Fisheries Cooperatives Act;
 - (vi) Act on Labor Relations of Specified Independent Administrative Institution, etc.;
 - (vii) Labor Unions Act;

- (viii) Small and Medium Sized Enterprise, etc., Cooperatives Act; (viii-ii) Act on Organizations of Small and Medium Sized Enterprises;
 - (ix) Local Public Officer Act;
 - (x) Forestry Partnership Act;
 - (xi) Act on Labor Relations of Local Public Enterprises.
- (6) When an entrepreneur as prescribed in paragraph 1 has entered into a contract which fixes and maintains the resale price as prescribed in the said paragraph, the entrepreneur shall, pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Fair Trade Commission thereof within thirty days from the date of the contract; provided, however, that this shall not apply if the Rules of the Fair Trade Commission stipulates otherwise.

CHAPTER VII INJUNCTIONS AND DAMAGES

Article 24

A person whose interests are infringed or likely to be infringed by an act in violation of the provisions of item 5 of paragraph 1 of Article 8 or Article 19 and who is thereby suffering or likely to suffer extreme damages is entitled to seek the suspension or prevention of such infringements from an entrepreneur or a trade association that infringes or is likely to infringe such interests.

Article 25

- (1) Any entrepreneur that has committed an act in violation of the provisions of Articles 3, 6, or 19 (in the case of entrepreneurs who have committed acts in violation of the provisions of Article 6, limited to those entrepreneurs who have effected unreasonable restraint of trade or employed unfair trade practices in the international agreement or contract concerned) and any trade association that has committed an act in violation of the provisions of paragraph 1 of Article 8 shall be liable for damages suffered by another party.
- (2) No entrepreneur or trade association may be exempted from the liability prescribed in the preceding paragraph by proving the non-existence of intention or negligence on its part.

Article 26

- (1) The right to claim for damages pursuant to the provisions of the preceding Article may not be alleged in court until the cease and desist order prescribed in the provisions of paragraph 1 of Article 49 (in the case that no such order is issued, the payment order prescribed in paragraph 1 of Article 50 (excluding those issued against an entrepreneur that constitutes a trade association that has committed an act in violation of the provisions of item 1 or 2 of paragraph 1 of Article 8)) or the

decision set forth in the provisions of paragraph 4 of Article 66 has become final and binding.

- (2) The right set forth in the preceding paragraph shall become extinct by prescription after a lapse of three years from the date on which the cease and desist order or the payment order or the decision set forth in the said paragraph became final and binding.

CHAPTER VIII FAIR TRADE COMMISSION

Section I Establishment, Duty, Affairs under the Jurisdiction and Organization, etc.

Article 27

- (1) The Fair Trade Commission shall, pursuant to the provisions of paragraph 3 of Article 49 of the Act on Establishment of the Cabinet Office (Act No. 89 of 1999), be established, whose duty shall be to achieve the purposes set forth in Article 1.
- (2) The Fair Trade Commission shall be administratively attached to the office of the Prime Minister.

Article 27-2

In order to perform the duty set forth in paragraph 1 of the preceding Article, the Fair Trade Commission shall take charge of the following affairs:

- (i) Matters relating to regulation on private monopolization;
- (ii) Matters relating to regulation on unreasonable restraint of trade;
- (iii) Matters relating to regulation on unfair trade practices;
- (iv) Matters relating to regulation pertaining to monopolistic situations;
- (v) Matters relating to international cooperation pertaining to affairs under the jurisdiction of the Fair Trade Commission;
- (vi) Affairs which are assigned to the Fair Trade Commission pursuant to an act (including an order pursuant to an act), in addition to what is listed in any of the preceding items.

Article 28

The chairman and the commissioners of the Fair Trade Commission shall perform their authority independently.

Article 29

- (1) The Fair Trade Commission shall consist of a chairman and four commissioners.
- (2) The chairman and the commissioners shall be appointed by the Prime Minister with the consent of both Houses of the Diet from among persons whose age is thirty-five or more and who have knowledge and experience in law or economics.

- (3) The appointment or dismissal of the chairman shall be certified by the Emperor.
- (4) The chairman and the commissioners shall be public officials.

Article 30

- (1) The term of office of the chairman and the commissioners shall be five years: however, the term of office of the chairman and the commissioners appointed to fill a vacancy shall be the remaining term of office of his or her predecessor.
- (2) The chairman and the commissioners may be reappointed.
- (3) The chairman and the commissioners shall retire from the office upon reaching the age of seventy.
- (4) If the term of office of the chairman or the commissioners expires, or a vacancy therefore occurs at the time when the consent of both Houses of the Diet is unobtainable because the Diet is not in session or the House of Representatives is dissolved, the Prime Minister may appoint the chairman or a commissioner from among persons who have such qualifications as prescribed in paragraph 2 of the preceding Article. In this case, the subsequent approval of both Houses of the Diet shall be obtained in the first session of the Diet after the appointment.

Article 31

The chairman or a commissioner may not, against his or her will, be dismissed from office while he or she is in office, except in cases falling under any of the following items:

- (i) Where a decision of the commencement of bankruptcy proceedings has been made against him or her;
- (ii) Where he or she has been dismissed by disciplinary action;
- (iii) Where he or she has been punished for violation of the provisions of this Act;
- (iv) Where he or she has been punished by imprisonment or severer punishment;
- (v) Where the Fair Trade Commission has decided that he or she is incapable of executing his or her duties due to mental or physical disorder;
- (vi) Where the subsequent approval of both Houses of the Diet could not be obtained in the case referred to in paragraph 4 of the preceding Article.

Article 32

In the case referred to in items i or iii to vi inclusive of the preceding Article, the Prime Minister shall dismiss the chairman or the commissioner concerned from office.

Article 33

- (1) (1) The chairman shall preside over the affairs of the Fair Trade Commission and shall represent it.
- (2) (2) The Fair Trade Commission shall choose in advance a commissioner from among the commissioners to act as the representative of the chairman in the case where he or she cannot execute the chairman's 9 duties.

Article 34

- (1) Meetings of the Fair Trade Commission shall not be declared open, and a resolution shall not be made without the attendance of the chairman and two or more commissioners.
- (2) All decisions of the Fair Trade Commission shall be made by a majority of the attendees. In the case that the votes are evenly divided, the chairman shall have the power to decide the vote.
- (3) The decision of the Fair Trade Commission under the provisions of item 5 of Article 31 shall, notwithstanding the provisions of the preceding paragraph, be made with the unanimous concurrence of all commissioners and the chairman except for the commissioner or chairman concerned.
- (4) For the purpose of applying the provisions of paragraph 1 in the case that the chairman cannot execute the chairman's 9 duties, the commissioner chosen to act as the representative of the chairman pursuant to the provisions of paragraph 2 of the preceding Article shall be deemed to be the chairman.

Article 35

- (1) A general secretariat shall be established at the Fair Trade Commission for the administration of its affairs.
- (2) The general secretariat shall have a secretary general.
- (3) The secretary general shall preside over the affairs of the general secretariat (excluding those affairs which the Fair Trade Commission decides, pursuant to the provisions of paragraph 1 of Article 56, to designate hearing examiners and cause them to conduct).
- (4) The secretariat and bureaus shall be established at the general secretariat.
- (5) The provisions of paragraphs 2 to 8 inclusive of Article 17 of the Act on Establishment of the Cabinet Office shall apply mutatis mutandis to the establishment, the scope of the affairs under the jurisdiction, and the internal organization of the secretariat and bureaus referred to in the preceding paragraph.
- (6) The secretariat and bureaus established pursuant to the provisions of paragraph 4 shall not exceed three in number.
- (7) Hearing examiners shall be posted at the general secretariat to conduct all or part of the hearing procedures (excluding the rendering of a decision).
- (8) The number of hearing examiners shall be stipulated by a Cabinet Order.

- (9) Hearing examiners shall be selected by the Fair Trade Commission from among the staff members of the general secretariat who have been found to have the knowledge and experience in law and economics necessary to conduct the hearing procedures and to be capable of making a fair judgment.
- (10) A public prosecutor, an attorney practicing at the time of the appointment or a person qualified to be an attorney shall be among the staff members of the general secretariat.
- (11) The duties of the staff member who is the public prosecutor referred to in the preceding paragraph shall be limited to matters relating to cases in violation of the provisions of this Act.

Article 35-2

- (1) Local offices shall be established at necessary locations as local organizations of the general secretariat of the Fair Trade Commission.
- (2) The names, locations and territorial jurisdictions of the local offices referred to in the preceding paragraph shall be provided for by a Cabinet Order.
- (3) Branches may be established at necessary locations under the local offices referred to in paragraph 1 to conduct some of the affairs of the local offices.
- (4) The names, locations and territorial jurisdictions of the branches referred to in the preceding paragraph shall be provided for by the Cabinet Office Ordinance.

Article 36

- (1) The remuneration of the chairman and the commissioners shall be provided for separately.
- (2) The remuneration of the chairman and the commissioners may not, against his or her will, be reduced in amount while he or she is in office.

Article 37

The chairman, the commissioners and such staff members of the Fair Trade Commission as may be stipulated by a Cabinet Order may not engage in any of the following acts while he or she is in office:

- (i) Becoming a member of the Diet or of the legislative assembly of a local public entity, or actively engaging in political activities;
- (ii) Holding any other remunerative positions except as permitted by the Prime Minister; or
- (iii) Engaging in commerce or any other business for pecuniary gain.

Article 38

The chairman, the commissioners and the staff members of the Fair Trade Commission shall not express their opinions outside the Fair Trade Commission on the

existence or non-existence of facts or the application of laws and regulations with regard to a case: however, this shall not apply to the cases prescribed in this Act or the cases where the results of his or her research on this Act are published.

Article 39

The chairman, the commissioners and the staff members of the Fair Trade Commission, or any person who once held such position shall not divulge to others or make surreptitious use of the secrets of entrepreneurs which came to his or her knowledge in the course of his or her duties.

Article 40

The Fair Trade Commission may, if necessary for the performance of its duties, order public offices, juridical persons formed by special laws and regulations, entrepreneurs or organizations of entrepreneurs, or their personnel to appear before the Fair Trade Commission, or require them to submit necessary reports, information or materials.

Article 41

The Fair Trade Commission may, if necessary for the performance of its duties, commission public offices, juridical persons formed by special laws and regulations, schools, entrepreneurs, organizations of entrepreneurs, persons with the relevant knowledge and experience, or others to carry out necessary research and surveys.

Article 42

The Fair Trade Commission may, if necessary for the performance of its duties, hold public hearings to obtain the opinions of the public.

Article 43

The Fair Trade Commission may, in order to ensure proper operation of this Act, make public any necessary matters except for the secrets of entrepreneurs.

Article 44

- (1) The Fair Trade Commission shall report annually to the Diet, through the Prime Minister, on the enforcement of this Act.
- (2) The Fair Trade Commission may submit to the Diet, through the Prime Minister, its opinions on matters necessary to attain the purpose of this Act.

Section II Procedures

Article 45

- (1) Any person may, when he or she considers that a fact involving violation of the provisions of this Act exists, report the said fact to the Fair Trade Commission and ask for appropriate measures to be taken.
- (2) The Fair Trade Commission, upon receipt of such report as prescribed in the preceding paragraph, shall make necessary investigations with respect to the case.
- (3) In the case where a report made pursuant to the provisions of paragraph 1 presents in writing a specific fact pursuant to the provisions of the Rules of the Fair Trade Commission, and where the Fair Trade Commission decides to take, or not to take, appropriate measures with respect to the case pertaining to such report, the Fair Trade Commission shall promptly give notice thereof to the person who made such report.
- (4) The Fair Trade Commission may, where it considers that there exists a fact involving violation of the provisions of this Act or a fact falling under the purview of a monopolistic situation, take appropriate measures on its own authority.

Article 46

- (1) The Fair Trade Commission shall, if it considers that there exists a fact which falls under the purview of a monopolistic situation, and if it decides to take measures set forth in paragraph 4 of the preceding Article, give notice thereof to the competent minister having jurisdiction over the business which the entrepreneur concerned operates.
- (2) In the case that a notice set forth in the preceding paragraph has been given, the competent minister may express to the Fair Trade Commission its opinion regarding the existence or non-existence of a monopolistic situation and other measures which it considers would be sufficient to restore competition as prescribed in the proviso to paragraph 1 of Article 8-4.

Article 47

- (1) The Fair Trade Commission may, in order to conduct necessary investigations with regard to a case, make the following measures:
 - (i) Ordering persons concerned with a case or witnesses to appear to be interrogated, or collecting their opinions or reports;
 - (ii) Ordering expert witnesses to appear to give expert opinions;
 - (iii) Ordering persons holding books and documents and other materials to submit such materials, or keeping such submitted materials at the Fair Trade Commission; and
 - (iv) Entering any business office of the persons concerned with a case or other necessary sites, and inspecting conditions of business operation and property, books and documents, and other materials.

- (2) The Fair Trade Commission may, where it finds it appropriate, designate, pursuant to the provisions of a Cabinet Order, staff members of the Fair Trade Commission as investigators and cause them to make the measures set forth in the preceding paragraph.
- (3) In the case where the staff members are caused to conduct an on-site investigation pursuant to the provisions of the preceding paragraph, the Fair Trade Commission shall cause them to carry their identification cards and to produce them to the persons concerned.
- (4) The authority to make measures pursuant to the provisions of paragraph 1 shall not be construed as granted for criminal investigation.

Article 48

The Fair Trade Commission shall, where it has conducted necessary investigations with regard to a case, keep an investigation record of the gist of the investigations, and where it has made any measures as prescribed in paragraph 1 of the preceding Article, set out the date of the making of the measures and the result thereof.

Article 49

- (1) An order issued pursuant to the provisions of paragraph 1 or 2 of Article 7 (including the cases where they are applied mutatis mutandis pursuant to paragraph 2 of Article 8-2 or paragraph 2 of Article 20 after deemed replacement), paragraph 1 or 3 of Article 8-2, Article 17-2 or paragraph 1 of Article 20 (hereinafter referred to as a "cease and desist order") shall be rendered in writing, and the written cease and desist order shall indicate the measures necessary to eliminate the violation or to ensure that the violation is eliminated, and the facts found by the Fair Trade Commission and the application of laws and regulations thereto, and the chairman and the commissioners who attended the meeting pursuant to the provisions of paragraph 1 of Article 69 shall affix their names and seals thereto.
- (2) A cease and desist order shall take effect by serving a transcript of the written cease and desist order to the addressee thereof.
- (3) The Fair Trade Commission shall, where it intends to issue a cease and desist order, give in advance to a person who is to be the addressee of the said cease and desist order an opportunity to express his or her opinions and to submit evidences.
- (4) The person who is to be the addressee of the cease and desist order may, when expressing his or her opinions or submitting evidences pursuant to the provisions of the preceding paragraph, appoint an agent (limited to attorneys at law, legal professional corporations or appropriate persons approved by the Fair Trade Commission; the same in paragraph 1 of Article 52, Article 57, Article 59, Article 60, and Article 63).
- (5) The Fair Trade Commission shall, when giving an opportunity to express opinions and to submit evidences pursuant to the provisions of paragraph 3, notify the person who is to be the addressee of the cease and desist order of the following matters in writing a sufficient period of time prior to the deadline for expressing his or her

opinions and submitting evidences:

- (i) The expected content of the cease and desist order;
 - (ii) The facts found by the Fair Trade Commission, and the application of laws and regulations thereto; and
 - (iii) The opportunity to express opinions and to submit evidences, with regard to the matters listed in the preceding two items, to the Fair Trade Commission, and the deadline therefore.
- (6) Any person who is dissatisfied with the cease and desist order may request, pursuant to the provisions of the Rules of the Fair Trade Commission and within sixty days from the date on which the transcript of the written cease and desist order was served (in the event of natural disaster or other inevitable reason that results in the request for hearings not being made within such period, within one week from the day following the date when such reason ceased to be valid), the Fair Trade Commission to initiate a hearing regarding the said cease and desist order.
- (7) If no request is made pursuant to the provisions of the preceding paragraph within the period prescribed in the said paragraph, the cease and desist order shall become final and binding.

Article 50

- (1) An order issued pursuant to the provisions of paragraph 1 of Article 7-2 (including the cases where it is applied *mutatis mutandis* pursuant to paragraph 2 of Article 7-2 or Article 8-3 after deemed replacement) (hereinafter referred to as a "payment order") shall be rendered in writing, and the written payment order for surcharge shall state the amount of the surcharge to be paid, the basis of calculation of such amount, the violation pertaining to such surcharge, and the deadline for payment, and the chairman and the commissioners who attended the meeting pursuant to the provisions of paragraph 1 of Article 69 shall affix their names and seals thereto.
- (2) A payment order shall take effect by serving a transcript of the written payment order for surcharge to the addressee thereof.
- (3) The deadline for payment of the surcharge set forth in paragraph 1 shall fall on the day on which three months have elapsed from the day on which the transcript of the written payment order for surcharge is issued.
- (4) Any person who is dissatisfied with the payment order may request, pursuant to the provisions of the Rules of the Fair Trade Commission and within sixty days from the date on which the transcript of the written payment order for surcharge was served (in the event of natural disaster or other inevitable reason that results in the request for hearings not being made within such period, within one week from the day following the date when such reason ceased to be valid), the Fair Trade Commission to initiate a hearing regarding the said payment order.
- (5) If no request is made pursuant to the provisions of the preceding paragraph within the period prescribed in the said paragraph, the payment order shall become final and binding.
- (6) The provisions of paragraphs 3 to 5 inclusive of the preceding Article shall apply *mutatis mutandis* to the payment order. In this case, the term The expected content

of the cease and desist order" in item 1 of paragraph 5 of Article 49 shall be deemed to be replaced with "Amount of the surcharge intended to be ordered to be paid" and the term "The facts found by the Fair Trade Commission, and the application of laws and regulations thereto " in item 2 of paragraph 5 of Article 49 shall be deemed to be replaced with "The basis of calculation of the surcharge and the violation pertaining to such surcharge".

Article 51

- (1) After the Fair Trade Commission has issued a payment order pursuant to the provisions of paragraph 1 of Article 7-2 (including the cases where it is applied *mutatis mutandis* pursuant to paragraph 2 of Article 7-2 after deemed replacement), the Fair Trade Commission shall, if there is a unappealable decision regarding the same case that imposes a fine on the person that received the said payment order, modify, by a decision, the amount of the surcharge in the said payment order by reducing such amount by an amount equivalent to one-half of the amount of the fine imposed in the said decision; provided, however, that this shall not apply if the amount of the surcharge in the said payment order does not exceed the amount equivalent to one-half of the amount of the said fine or the amount after the said modification is less than one million yen.
- (2) In the case of the proviso to the preceding paragraph, the Fair Trade Commission shall rescind the said payment order by a decision.
- (3) In the case of the main clause of paragraph 1, the Fair Trade Commission shall, if the hearing procedures pertaining to the said payment order are not completed, notwithstanding the provisions of the main clause of the said paragraph, modify the amount of the surcharge in the said payment order to the amount decided through the said hearing procedures reduced by an amount equivalent to one-half of the amount of the fine as prescribed in the main clause of the said paragraph by a decision regarding the request for hearings pertaining to the said payment order.
- (4) In the case of the preceding three paragraphs, the Fair Trade Commission shall without delay refund in pecuniary form any amount already paid pursuant to the pre-modification or pre-rescission payment order (excluding any arrearage charge as prescribed in paragraph 3 of Article 70-9), if there is some portion that should be refunded.

Article 52

- (1) Any person who makes a request for hearings pursuant to the provisions of paragraph 6 of Article 49 or paragraph 4 of Article 50 (hereinafter referred to as "hearing request") shall submit to the Fair Trade Commission a written request that states the matters listed in the following items:
 - (i) the name and domicile or residence of the person making the hearing request or his or her agent;
 - (ii) the order pertaining to the hearing request; and (iii) the gist of and reason for the hearing request.
- (2) The gist as prescribed in item iii of the preceding paragraph shall clearly state the

scope of the request for rescission or modification of the order, and the claim (in the case of a cease and desist order, the claim against the facts that led to the order; in the case of a payment order, the claim against the basis of calculation of the surcharge) against the cease and desist order or payment order (referred to as "original order" in paragraph 5, Article 58, paragraph 1 of Article 59, paragraph 3 and 4 of Article 66, and Article 70-8) shall be clarified in the reason prescribed in the same item.

- (3) In the case that a hearing request has been made, the Fair Trade Commission shall commence hearing procedures regarding the order pertaining to the said hearing request without delay, except for cases that fall under paragraph 1 of Article 66.
- (4) The hearing request may be withdrawn in writing at any point up to the date of the final hearing regarding the order pertaining to the said hearing request.
- (5) After hearing procedures have been commenced pursuant to the provisions of paragraph 3 of Article 55, the original order shall become final and binding if the hearing request is withdrawn pursuant to the preceding paragraph.

Article 53

- (1) The Fair Trade Commission may, in cases where it deems that a monopolistic situation exists (excluding cases as prescribed in the proviso to paragraph 1 of Article 8-4; the same shall apply in paragraph 1 of Article 67), commence hearing procedures for a case if the Fair Trade Commission finds that it would be in the public interest to commence hearing procedures for the case.
- (2) The Fair Trade Commission shall, where it intends to commence hearing procedures for a case pursuant to the provisions of the preceding paragraph, consult with the competent ministers pertaining to the business operated by the entrepreneur concerned.

Article 54

- (1) The Fair Trade Commission may suspend the execution of all or part of a cease and desist order, when it finds that such action is necessary in the case where a hearing request pertaining to the said cease and desist order is made.
- (2) In the case of suspension of execution pursuant to the provisions of the preceding paragraph, the Fair Trade Commission shall, if it deems that the suspension of the said execution would be likely to make it difficult to ensure competition in the market or otherwise deems it necessary, rescind the suspension of the said execution.

Article 55

- (1) The Fair Trade Commission shall, where it commences hearing procedures pursuant to the provisions of paragraph 3 of Article 52, send a written notice of hearing to such effect to the person who made the hearing request.
- (2) The decision of commencement of the hearing pursuant to the provisions of

paragraph 1 of Article 53 shall be made in writing, and the written decision of commencement of the hearing shall state the gist of the case and the name of the addressee of the measures as prescribed in paragraph 1 of Article 8-4, and the chairman and the commissioners in attendance at the resolution of the decision shall affix their names and seals thereto.

- (3) The hearing procedures shall be commenced by sending a written notice of the hearing to the person who made the hearing request set forth in paragraph 1 or serving a transcript of the written decision of commencement of the hearing to the addressee set forth in the preceding paragraph.
- (4) The person who made the hearing request as set forth in paragraph 1 or the addressee as set forth in paragraph 2 (hereinafter referred to as "respondent") shall be ordered to appear on the date of the hearing.
- (5) The date of the hearing shall be fixed on the day thirty days from the date of issue of the written notice of commencement of the hearing or the date of issue of the transcript of the written decision of commencement of the hearing; provided, however, that this shall not apply where the consent of the respondent is obtained.
- (6) The person who received the service of the transcript of the written decision of commencement of the hearing as prescribed in paragraph 2 shall submit a written answer thereto without delay to the Fair Trade Commission.

Article 56

- (1) The Fair Trade Commission may, after commencing the hearing procedures, designate hearing examiners for each case and cause them to conduct all or a part of the subsequent hearing procedures (excluding the decision; the same shall apply in the following paragraph, Article 63, and Article 64) in addition to the commission of research and surveys pursuant to the provisions of Article 41 and the measures listed in each item of paragraph 1 of Article 47 pursuant to the provisions of the Rules of the Fair Trade Commission; provided, however, that no person who has performed duties of an investigator of the said case or who has otherwise been involved in the examination of the said case may be designated as a hearing examiner.
- (2) The hearing examiners designated pursuant to the provisions of the preceding paragraph (in the case that more than one hearing examiner have been designated, the person nominated from among them) shall, pursuant to the provisions of the
- (3) Rules of the Fair Trade Commission, direct the affairs pertaining to the hearing procedures that the Fair Trade Commission causes them to conduct pursuant to the provisions of that paragraph.

Article 57

The Fair Trade Commission or the hearing examiners may conduct the hearings even if the respondent or his or her agent fails to appear on the date of the said hearings without any justifiable ground.

Article 58

- (1) An investigator designated pursuant to the provisions of paragraph 2 of Article 47 may attend hearings, make a claim about the facts that led to the original order, the application of laws and regulations thereto, and the appropriateness of the original order (in the case the hearings concern a case pertaining to paragraph 1 of Article 8-4, facts which fall under the monopolistic situation), offer evidences, and perform other necessary acts.
- (2) In the case referred to in the preceding paragraph, an investigator may, where the examiner finds necessary a modification (limited to modifications within the scope prescribed by the provisions of the Rules of the Fair Trade Commission) in respect of the facts that led to the original order and the application of laws and regulations thereto (in the case the hearings concern a case pertaining to paragraph 1 of Article 8-4, facts which fall under the monopolistic situation), claim such a modification; provided, however, that this shall not apply to the case that the interests of the respondent are harmed.

Article 59

- (1) A respondent or his or her agent may, at the hearings, state the reason why the original order made or the measures to be ordered pursuant to the provisions of paragraph 1 of Article 8-4 by the Fair Trade Commission in regard to a case concerned are not just; may submit material proving it; may request the Fair Trade Commission to interrogate necessary witnesses, order expert witnesses to submit expert opinions, order holders of books and documents, and other materials to submit them, or enter the necessary sites and inspect the conditions of the business and property, books and documents, and other materials, or commission research and surveys; or may interrogate witnesses or expert witnesses whom the Fair Trade Commission ordered to appear; or may question those commissioned to perform research and surveys.
- (2) A respondent (except a constituent entrepreneur of a trade association that has committed an act in violation of the provisions of item 1 or 2 of paragraph 1 of Article 8; hereinafter the same shall apply in this paragraph) or his or her agent may not, in the hearing procedures pertaining to the payment order, claim the nonexistence of the violation pertaining to the said payment order (in the case of item iii, limited to the portion pertaining to the finding concerned) in the case that any of the following items applies:
 - (i) the cease and desist order regarding the violation pertaining to the payment order has become final and binding pursuant to the provisions of paragraph 7 of Article 49;
 - (ii) the respondent or his or her agent has withdrawn the hearing request in respect of the cease and desist order regarding the violation pertaining to the payment order; or
 - (iii) all or a part of the violation is found in the decision pertaining to the cease and desist order regarding the violation pertaining to the payment order.

Article 60

If the Fair Trade Commission or hearing examiner does not adopt the evidences offered by the investigator, or the respondent or his or her agent, the Fair Trade Commission or hearing examiner shall state the reasons for not having adopted such evidences.

Article 61

- (1) All hearings shall be open to the public; provided, however, that hearings may not be open to the public, where found necessary to protect trade secrets of an entrepreneur, or necessary for the public interest.
- (2) Written statements of the hearings shall be compiled pursuant to the provisions of the Rules of the Fair Trade Commission.

Article 62

- (1) The provisions of Articles 143 to 147 inclusive, Article 149, Articles 154 to 156 inclusive, Article 165, and Article 166 of the Code of Criminal Procedure (Act No.131 of 1948) shall apply mutatis mutandis to the procedures by which the Fair Trade Commission or hearing examiners, in the course of hearings, shall interrogate witnesses, or order expert witnesses to express expert opinion.
- (2) In the case referred to in the preceding paragraph, the terms "court", "examination", and "the accused" shall be deemed to be replaced with "the Fair Trade Commission or hearing examiners", "interrogation", and "respondent", respectively.

Article 63

In cases where the Fair Trade Commission has caused hearing examiners to conduct all or a part of the hearing procedures pursuant to the provisions of paragraph 1 of Article 56, the Fair Trade Commission shall, if the respondent or his or her agent so offers, give the respondent or his or her agent an opportunity to state their views directly to the Fair Trade Commission; provided, however, that this shall not apply to cases where the hearing procedures pertaining to a payment order have been commenced pursuant to the provisions of paragraph 3 of Article 52 and the violation has been found in a decision pertaining to the cease and desist order regarding the said violation pertaining to the said payment order.

Article 64

The Fair Trade Commission or the hearing examiners may, where it or they determine it appropriate, merge or separate the hearing procedures on its or their own authority.

Article 65

After the Fair Trade Commission has decided to commence a hearing pursuant to the provisions of paragraph 1 of Article 53 regarding a case pertaining to paragraph 1 of Article 8-4, the Fair Trade Commission may, where the respondent admits the facts and the application of the law as stated in the written decision of commencement of the hearing, and offers in writing to accept the decision without requiring subsequent hearing procedures and submits to the Fair Trade Commission a written plan setting forth concrete measures which the respondent proposes voluntarily to take in order to restore competition with respect to the goods or services involved in the monopolistic situation, render a decision to the effect of the concrete measures stated in such plan without conducting the subsequent hearing procedures if the Fair Trade Commission finds it appropriate.

Article 66

- (1) The Fair Trade Commission shall, if the hearing request is made after the statutory period had elapsed or it is otherwise illegitimate, dismiss the said hearing request by a decision.
- (2) The Fair Trade Commission shall, if the hearing request is groundless, dismiss the said hearing request by a decision after the hearing procedures have been completed.
- (3) The Fair Trade Commission shall, if the hearing request has sufficient grounds, rescind or modify the entirety or a part of the original order by a decision after the hearing procedures have been completed.
- (4) In the case of rescission of the entirety or a part of the original order pursuant to the provisions of the preceding paragraph, the Fair Trade Commission shall, where it finds that an act in violation of the provisions of Article 3, Article 6, paragraph 1 of Article 8, paragraph 1 or 2 of Article 9, paragraph 1 of Article 10, paragraph 1 of Article 11, Article 13, Article 14, paragraph 1 of Article 15, paragraph 1 of Article 15-2, paragraph 1 of Article 16, Article 17, or Article 19 existed prior to the making of the original order but that the violation had already ceased to exist at the time of making of the said original order, make these facts clear by a decision.

Article 67

- (1) The Fair Trade Commission shall, where it finds after the hearing procedures have been completed that a monopolistic situation exists, order the respondent by a decision to take such measures as prescribed in paragraph 1 of Article 8-4.
- (2) The Fair Trade Commission shall, where it finds after the hearing procedures have been completed that facts falling under a monopolistic situation did not exist prior to the decision of commencement of the hearing, or that facts falling under a monopolistic situation existed prior to the decision of commencement of the hearing, but the said facts have already ceased to exist prior thereto, or that facts falling under a monopolistic situation exist and they fall under the proviso to paragraph 1 of Article 8-4, make clear these facts by a decision.

Article 68

In rendering a decision pursuant to the provisions of paragraphs 2 to 4 inclusive of Article 66 and the preceding Article, the Fair Trade Commission shall, except in the case of facts not contested by the respondent or known publicly, find the facts in question based on the evidences examined at the hearing procedures.

Article 69

- (1) Cease and desist orders, payment orders, and decisions shall be made by meetings of the chairman and the commissioners.
- (2) The provisions of paragraphs 1, 2 and 4 of Article 34 shall apply mutatis mutandis to such meetings as set forth in the preceding paragraph.
- (3) For a decision ordering the measures set forth in paragraph 1 of Article 8-4, three or more people shall concur, notwithstanding the provisions of paragraph 2 of Article 34, as applied mutatis mutandis pursuant to the preceding paragraph.

Article 70

Meetings of the Fair Trade Commission shall not be open to the public. Article 70-2

- (1) Decisions shall be rendered in writing, and the written decisions shall show the facts found by the Fair Trade Commission and the application of laws and regulations thereto and, in the case of decisions set forth in paragraph 3 of Article 66 pertaining to payment orders, the basis of calculating the surcharge, and the chairman and the commissioners attending the meeting shall sign and seal it.
- (2) A dissenting opinion may be stated in a written decision.
- (3) A decision shall take effect by serving the transcript of the written decision upon the respondent or other addressee thereof.
- (4) No decision ordering the measures set forth in paragraph 1 of Article 8-4 may be executed unless and until such decision becomes final and binding.

Article 70-3

The Fair Trade Commission may, if it finds it necessary, on its own authority, cause a third person interested in the results of the decision to participate in the hearing procedures as a party; provided, however, that it shall in advance interrogate the respondent and the said third party.

Article 70-4

Any public office or public organization concerned may, if it finds it necessary for the public interest, participate in the hearing procedures as a party with the approval of the Fair Trade Commission.

Article 70-5

Any public office or public organization concerned may, in order to protect the public interest, provide its opinions to the Fair Trade Commission.

Article 70-6

- (1) Where the Fair Trade Commission has issued a cease and desist order, the respondent may stay the execution of the said cease and desist order until it becomes final and binding by depositing such security deposits or securities (including book-entry transfer corporate bonds, etc. prescribed in paragraph 1 of Article 129 of the Act on Book-Entry Transfer of Corporate Bonds, etc. (Act No. 75 of 2001); the same shall apply in paragraph 1 of the following Article and Article 70-14) as the court may fix.
- (2) The judgment under the provisions of the preceding paragraph shall be made pursuant to the Act on Procedure in Non-Contentious Matters (Act No. 14 of 1898).

Article 70-7

- (1) In the case where the respondent has made a deposit pursuant to the provisions of paragraph 1 of the preceding Article and the cease and desist order has become final and binding, the court may, upon the petition of the Fair Trade Commission, sequester the whole or a part of the security deposits or securities deposited.
- (2) The provisions of paragraph 2 of the preceding Article shall apply mutatis mutandis to the judgment under the provisions of the preceding paragraph.

Article 70-8

After issuing a cease and desist order (limited to those orders that have become final and binding under the provisions of paragraph 7 of Article 49 or paragraph 5 of Article 52), or a decision (excluding those decisions that rescind the entirety of the original order) set forth in paragraphs 1 to 3 inclusive of Article 66, or a decision rendered pursuant to the provisions of Article 65 or paragraph 1 of Article 67, the Fair Trade Commission may, if it considers it particularly necessary, make the measures, or cause its staff members to make the measures, necessary to ascertain whether the measures ordered or maintained in that order or decision are being taken pursuant to the provisions of Article 47.

Article 70-9

- (1) If any person fails to pay a surcharge by the deadline for payment, the Fair Trade Commission shall demand the payment by serving a written demand designating a deadline for the payment.
- (2) Notwithstanding the provisions of the preceding paragraph, the Fair Trade Commission shall, if a hearing request regarding the payment order has been made (excluding the cases where the said hearing request is dismissed pursuant to the provisions of paragraph 1 of Article 66; the same shall apply in the following paragraph), promptly demand, after a decision on the said hearing request has been made, payment of the surcharge pertaining to the said payment order and if there is an arrearage charge pursuant to the provisions of the next paragraph, the arrearage charge, by serving a written demand designating a deadline therefor, excluding the cases where the said payment order is rescinded in its entirety pursuant to the provisions of paragraph 3 of Article 66; provided, however, that this shall not apply to cases where the said surcharge and arrearage charge are paid in their entirety by the date when a transcript of the written decision in regard to the hearing request regarding the said payment order was served.
- (3) In cases where any person fails to pay a surcharge by the deadline for payment, the Fair Trade Commission may collect an arrearage charge calculated at a rate of fourteen point five percent (14.5%) per annum (if a hearing request regarding the payment order pertaining to the said surcharge has been made, the rate specified by a Cabinet Order, but not exceeding seven point two five percent (7.25%) per annum up to and including the date when a transcript of the written decision regarding the hearing request is served) of the amount of such surcharge for the number of days intervening between the day after the deadline for payment and the day of payment; provided, however, that this shall not apply to cases where the arrearage charge involved is less than one thousand yen.
- (4) In the case that the amount of an arrearage charge, calculated pursuant to the provisions of the preceding paragraph, contains a fraction of less than one hundred yen, such fraction shall be disregarded.
- (5) In the case that a person upon whom a demand has been served under the provisions of paragraph 1 or 2 fails to make the payment to be made by the designated deadline, the Fair Trade Commission may collect such payment pursuant to the national tax delinquency procedures.
- (6) A statutory lien for the payment to be collected as prescribed in the preceding paragraph shall be next to those for national and local taxes, and the prescription on such payment shall be treated as if it were national tax.

Article 70-10

- (1) In the case that all or a part of a payment order is rescinded pursuant to the provisions of paragraph 3 of Article 66, the Fair Trade Commission shall without delay refund in pecuniary form any amount already paid pursuant to the pre-rescission payment order that should be refunded.
- (2) In the case of the refund of the amount set forth in the preceding paragraph, the Fair Trade Commission shall add to the said amount the amount calculated at a rate

specified by a Cabinet Order, but not exceeding seven point two five percent (7.25%) per annum, of the said amount for the number of days in a period between the day after the day when the said amount was paid and the day when the decision was made to pay the refund.

- (3) The provisions of the proviso to paragraph 3 and paragraph 4 of the preceding Article shall apply mutatis mutandis to amounts added pursuant to the provisions of the preceding paragraph.

Article 70-11

- (1) The Fair Trade Commission shall, where an application for approval set forth in paragraph 1 or 2 of Article 11 has been filed, dismiss it by a decision if the Fair Trade Commission finds the said application to be groundless.
- (2) The provisions of paragraph 2 of Article 45 shall apply mutatis mutandis to the cases where an application for approval set forth in the preceding paragraph has been filed.

Article 70-12

- (1) In cases where approval set forth in paragraph 1 or 2 of Article 11 has been granted, the Fair Trade Commission may, where it finds that the facts required for the said approval have ceased to exist or have changed, rescind or modify such approval by a decision after hearing procedures have been completed. In this case, the Fair Trade Commission may commence hearing procedures on its own authority.
- (2) The Fair Trade Commission may, where it finds that maintenance of a cease and desist order or a decision pursuant to the provisions of Article 65 or paragraph 1 of Article 67 is inappropriate due to changes in economic conditions or other reasons, rescind or modify it by a decision; provided, however, that this shall not apply if such action may result in harm to the interests of the respondent.

Article 70-13

- (1) The court may, upon petition by the Fair Trade Commission, where it finds the matter to be one of urgent necessity, order the person doing an act suspected of violating the provisions of Article 3, Article 6, paragraph 1 of Article 8, paragraph 1 or 2 of Article 9, paragraph 1 of Article 10, paragraph 1 of Article 11, Article 13, Article 14, paragraph 1 of Article 15, paragraph 1 of Article 15-2, paragraph 1 of Article 16, Article 17, or Article 19 to temporarily suspend the said act, the exercise of voting rights, or the operating of business as an officer in a corporation, or may rescind or modify such order.
- (2) The provisions of paragraph 2 of Article 70-6 shall apply mutatis mutandis to the judgment under the provisions of the preceding paragraph.

Article 70-14

- (1) The execution of a judgment under the provisions of paragraph 1 of the preceding Article may be stayed by depositing such security deposits or securities as the court may fix.
- (2) The provisions of Article 70-7 shall apply mutatis mutandis to sequestration of the security deposits or securities deposited under the provisions of the preceding paragraph.

Article 70-15

Any interested person may, after the hearing procedures have been commenced, request the Fair Trade Commission for inspection or copy of the records of the case in question, or for delivery of a transcript of the written cease and desist order, the written payment order for surcharge, the written decision of commencement of the hearing, or the written decision, or an extract thereof.

Article 70-16

Documents to be served shall be fixed, in addition to those as stipulated by this Act, by the Rules of the Fair Trade Commission.

Article. 70-17

With regard to the service of documents, the provisions of Article 99, Article 101, Article 103, Article 105, Article 106, Article 108, and Article 109 of the Code of Civil Procedure (Act No. 109 of 1996) shall apply mutatis mutandis. In this case, the term "court enforcement officer" in paragraph 1 of Article 99 of the said Code shall be deemed to be replaced with "staff members of the Fair Trade Commission", and the term "presiding judge" in Article 108 of the said Code and the term "court" in Article 109 of the said Code shall be deemed to be replaced with "the Fair Trade Commission".

Article 70-18

- (1) The Fair Trade Commission may conduct service by public notification in the following cases:
 - (i) When the domicile, residence, or other place where service is made of the person that is to receive the service is unknown;
 - (ii) When, with regard to service to be made in foreign countries, the provisions of Article 108 of the Code of Civil Procedure as applied mutatis mutandis pursuant to the preceding Article may not be applied, or it is recognized that service may not be made based on the said provisions; or
 - (iii) When, after the lapse of six months from the date when a foreign competent authority was commissioned to conduct service pursuant to the provisions of Article 108 of the Code of Civil Procedure as applied mutatis

mutandis pursuant to the preceding Article, documents certifying the service are not received.

- (2) Service by public notification shall be made through posting on the notice board of the Fair Trade Commission to the effect that the documents to be served shall be delivered at any time to the person that is to receive the service.
- (3) Service by public notification shall take effect after the lapse of two weeks from the date when the posting was commenced under the provisions of the preceding paragraph.
- (4) Regarding service by public notification pertaining to service to be made in foreign countries, the time period set forth in the preceding paragraph shall be six weeks.

Article 70-19

- (1) Notices of measures as prescribed in item 7 of Article 2 of the Act on Utilization of Information and Communications Technology in Administrative Procedure (Act No. 151 of 2002), which are to be made by service of documents pursuant to the provisions of this Act and the Rules of the Fair Trade Commission, may not be made using an electronic data processing system ("electronic data processing system" as prescribed in paragraph 1 of Article 4 of the Act on Utilization of Information and Communications Technology in Administrative Procedure; hereinafter the same shall apply in this Article) if the recipient of the said notice of measure has given no indication via the method stipulated in the Rules of the Fair Trade Commission of receiving the service, notwithstanding the provisions of that Article.
- (2) The staff members of the Fair Trade Commission shall, when performing affairs related to the notice of measure prescribed in the preceding paragraph using an electronic data processing system, record matters related to the service under the provisions of Article 109 of the Code of Civil Procedure as applied mutatis mutandis pursuant to Article 70-17 in a file stored in a computer (including input and output devices) used by the Fair Trade Commission via an electronic data processing system instead of preparing and submitting a document that states those matters.

Article 70-20

Necessary matters with respect to procedures for investigations and hearings of the Fair Trade Commission, and any other matters relating to the disposal of cases, as well as those with respect to deposits set forth in paragraph 1 of Article 70-6 and paragraph 1 of Article 70-14 shall be provided for by a Cabinet Order except for such matters as provided for in this Act.

Article 70-21

The provisions of Chapters II and III of the Administrative Procedures Act (Act No. 88 of 1993) shall not apply to cease and desist orders, payment orders, and measures pertaining to applications for approval prescribed in paragraph 1 of Article 70-11, and

decisions or any other measures under the provisions of this Section (including the measures effected by investigators under the provisions of paragraph 2 of Article 47 and by hearing examiners under the provisions of paragraph 1 of Article 56) that have been rendered by the Fair Trade Commission.

Article 70-22

Cease and desist orders and payment orders as well as decisions and any other measures under the provisions of this Section (including the measures effected by investigators under the provisions of paragraph 2 of Article 47 and by hearing examiners under the provisions of paragraph 1 of Article 56) that have been rendered by the Fair Trade Commission shall not be appealed under the Administrative Appeal Act (Act No. 160 of 1962).

Section III Miscellaneous Provisions

Article 71

The Fair Trade Commission shall, where it designates specific trade practices in a specific field of business pursuant to the provisions of paragraph 9 of Article 2, first hear the opinions of entrepreneurs operating in the same line of business as that of the entrepreneurs who employ the said specific trade practices, and hold a public hearing to obtain the opinions of the public and thereupon shall make the designation after due consideration of the opinions presented.

Article 72

Designation under the provisions of paragraph 9 of Article 2 shall be made by notice.

Article 73

In case that the Fair Trade Commission contemplates commencing hearing procedures pursuant to the provisions of paragraph 1 of Article 53, the Fair Trade Commission shall hold a public hearing to obtain the opinions of the public.

Article 74

- (1) The Fair Trade Commission shall, where it is convinced after an investigation conducted pursuant to the procedures as prescribed in Chapter XII that a criminal offense has taken place, file an accusation with the Prosecutor General.
- (2) In addition to the provisions of the preceding paragraph, the Fair Trade Commission shall, where it considers that a crime violating the provisions of this Act exists, file an accusation with the Prosecutor General.
- (3) The Prosecutor General shall, where he or she has made measures not to prosecute a case which is the subject of an accusation under the provisions of the preceding two

paragraphs, report in writing on the said fact and the reasons therefore to the Prime Minister through the Minister of Justice without delay.

Article 75

Witnesses or expert witnesses who have been ordered to appear or to give expert opinions pursuant to the provisions of item 1 or 2 of paragraph 1 of Article 47, paragraph 2 of Article 47, or paragraph 1 of Article 56, may claim travel expenses and compensation pursuant to the provisions of a Cabinet Order.

Article 76

- (1) The Fair Trade Commission may establish rules with respect to its internal disciplines, procedures for the disposal of cases and necessary procedures for notifications, applications for approval, and other matters.
- (2) In establishing rules with respect to the procedures for the disposal of cases pursuant to the provisions of the preceding paragraph, the Fair Trade Commission shall keep in mind the need to ensure that the said procedures are duly undertaken, including ensuring that the respondent has sufficient opportunity to state and prove his or her claims, etc.

CHAPTER IX LAWSUITS

Article 77

- (1) A suit to rescind a decision of the Fair Trade Commission shall be filed within thirty days (three months in the case of a decision ordering the measures set forth in paragraph 1 of Article 8-4) from the date on which the decision became effective.
- (2) The period set forth in the preceding paragraph shall be an unextendable period.
- (3) No suits may be filed regarding matters about which a hearing request may be made unless the suit concerns a decision.

Article 78

The Fair Trade Commission shall be the defendant in appeal suits prescribed in paragraph 1 of Article 3 of the Administrative Case Litigation Act (Act No. 139 of 1962) pertaining to a decision made by the Fair Trade Commission.

Article 79

The court shall, upon the filing of a suit, request the Fair Trade Commission without delay, to send the records of the relevant case (including interrogation records of persons concerned with a case, witnesses, and expert witnesses, records of the hearings, and any other matters that may be used as evidences in court).

Article 80

- (1) Findings of fact made by the Fair Trade Commission shall, if established by substantial evidences, be binding upon the court in regard to the suit prescribed in paragraph 1 of Article 77.
- (2) Whether such substantial evidences as prescribed in the preceding paragraph exists or not shall be determined by the court.

Article 81

- (1) A party may plead to the court to offer new evidences relevant to the case; provided, however, that any such offer of new evidences relating to the facts found by the Fair Trade Commission must have any of the following items as its reason for being offered:
 - (i) Where the Fair Trade Commission failed to adopt the evidences without justifiable ground; or
 - (ii) Where it was impossible to submit the evidences at the hearings of the Fair Trade Commission, and there was no gross negligence on the part of the party in failing to submit such evidences.
- (2) In regard to the offer of new evidences prescribed in the proviso of the preceding paragraph, the onus to show that the evidences falls under any of the items of the preceding paragraph shall be on the party seeking to introduce the evidences.
- (3) Where the court finds there is a good reason for the offer of new evidences prescribed in the proviso of paragraph 1 and it is necessary to examine such evidences, it shall refer the case back to the Fair Trade Commission and order it to take appropriate measures after examining such evidences.

Article 82

- (1) The court may rescind a decision of the Fair Trade Commission if the decision falls under any of the following items:
 - (i) If the facts on which the decision is based are not established by substantial evidences, or
 - (ii) If the decision violates the Constitution or other laws or regulations.
- (2) The Fair Trade Commission shall, where the judgment which rescinds the decision (limited to decisions pursuant to the provisions of Article 66) becomes final and binding, render another decision regarding the hearing request pursuant to the gist of the judgment.

Article 83

The court may, where it finds it necessary for further hearings to be conducted in the case a decision of the Fair Trade Commission (limited to decisions pursuant to the

provisions of Article 67 and paragraph 1 of Article 70-12) shall be rescinded, refer the case back to the Fair Trade Commission giving the reasons for the referral.

Article 83-2

- (1) Where a suit for suspension or prevention of infringements pursuant to the provisions of Article 24 has been filed, the court may order the plaintiff to provide adequate security by ruling at the petition of the defendant.
- (2) In order to lodge the petition set forth in the preceding paragraph, the fact that the suit set forth in the said paragraph has been filed for an unfair purpose (meaning purposes of acquiring a wrongful benefits, intending to do harm to another person, or other unfair purposes) shall be established by evidences showing a prima facie.

Article 83-3

- (1) Where a suit for suspension or prevention of infringements under the provisions of Article 24 has been filed, the court shall notify the Fair Trade Commission to that effect.
- (2) Where a suit set forth in the preceding paragraph has been filed, the court may ask for the opinion of the Fair Trade Commission with respect to the application of this Act for the case concerned or other necessary matters.
- (3) Where a suit set forth in paragraph 1 has been filed, the Fair Trade Commission may, with the permission of the court, state an opinion to the court on the application of this Act for the case concerned or other necessary matters.

Article 84

- (1) Where a suit for damages under the provisions of Article 25 has been filed, the court shall, without delay, ask for the opinion of the Fair Trade Commission with respect to the amount of damages caused by such violations as prescribed in the said Article.
- (2) If a claim for damages under the provisions of Article 25 is made in court proceedings for the purpose of reducing the other claim by set-off, the provisions of the preceding paragraph shall apply mutatis mutandis.

Article 84-2

- (1) In cases where the courts listed in the following items have jurisdiction over a suit for suspension or prevention of infringements under the provisions of Article 24 pursuant to the provisions of Articles 4 and 5 of the Code of Civil Procedure, the said suit may also be filed with the courts as prescribed in the respective item:
 - (i) A district court located within the jurisdiction of the Tokyo High Court (excluding the Tokyo District Court), the Osaka District Court, the Nagoya District Court, the Hiroshima District Court, the Fukuoka District Court, the Sendai District Court, the Sapporo District Court, or the Takamatsu

District Court: The Tokyo District Court

- (ii) A district court located within the jurisdiction of the Osaka High Court (excluding the Osaka District Court): The Tokyo District Court, or the Osaka District Court
 - (iii) A district court located within the jurisdiction of the Nagoya High Court (excluding the Nagoya District Court): The Tokyo District Court, or the Nagoya District Court
 - (iv) A district court located within the jurisdiction of the Hiroshima High Court (excluding the Hiroshima District Court): The Tokyo District Court, or the Hiroshima District Court
 - (v) A district court located within the jurisdiction of the Fukuoka High Court (excluding the Fukuoka District Court): The Tokyo District Court, or the Fukuoka District Court
 - (vi) A district court located within the jurisdiction of the Sendai High Court (excluding the Sendai District Court): The Tokyo District Court, or the Sendai District Court
 - (vii) A district court located within the jurisdiction of the Sapporo High Court (excluding the Sapporo District Court): The Tokyo District Court, or the Sapporo District Court
 - (viii) A district court located within the jurisdiction of the Takamatsu High Court (excluding the Takamatsu District Court): The Tokyo District Court, or the Takamatsu District Court
- (2) With respect to the application of the provisions of Article 7 of the Code of Civil Procedure to cases where several claims are made in one suit, including a claim under the provisions of Article 24 of this Act, the term "from Article 4 to the preceding Article inclusive (excluding paragraph 3 of Article 6)" in Article 7 of the Code of Civil Procedure shall be deemed to be replaced with "from Article 4 to the preceding Article inclusive (excluding paragraph 3 of Article 6), and paragraph 1 of Article 84-2 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade".

Article 84-3

The jurisdiction of the first instance over any suit pertaining to crimes as provided for in Articles 89 to Article 91 inclusive shall lie in the district courts.

Article 84-4

In cases when the courts listed in the items of paragraph 1 of Article 84-2 have jurisdiction over a case pertaining to crimes stipulated in the preceding Article pursuant to the provisions of Article 2 of the Code of Criminal Procedure, the courts as prescribed in the respective items also have jurisdiction over such cases.

Article 85

The jurisdiction of the first instance over any suit falling under any of the following items shall lie in the Tokyo High Court:

- (i) Appeal suits defined in paragraph 1 of Article 3 of the Administrative Case Litigation Act pertaining to decisions of the Fair Trade Commission (excluding suits defined in paragraphs 5 to 7 inclusive of the same Article); and
- (ii) Suits concerning compensation for damages pursuant to the provisions of Article 25.

Article 86

Any case provided for in paragraph 1 of Article 70-6, paragraph 1 of Article 70-7 (including cases where it is applied *mutatis mutandis* under paragraph 2 of Article 70-14), paragraph 1 of Article 70-13, Article 97, and Article 98 shall be subject to the exclusive jurisdiction of the Tokyo High Court.

Article 87

- (1) A panel of judges invested with the authority to hear exclusively the cases listed in Article 85 and cases listed in the preceding Article shall be established within the Tokyo High Court.
- (2) The number of judges on the panel set forth in the preceding paragraph shall be five.

Article 87-2

The court may, in cases where a suit for suspension or prevention of infringements pursuant to the provisions of Article 24 has been filed, and a suit pursuant to the same Article pertaining to the same or similar acts is pending in another court, when the court finds it proper in consideration of the addresses or locations of the parties, addresses of witnesses to be examined, the commonality of issues or evidences and any other circumstances, transfer, by petition or *ex officio*, the case in whole or in part to the said other court or other courts having jurisdiction on the said suit pursuant to the provisions of paragraph 1 of Article 84-2.

Article 88

With respect to appeal suits defined in paragraph 1 of Article 3 of the Administrative Case Litigation Act pertaining to decisions of the Fair Trade Commission, the provisions of Article 6 of the Act on the Authority of the Minister of Justice over Suits Affecting the Interests of State (Act No. 194 of 1947) shall not apply.

CHAPTER X MISCELLANEOUS PROVISIONS

Article 88-2

In case a Cabinet Order or the Rules of the Fair Trade Commission is established, revised, or abolished pursuant to the provisions of this Act, transitional measures (including transitional measures relating to penal provisions) may be provided for by virtue of such Cabinet Order or the Rules of the Fair Trade Commission to the extent they are considered reasonably necessary along with such establishment, revision, or abolition.

CHAPTER XI PENAL PROVISIONS

Article 89

- (1) Any person who falls under any of the following items shall be punished by imprisonment with work for not more than three years or by a fine of not more than five million yen:
 - (i) Any person who, in violation of the provisions of Article 3, has effected private monopolization or unreasonable restraint of trade; or
 - (ii) Any person who, in violation of the provisions of item 1 of paragraph 1 of Article 8 has effected substantial restraint of competition in any particular field of trade.
- (2) Any attempt to commit a crime falling under the preceding paragraph shall be punished.

Article 90

Any person who falls under any of the following items shall be punished by imprisonment with work for not more than two years or by a fine of not more than three million yen:

- (i) Any person who, in violation of the provisions of Article 6 item 2 of paragraph 1 of Article 8 has entered into an international agreement or an international contract which contains such matters as fall under unreasonable restraint of trade;
- (ii) Any person who violated the provisions of item 3 or 4 of paragraph 1 of Article 8; or
- (iii) Any person who fails to comply with a cease and desist order or a decision as provided for in Article 65 or paragraph 1 of Article 67 after it has become final and binding.

Article 91

Any person who falls under any of the following items shall be punished by imprisonment with work for not more than one year or by a fine of not more than two million yen:

- (i) Any person who, in violation of the provisions of the first part of paragraph 1 of Article 10, has acquired or held stocks;
- (ii) Any person who, in violation of the provisions of paragraph 1 of Article 11, has acquired or held stocks; or who, in violation of the provisions of paragraph 2 of the said Article, has held stocks;
- (iii) Any person who, in violation of the provisions of paragraph 1 of Article 13, has held concurrently positions as a director;
- (iv) Any person who, in violation of the provisions of the first part of Article 14, has acquired or held stocks; or
- (v) Any person who violated the provisions of Article 17 with regard to the prohibitions or restrictions listed in the preceding items.

Article 91-2

Any person who falls under any of the following items shall be punished by a fine of not more than two million yen:

- (i) Any person who, in violation of the provisions of paragraphs 2 to 4 inclusive of Article 8, has failed to notify or submitted a written report with a false description;
- (ii) Any person who, in violation of the provisions of paragraph 5 of Article 9, has failed to submit a written report or submitted a written report with a false description;
- (iii) Any person who, in violation of the provisions of paragraph 6 of Article 9, has failed to notify or submitted a written notification with a false description;
- (iv) Any person who, in violation of the provisions of paragraph 2 of Article 10 (including cases where it is applied *mutatis mutandis* under paragraph 3 of the same Article), has failed to submit a written report or submitted a written report with a false description;
- (v) Any person who, in violation of the provisions of paragraph 2 of Article 15 (including cases where it is applied *mutatis mutandis* under paragraph 3 of the same Article after deemed replacement), has failed to notify or submitted a written notification with a false description;
- (vi) Any person who, in violation of the provisions of paragraph 4 of Article 15, has effected a register of an incorporation or a change as a result of a merger;
- (vii) Any person who, in violation of the provisions of paragraphs 2 and 3 of Article 15-2 (including cases where they are applied *mutatis mutandis* under

- (viii) paragraph 5 of the same Article after deemed replacement), has failed to notify or submitted a written notification with a false description;
- (ix) Any person who, in violation of the provisions of paragraph 4 of Article 15 which is applied mutatis mutandis under paragraph 6 of Article 15-2 after deemed replacement, has effected a register of incorporation as a result of a joint incorporation-type demerger or a register of change as a result of an absorption-type demerger;
- (x) Any person who, in violation of the provisions of paragraph 2 of Article 16 (including cases where it is applied mutatis mutandis under paragraph 4 of the same Article after deemed replacement), has failed to notify or submitted a written notification with a false description;
- (xi) Any person who, in violation of the provisions of paragraph 4 of Article 15, which is applied mutatis mutandis under paragraph 5 of Article 16 after deemed replacement, has carried out an act falling under item 1 or 2 of paragraph 1 of Article 16; or
- (xii) Any person who, in violation of the provisions of paragraph 6 of Article 23, has failed to notify or submitted a written notification with a false description

Article 92

Any person who has committed any of the crimes provided for in Articles 89 to 91 inclusive may, according to the circumstances, be punished by both imprisonment with work and a fine.

Article 92-2

- (1) Any witness or expert witness under oath pursuant to the provisions of Article 154 or 166 of the Code of Criminal Procedure which are applied mutatis mutandis under Article 62 of this Act after deemed replacement, who has made a false statement or expert opinion, shall be punished by imprisonment with work for not less than three months but not more than ten years.
- (2) Where a person having committed a crime set forth in the preceding paragraph confesses his or her crime prior to the completion of the hearing procedures and before the revelation of such crime, the punishment for such crime may be commuted or waived.

Article 93

Any person who violated the provisions of Article 39 shall be punished by imprisonment with work for not more than one year or by a fine of not more than one hundred thousand yen.

Article 94

Any person who falls under any of the following items shall be punished by imprisonment with work for not more than one year or by a fine of not more than three million yen:

- (i) Any person concerned with a case or any witness who, in violation of the measures made against him or her pursuant to the provisions of item 1 of paragraph 1 or paragraph 2 of Article 47, or paragraph 1 of Article 56, has failed to appear or to make a statement, or made a false statement, or failed to submit a report, or submitted a false report;
- (ii) Any expert witness who, in violation of the measures made against him or her pursuant to the provisions of item 2 of paragraph 1 or paragraph 2 of Article 47, or paragraph 1 of Article 56, has failed to appear or to give an expert opinion, or submitted a false expert opinion;
- (iii) Any holder of the materials who, in violation of the measures made against him or her pursuant to the provisions of item 3 of paragraph 1 or paragraph 2 of Article 47 or paragraph 1 of Article 56, has failed to submit the materials; or
- (iv) Any person who has refused, obstructed, or evaded the inspection pursuant to the provisions of item 4 of paragraph 1 or paragraph 2 of Article 47 or paragraph 1 Article 56.

Article 94-2

Any person who falls under any of the following items shall be punished by a fine of not more than two hundred thousand yen:

- (i) Any person who, in violation of the measures pursuant to the provisions of Article 40, has failed to appear or to submit a report, information, or materials, or submitted a false report, information, or materials; or
- (ii) Any witness or expert witness who, in violation of the order issued to him or her pursuant to the provisions of Article 154 or 166 of the Code of Criminal Procedure which are applied mutatis mutandis under Article 62 of this Act after deemed replacement, has failed to take the oath.

Article 95

(1) When a representative of a juridical person, or an agent, an employee, or any other servant of a juridical person or of an individual has, with regard to the business or property of the said juridical person or individual, committed a violation of the provisions in any of the following items, not only the offender shall be punished but also the said juridical person or individual shall be punished by the fine as prescribed in the respective items.

- (i) Article 89: Fine of not more than five hundred million yen.
- (ii) Item 3 of Article 90 (excluding cases of violations of orders pursuant to the provisions of paragraph 1 of Article 7 or paragraph 1 or 3 of Article 8-2

(limited to portions ordering the party to cease and desist from the act in violation of the provisions of Article 3 or item 1 of paragraph 1 of Article 8)) Fine of not more than three hundred million yen.

- (iii) Item 1, 2 or 3 of Article 90 (limited to cases of violations of orders pursuant to the provisions of paragraph 1 of Article 7 or paragraph 1 or 3 of Article 8-2 (limited to portions ordering the party to cease and desist from the act in violation of the provisions of Article 3 or item 1 of paragraph 1 of Article 8)) Article 91 (excluding item 3), Article 91-2, or Article 94: Fine as provided for in the respective Articles.
- (2) Where a representative, a manager, an agent, an employee, or any other servant of an organization without juridical personality has, with regard to the business or property of the said organization, committed a violation of the provisions in any of the following items, not only the offender shall be punished but also the said organization shall be punished by the fine as prescribed in the respective items.
- (i) Article 89: Fine of not more than five hundred million yen.
 - (ii) Item 3 of Article 90 (excluding cases of violations of orders pursuant to the provisions of paragraph 1 of Article 7 or paragraph 1 or 3 of Article 8-2 (limited to portions ordering the party to cease and desist from the act in violation of the provisions of Article 3 or item 1 of paragraph 1 of Article 8)) Fine of not more than three hundred million yen.
 - (iii) Item 1, 2 or 3 of Article 90, (limited to cases of violations of orders pursuant to the provisions of paragraph 1 of Article 7 or paragraph 1 or 3 of Article 8-2 (limited to portions ordering the party to cease and desist from the act in violation of the provisions of Article 3 or item 1 of paragraph 1 of Article 8)) item 4 or 5 of Article 91 (limited to portions related to item 4), item 1 of Article 91-2, or Article 94: Fine as provided for in the respective Articles.
- (3) In the case of the preceding paragraph, the representative or manager shall represent the said organization in respect of procedural actions and the provisions of the Code of Criminal Procedure which are applicable to procedural actions where a juridical person is the accused or the suspect shall apply *mutatis mutandis*.

Article 95-2

In case of a violation of item 1 of paragraph 1 of Article 89 , item 1 or 3 of Article 90, or Article 91(excluding item 3), the representative of the relevant juridical person (excluding those which fall under a trade association in case of violation of item 1 or 3 of Article 90) who has failed to take necessary measures to prevent such violation despite the knowledge of a plan for such violation or who has failed to take necessary measures to rectify such violation despite the knowledge of such violation, shall also be punished by the fine as prescribed in the respective Articles.

Article 95-3

- (1) In case of a violation of item 2 of paragraph 1 of Article 89 or Article 90, a director or any other officer or a manager of the relevant trade association or its constituent entrepreneurs (including, in the case where the officer, employee, agent, or other person who has done the act for the benefit of an entrepreneur was a constituent entrepreneur, the said entrepreneur) who has failed to take necessary measures to prevent such violation despite the knowledge of a plan for such violation or who has failed to take necessary measures to rectify such violation despite knowledge of such violation, shall also be punished by the fine as prescribed in the respective Articles.
- (2) The provisions of the said paragraph shall, where a director or any other officer or a manager of the relevant trade association or its constituent entrepreneurs as provided for in the preceding paragraph is a juridical person or any other organization, apply to a director or any other officer or a manager of the said organization.

Article 95-4

- (1) The court may, when it finds that sufficient grounds exist, sentence a trade association to dissolution, simultaneously with the rendition of penalties as provided for in item 2 of paragraph 1 of Article 89 or Article 90.
- (2) When dissolution has been sentenced pursuant to the provisions of the preceding paragraph, the trade association shall be dissolved by virtue of such sentence, notwithstanding the provisions of any other laws or regulations, articles of incorporation, or any other stipulations.

Article 96

- (1) Any crime under Articles 89 to Article 91 inclusive shall be considered only after an accusation is filed by the Fair Trade Commission.
- (2) The accusation set forth in the preceding paragraph shall be made in writing.
- (3) The Fair Trade Commission may, in filing the accusation under paragraph 1, when it finds it appropriate that the sentence under paragraph 1 of the preceding Article or item 1 of paragraph 1 of Article 100 should be rendered with respect to a crime pertaining to the accusation, state the said effect in the written accusation set forth under the preceding paragraph.
- (4) The accusation under paragraph 1 shall not be revoked after public prosecution.

Article 97

Any person who has violated a cease and desist order shall be punished by a civil fine of not more than five hundred thousand yen; provided, however, that the foregoing shall not apply when the relevant act shall be punished.

Article 98

Any person who has violated a judgment under the provisions of paragraph 1 of Article 70-13 shall be punished by a civil fine of not more than three hundred thousand yen.

Article 99

Deleted.

Article 100

- (1) The court may, in the case of Article 89 or Article 90, according to circumstances, issue the following sentences simultaneously with the rendition of punishments; provided, however, that the sentence under item 1 shall be limited to the case when the relevant patent right, or exclusive or non-exclusive license for a patented invention belongs to the criminal:
 - (i) That the patent under patent right or the exclusive or non-exclusive license for the patented invention which was used for the violation relates shall be revoked; or
 - (ii) That the criminal may not enter into a contract with the government for a period of not less than six months and not more than three years after the judgment becoming final and binding.
- (2) When a judgment with a sentence as provided for in item 1 of the preceding paragraph becomes final and binding, the court shall send an authenticated copy thereof to the Commissioner of the Patent Office.
- (3) The Commissioner of the Patent Office shall, upon receipt of the authenticated copy of the judgment under the provisions of the preceding paragraph, revoke the patent under the patent right, or the exclusive or non-exclusive license for the patented invention.

CHAPTER XII INVESTIGATION, ETC. OF CRIMINAL CASES

Article 101

- (1) When necessary to investigate a criminal case (cases pertaining to crimes in Articles 89 to 91 inclusive; hereinafter the same shall apply in this Chapter), the staff members of the Fair Trade Commission (limited to the staff members designated by the Fair Trade Commission; hereinafter referred to in this Chapter as "FTC staff member(s)") may request criminal suspects or witnesses (hereinafter referred to in this paragraph as "criminal suspects, etc.") to attend at the Fair Trade Commission, may question criminal suspects, etc., may inspect objects possessed or abandoned by criminal suspects, etc., or may retain objects voluntarily submitted or abandoned by criminal suspects, etc.
- (2) FTC staff members may, in the course of their investigation of a criminal case, inquire of public agencies or public or private organizations and request them to report the necessary matters.

Article 102

- (1) FTC staff members may, when necessary to investigate a criminal case, conduct visit, search, or seizure by virtue of a warrant issued in advance by a judge of the district court or the summary court having jurisdiction over the location of the Fair Trade Commission [Note: the Tokyo District Court and the Tokyo Summary Court].
- (2) FTC staff members may, in case of urgency in the case of the preceding paragraph, make the measures in the preceding paragraph by virtue of a warrant issued in advance by a judge of the district court or the summary court having jurisdiction over the location of the site to be visited, the site, person, or objects to be searched, or the objects to be seized.
- (3) An FTC staff member shall, when requesting a warrant provided for in paragraph 1 or the preceding paragraph (hereinafter referred to in this Chapter as "warrant"), submit materials that confirm the existence of a criminal case.
- (4) In the case of a request provided for in the preceding paragraph, the judge of the district court or the summary court shall issue to the FTC staff member a warrant with the judge's name and seal affixed and the following information written: the site to be visited; the site, person, or objects to be searched; or the objects to be seized; the government position and name of the person making the request; the warrant's valid period; the effect that the inspection, search, or seizure may not be initiated and the warrant must be returned after the expiration of the valid period; the date of issuance of warrant; and the name of the court to which the judge belongs. In this case, the name of the criminal suspect and the suspicion shall, if known, also be written.
- (5) The FTC staff member may deliver the warrant to another FTC staff member and have that FTC staff member conduct the visit, search, or seizure.

Article 103

- (1) FTC staff members may, when necessary to investigate a criminal case, after receipt of a warrant, seize mails, personal letters, or documents related to telegrams that are sent by or to criminal suspects and stored or possessed by persons handling communications affairs pursuant to the provisions of laws and regulations.
- (2) FTC staff members may, after receipt of a warrant, seize mails, personal letters, or documents related to telegrams that are stored or possessed by persons handling communications affairs pursuant to the provisions of laws and regulations and do not fall under the provisions of the preceding paragraph, to the extent that there are sufficient grounds to suspect each of the items is related to a criminal case.
- (3) In the case that measures in the preceding two paragraphs have been made, FTC staff members shall notify the sender or recipient of the items to that effect; provided, however, that this shall not apply to cases where such notification risks impediments to the investigation of the criminal case.

Article 104

- (1) No visit, search, or seizure may be conducted during the period from sunset to sunrise unless it is specified on the warrant that such can be conducted at night.
- (2) Visit, search, or seizure that was initiated before sunset may, when found necessary, be continued beyond sunset.

Article 105

Warrants for visit, search, or seizure shall be produced to those against whom such measures are to be made.

Article 106

FTC staff members shall, when conducting questioning, inspection, retention, visit, search, or seizure pursuant to the provisions of this Chapter, carry identification cards that indicate their identity and produce them upon request by a person concerned.

Article 107

- (1) FTC staff members may, when necessary to conduct a visit, search, or seizure, open locks, break the seal on mail, and take other necessary measures.
- (2) The measures set forth in the preceding paragraph may be taken in relation to objects retained or seized.

Article 108

FTC staff members may prohibit any person from entering or leaving the site without permission while the questioning, inspection, retention, visit, search, or seizure pursuant to the provisions of this Chapter are being conducted.

Article 109

- (1) FTC staff members shall, when conducting visit, search, or seizure of a person's residence or a residence, building, or other site guarded by a person, have the owner or superintendent (including their representative or agent or other person who can act on behalf of them), or their employee or relative who is of legal age and also living together witness it.
- (2) If it is not possible, in the case of the preceding paragraph, to have a person provided for in that paragraph witness it, the FTC staff members shall have a neighbor who is of legal age or a local police official or local government official witness the visit, search, or seizure.

- (3) Any body search of a girl or woman shall be conducted with the witness of another woman who is of legal age; provided, however, that this shall not apply to cases of urgency.

Article 110

FTC staff members may, when necessary in the course of a visit, search, or seizure, request the assistance of police officials.

Article 111

FTC staff members, after conducting questioning, inspection, retention, visit, search, or seizure pursuant to the provisions of this Chapter, shall prepare a written report that states the date the measures were made and the findings, shall show it to the person who was questioned or has witnessed it, and shall, along with the person who was questioned or has witnessed it, affix their names and seals thereto; provided, however, that if the person who was questioned or has witnessed it does not affix his or her name and seal thereto or is unable to do so, it is sufficient to make supplementary note to that effect.

Article 112

FTC staff members shall, after conducting retention or seizure, prepare an inventory of the objects retained or seized and deliver a transcript of the inventory to the owner or holder of the objects retained or seized or a person who can be in lieu of the owners or holders.

Article 113

Regarding objects retained or seized that are hard to transport or store, FTC staff members may, with the consent of the owner or holder of the objects or other person that the FTC staff member deems appropriate, have such person store the objects after receiving a safekeeping receipt.

Article 114

- (1) The Fair Trade Commission shall, after the objects retained or seized no longer need to be held in custody, return the objects to the persons to whom they should be returned.
- (2) The Fair Trade Commission shall, in the case that it cannot return the objects retained or seized set forth in the preceding paragraph because it does not know the domicile or residence of the person to whom the objects should be returned or because of another reason, make a public notice to that effect.
- (3) The objects retained or seized for which public notice is made pursuant to the preceding paragraph shall, if there is no request for return of the objects six months after the date of the public notice, belong to the national treasury.

Article 115

FTC staff members shall, after completing the investigation of the criminal case, report to the Fair Trade Commission the results of the investigation.

Article 116

- (1) The Fair Trade Commission shall, if there are objects retained or seized, deliver the objects together with the inventory of such objects in the case that an accusation is filed pursuant to the provisions of paragraph 1 of Article 74 as a result of the investigation of the criminal case.
- (2) In the case that the objects retained or seized set forth in the preceding paragraph are stored pursuant to the provisions of Article 113, the Fair Trade Commission shall deliver the safekeeping receipt set forth in that Article and notify the person storing the objects pursuant to that Article of such delivery.
- (3) When objects retained or seized are delivered pursuant to the provisions of the preceding two paragraphs, the said objects shall be deemed as seized pursuant to the provisions of the Code of Criminal Procedure.

Article 117

The provisions of Chapter II to Chapter IV inclusive of the Administrative Procedures Act do not apply to measures made or administrative guidance implemented by the Fair Trade Commission or FTC staff members in accordance with the provisions of this Chapter.

Article 118

Measures made by the Fair Trade Commission or FTC staff members pursuant to the provisions of this Chapter may not be appealed under the Administrative Complaint Review Act.

LATVIA

COMMENTARY BY THE GOVERNMENT OF LATVIA ON LATVIAN COMPETITION LEGISLATION

The mandate of the Competition Council is determined by the Competition Law (see English translation of the Competition Law in Competition Council's website <http://www.kp.gov.lv>). Tasks carried by the Competition Council are directed towards protection and development of the competition. The Competition Council is dealing with five groups of cases concerning possible violations of the Competition Law and the Advertising Law and takes decisions regarding:

- abuse of dominant position;
- violation of prohibited agreements and;
- mergers and acquisition of enterprises;
- unfair competition;
- violations of the Advertising Law.

Decisions of Competition Council are binding for market participants, associations of market participants and for any other entity engaged in economic activity which either perform already or prepare themselves to do so. The Competition Council has been delegated the rights to apply punitive sanctions to eliminate market participants from possible violations as well as to stimulate market participants to withdraw from prohibited agreements. The fines imposed shall be counted into the State basic budget.

Decisions adopted by the Competition Council (excepting decisions on case initiation or prolongation of date of adoption of decision) participant of proceedings can be appealed in the District Administrative Court in time within one month, counting from the day when the decision was announced in written form to the participant of proceedings.

The role of legislature in the field of competition law enforcement becomes more and more topical and important. Such importance is indicated *inter alia* by fact that the publication of legislature "Verdicts and Decisions of the Department of Administrative Affairs of the Senate of the Supreme Court of the Republic of Latvia 2006" has included special chapter "Judgements in Cases on Decisions of the Competition Council" for the first time. The right to judicial review of verdicts of the Administrative District Court and of appellate court is used both by market participants and the Competition Council in accordance with the Administrative Proceedings Law.

During year 2007 the Competition Council has adopted 148 decisions totally (90 decisions during 2006). 16 decisions are adopted on established violations, 5 of these decisions – with imposing fines. The total number of decisions, adopted by Competition Council during 2007, can be divided in following groups by possible violations:

- **Abuse of dominant position** – 13 decisions (11 decisions during 2006), 2 of these decisions on established violations;
- **Prohibited agreements** – 12 decisions (10 decisions during 2006), 5 of these decisions on established violations;

- **Merger of enterprises** – 82 decisions (28 decisions during 2006), 3 of these decisions on establishment of violation due to non-submitting of pre-merger notification.
- **Unfair competition** – 18 decisions (16 decisions during 2006), There were no decisions adopted on established violations.
- **Possible violations of Advertising Law** – 18 decisions (25 decisions during 2006), 6 of these decisions are on established violations.

Especially the number of merger cases examined by the Competition Council has increased during the last year due to the escalated activity in several sectors of national economy. Under conditions of fast economic growth, one part of market participants is not able to keep their positions in the market. As a result of merger of market participants, competitiveness of companies is raised and strengthened, which ensures lower prices, better quality of goods or service, as well as wider choice in the range of goods and services. Taking into account that assessment of the influence of market participants' merger on competition in the relevant market may not hinder further activity of merger participants and the fact that company merger cases make increasingly bigger proportion in the list of cases to be examined by the Competition Council, control over merger of market participants becomes priority in performance of the authority. Intensity of merging of companies is expressed evidently by the number of decisions taken by the Competition Council in these cases: in 2004 – 9 decisions; 2005 – 18 decisions; 2006 – 28 decisions; 2007 – 82 decisions.

Assessing the influence of market participants' merger on competition in the relevant market, the Competition Council is competent to allow to merge, prohibit to merge, as well as allow merging, by setting the incumbent provisions. In 2007 the Competition Council has allowed mergers of market participants in major part of cases, however, one decision was adopted on prohibition to merge and 4 decisions - on permission to merge by setting incumbent provisions.

During 2007 the Competition Council has performed its activities in the field of improvement of national competition legislation. Planned Law amendments will provide changes for definition of dominant position, notification system as well as provide tools for solving existing competition problems in retail market, caused by market participants with a big market power.

Definition of dominant position laid down by the Section 1 of the existing Competition Law does not allow to establish existence of dominant position in case if market share of market participant does not reach 40 % in spite of fact that this participant or participants can substantially hinder, restrict or distort competition, acting absolutely or partially independently from competitors, clients, suppliers or consumers. Thus existing definition does not include whole scope of market participants, whose activities can be hazardous towards effective competition, and therefore it was chosen to abolish 40% threshold of the definition of dominant position.

Existing practices in Latvia and in other EU member states demonstrate facts of unequal contract provisions towards suppliers, enforced by supermarket chains which formally do not comply with legal criteria of dominant position. At present there is no special regulation included in Competition Law about abuse of market power by the big retail sales networks if they are not in dominant position. Therefore draft Law establishes particular definition for dominant position in retail market as well as exhaustive list of

violations of dominant position in retail market that will help to prevent the possible malfunction of market participants in this market.

These Law amendments will also stimulate more effective competition supervision and more precisely define administrative proceedings necessary for Competition Law enforcement. Law amendments will also make easier notification procedure in several merger categories. Text of amendments to the Competition Law are adopted by the Saeima (Parliament) in the first reading on 20 September 2007 and prepared for the second reading in February 2008. The third (last) reading is expected in April 2008. Public discussions regarding the draft law “Amendments to the Competition Law” have been actively developed during 2007. The Competition Council had been actively engaged in giving explanations of the substance and necessity of the amendments to members of Saeima, to law offices and non-governmental organisations, by providing information in mass media and the dialogue on these issues is continued.

COMPETITION LAW

Chapter I

General Provisions

Section 1. Terms Used in this Law

The following terms are used in this Law:

- 1) **dominant position** – an economic (commercial) position in a relevant market of a market participant or several market participants if the market share of such participant or the participants in this relevant market is at least 40 per cent and if such participant or such participants have the capacity to significantly hinder, restrict or distort competition in any relevant market for a sufficient length of time by acting with full or partial independence from competitors, clients or consumers;
- 2) **decisive influence** – the capability, directly or indirectly, to:
 - a) control (regularly or irregularly) the taking of decisions in market participant supervisory bodies, with or without active participation thereof, and
 - b) appoint such numbers of members in the market participant supervisory body, which ensures for the wielder of the decisive influence can ensure a majority of votes in the respective body;
- 3) **relevant geographical market** – a geographical territory in which competition conditions in a relevant market of a good are sufficiently the same for all participants in such market and therefore this territory can be separated from other territories;
- 4) **relevant market** – a market of a concrete good which is evaluated in connection with a relevant geographical market;
- 5) **relevant market of a good** – a market of a particular good which also includes all those goods which may be substituted for this specific good in a relevant geographical market, taking into consideration the factor of substitution of demand and supply, the specific features of the good and its utilisation characteristics;
- 6) **competition** – the existing or potential economic (commercial) rivalry between two or more market participants in a relevant market;
- 7) **competitors** – two or more market participants who compete;

- 8) **goods** – tangible or intangible property or service which satisfies some need and for which a price may be specified when purchasing or selling such good on the market;
- 9) **market participant** – any person (also foreign persons), who performs or is preparing to perform economic activity in the territory of Latvia or whose activity shall influence competition in the territory of Latvia. If a market participant or several market participants jointly have a decisive influence over one market participant or several other market participants, then all market participants may be considered as one market participant;
- 10) **market share** – that share of goods which a market participant offers in a relevant market in relation to the total amount of goods offered in such market; and
- 11) **agreement** – a contract between two or more market participants or concerted practices in which market participants participate, as well as a decision taken by a registered or unregistered grouping (association, union and the like) of market participants or by an official of such a grouping.
[22 April 2004]

Section 2. Purpose of this Law

The purpose of this Law is to protect, maintain and develop free, fair and equal competition in the interests of the public in all economic sectors, to restrict market concentration, impose as an obligation the termination of activities which are prohibited by the regulatory enactments regulating competition, and to call to account persons at fault in accordance with procedures prescribed by regulatory enactments.

Section 3. Operation of this Law

This Law applies to market participants and to any registered or unregistered groupings of market participants.

Chapter II

Competition Council

Section 4. Legal Status of the Competition Council

- (1) The Competition Council is a direct administrative institution, which shall act in accordance with this Law and other regulatory enactments. The Cabinet shall establish the Competition Council and it shall be subordinate of the Ministry of Economics, which shall be realised in the form of supervision.
- (2) *[22 April 2004]*
- (3) The operation of the Competition Council shall be financed from the State budget.
[22 April 2004]

Section 5. Composition and Operation of the Competition Council

- (1) The Competition Council shall take decisions in competition matters. The Competition Council shall comprise its Chairperson and four members of the Competition Council. The Chairperson of the Competition Council shall manage the Competition Council. The work of the Competition Council shall be ensured by a Bureau, which shall perform its secretariat and expert functions, prepare issues, documents and draft decisions for examination at meetings of the Competition Council, and implement the execution of decisions taken by the Competition Council.
- (2) The Cabinet upon the recommendation of the Minister for Economics, shall confirm in office the Chairperson and members of the Competition Council.
- (3) The term of office of the Chairperson and members of the Competition Council shall be five years. The Chairperson and members of the Competition Council may be re-appointed to office.
- (4) The Chairperson and members of the Competition Council shall be civil servants whose professional qualifications give them the capability of taking decisions in competition matters.
- (5) [22 April 2004]
- (6) Meetings of the Competition Council shall be closed unless otherwise decided. Meetings shall be convened at the request of the Chairperson of the Competition Council or at least three members of the Competition Council. The Competition Council is entitled to take a decision if not less than three members of the Competition Council participate in the voting. A decision shall be considered taken, if at least three members of the Competition Council have voted in favour of it.
- (7) Minutes shall be taken of the meetings of the Competition Council. All members of the Competition Council who took part in a meeting shall sign the minutes of the meeting. Members of the Competition Council when signing the minutes may write in their own views regarding the issue examined or may make a written note regarding substantiation of their views for appending to the minutes.
- (8) The Chairperson of the Competition Council shall sign the decisions of the Competition Council.
- (9) The Chairperson of the Competition Council:
 - 1) shall manage and organise the work of the Competition Council and shall be responsible for such work;
 - 2) shall be the manager of the financial resources of the Competition Council and shall be responsible for their utilisation;
 - 3) shall chair and organise the meetings of the Competition Council;
 - 4) may, without a special authorisation, represent the Competition Council;
 - 5) [22 April 2004]

- 6) is entitled to give direct orders to the director of the Competition Bureau and to any employee of the Competition Bureau; and
 - 7) is entitled to give direct orders to members of the Competition Council only in relation to organisational issues associated with the fulfilment of the duties of office.
- (10) During the illness or absence of the Competition Council Chairperson, a member of the Competition Council who has been authorised to do so by the Chairperson of the Competition Council shall carry out the duties of the Chairperson.
- [22 April 2004]

Section 6. Duties of the Competition Council

- (1) The Competition Council shall:
 - 1) monitor the observance of the prohibitions against the abuse of dominant position, unfair competition and prohibited agreements by market participants, which prohibitions are prescribed in this Law, other regulatory enactments and international agreements;
 - 2) supervise the observance of the Advertising Law;
 - 3) examine submitted notifications regarding market participant agreements and decisions taken in respect of them;
 - 4) restrict market concentration by taking decisions in relation to mergers of market participant; and
 - 5) co-operate, within the scope of its competence, with relevant foreign institutions.
 - (2) The Competition Council shall inform the public regarding performance of the tasks of the Competition Council and other issues relating to the protection, maintenance and development of competition, as well as by 1 March of each year publish in the newspaper *Latvijas Vēstnesis* [the official Gazette of the Government of Latvia] a report regarding the decisions taken by the Competition Council in the previous year. The Competition Council shall publish the decisions taken by it in the newspaper *Latvijas Vēstnesis* not later than ten days after the taking of a decision.
 - (3) The Competition Council, as an institution subordinate to the Ministry of Economics, shall:
 - 1) within the scope of its competence, formulate and in accordance with specified procedures submit to the Ministry of Economics draft legislation;
 - 2) prepare and submit opinions regarding draft regulatory enactments to be examined by the Cabinet which opinions directly or indirectly affect issues on the protection, maintenance or development of competition; and
 - 3) in the case of privatisation, reorganisation and demonopolization of State or local government undertakings (companies), submit if necessary, to the institution concerned written proposals or opinions regarding observance of the principles for the protection, maintenance or development of competition.
- [22 April 2004]

Section 7. Rights of the Competition Council

- (1) The Competition Council is entitled to:

- 1) perform market assessments, with the involvement of independent experts if necessary;
 - 2) provide opinions regarding conformity of the activities of market participants with regulatory enactments that regulate competition and the Advertising Law;
 - 3) submit claim applications and complaints to a court in the cases provided for in this Law and other regulatory enactments;
 - 4) publish the views and recommendations of the Competition Council;
 - 5) apply European Union competition law; and
 - 6) perform the duties imposed upon a Member State competition protection institution by 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 (Text with EEA relevance) and to utilise the rights provided for in the Regulation.
- (2) The Competition Council is entitled to evaluate draft legislation prepared by other institutions and other documents and to provide opinions in respect of them, if such draft legislation includes norms which influence the market mechanism, the realisation of which may directly or indirectly restrict competition.
- [22 April 2004]*

Section 8. Decisions of the Competition Council

- (1) The Competition Council shall take decisions regarding:
 - 1) to initiate or not initiate a matter;
 - 2) the extension of the time period for the taking of a decision;
 - 3) the determination of violations, legal duties and imposition of fines;
 - 4) the termination of the investigation of a matter;
 - 5) mergers of market participants;
 - 6) notified agreements; and
 - 7) violations of the Advertising Law.
- (2) A market participant may appeal to a district administrative court the decisions of the Competition Council referred to in Paragraph one of this Section, except for decisions regarding the initiation of a matter and the extension of the time period for the taking of a decision, within a period of one month from the day when such decision came into effect.
- (3) Those not fulfilling the lawful requests of officials of the Competition Council within a specified time shall be held to administrative liability.
- (4) In order to perform the tasks provided for in this Law, the Competition Council is entitled to perform other activities permitted by other regulatory enactments.
- (5) The Competition Council is exempt from court costs, if it brings an action in court or submits a complaint in connection with violations of this Law or other regulatory enactments adopted in this field.
- (6) Directions regarding the commencement of an investigation of a matter in a specific case, as well as regarding the manner in which the investigation shall be conducted

or a decision taken, may not be given to the Chairperson and members of the Competition Council by the Cabinet, the Minister for Economics or other persons.

- (7) The decisions of the Competition Council are binding on market participants, and market participant groupings.
- (8) The decisions of the Competition Council shall be implemented voluntarily. A bailiff shall perform the compulsory implementation of decisions, which are not voluntarily implemented. The Competition Council is exempt from the payment of State fees regarding the submission of a decision for implementation.
[22 April 2004]

Section 9. The Bureau

- (1) The Bureau shall ensure the work of the Competition Council.
- (2) A director shall manage the work of the Bureau. The director of the Bureau shall be a civil servant of the State civil service who shall be directly subordinate to the Chairperson of the Competition Council.
- (3) In ensuring the work of the Competition Council, the Bureau shall:
 - 1) perform the functions of a secretariat for the Competition Council;
 - 2) prepare draft decisions of the Competition Council;
 - 3) analyse submissions received in the Competition Council and prepare materials on the matter for examination at a meeting of the Competition Council;
 - 4) conduct investigations of possible violations of this Law and the Advertising Law, conduct market assessments and prepare Competition Council opinions regarding compliance with this Law and the Advertising Law of activities of market participants and officials;
 - 5) organise the execution of Competition Council decisions in relation to the termination of violations of this Law and the Advertising Law and the payment of fines;
 - 6) prepare in the name of the Competition Council claim applications to a court;
 - 7) prepare Competition Council draft opinions regarding drafts of regulatory enactments to be examined in the Cabinet, the implementation of which, directly or indirectly, may create a threat to the protection, maintenance or development of competition;
 - 8) prepare Competition Council draft opinions regarding the observance of competition protection principles in the processes of privatisation, reorganisation and demonopolization of State or local government undertakings (companies);
 - 9) prepare Competition Council proposals for draft regulatory enactments in the field of competition protection; and
 - 10) ensure co-operation with foreign persons.
- (4) The director of the Bureau:
 - 1) shall, within the scope of the competence of the Bureau without special authorisation, represent the Competition Council;
 - 2) shall manage and organise the work of the Bureau; and
 - 3) shall be liable for the work of the Bureau.

- (5) The Bureau is entitled in the name of the Competition Council:
- 1) to request from any person and person association, information necessary to perform the tasks specified in this Law, also restricted access information or information containing commercial secrets, as well as to receive from the relevant persons explanations either in writing or orally;
 - 2) to visit market participants (also without prior warning). During the visit to the market participant, Bureau officials on the basis of an authorisation have the right to receive from the relevant persons explanations either in writing or orally, become acquainted on site with all documents (also documents prepared in an electronic way) and to receive such documents, the true copy (copies) thereof or extracts thereof;
 - 3) on the basis of a substantiated decision of the Bureau director, to remove property and documents of a market participant and the employees thereof which may be of importance in a matter;
 - 4) on the basis of a court decision, without prior warning in the presence of police, to enter the means of transport, dwellings, non-residential premises, structures and other immovable and movable property of a market participant and the employees thereof, to open them and the existing storage facility thereof, and perform an inspection of the existing property and documents therein, and an inspection of the property and documents of the market participant and the employees thereof. During the inspection the Bureau is entitled to request explanations either in writing or orally from officials and employees of the market participant, receive true copies (copies) of documents or extracts thereof, as well as to remove property and documents, which may be of importance in clarifying the issue under investigation. Officials of the Bureau have the right to seal means of transport dwellings, non-residential premises, structures and other immovable and movable property and storage facilities in order to ensure the preservation of evidence;
 - 5) on the basis of a court decision, if there are justifiable grounds for suspicion that documents, which may serve as evidence for a violation of the Competition Law, are being stored in the means of transport, dwellings, non-residential premises, structures and other immovable and movable property belonging to another person or in the possession of another person, the Bureau in relation to such persons the property thereof is entitled to perform the activities referred to in Clause 4 of this Paragraph in the presence of police; and
 - 6) to compile reports regarding administrative violations if the information referred to in Clauses 1, 2 and 4 of this Paragraph is not provided in the time and amount specified, or also the duties referred to in Paragraph six of this Section are not implemented. Such reports shall be compiled and signed by the Bureau director or his or her authorised official.
- (6) Upon a request from the Bureau, market participants, the representatives and employees thereof, and other persons have a duty to provide full and truthful information and to ensure for the employees of the Bureau and the State police access to any of the means of transport, dwellings, non-residential premises, structures and other immovable and movable property owned or in the possession thereof, to open them and their existing storage facilities, as well as to in any form compiled or stored documents.

- (7) The State police shall provide assistance to employees of the Bureau for the implementation of the investigatory activities referred to in Paragraph five of this Section.

[22 April 2004]

Section 9.¹ Court Decisions

- (1) A district (city) court on the basis of the legal address of the Competition Council shall take a decision regarding permission to perform the activities referred to in Section 9, Paragraph five, Clauses 4 and 5 of this Law. The court shall, within a period of 48 hours, examine the submission by the director of the Bureau and other documents, which justify the necessity to perform such activities, hear the information provided by Bureau officials and take a decision regarding the permitting of the activity or regarding refusal.
- (2) A true copy of the court decision shall be sent to the Bureau within a period of 24 hours from the moment of the taking of the decision.
- (3) In respect of the court decision referred to in Paragraph one of this Section an ancillary complaint may be submitted.
- (4) the submission of an ancillary complaint regarding a court decision shall not suspend the implementation thereof.
- (5) An ancillary complaint regarding a court decision shall be examined within a period of seven days from the day it was accepted.
- (6) An ancillary complaint shall be examined with the participation of a representative of the Competition Council and the person who has submitted the ancillary complaint.

[22 April 2004]

Section 10. Liability of Officials and Employees of the Competition Council

- (1) Officials and employees of the Competition Council are prohibited from disclosing, without the permission of the Chairperson of the Competition Council, information that they have received in the course of performing their official duties. Confidential information that has been obtained shall not be disclosed, except in specific cases prescribed in regulatory enactments.
- (2) Officials and employees of the Competition Council shall be liable, pursuant to the procedures prescribed in regulatory enactments, for the non-observance of confidentiality and for losses incurred by market participants due to unlawful actions by Competition Council or Bureau officials or employees.

Chapter III

Actions which Restrict Competition

Section 11. Prohibited Agreements and Agreements which are Considered to be in Effect

- (1) Agreements between market participants, which agreements have as their purpose or consequence the hindrance, restriction or distortion of competition in the territory of Latvia, are prohibited and null and void from the moment of being entered into, including agreements regarding:
 - 1) the direct or indirect fixing of prices and tariffs in any manner, or provisions for their formation, as well as regarding such exchange of information as relates to prices or provisions regarding sale;
 - 2) restriction or control of the scope of production or sales, markets, technical development, or investment;
 - 3) the division of markets, taking into account territory, customers, suppliers, or other conditions;
 - 4) provisions in accordance with which the conclusion, amendment or termination of a transaction with a third person is made dependent on whether such third person accepts obligations which, according to commercial usage, are not relevant to the particular transaction;
 - 5) the participation or non-participation in competitions or auctions or regarding the provisions for such actions (inactions), except for cases when the competitors have publicly announced their joint tender and the purpose of such a tender is not to hinder, restrict or distort competition;
 - 6) the application of unequal provisions in equivalent transactions with third persons, creating for them disadvantageous conditions in terms of competition; and
 - 7) action (inaction), due to which another market participant is forced to leave a relevant market or the entry of a potential market participant into a relevant market is made difficult.
- (2) The Competition Council may permit, or permit with conditions for a specified time period, if according to the procedures specified by the Cabinet the market participants have submitted to the Competition Council a notification regarding agreement and a matter has not been initiated in respect of it, and the agreements referred to in Paragraph one of this Section if it determines that the agreement promotes improvements in the production or sale of goods or economic progress and thereby benefits consumers, and, in addition, such agreement:
 - 1) does not impose on the market participants concerned restrictions which are not necessary for the achievement of these objectives; and
 - 2) does not afford the possibility of eliminating competition in a substantial part of the relevant market.
- (3) The agreements specified in Paragraph one of this Section are permitted, if the market participants have obtained permission from the Competition Council in accordance with procedures prescribed by the Cabinet.
- (4) The Cabinet shall issue regulations which regulate:

- 1) agreements, decisions and concerted actions of individual market participants, which are exempted from the prohibitions referred to in Paragraph one of this Section, if such activities comply with the concrete requirements prescribed in these regulations; and
- 2) agreements, decisions and concerted actions of individual market participants regarding which the Competition Council need not be notified in accordance with Paragraphs two and three of this Section, if such activities do not significantly affect competition.

[22 April 2004]

Section 12. Liability for Violations of Prohibited Agreements

- (1) If the Competition Council determines that there is a violation of Section 11, Paragraph one of this Law in the activities of market participants, it shall take a decision regarding the determination of a violation, legal obligations and imposition of a fine.
- (2) The Competition Council may impose on market participants fines of up to 5 per cent of their net turnover for the previous financial year each, but not less than 250 lats each. The funds referred to shall be paid into the State basic budget.
- (3) The Competition Council may impose on market participants fines of up to 10 per cent of their net turnover for the previous financial year each, but not less than 500 lats each. The funds referred to shall be paid into the State basic budget.
- (4) If the legally imposed obligations have not been complied with, the Competition Council may take a decision regarding increasing the fines specified in Paragraphs two and three of this Section up to the maximum amounts prescribed in the two paragraphs.
- (5) The Cabinet shall issue regulations regarding the procedures by which fines are specified, which provide for special features of the financial year net turnover calculation in separate cases, criteria for the specification of the amount of fines, mitigating circumstances and aggravating circumstances, and cases where the fine may be reduced.

[22 April 2004]

Section 13. Prohibition of the Abuse of Dominant Position

Any market participant, who is in a dominant position is prohibited from abusing such dominant position in any manner in the territory of Latvia. Abuse of dominant position may also occur as:

- 1) refusal to enter into transactions with other market participants or amending the provisions of a transaction without an objectively justifiable reason;
- 2) restriction of the amount of the production or sale of goods, the market or technical development without an objectively justifiable reason to the detriment of consumers;
- 3) imposition of provisions according to which the entering into, amendment or termination of transactions with other market participants makes such participants dependent on them, or these market participants accept such

additional obligations as, by their nature and commercial usage, have no connection with the particular transaction;

- 4) direct or indirect imposition or application of unfair purchase or selling prices or other unfair trading provisions; or
- 5) application of unequal provisions in equivalent contracts with other market participants, creating for them, in terms of competition, disadvantageous conditions.

[22 April 2004]

Section 14. Liability for the Abuse of Dominant Position

- (1) If the Competition Council determines that there is a violation of Section 13, Paragraph one of this Law in the activities of market participants, the Council shall take a decision regarding the determination of a violation, legal obligations and imposition of a fine.
- (2) The Competition Council may impose upon market participants fines of up to 5 per cent of their net turnover for the previous financial year each, but not less than 250 lats each. The funds referred to shall be paid into the State basic budget.
- (3) If the legally imposed obligations have not been complied with, the Competition Council may take a decision regarding increasing the fines specified in Paragraph two of this Section up to 10 per cent of the net turnover for the previous financial year, however the fine may not be smaller than 500 lats each. The funds referred to shall be paid into the State basic budget.
- (4) The Cabinet shall issue regulations regarding the procedures by which fines are specified, which provide for special features of the financial year net turnover calculation in separate cases, criteria for the specification of the amount of fines, mitigating circumstances and aggravating circumstances, and cases where the fine may be reduced.

[22 April 2004]

Chapter IV

Market Participant Merger Control

Section 15. Market Participant Merger Provisions

- (1) A merger of market participants is:
 - 1) the merging of two or more independent market participants in order to become one market participant (consolidation);
 - 2) the joining of one market participant to another market participant (acquisition);
or
 - 3) such a situation where one or more natural persons who already have a decisive influence over another market participant or other market participants, or one or more market participants acquire part or all of the fixed assets of another market participant or other market participants or the right to utilise such, or a direct or indirect decisive influence over another market participant or other market participants.
- (2) Market participants who have decided to merge in one of the ways set out in Paragraph one of this Section shall, prior to merger, submit a notification of such

merger to the Competition Council in accordance with Section 16 of this Law if one of the following conditions exists:

- 1) the combined turnover of the participants in the merger during the previous financial year was not less than 25 million lats and
 - 2) the combined market share of the market participants involved in the merger in a concrete market exceeds 40 per cent.
- (3) A merger of market participants, regarding which merger a notification had to be given, but was not given, is illegal.
- (4) Notifications need not be submitted to the Competition Council in the following cases:
- 1) credit institutions, other financial institutions or insurance companies the activities of which includes transactions with securities for own or other funds, have time-limited ownership rights to market participant securities, which they have acquired for further sale, if such credit institutions or insurance companies do not utilise voting rights created by the referred to securities in order to influence the competitive activities of the relevant market participant, or utilise the voting rights created by the referred to securities in order to prepare the investment of fixed assets or relevant securities only of the market participant, or a part thereof, and such investments occur within a period of one year after the creation of voting rights. The Competition Council may extend the referred to time period on the basis of a submission from the relevant credit institution or insurance company, if it proves that the relevant investment within a period of one year was not possible; and
 - 2) a liquidator or administrator acquires a decisive influence in the case of the insolvency or liquidation of a market participant.
- (5) The Cabinet shall issue regulations regarding the procedures for the submission and examination of notifications. Such regulations may include additional rules regarding the calculation of the turnover, including special requirements in respect of credit institutions and insurance companies.

[22 April 2004]

Section 16. Procedures for Examination of Notifications regarding Mergers of Market Participants

- (1) The Competition Council shall, within a period of one month from the receipt of a full notification in accordance with procedures specified by the Cabinet, examine the notification and take one of the decisions referred to in Paragraph three or four of this Section, or a decision regarding the commencement of additional investigations. A full notification shall be considered to be a notification, which conforms to the requirements specified by the Cabinet.
- (2) After the commencement of additional investigations, the Competition Council, within a period of four months from the day of receipt of the full notification, shall take one of the decisions referred to in Paragraph three or four of this Section.
- (3) The Competition Council by its decision shall prohibit mergers as a result of which a dominant position is created or strengthened, or which may significantly reduce competition in any concrete market. The Competition Council may permit such

mergers, determining binding provisions for the relevant market participants, which prevents the negative consequences of the merger in relation to competition.

- (4) If the merger of market participants of which a notification has been given does not cause the consequences referred to in Paragraph three of this Section, the Competition Council shall take a decision, which permits the merger.
- (5) If the Competition Council within a period of four months after the receipt of the notification has not taken one of the decisions referred to in Paragraph three or four of this Section, the relevant merger of market participants shall be deemed to be permitted.
- (6) The Competition Council may take the decisions referred to in Paragraph three of this Section also in respect of such mergers of market participants of which notification should have been given in accordance with Section 15, Paragraph two of this Law, but such notification was not given.

[22 April 2004]

Section 17. Liability for Illegal Mergers of Market Participants

- (1) If a notification has not been submitted in the cases prescribed by this Law, the Competition Council may take a decision regarding the imposition of a fine of up to 1000 lats for each day, counting from the day when the notification should have been submitted, on the new market participant or the acquirer of a decisive influence. The funds referred to shall be paid into the State basic budget.
- (2) If a merger of market participants has occurred, which is contrary to a decision of the Competition Council taken in accordance with the procedures set out in Section 16, Paragraph three or six of this Law, the Competition Council may take a decision regarding the imposition of a fine on the new market participant or on the acquirer of a decisive influence of up to 1000 lats for each day counting from the day when the notification should have been submitted. The funds referred to shall be paid into the State basic budget.
- (3) The payment of a fine does not release the market participants concerned from the obligation to fulfil the provisions of this Law and the decisions of the Competition Council.
- (4) When the Competition Council has determined that the new market participant or the acquirer of a decisive influence has ceased the illegal activity referred to in Paragraph one or two of this Section and has taken a relevant decision, the Council shall cease calculation of the fine referred to in Paragraph one or two of this Section.

[22 April 2004]

Chapter V

Unfair Competition

Section 18. Prohibition of Unfair Competition

- (1) Unfair competition is prohibited.
- (2) Actions, as the result of which regulatory enactments or the fair practices of commercial activities are violated and which have created or could create a hindrance, restriction or distortion of competition, shall be deemed to be unfair competition.

- (3) Unfair competition may also occur in the form of the following activities if as a result of such activities a hindrance, restriction or distortion of competition has been created or could have been created:
- 1) the utilisation or imitation of a legally used name, distinguishing marks or other features of another market participant (whether existing, having ceased its activities or reorganised) if such use may be misleading as regards the identity of the market participant;
 - 2) the imitation of the name, external appearance, labelling, or packaging of goods produced or sold by another market participant, or the utilisation of trademarks, if such imitation or utilisation may be misleading as regards the origin of the goods;
 - 3) the dissemination of false, incomplete or distorted information regarding other market participants or their employees, as well as, in respect of the goods produced or sold by such a market participant, the economic significance, quality, form of production, characteristics, quantity, usefulness, prices, their formation and other provisions, which may cause losses to such other market participant;
 - 4) the acquisition, utilisation or distribution of information, which includes the commercial secrets of another market participant, without the consent of such participant; or
 - 5) the coercion of employees of another market participant with threats or bribery in order to create advantages for one's own economic activity, thereby causing losses to the market participant.

Section 19. Liability for Unfair Competition

- (1) If the Competition Council determines that there is a violation of Section 18 of this Law in the activities of market participants, it shall take a decision regarding the determination of a violation, legal obligations and imposition of a fine.
- (2) The Competition Council may impose on market participants, fines of up to 5 per cent of their net turnover during the previous financial year each, but not less than 250 lats each. The funds referred to shall be paid into the State basic budget.
[22 April 2004]

Chapter VI

Application of Competition Law in Civil Actions

Section 20. Competence of the Courts

- (1) Concurrently with the Competition Council, a court may also determine a violation of this Law.
- (2) Courts which adjudicate civil claims in relation to violations of the Competition Law shall inform the Competition Council thereof.

Section 21. Compensation for Losses

A market participant who deliberately or by carelessness violates the provisions of Sections 11, 13, 15 or 18 of this Law shall cover the losses which due to the violation have been caused to another market participant or a party to a contract.

Chapter VII

Procedures for the Investigation of a Matter

Section 22. Initiation of a Matter

The investigation of a possible violation of this Law matter shall be initiated on:

- 1) the basis of a submission;
- 2) the basis of an initiative from the Competition Council; or
- 3) on the basis of a report from another institution.

[22 April 2004]

Section 23. Initiation of a Matter on the basis of a Submission

- (1) A matter shall be initiated if a justifiably interested person based upon the prevention of a violation of the law submits a written submission. A justifiably interested person is a person for who due to the violation has been caused or may cause rights or lawful interest infringements, as well as the person involved in the violation.
- (2) A submission shall indicate documentarily justified information regarding:
 - 1) the persons involved in the possible violation;

- 2) evidence, which testifies regarding the possible violation and on which the submission has been based;
 - 3) the norms of the Competition Law, which may have possibly been violated;
 - 4) the facts, which testify regarding the justifiable interest of the person in the prevention of a violation of the law; and
 - 5) the measures, which have been performed to terminate the violation prior to the receipt of the submission by the Competition Council.
- (3) The Competition Council, not later than 30 days after the receipt of the submission, shall evaluate the information included in the submission, if necessary, acquiring additional information and shall take a decision regarding the initiation or non-initiation of a matter.
- (4) The Competition Council may not initiate a matter if:
- 1) the submission does not include the information provided for in Paragraph two of this Section or it is insufficient or the submitter has not submitted additional information in the time period specified by the Competition Council; or
 - 2) the violation committed is of little importance.
- (5) If a matter is not initiated, the submitter shall be informed regarding the reasons for the non-initiation and regarding the possible renewal of the examination of the submission after the rectifying of the deficiencies in the submission or the receipt of additional information.

[22 April 2004]

Section 24. Initiation of a Matter on the basis of an Initiative of the Competition Council

The Competition Council may initiate a matter if facts become known to them on the basis of which a violation may be determined, as well as where the Competition Council has a basis for considering that such facts exist.

[22 April 2004]

Section 25. Initiation of a Matter on the basis of a Report from another Institution

The Competition Council may initiate a matter in the basis of the written report from another institution if it includes information regarding facts, which testify or may testify regarding possible violations of the Competition Law.

[22 April 2004]

Section 26. Investigation of a Matter

- (1) After the initiation of a matter, the Competition Council shall acquire information, which is necessary to take a decision.
- (2) A person shall provide the requested information not later than within a period of seven days from the receipt of the request. During market assessment, the requested information, in the preparation of which special compilation or analysis activities are not necessary, the submitter of the information shall provide it without delay.

- (3) If information is requested, in the preparation of which special compilation or analysis activities are necessary, and the submitter of the information due to objective reasons cannot prepare the requested information within the specified time period, he or she shall notify the Competition Council in writing, indicating such reasons and the date when the information shall be submitted. The competition Council, taking into account the referred to notice may specify another time period for the submission of the information.
- (4) If the information is requested from a possible violator of the Competition Law, the Competition Council shall in the submitter thereof of the Section of the Competition Law, which has been possibly violated.
- (5) The Competition Council may combine in one record several matters regarding one and the same violation of law in the operations of one and the same possible violator if the combination of the matters facilitates the quicker and more objective examination thereof.
- (6) After the determination of the facts necessary for the taking of a decision, the participants in the process have the right to become acquainted with the matter. In respect of the determination of the facts necessary for the taking of a decision, the Competition Council shall inform in writing the participants in the process.
- (7) The participants in the process may become acquainted the matter, express their own point of view and submit additional information within a period of 10 days from the moment of receipt of the notification specified in Paragraph six of this Section. The Competition Council need not take into account information, which has been received after the end of such time period.

[22 April 2004]

Section 27. Time period for the taking of a Decision

- (1) The Competition Council shall take a decision within a period of six months from the day of the initiation of a matter.
- (2) If due to objective reasons it is not possible to observe the six month time period, the Competition Council may extend it for a period up to one year counting the time period from the day of the initiation of a matter.
- (3) In applying European Union competition law, the Competition Council with a justified decision may extend the time period for taking a decision to a period, which does not exceed two years from the day of the initiation of a matter.

[22 April 2004]

Chapter VIII

Application of European Union Competition Law

Section 28. Legislation to be applied in a Matter regarding the Possible Violation of European Union Competition Law

- (1) The Competition Council shall investigate and examine a matter regarding the possible violation of European Union competition law in accordance with the procedures for investigation and examination of possible violations of European Union competition legislation provided for in this Law and other regulatory enactments.
- (2) For the violation of European Union competition law, the Competition Council shall impose a penalty in accordance with Sections 12 and 14 of this Law and

Cabinet regulations regarding the procedures for the imposition of fines, which are issued in accordance with Section 12, Paragraph five and Section 14, Paragraph four of this Law.

- (3) In applying European Union competition law, the term “market participant” shall be understood as the term “undertaking” in European Commission decisions and European Court of Justice judgments.

[22 April 2004]

Section 29. Reduction of Fines for Separate Violations of Article 81, Paragraph one of the Treaty Establishing the European Community

- (1) Fines for undertakings shall be reduced or fully released from the fine thereof, if the undertaking on the basis of its own initiative, has notified the Competition Council regarding such Article 81, Paragraph one of the Treaty Establishing the European Union prohibited agreements between competitors:

- 1) agreements regarding direct or indirect price or tariff specification in any way or the formation regulations thereof, as well as regarding such exchanges of information, which relate to price or sale regulations;
- 2) agreements regarding the volume of production or sales, markets, technical developments or restrictions of trade or control;
- 3) agreements regarding the division of markets, taking into account territories, customers, suppliers or other conditions; and
- 4) agreements regarding participation or non-participation in competitions or tendering procedures or regarding the regulations of such activities (inactiveness).

- (2) The reduction of the fine for undertakings or the full release from the fine thereof for undertakings provided for in Paragraph one of this Section shall be in accordance with Cabinet regulations regarding the procedures for the specification of fines, which are issued in accordance with Section 12, Paragraph five and Section 14, Paragraph four of this Section.

[22 April 2004]

Section 30. Temporary Regulation

- (1) If the Competition Council has at its disposal evidence, which testifies to the possible violation of European Union competition law, and such the non-termination of such violations may cause significant and irreversible harm to competition, the Competition Council may take a decision regarding temporary regulation.
- (2) The means of temporary regulation is a decision, which imposes a duty upon market participants within a specified time period to perform specific activities or prohibits specific activities.
- (3) A market participant may appeal a decision regarding temporary regulation in an administrative district court within a period of one month from the day it came into effect.
- (4) A decision regarding temporary regulation shall be in effect until the moment when a final decision in a matter by the Competition Council becomes indisputable.

[22 April 2004]

Section 31. Decisions regarding Appeal of Temporary Regulation

- (1) A court shall examine an application regarding a decision regarding temporary regulation within a period of 14 days.
- (2) An appeal of a decision regarding temporary regulation shall not suspend the effect of the decision regarding temporary regulation and the implementation thereof.
- (3) A court decision in relation to an application regarding a decision regarding temporary regulation cannot be appealed and it shall come into force from the moment the decision is taken.

[22 April 2004]

Section 32. Performance of European Commission Investigatory Activities in the Territory of Latvia

- (1) A district (city) court on the basis of the legal address of the Competition Council shall take a decision regarding permission to perform the investigatory activities provided for in Article 21, Paragraphs one and four of the Regulation. The procedures for the taking of the court decision and the validity thereof shall be determined by Section 9. of this Law.
- (2) Both the European Commission and the Competition Council on behalf of the European Commission are entitled to submit an application for the receipt of the permission provided for in Paragraph one of this Section.

[22 April 2004]

Section 33. Assistance for the Preparation and Performance of European Commission Investigatory Activities

- (1) The Competition Council shall provide the necessary assistance to the European Commission for the preparation and performance of the activities provided for in Articles 20 and 21 of the Regulation.
- (2) The State police shall ensure necessary assistance to the European Commission if the market participant does not comply with the performance of the investigatory activities provided for in Article 20, Paragraph two and Article 21, Paragraph one of the Regulation.
- (3) On the basis of a request from the European Commission, the Competition Council, on the basis of a court decision, shall perform the activities referred to in Section 9, Paragraph five, Clause 4 of this Law. The procedures for the taking of the court decision and the validity thereof shall be determined by Section 9. of this Law.

[22 April 2004]

Section 34. Co-operation with Competition Protection Institutions of other Member States

- (1) On the basis of a request from a competition protection institution of another Member State in a matter regarding a possible violation of European Union competition law, the Bureau shall perform the activities referred to in Section 9, Paragraph five of this Law in relation to existing market participants in the territory

of Latvia according to the procedures provided for in this Law and other regulatory enactments.

- (2) Representatives of the competition protection institutions of another Member States are entitled to participate in the performance of the activities referred to in Section 9, Paragraph five of this Law.

[22 April 2004]

Section 35. Duty of a Court

- (1) A court, which has accepted an application and referred the matter regarding a violation of European Union competition law, shall within a period of seven days from the day the matter was referred send a true copy (copy) of the request application to the Competition Council.
- (2) A court, within a period of seven days after the drawing up of a full judgment in a matter regarding a violation of European Union competition law, shall send a true copy (copy) of the judgment to the Competition Council and the European Commission.

[22 April 2004]

Transitional Provisions

1. With the coming into force of this Law, the Competition Law (*Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs*, No. 16, 1997; No. 2, 2000) is repealed.
2. Until the adoption of the relevant Cabinet regulations referred to in this Law, but not later than six months after the adoption of this Law, the following Cabinet regulations issued in accordance with the Competition Law are in force insofar as they are not in contradiction to this Law:
 - 1) Cabinet Regulation No. 444 of 30 December 1997, Procedures for the Examination of Violations of the Competition Law;
 - 2) Cabinet Regulation No. 37 of 3 February 1998, Procedures by which Agreements between Market Participants are Acknowledged as in Effect;
 - 3) Cabinet Regulation No. 73 of 3 March 1998, Procedures for the Submission and Examination of Notifications on the Merger of Undertakings (Companies);
 - 4) Cabinet Regulation No. 74 of 3 March 1998, Regulations on Exclusive Distribution Agreements and Exclusive Purchasing Agreements Exempted from Prohibited Agreements Prescribed by the Competition Law;
 - 5) Cabinet Regulation No. 341 of 8 September 1998, Regulations on Agreements on Specialisation in Production Exempted from Prohibited Agreements Prescribed by the Competition Law;
 - 6) Cabinet Regulation No. 52 of 16 February 1999, Regulations on Franchise Agreements Exempted from Prohibited Agreements Prescribed by the Competition Law;
 - 7) Cabinet Regulation No. 53 of 16 February 1999, Regulations on the Exemption of Agreements on Joint Research and Development from Prohibited Agreements Prescribed by the Competition Law;
 - 8) Cabinet Regulation No. 122 of 23 March 1999, Regulations on Agreements on Patents and Know-how Licenses Exempted from Prohibited Agreements Prescribed by the Competition Law;

- 9) Cabinet Regulation No. 147 of 20 April 1999, Regulations on the Exemption of Agreements on Motor Vehicle Distribution and Servicing from Prohibited Agreements Prescribed by the Competition Law;
 - 10) Cabinet Regulation No. 260 of 20 July 1999, Regulations on the Exemption of Agreements in the Field of Insurance from the Prohibition of Agreements Prescribed by the Competition Law;
 - 11) Cabinet Regulation No. 284 of 22 August 2000, Regulations on the Exemption of Agreements of Carriers Engaged in Air Transport from the Prohibition of Agreements Prescribed by the Competition Law; and
 - 12) Cabinet Regulation No. 50 of 6 February 2001, Regulations on the Exemption of Agreements of Liner Shipping Companies from the Prohibition of Agreements Prescribed by the Competition Law.
3. The Competition Council referred to in this Law is the successor in law and interest of the Competition Council, which was established and operated in accordance with the Competition Law of 18 June 1997.
 4. Until the issue of new Cabinet regulations, but not later than by 1 November 2004, the following Cabinet regulations are in force insofar as they are not in contradiction with this Law:
 - 1) Cabinet Regulation No. 22 of 20 January 2003, Procedures for Submission and Examination of Notification Regarding Market Participant Mergers; and
 - 2) Cabinet Regulation No. 468 of 19 August 2003, Procedures for Calculation of Fines for Violations referred to in Section 11, Paragraph one and Section 13 of the Competition Law.
[22 April 2004]

Informative Reference to European Union Directives

This Law includes references to the following Council Regulation:
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 (Text with EEA relevance) (published in the *Official Journal of the European Union*, L 001, 04.01.2003).
[22 April 2004]

LITHUANIA

COMMENTARY BY THE GOVERNMENT OF LITHUANIA ON THE LAW ON COMPETITION NO. VIII-1099 (AS AMENDED BY 15 APRIL 2004 NO. IX-2126)

The first Lithuanian Law on Competition was enacted in 1992. In 1999 a new Law on Competition was adopted that replaced the formerly existing Law on Competition. The Law has set up fundamental competition rules prohibiting the agreements aimed at restriction of competition, the abuse of a dominant position, unfair competition and made provisions for control of concentration and responsibility for violation of the rules of Law as well as granted more independence and powers to the competition institution of the Republic of Lithuania. The provisions of the Law have legitimized the right both to demand from undertakings to present their financial instruments and other documents, including the ones containing commercial secrets, and to undertake inspections *in situ*.

The provisions of the said Law (of 1999) on Competition prohibiting competition restricting agreements and abuse of a dominant position were, in essence, identical to Articles 81(1) and 82 of the EC Treaty. Besides, the Law contained provisions for the opportunity to grant individual and block exemptions that were coherent with Article 81(3) of the EC Treaty.

The principles governing concentration control procedure, as set out in the said Law, were based essentially on the Council Regulation (EC) No 4064/89 (including subsequent amendments).

The section in the Law devoted to legal proceedings was also harmonised with the EC competition legal acts. Based on the new Law, all cases are heard publicly during the sitting of the Competition Council apart from the cases where it becomes necessary to secure confidentiality of state secrets or to keep commercial secrets of undertakings. During hearing of the case all parties are entitled to be heard and to present their explanations. Once the case is heard, the Competition Council has the right to take a decision on infringement or non-infringement of the law. In case of infringement, the Competition Council may impose appropriate sanctions. The decisions made by the Competition Council may be appealed to the Vilnius Regional Administrative Court.

Amendments to the Law of 1999 *General Provisions*

Accession of Lithuania into the European Union and the modernization of the EU competition rules, in particular, the adoption of Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (further – Council Regulation No.1/2003) and Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (further – Council Regulation No. 139/2004) brought relevant amendments to the Law on Competition of 1999 and the Code of Civil Procedure.

The amendments to the Law on Competition, which were **enacted in 2004**, sought, most importantly, the harmonization of the Lithuanian legislation to the EU *acquis*. This

objective has been expressly manifested in Article 1(3) of the Law on Competition, which stipulates that the Law seeks for the harmonization of the Lithuanian and the European Union law regulating competition relations. The same Article 1 was supplemented with par. 4 with a reference to the Annex containing Council Regulation No. 1/2003, which is being implemented by the Law on Competition.

Furthermore, the Law on Competition was supplemented by a new Chapter VII - "Application of the European Union Competition Rules", Article 47(1) of which stipulates that "the Competition Council shall be the institution authorized to apply the EU competition rules, the supervision of compliance whereof according to the European Union competition law is entrusted to the national competition authority". This provision expands the competence of the Competition Council by ensuring the simultaneous application of Articles 81 and 82 of the EC Treaty and the Law on Competition.

Restricted agreements (Art. 81)

In order to establish a uniform regulation of prohibited agreements both under the national and the EU law, the system of prior notification and individual exemptions in respect of agreements between undertakings was abolished. Agreements complying with the established terms and conditions for block exemption shall be effective from the moment of the conclusion thereof (*ab initio*) without any prior decision by the Competition Council. In case of any dispute concerning the compliance of the agreement with the established terms and conditions for block exemption, the burden of proof concerning the compliance shall fall upon the Party to the agreement benefiting from the exemption. And, accordingly, where the Competition Council seeks to demonstrate that the agreement constitutes an infringement, it shall have to prove the allegation. Thereby the provision enabling undertakings to apply to the Competition Council concerning the granting of the individual exemption, also the obligation to submit the information concerning an agreement concluded under conditions qualifying for a block exemption were removed.

Merger control

Several important new provisions have been introduced into the section on concentrations.

First, the term for the submission of the notification has been liberalized. The requirement upon the undertakings participating in the concentration to submit a notification within 7 days following the first action related to the concentration, as well as the requirement to suspend the concentration after the first action has been performed until the decision was passed by the Competition Council to permit the further course of the concentration concerned, have been abolished. Under the current Law undertakings participating in concentration shall have a right at their own discretion to determine the stage at which they will notify the Competition Council but prior to the implementation of the concentration. In connection to that, sanctions for failure to timely submit the notification on concentration also have been abolished.

Further, the term of four months that allowed the Competition Council to pass the final decision also has been liberalized, i.e., upon a duly grounded request of the person notifying the concentration it may be extended for an extra month. This may be of special

importance in some more complex cases when the Competition Council intends to permit the concentration subject to certain conditions and obligations.

Second, the Law stipulates that the undertakings concerned shall have to pay the fee of the amount established by the Government for the submission and the examination of the notification on concentration.

Third, for the purpose of the assessment of concentration the dominance test has been supplemented by one more test, i.e., the criterion of significant impediment of competition. In order to declare the concentration impermissible, it is enough from now that only one criterion either creating or strengthening of a dominant position, or a significant impediment of competition is satisfied.

Fourth, the new wording of the Law provides for additional right to the Competition Council to obligate an undertaking to submit a notification in cases of a threat that the concentration will create or strengthen dominant position or significantly impede competition, although the turnover thresholds established by the Law have not been exceeded. This new procedure has been introduced in the view of the experience acquired, which showed that in certain markets (services market in particular) concentration could be effected without notifying the Competition Council thereof, because the minimum turnover thresholds were below those, established by the Law, although the dominant position was created or strengthened. However, this new procedure will be applicable only provided that less than 12 months passed since the implementation of the concentration.

Sanctions

The system of sanctions has been reformed in accordance with the principles of imposition of sanctions employed by the European Commission. Fines imposed by the Competition Council upon undertakings for prohibited agreements, abuse of a dominant position, 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 have been increased up to 10 percent of the gross annual income in the preceding business year.

In accordance with the new provision of the Law on Competition the procedure for the establishment of the amount of the fine was approved by the Government Resolution No. 1591 of 6 December 2004.

Investigation procedure

Under the new provisions introduced into the Law on Competition the Competition Council is bound to complete the investigation of the applications concerning restrictive practices not within 14 days as it used to be the case, but within 30 days from the submission of the application, as well as pass the decision to start or to refuse to start the investigation. Besides, the time limit for the completion of the investigation has been prolonged up to 5 months, providing for a possibility to extend the term each time for another 3 months. Also, in the absence of evidence justifying the suspicion of an infringement of the Law, a possibility has been provided to refuse to start the investigation.

Another significant amendment is related to a possibility to terminate the investigation.

In accordance with the new provisions of the Law on Competition the investigation may be terminated not only where no infringement of the Law is established but also where the actions did not result in the significant damage to the interests protected by the law, and the undertaking suspected in the infringement of the law voluntarily ceases the actions and submits to the Competition Council a commitment in writing not to perform such actions. Such commitments assumed shall be binding upon the undertakings concerned. In case of a failure to fulfill the commitments assumed, a fine up to 5 percent of the average gross daily turnover in the preceding business year may be imposed for each day of exercise (continuation) of the infringement.

Having regard to the Council Regulation No. 1/2003 the new provision providing the possibility to use coercive actions was introduced. This provision establishes that inspections conducted by the European Commission and the possible use of coercive actions, are subject to the authorization of the Vilnius Regional Administrative Court.

The Law also provides for an additional basis to reopen the case, when it becomes clear that after the adoption of the court decision (ruling) providing for the application of Article 81 or 82 of the EC Treaty to the agreements, decisions or practices, the European Commission adopts the decision on the application of the said Articles to the same agreements, decisions or practices, and the effects of the application of the said decision are substantially different.

Since in accordance with Council Regulation No. 1/2003 the right and duty to directly apply Articles 81 or 82 of the EC Treaty have been also imposed upon the national courts, the Law on Competition governs the particularities of judicial proceeding of the competition cases. For that reason the Code of Civil Procedure has been supplemented by a provision that the competition cases are examined in accordance with the rules of the Code, save the exceptions provided for by the Law on Competition. Upon receipt of a claim related to the application of Articles 81 or 82 of the Treaty the court shall thereof notify the European Commission and the Competition Council. In this case the European Commission and the Competition Council, at their own initiative, may submit comments concerning the application of Articles 81 or 82 of the EC Treaty, provide explanations, evidences and participate at the examination thereof, as well as submit requests and applications.

New Article 50 of the Law on Competition stipulates that undertakings whose legitimate interests have been violated by actions contradicting Articles 81 or 82 of the EC Treaty or other restrictive practices, shall have a right to appeal to the Vilnius Regional Court with a claim concerning the termination of illegal actions and the indemnification for the damage incurred. Thus, the Vilnius Regional Court has an exclusive authority to investigate cases concerning the indemnification of the damage incurred through the restrictive practices mentioned above.

REPUBLIC OF LITHUANIA

LAW ON COMPETITION

23 March 1999 No. VIII-1099

Vilnius

(As amended by 15 April 2004 No. IX-2126)

Chapter I

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.
4. Provisions of this Law shall implement the European Union regulation provided for in the Annex to this Law.

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:

- (a) 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;
 - (b) 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;
 - (c) 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;
 - (d) 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;
 - (e) 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:
- (f) 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;
 - (g) 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:

- (h) ownership or the right to use all or part of the assets of the undertaking;
 - (i) 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. Repealed

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 II RESTRICTIVE PRACTICES

Section I 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:
 - (j) agreements to directly or indirectly fix prices of certain goods or other conditions of sale or purchase;

- (k) agreements to share the product market on a territorial basis, according to groups of buyers, suppliers or in any other way;
 - (l) agreements to fix production or sale volumes for certain goods, as well as to restrict technical development or investment;
 - (m) agreements to apply dissimilar (discriminating) conditions to equivalent transactions with individual undertakings, thereby placing them at a competitive disadvantage;
 - (n) 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;
 - (o) repealed.
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. Repealed.
 4. This Article may be not applicable to agreements concluded between undertakings, which because of their small influence cannot substantially restrict competition. The requirements, terms and conditions in respect of such agreements shall be laid down by a relevant resolution of the Competition Council of the Republic of Lithuania (hereinafter referred to as the Competition Council).
 5. Repealed.

Article 6. Exemption

1. Article 5 of this Law shall not apply where the agreement promotes technical or economical progress or improves the production or distribution of goods, and thus creates conditions for consumers to receive additional benefit, also where:
 - (p) 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;
 - (q) the agreement does not afford contracting parties the possibility to restrict competition in a large share of the relevant market.
2. An agreement complying with terms and conditions of paragraph 1 of this Article shall be effective from the moment of conclusion thereof (*ab initio*) without any prior decision by the Competition Council. In case of any dispute concerning the compliance of the agreement with the provisions of paragraph 1 of this Article, the burden of proof concerning the compliance shall fall upon the Party to the agreement benefiting from the exemption.
3. The Competition Council shall have a right to pass regulations and define the groups of agreements, as well as conditions under which the agreement shall be deemed in compliance with the conditions of paragraph 1 of this Article.
4. The Competition Council shall have a right to withdraw the right of undertakings to take advantage of the exemption granted by regulations referred to in paragraph 3, where it is determined that in certain cases the impact of the agreement is not

compatible with the provisions of paragraph 1 of this Article.

Article 7. Repealed

Article 8. Repealed

Section II

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:

- (r) direct or indirect imposition of unfair prices or other purchase or selling conditions;
- (s) limitation of trade, production or technical development to the prejudice of consumers;
- (t) application of dissimilar (discriminating) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage;
- (u) 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 III

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:
 - (v) the sum of aggregate income of the undertakings concerned;
 - (w) 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;

- (x) 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;
- (y) 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:

- (z) repealed;
- (aa) an insurance enterprise, the value of gross insurance premiums shall be calculated instead of the aggregate income;
- (bb) collective investment undertakings and management companies managing them - aggregate income shall be calculated as the sum total of the aggregate income of all the undertakings under the control of management company or the investment variable capital company the management of the assets whereof has not been transferred to the management company;
- (cc) 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;
- (dd) 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, collective investment undertakings and management companies managing them, 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 prior to the implementation of the concentration. The notification shall be made after the submission of the proposal to conclude the agreement, acquire the shares or assets, an instruction to conclude and agreement, conclusion of the agreement, acquisition of the right of ownership or the right to dispose of certain assets. The notification may also be submitted in case of a good faith intention to conclude the agreement or announce a public bid to buy-up shares. The Competition Council shall establish a model form for notification of concentration.
3. The notification of concentration shall include:
 - (ee) registration data of the undertakings participating in concentration;reasons and objectives of concentration;
description of the way of concentration;
annual financial accounts of each undertaking participating in concentration, for the preceding three years prior to concentration;
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 shareholders of which they are;
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;
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.
6. The notification to the Competition Council shall be accompanied by documents, confirming that the undertakings concerned have paid the fee of the amount established by the Government for the submission and examination of the notification.

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 implement concentration until the resolution of the Competition Council is passed in accordance with items 1 or 2 of paragraph 1 of Article 14 of this Law.
2. All 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. The permission of the Competition Council to implement individual actions of concentration may be made subject to certain conditions and obligations necessary to ensure effective competition.

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 “*Valstybės žinios*” (the “*Official Gazette*”), 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 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. The Competition Council, for the purpose of passing a decision in accordance with item 2 of paragraph 1 of Article 14, upon a duly grounded request of the person notifying the concentration may extend the term for the examination of the

concentration referred to in paragraph 2 of this Article by one month.

5. 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:
 - (ff) to permit the concentration notified;
 - (gg) 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;
 - (hh) 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 or substantially restrict 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 “*Valstybės žinios*” (the “*Official Gazette*”).

Article 14¹. Application of the concentration control procedure by own initiative:

1. The Competition Council may obligate the undertakings to submit notifications on concentration and *mutatis mutandis* apply the concentration control procedure, defined in Section III of the Law, even though the gross income indicators established in paragraph 1 of Article 10 are not exceeded, where it becomes probable that concentration will result in the creation or strengthening of the

dominant position, or a significant restriction of competition in the relevant market.

2. The Competition Council may pass an individual decision to apply the concentration control procedure only in cases where no more than 12 months have passed from the implementation of concentration in question.

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 to believe that the 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 Chapter 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 III

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:
 - (ii) 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;
 - (jj) 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;
 - (kk) 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;

- (ll) 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;
 - (mm) 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;
 - (nn) 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;
 - (oo) 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:
 - (pp) termination of illegal actions;
 - (qq) recovery of the damages;
 - (rr) 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 IV

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:
(ss)control the compliance by undertakings, public and local authorities with the requirements of this Law;

- (tt) 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;
 - (uu) 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;
 - (vv) 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 Supreme Administrative Court of Lithuania, and appeal the decisions of the local authorities to the regional administrative court;
 - (ww) investigate and consider infringements of this Law and impose penalties on the defaulters in the cases and following the procedure provided for by law;
 - (xx) appeal to the court for the protection of interests of the State and other persons safeguarded by this Law;
 - (yy) adopt legal acts within the limits of its competence;
 - (zz) 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;
 - (aaa) 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 paragraph 4 of Article 10, paragraph 1 of Article 14, paragraph 2 of Article 15 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. The same person may be appointed the Chairman or a member of the Competition Council for not more than two consecutive terms of office. During the first appointment of the members of the Competition Council two members shall be appointed for a term of six years and two 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:
 - (bbb) of their own volition;
 - (ccc) upon the expiry of their term of office;
 - (ddd) upon being elected or appointed to another office;
 - (eee) upon the coming into force of the court sentence;
 - (fff) if instances of malfeasance are revealed;
 - (ggg) if by their acts they discredit the name of the Chairperson or the member of the Competition Council;
 - (hhh) for health reasons.
 4. The Chairperson and the members of the Competition Council removed from the office upon the end of their term of office shall be on the day of their dismissal from the office paid a severance payment in the amount of their average monthly salary except cases when they are appointed for the second term.
 5. 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.
 6. The Competition Council shall resolve issues assigned within its competence by passing resolutions. The resolutions shall be passed by majority vote with at least three members of the Competition Council, the Chairperson including, participating in the voting. In the event of a tie, the Chairperson shall have the casting vote.
 7. 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:
 - (iii) direct the work of the Competition Council;
 - (jjj) represent the Competition Council in the Republic of Lithuania and abroad;
 - (kkk) employ and dismiss the administrative staff of the Competition Council;
 - (lll) submit annual reports on the Competition Council activities to the Seimas and

Government of the Republic of Lithuania;

(mmm) 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 V

INVESTIGATION OF RESTRICTIVE PRACTICES AND HEARING OF CASES

Section IV

INVESTIGATION OF RESTRICTIVE PRACTICES, CARRIED OUT BY THE COMPETITION COUNCIL

Article 23. Infringements Investigated by the Competition Council

1. The Competition Council shall investigate:
 - (nnn) agreements restricting competition;
 - (ooo) abuse of a dominant position;
 - (ppp) 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;
 - (qqq) unfair competition in the cases provided for in paragraph 4 of Article 17 of this Law;
 - (rrr) infringements in case of failure to comply with the requests to supply information or failure to supply the information timely, 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 established time limit, 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 and also obligations assumed by undertakings in accordance with item 2 of paragraph 2 of Article 30.

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:
 - (sss) undertakings whose interests have been violated due to restrictive practices;
 - (ttt) public and local authorities;
 - (uuu) 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 30 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:
 - (vvv) the facts indicated in the application are immaterial, causing no substantial damage to the interests protected under this Law;
 - (www) investigation of the facts specified in the application is not within the Competition Council's remit;
 - (xxx) the facts specified in the application have already been investigated and a resolution has already been taken on the issue;
 - (yyy) 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;
 - (zzz) there are no data available allowing to reasonably suspect the infringement of the Law.

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 5 months from the commencement thereof. The Competition Council may extend the period by a justified resolution each time by up to three 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:
 - (aaaa) to enter and to check any premises, land and means of transport used by the undertaking;
 - (bbbb) 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;
 - (cccc) 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;
 - (dddd) 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;
 - (eeee) 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;
 - (ffff) to take possession of any documents and articles having evidential value in the investigation of the case;
 - (gggg) to enlist the assistance of specialists and experts in carrying out the investigation;
 - (hhhh) 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 officers.
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 Vilnius Regional 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:
 - (iii) to obligate the undertakings to cease an illegal activity;
 - (jjj) upon being issued a warrant by the judge of the Vilnius Regional 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 Vilnius Regional 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 Vilnius Regional 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 Vilnius Regional 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 Vilnius Regional Administrative Court to reject the application, he shall have the right to appeal within 7 days against the judge's decision to the Supreme Administrative Court of Lithuania.
6. The Supreme Administrative Court of Lithuania must investigate the complaint against the decision of the judge of the Vilnius Regional 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 Supreme Administrative Court of Lithuania shall be final and shall not be referred to the court for review.
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 investigation shall be terminated where:
(kkkk) in the course of the investigation it becomes evident that there is no

composition of the infringement of the Law;

(III) the actions did not result in the significant damage to the interests protected by the law, and the undertaking suspected in the infringement of the law voluntarily ceases the actions and submits to the Competition Council a commitment in writing not to perform such actions.

3. The applicant and the interested parties shall be notified in writing of the decision taken.
4. 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 V

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:
 - (mmm) the applicant (the initiator of investigation);
 - (nnn) the undertaking suspected of infringement of the Law on Competition (alleged defaulter);
 - (ooo) on the decision of the Competition Council, other undertakings whose interests are directly related to the case under investigation;
 - (ppp) representatives of public and local authorities, at their request;
 - (qqq) 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 the 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:
 - (rrrr) to impose the penalties provided for by this Law;
 - (ssss) to refuse to impose penalties where there are no legally established grounds;
 - (tttt) to close the case in the absence of infringements of the Law;
 - (uuuu) 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 “*Valstybės žinios*” (the “*Official Gazette*”).

Section VI

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 Vilnius Regional 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 “*Valstybės žinios*” (the “*Official Gazette*”).
3. Unless the Vilnius Regional 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:

- (vvvv) to leave the resolution as it stands and to reject the complaint;
- (wwww) to revoke the resolution or its individual sections and to remand the case to the Competition Council for supplementary investigation;
- (xxxx) to revoke the resolution or its individual sections;
- (yyyy) to amend the resolution on concentration, application of penalties or interim measures.

Chapter VI

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 following the principles of impartiality and proportionality shall have the right:
 - (zzzz) 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;
 - (aaaaa) 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;

(bbbb) to impose fines on undertakings fixed by this Law.

2. Upon being issued an authorisation by the Vilnius Regional 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 up to 10 percent of the gross annual income in the preceding business year shall be imposed by the Competition Council upon undertakings for prohibited agreements, abuse of a dominant position, 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.
2. A fine of up to 3 per cent of the gross annual income in the preceding business year may be imposed by the Competition Council upon undertakings for the actions of unfair competition subject to investigation by the Competition Council.
3. A fine of up to 1 per cent of the gross annual income in the preceding business year may be imposed by the Competition Council upon undertakings for not providing information required for investigation or for examination of concentration, also for providing incorrect and incomplete information in cases stipulated by this Law, 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.
4. A fine of up to 5 per cent of the average gross daily income in the preceding business year 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 timely fulfil the instructions to provide information; for failure to fulfil the assumed obligations in 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:
 - (cccc) the gravity of the infringement;
 - (dddd) duration of the infringement;
 - (eeee) circumstances extenuating or aggravating the liability of an undertaking;
 - (ffff) repealed;
 - (ggggg) 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.
5. The Government shall pass a resolution approving the procedure for the establishment of the amount of the fine.

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:
 - (hhhhh) the undertaking provides information prior to the beginning of investigation of the agreement;
 - (iiiiii) the undertaking is the first of the parties to the prohibited agreement to provide such information;
 - (jjjjj) the undertaking provides complete information available to it regarding the prohibited agreement and co-operates with the Competition Council during the investigation;
 - (kkkkk) 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:

- (lllll) the undertaking provides complete information required for the investigation of abuse of dominant position and co-operates with the Competition Council during the investigation;
 - (mmmmm) the prohibited actions committed by the undertaking have not caused substantial and irreparable damage to the interests of other undertakings or public interests;
 - (nnnnn) the undertaking stops the prohibited actions of its own free will and furnishes proof thereof before the end of the investigation;
 - (ooooo) 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.

CHAPTER VII

APPLICATION OF THE EUROPEAN UNION COMPETITION RULES

Article 47. The authorised institution

1. The Competition Council shall be the institution authorized to apply the EU competition rules, the supervision of compliance whereof according to the European Union competition law is entrusted to the national competition authority.
2. In performing functions assigned to it in accordance with paragraph 1 of this Article the Competition Council shall act in accordance with the procedure set forth by this Law.

Article 48. State aid

1. The Competition Council shall be a coordinating institution in matters related to State aid subject to the European Union State aid rules.
2. Following the procedure set forth by the Government of the Republic of Lithuania the Competition Council shall perform the expert examination of projects referred to in paragraph 1 of this Article, submit to State aid providers conclusions and recommendations, accumulate information on State aid granted to undertakings of Lithuania and submit such information to the European Commission and to other institutions concerned.
3. The Register of State aid referred to in paragraph 1 of this Article, including the *de minimis* aid shall be maintained by the Competition Council.

Article 49. The police assistance and authorisation of investigation actions

1. For the purpose of maintaining the public order and possible use of violence officers authorised by the European Commission to perform an investigation in accordance with the EU competition rules and officers appointed by the Competition Council to assist the authorized officers of the European Commission may refer to police officers.
2. The Vilnius Regional Administrative Court authorizes the use of force in the case set forth in Article 20 of Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (further - Council Regulation (EC) No. 1/2003);
3. The Vilnius Regional Administrative Court authorizes the inspections to be conducted by the European Commission, and the possible use of force in the cases set forth in Article 21 of Council Regulation (EC) No. 1/2003.
4. European Commission or the Competition Council shall file the request for the authorization by the court.

Article 50. Judicial proceeding of competition cases

1. The undertaking whose legitimate interests have been violated by actions performed in contravention of Articles 81 or 82 of the Treaty or other restrictive

actions prohibited by this Law shall be entitled to appeal to the Vilnius Regional court with a claim concerning:

(ppppp) the termination of illegal actions;

(qqqqq) compensation of damage incurred;

2. Upon receipt of the claim related to the application of Articles 81 or 82 of the Treaty the Court shall thereof notify the European Commission and the Competition Council. In this case the European Commission and the Competition Council shall have the rights specified in paragraph 2 of Article 50 of the Civil Procedure Code.
3. A copy of the decision (ruling) passed in the case subject to Articles 81 or 82 of the Treaty shall immediately after publishing of the decision be communicated to the European Commission and the Competition Council.
4. The proceedings may be renewed when it becomes clear that after the adoption of the court decision (ruling) providing for the application of Article 81 or 82 of the Treaty to the agreements, decisions or practices, the European Commission adopts the decision on the application of the said Articles to the same agreements, decisions or practices, and the effects of the application of the said decision are substantially different.
5. For the purpose of investigation of the case in the Vilnius Regional Administrative Court paragraphs 2, 3 and 4 of this Article shall apply *mutatis mutandis*.

I promulgate this Law passed by the Seimas of the Republic of Lithuania.

PRESIDENT OF THE REPUBLIC VALDAS ADAMKUS

Annex to
Republic of Lithuania Law No. VIII-1099
of 23 March 1999

The implemented EU Regulation

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.

MADAGASCAR

COMMENTARY BY THE GOVERNMENT OF MADAGASCAR ON THE COMPETITION LAW NO. 2005-020 OF 17 OCTOBER 2005

PRESENTATION DE LA LOI N° 2005-020 DU 17 OCTOBRE 2005 SUR LA CONCURRENCE

Le droit de la concurrence, tel qu'il est institué à Madagascar, est de tradition romaniste et, plus particulièrement, d'inspiration française et/ou francophone. Dans son évolution récente, il est aussi marqué par la part de plus en plus importante prise par le traitement des questions qui entrent dans le champ de compétence de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA). Cet organisme d'envergure régionale a pour objectif de favoriser, au plan économique, le développement et l'intégration régionale ainsi que la sécurité juridique et judiciaire et, en particulier, de doter les Etats parties d'un même droit des affaires moderne et adapté à la situation de leurs économies.

Le droit de la concurrence à Madagascar a été profondément modifié par la loi n° 2005-020 du 17 octobre 2005 sur la concurrence. Il a pour objectif de garantir la liberté et la loyauté de la concurrence et, dans cette optique, de promouvoir la compétitivité et le bien être du consommateur. Il porte essentiellement sur :

- la libre concurrence, la liberté des prix et les obligations mises à la charge de toute personne qui exerce une activité économique ;
- le cadre institutionnel chargé de mettre en œuvre les règles relatives à la concurrence ;
- les infractions au droit de la concurrence et la procédure en vigueur pour leur poursuite et leur sanction.

Aussi allons-nous exposer brièvement quelles en sont les grandes lignes.

Généralités

La loi n° 2005-025 du 17 octobre 2005 sur la concurrence, qui fonde l'action juridique en matière de concurrence à Madagascar, tend à garantir :

- la transparence dans les transactions commerciales ;
- la prévention et/ou la répression des entraves au libre jeu de la concurrence et des pratiques commerciales qui limitent l'accès au marché ou, de manière générale, ont pour effet de restreindre, fausser ou empêcher la concurrence sur les marchés ;
- la libre détermination des prix des biens, produits et services par le jeu de la concurrence à tous les secteurs de l'économie.

La principale innovation de la loi n° 2005-020 du 17 octobre 2005 sur la concurrence, qui fonde l'action juridique en matière de concurrence à Madagascar, est

l'affirmation de la liberté des prix et leur détermination par le libre jeu de l'offre et de la demande. Le libre exercice de la concurrence dans les relations commerciales est la conséquence logique du principe fondamental de la liberté du commerce et de l'industrie.

Même si une possibilité d'intervention par décret est réservée aux pouvoirs publics, il s'agit d'une rupture avec le régime antérieur qui reposait sur le fondement inverse : les prix étaient par principe soumis au contrôle de l'Administration, la liberté des prix ne constituant qu'une modalité de ce contrôle. En effet, le principe de la libre détermination des prix est limité par deux exceptions où l'Administration se réserve le droit d'intervenir sur les prix pour des raisons économiques à caractère soit structurel (monopole, absence de concurrence...), soit conjoncturel (situation de crise ou calamité publique).

Le champ d'application de la loi n° 2005-020 du 17 octobre 2005 sur la concurrence se caractérise par son universalité. Toute personne est ainsi libre d'exercer telle profession ou activité de production, de distribution et de service qu'elle trouvera bon, à condition de l'exercer dans le cadre d'une concurrence claire et loyale. Ses dispositions s'appliquent :

- à toutes les personnes physiques ou morales opérant sur le marché national ;
- à toutes les activités de production, de distribution et de services ;
- aux personnes publiques en dehors de l'exercice de leurs prérogatives de puissance publique ou de mission de service public.

De l'obligation de transparence dans la vente des produits et dans les prestations

C'est la première fois qu'à Madagascar, un texte à valeur législative fait référence à la notion de transparence du marché : les règles en matière de concurrence doivent contribuer à assurer la transparence d'un marché soumis à la concurrence. Au-delà de cette affirmation de principe, il s'agit de renforcer les règles relatives à la transparence aussi bien dans les relations entre professionnels et consommateurs (extension de l'information à ces derniers), que dans les relations entre les professionnels eux-mêmes, c'est-à-dire entre producteurs et distributeurs.

Des pratiques anticoncurrentielles

Le législateur s'oppose à un certain nombre de pratiques anticoncurrentielles par lesquelles les entreprises commerciales cherchent à restreindre, limiter, voire supprimer la concurrence qui peut régner entre elles. Pour y parvenir, les entreprises disposent de différents moyens :

- les procédés ayant un caractère généralement individuel ;
- les pratiques anticoncurrentielles à caractère collectif.

Le législateur n'en a pas moins veillé à assurer, en toute hypothèse, la répression de pratiques anticoncurrentielles, créant même un instrument de contrôle original, le Conseil de la concurrence, qui joue un rôle primordial dans l'action conduite aujourd'hui par les pouvoirs publics contre les entraves illicites.

Du cadre institutionnel

L'application du droit de la concurrence est assurée par les autorités de concurrence, et la tâche de faire respecter la concurrence est partagée entre deux institutions : le Ministère chargé du commerce et le Conseil de la concurrence.

Des compétences en matière de contrôle des ententes et abus de domination sont attribuées au nouveau Conseil de la concurrence, organisme disposant d'un pouvoir propre de décision et de sanction.

Des pouvoirs d'enquête

La recherche et la constatation des infractions obéissent à des règles de procédure tendant à se rapprocher du droit commun et supprimant, en principe, les pouvoirs exorbitants conférés auparavant aux agents de l'Administration.

Les sanctions sont du ressort de l'ordre judiciaire. Leurs niveaux sont déterminés en fonction de l'importance de l'infraction et du préjudice subi par le marché ou par les opérateurs ainsi que des circonstances qui les justifient (mauvaise foi des parties en cause, récidive). La faculté de demander le bénéfice d'un règlement par voie transactionnel est accordée aux auteurs d'infractions.

COMPETITION LAW NO. 2005-020 OF 17 OCTOBER 2005

REPOBLIKAN'I MADAGASIKARA

Tanindrazana-Fahafahana-Fahamarinana

PRESIDENCE DE LA REPUBLIQUE

LOI N° 2005-020 du 17 octobre 2005

Sur la Concurrence

L'Assemblée Nationale et le Sénat ont adopté en leur séance respective en date du 27 juillet 2005,

LE PRESIDENT DE LA REPUBLIQUE,

Vu la Constitution ,

Vu la Décision N° 15- HCC/D3 du 12 octobre 2005 DE LA Haute Cour Constitutionnelle ;

Promulgue la loi dont la teneur suit :

CHAPITRE PREMIER

Dispositions générales

Article premier: - La présente loi a pour objectif fondamental de garantir la liberté et la loyauté de la concurrence.

La présente loi vise dans ce cadre à promouvoir la compétitivité des entreprises et le bien-être des consommateurs.

Article 2: - Toute personne peut librement exercer toute activité, tout commerce et toute industrie, sous réserve du respect des conditions prescrites par les dispositions législatives et réglementaires.

Les prix des biens, produits et services sont librement déterminés par la loi de l'offre et de la demande.

Toutefois, dans les secteurs ou zones où la concurrence par les prix est limitée en raison de la situation de monopole ou de difficultés durables d'approvisionnement, un décret pris en Conseil du Gouvernement peut, après consultation du Conseil de la concurrence et des organismes représentant les opérateurs privés, apporter des restrictions à la liberté générale des prix.

De même, le Gouvernement peut prendre, contre les hausses ou les baisses excessives des prix, des mesures temporaires motivées par une situation de crise, des circonstances exceptionnelles, une calamité ou une situation manifestement anormale du marché dans un secteur déterminé, par décret pris en Conseil du Gouvernement, après consultation du Conseil de la concurrence. Ce décret précise la durée de validité des mesures qui ne peut excéder six mois.

Article 3: - Au sens de la présente loi, les termes ci-après sont définis comme suit:

1. le marché est la confrontation des offres, ou productions et des demandes, ou consommation, concernant un bien ou service et aboutissant à la détermination des quantités à échanger et du prix à payer. Il existe autant de marchés que de biens ou services susceptibles d'être vendus et achetés.
2. l'entreprise est une organisation autonome qui coordonne un ensemble de facteurs en vue de la production et de la distribution de certains biens et services pour le marché.

Article 4: - Les dispositions de la présente loi s'appliquent à toutes les activités économiques exercées de manière permanente ou occasionnelle dans les secteurs public et privé, qui ont lieu sur le territoire national.

Elles concernent toutes les transactions portant sur des biens et des services relevant de tous les secteurs d'activité. Elles visent toutes entreprises quelles que soient les parties intervenant dans les transactions, tous actes, comportements, dès lors que ceux-ci ont pour objet, ou peuvent avoir pour effet, de restreindre la concurrence.

Sous réserve des obligations internationales de l'Etat malagasy, la présente loi s'applique aux pratiques restreignant la concurrence qui se produisent sur le territoire national ou qui ont ou peuvent y avoir des effets.

Article 5: - Les dispositions de la présente loi ne dérogent pas aux protections reconnues ou accordées par les lois particulières, notamment par les textes relatifs à la propriété intellectuelle.

Sont exemptés de l'application de la présente loi :

- les activités ayant trait aux négociations collectives et celles des syndicats,
- les actes relevant de la souveraineté de l'Etat.

Article 6: - Le Gouvernement peut, dans le cadre limitatif de l'application des accords et conventions internationaux dont Madagascar fait partie et selon les pratiques internationales, par voie de décret pris en Conseil du Gouvernement, prendre des mesures de sauvegarde à caractère temporaire, aux fins de protection de l'industrie locale.

Les modalités d'enquête sur l'opportunité des mesures à prendre, ouvertes soit à l'initiative du Ministre chargé du commerce lui-même, soit sur la base d'une demande présentée par la branche de production s'estimant lésée, seront fixées par voie réglementaire.

Les pratiques commerciales déloyales résultant de dumping ou de subventions peuvent également être prouvées, après enquêtes spécifiques, sur la base d'une plainte de la branche de production nationale s'estimant lésée, en vue de déterminer l'existence de dommage causé à son encontre et d'appliquer le droit antidumping ou compensatoire correspondant.

En matière de commerce extérieur, le Ministre chargé du commerce peut proposer au Gouvernement des mesures de réciprocité.

CHAPITRE II

De la loyauté de la concurrence

Article 7: - Tout agissement non conforme aux usages d'une profession,

commerciale ou non, tendant à attirer la clientèle ou à la détourner d'un concurrent, constitue un acte de concurrence déloyale et engage la responsabilité de son auteur. Les agissements visés sont notamment ceux définis dans les articles 8, 9 et 10 ci-après.

Article 8: - Le dénigrement est le comportement consistant à jeter le discrédit sur les produits, le travail ou la personne d'un concurrent.

Article 9: - La publicité tendant à comparer des biens ou services d'autrui par rapport à ceux d'un autre sous quelque forme que ce soit, notamment la citation ou la représentation de la marque de fabrique, de commerce ou de service, la citation ou la représentation de la raison sociale ou la dénomination sociale, du nom commercial ou de l'enseigne, engage la responsabilité de son auteur si elle n'est pas loyale et véridique et qu'elle est de nature à induire en erreur le consommateur.

Article 10: - Le parasitisme est tout comportement par lequel une entreprise, sans chercher nécessairement à créer une confusion, se place dans le sillage d'une autre, soit pour exploiter le même type de clientèle, soit pour profiter de sa réputation ou des efforts qu'elle déploie en exploitant une clientèle distincte.

CHAPITRE III DE LA LIBERTE DE CONCURRENCE

SECTION I De l'obligation de transparence

Article 11 : - Pour assurer la transparence et la loyauté des transactions ainsi que la mise en place d'un environnement stable, clair, connu de tous, permettant et encourageant la concurrence :

1. le détaillant ou prestataire de service doit, par voie de marquage, d'étiquetage, d'affichage ou par tout autre procédé approprié, informer le consommateur sur les prix et les conditions et modalités particulières de vente. Ce détaillant ou prestataire de service est tenu de délivrer la facture à tout consommateur qui en fait la demande.
2. Tout producteur, prestataire de service, grossiste ou importateur-revendeur, est tenu de communiquer à tout acheteur de produit ou demandeur de prestation de service pour toute activité professionnelle, qui en fait la demande, son barème de prix et ses conditions de vente. Celles-ci comprennent les conditions de règlement et, le cas échéant, de rabais et ristournes.

Article 12: - Tout achat de produit et toute prestation de service fait pour les besoins d'une activité professionnelle doivent faire l'objet d'une facturation. Le vendeur est tenu de délivrer la facture dès la réalisation de la vente ou la prestation de service et l'acheteur doit la réclamer. La facture doit être rédigée en double exemplaire au moins. Le vendeur et l'acheteur doivent la conserver pour une période minimale de trois ans.

SECTION II Des pratiques anticoncurrentielles

Article 13: - La pratique est réputée anticoncurrentielle lorsqu'un opérateur économique, dans la conduite de ses affaires, adopte un comportement qui, en lui-même ou considéré conjointement avec celui d'autre opérateur, vise à avoir ou risque d'avoir

pour effet de restreindre, fausser ou empêcher la concurrence dans la production, la distribution ou l'acquisition de bien ou service.

Sous-section 1 **Des pratiques anticoncurrentielles individuelles**

1.- Des clauses de non concurrence

Article 14: - La clause de non concurrence est celle par laquelle une partie à un contrat promet à son cocontractant de ne pas exercer une ou des activités déterminées.

La clause de non concurrence, pour être valable, doit être limitée dans son objet ainsi que dans le temps et dans l'espace.

2.- Des pratiques restrictives

Article 15: - Est interdit le fait pour toute personne physique ou morale de procéder, de façon directe ou indirecte, à une fixation verticale des prix par tout moyen, ayant pour objet ou pour effet d'imposer ou d'attribuer un caractère minimal aux prix de vente ou aux marges de commercialisation, ainsi que de maintenir ou de pratiquer de tels prix ou de telles marges.

Toutefois, ces dispositions ne s'appliquent pas à la vente de livres, journaux ou toute autre publication ainsi qu'aux produits soumis au contrôle administratif prévu par les article 05.01.01 et suivants du Code Général des Impôts.

Article 16: - Sauf motif légitime, il est interdit de refuser de satisfaire, dans la mesure des disponibilités du vendeur et dans les conditions conformes aux usages commerciaux, aux demandes des acheteurs de produits ou aux demandes de prestation de service, lorsque ces demandes ne présentent aucun caractère anormal, qu'elles émanent de demandeurs de bonne foi et que la vente de produits ou la prestation de service n'est pas interdite par la loi ou un règlement de l'autorité publique.

Sont considérés comme justifiant un refus :

1. La satisfaction des exigences normales de l'exploitation industrielle ou commerciale du vendeur,
2. L'exécution d'engagements antérieurement assumés par le vendeur,
3. La disproportion manifeste de la commande par rapport aux quantités normales de consommation de l'acquéreur ou par rapport aux volumes habituels des livraisons du vendeur,
4. Le manque de confiance fondé de la part du vendeur quant au règlement ponctuel de l'acquisition par l'acheteur dans le cas de ventes à crédit.
5. L'existence de tout autre circonstance inhérente aux conditions matérielles de la transaction, susceptible de rendre la vente du bien ou la prestation du service anormalement préjudiciable pour le vendeur.

Article 17: - Est interdit le fait de subordonner la vente d'un bien ou la prestation d'un service à l'acquisition d'un autre bien ou d'un autre service.

Article 18: - Il est interdit de restreindre, d'empêcher ou d'éliminer la concurrence par l'accaparement d'un produit, l'accaparement étant entendu comme la mise en œuvre de procédés tendant à contrôler l'écoulement d'un produit et à provoquer ou aggraver sa pénurie à des fins spéculatives.

Article 19: - Est interdite la revente de tout produit en l'état à un prix inférieur à son prix d'achat effectif majoré des taxes afférentes à cette revente et le cas échéant, du prix du transport, lorsque cette revente a pour effet de fausser le mécanisme de la concurrence.

Cette interdiction n'est pas applicable:

- 1- aux produits périssables menacés d'altération rapide,
- 2- aux ventes motivées par la cessation ou le changement d'activité commerciale,
- 3- aux produits ou articles à caractère saisonnier ainsi qu'aux produits ou articles démodés, défraîchis ou de fin de série,
- 4- aux produits obsolètes,
- 5- aux produits dont le prix de vente est aligné sur le prix d'un commerçant exerçant son activité dans la même zone d'achalandage.

3- Des abus de dépendance économique

Article 20: - Est prohibée l'exploitation abusive par une entreprise d'un état de dépendance économique dans lequel se trouve, à son égard, une entreprise cliente ou fournisseur qui ne dispose pas de solution équivalente.

On entend par état de dépendance dans le sens de la présente loi, la situation d'une entreprise qui réalise auprès d'une autre une part importante de ses achats, ventes ou prestations et qui ne peut y renoncer sans mettre en péril son activité, ni remplacer son partenaire commercial, en position de force, par d'autres clients, dans des conditions voisines.

Sous-section 2

Des pratiques anticoncurrentielles collectives

1- Des ententes

Article 21: - Sont prohibées les pratiques concertées, les accords entre entreprises, les ententes expresses ou tacites ou les coalitions ayant pour objet ou pour effet d'empêcher, de restreindre ou de fausser de façon sensible le jeu de la concurrence à l'intérieur du marché national ou d'une partie importante de celui-ci.

Les ententes qualifiées de pratiques restrictives peuvent consister à :

- 1- limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises,
- 2- faire obstacle à la fixation des prix par le libre jeu du marché
- 3- répartir les marchés ou les sources d'approvisionnement.

Article 22: - Peuvent également être qualifiées de pratiques restrictives de la concurrence, celles qui sont considérées comme telles dans les conventions ou accords internationaux auxquels Madagascar fait partie.

Toute clause considérée comme pratique restrictive de la concurrence au sens des dispositions qui précèdent est nulle de plein droit.

2- Des abus de position dominante

Article 23: - Est prohibée dans les mêmes conditions, l'exploitation abusive d'une position dominante sur le marché national, ou une partie importante de celui-ci, par une entreprise ou un groupe d'entreprises et ayant pour effet d'empêcher, de fausser ou de restreindre le jeu de la concurrence.

On entend par position dominante dans le sens de la présente loi la situation dans laquelle une ou plusieurs entreprises sont en mesure de jouer un rôle directeur qui leur permet de contraindre leurs concurrents de se conformer à leur attitude, ou de s'abstenir de la pression de ses concurrents.

Cette position résulte du comportement de la ou des entreprises concernées en matière de fixation des prix, de discrimination, de fusions, prises de contrôle ou tout autre mode d'acquisition du contrôle de caractère horizontal, vertical ou hétérogène comme dans les cas des ententes prévues à l'article 21 de la présente loi.

Article 24: - Ne sont pas soumises aux dispositions des articles 21 à 23 qui précèdent les pratiques dont les auteurs peuvent justifier qu'elles ont pour objet ou effet l'amélioration de la production, la qualité, la distribution des biens et des services ou le bien-être du consommateur, ainsi que la promotion du progrès technique, technologique ou économique, tout en réservant aux utilisateurs une partie équitable du profit qui en résulte, à condition de :

- ne pas imposer aux entreprises intéressées des restrictions qui ne sont pas indispensables pour atteindre ces objectifs,
- ne pas éliminer toute forme de concurrence pour une partie substantielle des produits en cause.

3 - De la concentration

Article 25: - Constitue une concentration économique, toute situation qui résulte de tout acte, quelle qu'en soit la forme, qui emporte transfert de propriété ou de jouissance sur tout ou partie des biens d'une entreprise, qui a pour objet ou pour effet de permettre à une entreprise ou à un groupe d'entreprises d'exercer, directement ou indirectement, sur une ou plusieurs autres entreprises, une influence déterminante.

La concentration de la puissance économique s'opère notamment par voie de fusions, rachats, coentreprises et toutes autres formes de contrôle à caractère horizontal, vertical ou hétérogène.

Au sens de la présente loi :

- La fusion est l'union en une seule et même entreprise de deux ou plusieurs entreprises dont l'une ou plusieurs perdent leur identité.
- Le rachat d'une entreprise par une autre est le fait pour une seconde entreprise d'acheter la totalité des actions de la première ou un pourcentage suffisant pour pouvoir exercer le contrôle, même sans le consentement de l'entreprise absorbée.
- La co-entreprise est la création d'une entreprise distincte par deux ou plusieurs entreprises

Le chiffre d'affaire annuel et/ou et le pourcentage du marché à partir desquels la concentration est considérée comme pouvant entraver la concurrence, seront fixés par voie réglementaire.

Article 26: - Toute concentration économique, telle que définie ci-dessus, est

soumise à un contrôle a priori du Conseil de la Concurrence.

Le Conseil détermine si l'opération qui lui est soumise risque de créer ou de renforcer une position dominante sur le marché national au point d'éliminer la concurrence ou de la réduire de façon sensible. Il apprécie également si l'opération apporte au progrès économique une contribution suffisante pour compenser les atteintes éventuelles à la concurrence.

Si le Conseil décide après étude de la situation que l'opération est susceptible d'altérer la concurrence, il peut, soit l'interdire, soit l'autoriser à condition que des mesures précises soient prises pour éviter les effets préjudiciables à la concurrence.

Le Conseil de la Concurrence tiendra compte notamment pour ce faire des éléments ci-après :

- position des entreprises concernées sur le marché,
- accès de celles-ci aux sources d'approvisionnement et aux débouchés,
- structure du marché,
- compétitivité de l'industrie nationale,
- obstacles à l'implantation d'entreprises concurrentes sur le marché,
- évolution de l'offre et de la demande des produits ou services considérés.

4- Des monopoles

Articles 27:- Constitue un monopole toute situation dans laquelle :

- un certain pourcentage de l'ensemble des biens d'une catégorie donnée commercialisé sur le territoire national est fourni par une seule et même personne, physique ou morale ou un même groupe,
- un certain pourcentage des services d'une catégorie donnée est fourni par une seule et même personne,
- un certain pourcentage de l'ensemble des biens d'une catégorie donnée exporté hors du territoire national y est produit et/ou exporté par une seule et même personne physique ou morale ou un même groupe.

Les pourcentages en question seront fixés par voie réglementaire, après consultation du Conseil de la Concurrence et des organismes représentant les opérateurs économiques privés.

CHAPITRE IV **Du cadre institutionnel**

SECTION I **Du Ministère chargé du commerce**

Article 28: - Relèvent du Ministère chargé du commerce les attributions ci-après:

- 1- la réalisation d'études sectorielles qui se révèlent utiles en matière de règles de concurrence;
- 2- l'initiative de proposer au Gouvernement les mesures qui apparaissent appropriées en vue du rétablissement de la concurrence dans les cas où des distorsions sont constatées dans ce domaine;
- 3- l'identification des pratiques susceptibles de porter atteinte à la présente loi et la mise en œuvre de l'organisation et de l'instruction des procédures prévues à cet égard sous réserve des attributions du Conseil de la concurrence;
- 4- la collecte des doléances et plaintes émanant d'une entreprise ou d'un groupement dans le cadre des attributions déterminées ci-dessus;

Toutefois, les autres départements ministériels ainsi que les organismes spécialisés peuvent, de concert avec le Ministre chargé du commerce, contribuer à l'élaboration des modalités pratiques prévues par les dispositions de la présente loi

SECTION II **Du Conseil de la concurrence**

Article 29: - Il est créé un Conseil de la concurrence chargé de

- 1- proposer au Ministre chargé du commerce des orientations dans les divers domaines d'application de la présente loi;
- 2- se prononcer sur toutes autres questions en matière de concurrence dont il est saisi;
- 3- présenter annuellement au Ministre chargé du commerce un rapport d'activité,
- 4- statuer sur les affaires qui sont de sa compétence conformément aux dispositions de la présente loi;
- 5- imposer les mesures nécessaires en cas de monopole et de concentration économique préjudiciable à la concurrence;
- 6- publier dans un bulletin spécial toutes ses décisions;

Article 30: - Le Conseil de la concurrence est un organe national indépendant composé de sept membres, nommés pour un mandat de quatre ans, par voie de décret pris en Conseil des Ministres, sur proposition du Ministre chargé du commerce. Il est composé de:

- 1- un magistrat, président, présenté par le Premier Président de la Cour Suprême ;
- 2- deux personnalités choisies en raison de leur compétence en matière juridique, économique et commerciale ;
- 3- deux personnalités ayant exercé leurs activités dans les secteurs de la production, de la distribution, de l'artisanat, des services ou des professions libérales, choisies sur une liste présentée par les groupements professionnels les plus représentatifs ;

4- deux spécialistes en matière de concurrence et de consommation.

Le Conseil choisit parmi ses membres un vice-président.

Le Ministre chargé du commerce désigne un Commissaire du Gouvernement auprès du Conseil de la Concurrence justifiant d'une expérience professionnelle en matière de concurrence et de consommation.

Article 31: - Un ou plusieurs rapporteurs peuvent être nommés par arrêté du Ministre chargé du commerce, sur proposition du Président.

Eventuellement, le Conseil de la concurrence peut recourir au concours de personnalités spécialisées dans des domaines déterminés pour lui apporter des avis sur certains points d'ordre technique.

Article 32: - Les personnes membres sont soumises aux règles d'incompatibilité prévues pour les emplois publics. Aucun membre du Conseil ne peut délibérer dans une affaire où il a un intérêt ou s'il représente ou a représenté une des parties intéressées.

A l'exception des magistrats, tous les membres du Conseil doivent prêter serment devant la Cour de cassation avant leur prise de fonction.

Article 33: - Les conditions de nomination, de rémunération et de destitution des membres du Conseil, ainsi que les règles de fonctionnement seront précisées par décret pris en Conseil du Gouvernement.

Article 34: - Le Conseil de la concurrence est obligatoirement consulté par le Gouvernement sur tout projet de texte pouvant toucher directement ou indirectement la concurrence.

Il peut par ailleurs être consulté sur toutes questions relevant de sa compétence par le Gouvernement, les commissions parlementaires, les Collectivités Territoriales et syndicats, les organisations des consommateurs agréées, les chambres de commerce, d'industrie et d'agriculture.

Article 35: - Le Conseil de la concurrence peut être saisi soit par le Ministre chargé du commerce, soit par les entreprises, soit par les organismes visés à l'alinéa 2 de l'article 34 de la présente loi pour toute affaire qui concerne les intérêts dont il a la charge, soit par tout intéressé, soit se saisir d'office.

Article 36: - Le Conseil de la concurrence a compétence, pour connaître de toutes les affaires relevant des pratiques collectives prévues aux articles 21 à 27 de la présente loi.

Le Conseil ne peut valablement délibérer que si cinq de ses membres sont présents. Le Conseil statue à la majorité des voix, et en cas de partage de voix, celle du Président est prépondérante.

Les décisions du Conseil sont revêtues de la formule exécutoire par son Président ou le vice-président. Les décisions sont notifiées aux parties intéressées.

Les décisions sont susceptibles de recours en annulation pour vices de forme devant le Conseil d'Etat. A la demande des parties, cette juridiction peut en ordonner le sursis à exécution.

Article 37: - Lorsque le Conseil de la concurrence est saisi en matière de pratiques anticoncurrentielles collectives, il examine si les pratiques dont il est saisi entrent dans le champ des articles 21 à 27 ou peuvent se trouver justifiées en application de l'article 24 de la présente loi. Il peut ordonner aux intéressés de mettre fin aux pratiques anticoncurrentielles. Il prononce, le cas échéant, des injonctions et des sanctions pécuniaires.

Lorsque les faits lui paraissent de nature à justifier l'application de l'article 49, il adresse le dossier au Procureur de la République. Cette transmission interrompt la prescription de l'action publique.

Article 38: - Les concentrations économiques ainsi que les monopoles prohibés sont soumis aux mesures édictées par le Conseil de la concurrence. Le refus de se soumettre aux dites mesures peuvent faire l'objet d'une sanction pécuniaire prononcée par ledit Conseil.

Article 39: Le Conseil dispose de pouvoir d'appréciation des sanctions pécuniaires qui doivent être proportionnées à la gravité des faits reprochés et à l'importance du dommage causé à l'économie.

Article 40: - Le Conseil de la concurrence, sur demande du Ministre chargé du commerce ou de l'une des parties, peut prendre des mesures conservatoires limitées dans le temps et/ou dans l'espace lorsque la pratique dénoncée porte une atteinte significative et actuelle à l'économie générale, à celle du secteur concerné, à l'intérêt des consommateurs ou à l'entreprise plaignante.

Article 41: - Le Conseil notifie les griefs aux intéressés ainsi qu'au Commissaire du Gouvernement, qui peuvent consulter le dossier et présenter leurs observations dans un délai de deux mois.

Article 42: - Les séances du Conseil de la Concurrence ne sont pas publiques. Les rapports sont présentés au Conseil par le ou les rapporteurs. Le Conseil procède à l'audition de la personne mise en cause, qui peut se faire représenter par un conseil, ainsi qu'à l'audition des parties intéressées régulièrement convoquées et de toute personne qui lui paraît susceptible de contribuer à son information.

Article 43: - Le Conseil de la concurrence est assisté des commissions préventives provinciales ou régionales. Ces commissions ont un rôle consultatif et émettent des avis préalables sur toute question relative à la concurrence au niveau de leur juridiction. Elles formulent également leur avis sur les actes accomplis ou projetés si ceux-ci nuisent ou risquent de nuire à la libre concurrence. Ces avis doivent être communiqués dans le délai imparti par le Conseil de la concurrence.

Chaque commission est composée de quatre membres dont deux fonctionnaires compétents en matière de concurrence et de consommation, un professionnel de niveau universitaire désigné par le secteur privé et un représentant de la circonscription concernée.

En tant que de besoin, la commission peut consulter pour des détails d'ordre technique un ou des représentants de la branche d'industrie, d'agriculture, de commerce ou de consommation intéressée.

CHAPITRE V

Des infractions

Article 44: - Toute violation des dispositions des articles 11 et 12 relative à l'obligation de transparence et de loyauté des transactions est punie d'une amende de 500.000 ARIARY à 10.000.000 ARIARY

Article 45: - L'imposition de prix minima en violation de l'article 11 est punie d'une amende de 500.000 ARIARY à 10.000.000 ARIARY.

Article 46: - Le refus de vente en violation de l'article 16 est punie d'une amende de 500.000 ARIARY à 10.000.000 ARIARY.

La même peine s'applique au cas de subordination de vente visée par l'article 17..

Article 47: - L'accaparement en violation de l'article 18 est puni d'une amende de 1.000.000 ARIARY à 30.000.000 ARIARY..

Article 48: - La vente à un prix inférieur au prix d'achat effectif, en violation des dispositions de l'article 19, est punie d'une amende de 500.000 ARIARY à 10.000.000 ARIARY .

Article 49: - Toute personne ayant pris part d'une manière frauduleuse et déterminante dans la conception, l'organisation ou la mise en œuvre des pratiques visées aux articles 20 à 23, encourt une peine d'emprisonnement de six mois à cinq ans et une amende de 5.000.000 ARIARY à 50.000.000 ARIARY

Article 50: - Quiconque, ayant été condamné pour l'une des infractions visées au présent chapitre, sera reconnu coupable de l'une de ces infractions, commises dans le délai de cinq ans à compter du jour où la décision est devenue définitive, est passible d'une peine égale au double de la peine prévue.

CHAPITRE VI

De la procédure

Article 51: - En tout ce qui n'est pas contraire aux dispositions du présent chapitre, il est fait application des dispositions du Code de procédure pénale.

SECTION I

De l'enquête

Article 52: - Les infractions prévues à la présente loi sont constatées par les officiers de police judiciaire, par les commissaires et contrôleurs du commerce et de la concurrence, dûment commissionnés et assermentés et, pour les affaires dont le Conseil de la concurrence est saisi, par les rapporteurs du Conseil.

Les enquêteurs sont habilités à procéder à la constatation des infractions de droit commun connexes ou indivisibles à l'infraction à la concurrence dont ils ont eu

connaissance.

Le Président du Conseil de la concurrence, investi d'un pouvoir de réquisition, peut faire appel aux agents commissionnés du Ministère chargé du commerce pour assister le Conseil dans une enquête déterminée.

Article 53: - Les enquêtes donnent lieu à l'établissement de procès-verbaux et, le cas échéant, de rapports. Un double en est laissé aux parties intéressées. Ils font foi jusqu'à preuve du contraire. Dans tous les cas, l'original est envoyé directement au Conseil de la concurrence.

Article 54: - Les procès-verbaux doivent être établis par les personnes habilitées, ayant pris part personnellement et directement à la constatation des faits.

Ces personnes, si elles ne sont pas revêtues d'un uniforme, sont tenues de faire connaître leur qualité et d'exhiber leur insigne ou leur carte professionnelle.

Le procès-verbal doit contenir les déclarations de la personne entendue, préciser la date, le lieu et la nature des constatations ou des contrôles effectués, et indiquer que la personne mise en cause a été informée de la date et du lieu de sa rédaction.

Le procès-verbal précise, selon le cas, que la déclaration de saisie a été faite à l'intéressé et qu'un double du procès-verbal lui a été communiqué.

Article 55: - Les enquêteurs peuvent pendant les heures d'ouverture officielle des établissements accéder à tous locaux ou moyens de transport à usage professionnel, demander la communication des livres, factures et de tous autres documents professionnels et en prendre copie, recueillir sur convocation ou sur place les renseignements et justifications. A défaut, ils sont tenus de se munir d'une réquisition dûment visée par le Procureur de la République.

Ils peuvent recourir à un expert pour procéder à toute expertise contradictoire nécessaire.

Article 56: - Les enquêteurs peuvent, à tout moment de l'enquête, procéder à la saisie de documents ou des produits constituant le corps du délit ainsi qu'à leur consignation, le cas échéant.

Ils peuvent, sans se voir opposer le secret professionnel, accéder à tout document ou élément d'information détenu par les services et établissements de l'Etat et des autres collectivités publiques.

Article 57: - Les fonctionnaires, agents ou toutes autres personnes appelées à connaître des dossiers d'infractions sont tenus au secret professionnel et les dispositions de l'article 378 du Code Pénal leur sont applicables.

SECTION II

De la poursuite des infractions

Article 58: - Les infractions prévues aux articles 11, 12, 15 à 20 de la présente loi sont poursuivies devant les juridictions de droit commun. Toutefois, leurs auteurs ont la faculté de solliciter une transaction et dans ce cas, le Ministre chargé du Commerce est obligatoirement saisi soit par le Procureur de la République, soit par toute autre autorité en cas de constatation par des officiers de police judiciaire.

Les modalités d'application seront fixées par voie réglementaire.

Le paiement de la transaction vaut acquiescement et emporte extinction de l'action publique, s'il intervient dans un délai de six mois, à compter de sa notification.

En tout état de cause, le Ministre chargé du commerce est lié par sa décision, dès lors que celle-ci a été notifiée à l'intéressé.

Le montant des transactions est recouvré par le Trésor public.

Les décisions de transaction doivent statuer sur le sort des objets saisis. A défaut, l'acte constatant la transaction emporte mainlevée d'office

Article 59: - A l'expiration du délai imparti ci-dessus ou en cas de refus notifié de la transaction, le Ministre chargé du commerce est définitivement dessaisi du dossier.

Article 60: - Quelle que soit la nature du règlement dont le procès-verbal a fait l'objet, les sanctions administratives suivantes peuvent être infligées, à titre de peine accessoire, par le Ministre chargé du commerce :

1. fermeture pour une durée déterminée qui ne peut excéder six mois, des établissements, usines, ateliers ou magasins du délinquant,
2. retrait pour une durée déterminée, qui ne peut excéder un an, de l'agrément à l'exercice d'une activité professionnelle ou de la carte autorisant l'exercice de celle-ci.

En collaboration avec le Ministre chargé de l'intérieur et sur décision de l'autorité judiciaire compétente, l'interdiction de sortie de toute personne qui aura commis une infraction aux dispositions de la présente loi peut toujours être ordonnée tant que la transaction n'a pas été acquittée dans son intégralité, ou tant qu'il n'a pas été statué définitivement sur l'infraction.

Article 61: - Pour garantir le recouvrement des amendes et des confiscations prononcées par les juridictions compétentes, celles-ci peuvent ordonner la mise sous séquestre de tout ou partie des biens du condamné jusqu'à concurrence du montant des amendes prononcées.

Article 62: - La répartition du produit des pénalités, des transactions et des confiscations recouvrées en vertu des dispositions de la présente loi est opérée conformément aux règlements en vigueur.

CHAPITRE VII

Dispositions diverses

Article 63: - Pour la promotion de la production, la professionnalisation des activités commerciales et la transparence des transactions, les autorités locales sont tenues de prévoir des lieux d'implantation fixes pour les « tsena », marchés périodiques ou toute autre manifestation à caractère commercial. La création et l'organisation des marchés périodiques incombent aux collectivités territoriales.

Celles-ci sont tenues de contribuer progressivement à la professionnalisation des activités commerciales et de procéder régulièrement au recensement des opérateurs relevant de leur circonscription.

Article 64: - Des textes réglementaires seront pris, en tant que de besoin, pour l'application des dispositions de la présente loi.

Article 65: - Sont abrogées toutes dispositions contraires à celles de la présente loi, notamment l'Ordonnance 73-054 du 11 septembre 1973 portant refonte de l'ordonnance n° 60-129 du 3 octobre 1960 relative au régime des prix et à certaines modalités d'intervention en matière économique et l'ordonnance 73-055 du 11 septembre 1973 portant refonte de l'Ordonnance 60-130 du 3 octobre 1960 concernant la constatation, la poursuite et la répression des infractions à l'ordonnance 73-054 du 11 septembre 1973 ainsi que les dispositions des articles 419 et 420 du Code pénal.

Article 66: - La présente loi sera publiée au Journal Officiel de la République de Madagascar et exécutée comme loi de l'Etat.

Promulguée à Antananarivo, le 17 octobre 2005

Marc RAVALOMANANA

Pour ampliation conforme
Antananarivo, le 24 octobre
2005
LE SECRETAIRE GENERAL
DU GOUVERNEMENT

Alice RAJAONAH

MALAWI

COMPETITION AND FAIR TRADING BILL, 1998* MEMORANDUM

This Bill seeks to enact a new law that encourages competition in the economy by prohibiting anti-competitive trade practices. The principal objectives of the Bill include:

- (a) The establishment of an appropriate mechanism to regulate monopolistic and anti-competitive trade practices, including specifically resale price maintenance, mergers and acquisitions, and restrictive trade practices such as collusion and price fixing;
- (b) Deterrence of unfair trading practices and provision of protection of consumers; and
- (c) Implementation and monitoring of policy issues and establishment of enforcement mechanisms.

Part I of the Bill deals with preliminary issues, including interpretation of various terms used in the Bill. This part also specifies areas to which the Act shall not apply, and which include, among others:

- (a) Activities of employees for reasonable protection of themselves as employees; and
- (b) Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment.

Part II of the Bill, among other things, establishes the Competition and Fair Trading Commission and makes provision for its composition, the tenure of officers and members of the Commission, vacancies, and allowances payable to members of the Commission.

This part also spells out the functions and powers of the Commission, which include:

- (a) Carrying out investigations at its own initiative or at the request of any person who may be adversely affected by a proposed merger;
- (b) Taking 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 any enterprise; and
- (c) Providing information for the guidance of consumers regarding their rights under this Act.

The powers of the Commission include:

- (a) Summoning and examining witnesses;
- (b) Calling for and examining documents; and

(c) Administering oaths.

This Part further requires members of the Commission to disclose their interest in any matter before the Commission.

Part III of the Bill provides for the establishment of the Secretariat of the Commission. The Secretariat will be headed by an Executive Director, and the Commission will employ such other employees as the Commission shall consider necessary.

Under this part, employees are required to disclose any interest they might have in any matter being considered by the Commission.

Part IV deals with financial provisions and, among other things, identifies sources of Commission funding, which include monies appropriated by Parliament, levies, grants and donations.

Part V of the Bill enumerates what constitutes anti-competitive trade practices. These include:

- (a) Making the supply of goods or services dependent on the acceptance of restrictions on the distribution or manufacture of competing or other goods or the provision of competing or other services;
- (b) Imposing restrictions regarding where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;
- (c) Resale price maintenance; and
- (d) Predatory behaviour towards competitors, including the use of cost pricing to damage, hinder or eliminate competition.

This part also spells out the criteria under which the Commission allows mergers and takeovers. Included in the criteria is whether a merger or takeover is regarded as advantageous to Malawi.

This part further makes provision against the misuse of market power by a person who has a dominant position of market power. Such a person is prohibited from using his power, among other things, 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) Preventing a person from engaging in competitive conduct in that or any other market.

Under this part, the Commission is mandated to monitor concentrations of economic power or anti-competitive trade practices.

The consumer is given protection under this art against, among other things, the following:

- (a) Excluding liability for defective goods;
- (b) Claiming payment for unsolicited goods or services;
- (c) Engaging in unconscionable conduct in carrying out trade in goods or services;
- (d) Engaging in pyramid selling;
- (e) Engaging in bait selling;
- (f) Offering gifts or prizes with no intention of supplying them; and
- (g) Misleading or deceptive advertising.

Part VI of the Bill contains miscellaneous provisions. This part empowers the Commission to designate investigating officers and outlines the powers of such officers.

This part also makes provision for appeals to a Judge in Chambers by any person aggrieved by a finding of the Commission.

Furthermore, the part contains an offence and penalty section. This fine is put at MK500,000 or an amount equivalent to the financial gain generated by the offence. The fine is high in order to act as a deterrent.

Under this part, the Minister has the power to make regulations. Finally, the Bill makes provision for the Act to apply to and bind the Government.

COMPETITION AND FAIR TRADING ACT, 1998

Act No. 43 of 1998

I assent

BAKILI MULUZI
President

30th December, 1998

ARRANGEMENT OF SECTIONS

PART I - PRELIMINARY

Section

1. Short title and commencement
2. Interpretation
3. Non-application of the Act

PART II -THE COMPETITION AND FAIR TRADING COMMISSION

4. Establishment of the Commission
5. Composition of the Commission
6. Tenure of office and vacancies
7. Allowances of members
8. Functions of the Commission
9. Commission shall seek information
10. Powers of the Commission
11. Hearings to be held in public
12. Policy directions
13. Proceedings of the Commission
14. Committees of the Commission
15. Minutes of meetings
16. Disclosure of interest
17. Protection of members

18. Invited persons

PART III - SECRETARIAT

19. Secretariat of the Commission

20. Executive Director of the Commission

21. Other employees

22. Disclosure of interest by employees, etc.

23. Oath of secrecy

24. Prohibition of publication or disclosure of information by unauthorised persons

25. Protection of employees

PART IV - FINANCIAL PROVISIONS

26. Funds of the Commission

27. Levy

28. Financial year

29. Accounts

30. Annual reports

31. Progress reports

PART V - ANTI-COMPETITIVE TRADE PRACTICES, ETC.

32. Enumeration of anti-competitive trade practices

33. Trade agreements

34. Anti-competitive trade practices by associations

35. Control of mergers and takeovers

36. Application to the Commission for authorization

37. Investigation by the Commission

38. Criteria for evaluating applications for authorization

39. Order of the Commission on mergers or takeovers

40. Enforcement of orders

41. Misuse of market power
42. Monitoring concentrations of economic power, etc
43. Unfair trading
44. Authorization of allowable acts

PART VI - MISCELLANEOUS PROVISIONS

45. Investigating officers
46. Powers of entry and inspection
47. Secrecy to be observed
48. Appeal against finding of the Commission
49. Operation of order pending determination of appeal
50. Offences
51. Penalty for offences
52. Civil liability
53. Regulations
54. Government to be bound

A Bill

entitled

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

ENACTED by the Parliament of Malawi as follows:

PART I
PRELIMINARY

Short title and commencement

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

Interpretation

2. (1) In this Act, unless the context otherwise requires:

“advertisement” means any form of communication made to the public or a section of the public for the purpose of promoting the supply of goods or services;

“affiliated” means associated with each other, formally or informally, shareholding or otherwise;

“anti-competitive trade practices” means the trade practices enumerated in sections 32, 33 and 34;

“Chairman” means the Chairman of the Commission appointed under section 5;

“Committee” means a committee of the Commission established under section 14.

“consumer” includes any person:

- (a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale;
- (b) to whom a service is rendered;

“controlling interest”, in relation to:

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

“customer” means a person who purchases goods or services;

“distribution” includes any act by which goods are sold or services are supplied for consideration;

“distributor” means a person who engages in distribution;

“Executive Director” means the Executive Director of the Commission appointment under section 20;

“immediate family member”, in relation to any person, means that person’s spouse, child, parent, brother or sister;

“manufacturing” means transforming, on a commercial scale, raw materials into finished or semi-finished products, and includes the assembling of inputs into finished or semi-finished products but does not include mining.

“member” means a member of the Commission;

“merger” means:

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

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

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

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

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

“supply”:

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

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

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

No. 16 of 1996

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

(2) For the purpose of this Act:

(rrrrr) 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

(sssss) 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 amount equivalent to the financial gain generated by the offence, if such amount be greater, and to imprisonment for five years.

Civil liability

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

Regulations

53. The Minister may, on the advice of the Commission, make regulations for carrying into effect the provisions of this Act, and, in particular and without prejudice to the generality of the foregoing power, such regulations may provide for:
- (a) anything required to be prescribed under or for the purposes of this act;
 - (b) any forms required for the purposes of this Act;

(c) fees payable in respect of any service provided by the Commission.

Government to be bound

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

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

R. L. Gondwe
Clerk of Parliament

MALTA

COMMENTARY BY THE GOVERNMENT OF MALTA ON THE MALTESE COMPETITION LEGISLATION

A. Description of the reasons for the introduction of the legislation

Competition law in Malta is regulated by Act XXXI of 1994, as subsequently amended by Acts XXVIII of 2000, IV of 2003 and III of 2004. The Competition Act (hereinafter referred to as the ‘Act’) came into force on 1 February 1995. The substantive provisions of the Act prohibit restrictive agreements and practices and abuse of dominance. Mergers are governed by the Control of Concentrations Regulations (Legal Notice 294 of 2002) which came into force on 1 January 2003. These Regulations were recently amended by Legal Notice 49 of 2007.

The introduction of the Act complemented the Government’s economic restructuring and trade liberalization programme at the time. With Malta’s eventual accession to the European Community in mind, Government also wanted to adopt a Competition Act based on EU competition law. At the time of enactment the local situation was however also kept in mind, so that the Act as originally drafted included provisions particularly aimed to cater for the economic situation in Malta.

The White Paper on “*Fair Trading, the next step forward...*”⁵ which had introduced the Competition Bill provided that:-

“Government is committed to the adoption and promotion of fair competition and consumer policies. This objective has required the devising of formal rules and structures for identifying particular unfair and anti-competitive business practices which adversely affect the economic interest of consumers.”

The Control of Concentrations Regulations were enacted as the Act *per se* was an inadequate tool for dealing with concentrations and could not be used to control all kinds of concentrations.

B. Description of the objectives of the legislation and the extent to which it has evolved since the introduction of the original legislation

The White Paper on “*Fair Trading, the next step forward...*” provided that:-

“The aim of the Competition Act is to promote competition in trade in a manner which best guarantees positive economic results, encourages technological progress and quality and contributes towards price moderation. Competition between undertakings exercises constant pressure on prices making it increasingly possible to relax price control. This Act is intended to create a modern system consistent with the European Union rules establishing a framework for effective competition in Malta. It provides legal certainty to undertakings in Malta by defining the parameters within which they may lawfully

⁵ Proposals for Legislative Reforms, November 1993, Department of Information.

conduct their business on the Maltese market and will guarantee business and consumers the benefits of competition.”

The Act has been significantly amended since its enactment. One of the most significant amendments concerned the position of public entities and public undertakings. Originally, the Act did not automatically apply to any Government Department or to any body corporate established by law or to any company or partnership in which Government, directly or indirectly, held a controlling interest. The application of the Act was dependent upon the Minister declaring by Order that such department, corporation, company or partnership was subject to the Act. This was because in 1994, Government had felt that the liberalization process was not yet complete and that it was still too early to submit all public undertakings to the competition rules. In the year 2000 the situation was inverted, so that all public undertakings became subject to the Act, however, the Minister still had the power to exempt any or all of the operations of any public undertaking from the application of the Act. In 2003, the Act was again amended so that the possibility to grant such exemption was removed. Undertakings entrusted with the operation of services of a general economic interest or having the character of a revenue producing monopoly are subject to the Act, insofar as the application of the competition rules does not obstruct the performance of the particular tasks assigned to them.

Originally the primary role of the Director of the Office for Fair Competition (OFC) was merely to investigate breaches of the Act. Subsequently, the Director's powers were enhanced to include also (albeit limitedly) the power to take decisions and issue cease and desist orders and compliance orders.⁶

The Minister's power to make regulations under the Act was also gradually widened to include not only the power to make Block Exemption Regulations, but also to make regulations for the better carrying out of the provisions of the Act, such as the Regulations on merger control, to prescribe fees under the Act, to exempt any agreement, decision or practice in connection with agriculture and fisheries from Article 5 of the Act and to make regulations to enable the application of Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.

The last amendments in 2004 were principally aimed to provide for the application of Council Regulation (EC) 1/2003. A significant amendment was the abolition of the notification system, so that undertakings now can no longer apply for an individual exemption but have to make their own independent assessment and see if the conditions for exemption stipulated in the Act are satisfied. The possibility to seek negative clearance on an agreement was also removed. The OFC can investigate alleged breaches of Articles 81 and 82 of the Treaty and make a report thereon to the Commission for Fair Trading (CFT). The CFT and the national courts can apply Articles 81 and 82 where the agreement, decision or concerted practice or abusive conduct appreciably affects trade between Malta and any one or more Member States.

C. Description of the practices, acts or behaviour subject to control

i. The Competition Act

⁶ The powers of the Director will be examined in Section E below.

The substantive provisions in the Act mirror Articles 81 and 82 of the EC Treaty. The pertinent substantive provisions are the following:-

- Article 5. This provision prohibits “any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta.” Such agreements and decisions are ipso jure null and unenforceable. Article 5 provides the following non-exhaustive list of the kind of agreements and practices that are prohibited:-

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- limiting or controlling production, markets, technical development or investment;
- sharing markets or sources of supply;
- imposing the application of dissimilar conditions to equivalent transactions with other trading parties outside the agreement, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The above prohibition, however, does not apply where the agreement, decision or practice produces beneficial effects as provided in the Act that outweigh the negative effects on competition. In this case the following four cumulative conditions must be satisfied by the agreement, decision or practice in order to escape the above prohibition:-

- it contributes towards the objective of improving production or distribution of goods or services or of promoting technical or economic progress;
- it allows consumers a fair share of the resultant benefit;
- it does not impose on the undertakings concerned any restriction which is not indispensable to the attainment of the said objective;
- it does not give the undertakings concerned the possibility of eliminating or significantly reducing competition in respect of a substantial part of the products to which it refers.

The burden of proving that these conditions are fulfilled is on the undertaking/s claiming the benefit of this provision. As under EC law, it is no longer possible under the Act to notify an agreement to obtain individual exemption.

The Minister may, after consultation with the Director of the OFC (henceforth Director), by regulations provide block exemptions for categories of agreements, decisions and concerted practices where these satisfy the four cumulative conditions described above. Currently there are the Research and Development Agreements (Block Exemption) Regulations and the Specialisation Agreements (Block Exemption) Regulations. The Vertical Agreements and Concerted Practices (Block Exemptions) Regulations and the Technology Transfer Agreements (Block Exemption) Regulations expired in 2006 and are currently being re-examined by the OFC.

The prohibition in Article 5 does not apply where the impact of the agreement, decision or concerted practice on the relevant market is minimal, unless competition is restricted by the cumulative effect of parallel networks of similar agreements established by several undertakings.

The prohibition in Article 5 also does not apply to agreements which may affect trade between Member States but which do not restrict competition in terms of Article 81(1) or which fulfil the criteria of Article 81(3) of the EC Treaty or which are covered by an EC Block Exemption.

- Article 9. This provision prohibits the abuse of a dominant position by one or more undertakings within Malta or any part of Malta. In line with the case-law of the European Court of Justice, a dominant position is defined as “*a position of economic strength held by one or more undertakings which enables it or them to prevent effective competition being maintained on the relevant market by affording it or them the power to behave, to an appreciable extent, independently of its or their competitors, suppliers or customers.*” The relevant market is defined as the market for the product whether within Malta, or a part thereof, or outside Malta, and whether or not restricted to a particular period of time or season of the year.

Article 9 provides the following non-exhaustive list of prohibited behaviour by a dominant undertaking:-

- directly or indirectly imposing an excessive or unfair purchase or selling price or other unfair trading conditions;
- charging prices below the average variable cost price of a product in order to drive rival competitors out of the market;
- limiting production, markets or technical development to the prejudice of consumers;
- refusing to supply goods or services indiscriminately in order to eliminate a trading party from the relevant market to the prejudice of consumers;
- applying dissimilar conditions, including price discrimination, to equivalent transactions with different trading parties, thereby placing any or some of the trading parties at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other party of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts.

For the purpose of determining dominance, there is a rebuttable presumption that an undertaking which alone or jointly with others has a 40% market share is dominant. An undertaking which alone or jointly has a market share of less than 40% can also be found to be in a dominant position.

The Act also provides an indicative list of the factors to be taken into account for the purposes of determining whether a purchase or selling price is excessive or unfair.

ii. Control of Concentrations

Concentrations must be notified to the Director prior to their implementation. A concentration falls within the parameters of the Regulations if it satisfies both the legal definition of a concentration and the turnover threshold. A concentration, whether occurring in Malta or outside Malta, must be notified, when in the preceding financial year the aggregate turnover in Malta of the undertakings concerned exceeded €2,329,373.4 (LM1,000, 000) and each of the undertakings concerned had a turnover in Malta equivalent to at least 10% of the combined aggregate turnover of the undertakings concerned.

Concentrations are appraised by the Director according to the substantial lessening of competition test. The Regulations provide an indicative list of the factors that must be taken into account when making such appraisal. These include the structure of the markets concerned, actual or potential competition, whether the business of one of the parties has failed or is likely to fail, the market position and the economic power of the undertakings concerned, the alternatives available to suppliers and users and barriers to entry. The parties may also rely on the efficiency defence.

The notification of a concentration involves at least a first phase investigation and if the Director at the end of phase 1 finds that the concentration raises serious doubts as to its lawfulness, a phase 2 investigation is made. Decisions under both phases must be taken within the time-limits imposed. A simplified procedure is provided for concentrations which are considered not to give rise to serious doubts as to their legality.

D. Description of the scope of application of the legislation

The Act and the Control of Concentrations Regulations apply to all sectors of the economy in Malta. Although, there is a possibility for the Minister to exempt from Article 5 any agreement, decision or practice in connection with agriculture and fisheries by means of Regulations, no such Regulations have been made.

The Control of Concentrations Regulations apply to concentrations occurring even outside Malta, so long as the undertakings concerned have a turnover in Malta as explained above. The Act does not contain a provision specifically dealing with the situation where the practices, acts or behaviour occur outside Malta but have effects in Malta. Nor has this point been expressly considered by the CFT or OFC in their decisions. However, Article 5 applies to all agreements, decisions and concerted practices which have the object or effect of restricting competition in Malta. Article 9 applies in respect of “*any abuse by one or more undertakings of a dominant position within Malta or any part of Malta*”.

The existence of an agreement is not necessary as the term ‘concerted practice’ catches any form of co-operation. However, where there is an agreement its existence is sufficient for the Act to apply and it is not necessary that the agreement be put into effect.

E. Description of enforcement machinery (administrative and/or judicial) indicating any notification and registration agreements as well as the principal powers or body(-ies)

The Act establishes the OFC and the CFT as the overall guardians of competition in Malta. The OFC currently forms part of the Consumer and Competition Division which is

a Government Department. Following EC Regulation 1/2003, the OFC has been designated as the national competition authority.

The CFT is independent from the OFC. The CFT is composed of a Chairman (a Magistrate by profession) and two other members (an economist and an accountant).

It is the duty of the Director of the OFC to ensure that the provisions of the Act are observed by all. Indeed, the primary function of the OFC is to gather information and carry out investigations concerning restrictive practices and abusive behaviour. In terms of the Act, the Director may carry out investigations of his own motion or at the request of the Minister or upon a reasonable allegation in writing of a breach of the provisions of the Act by a complainant or at the request of any designated national competition authority of any other Member State of the European Union or the European Commission. The Director has wide investigatory powers under the Act, including the power of entry and search in business and residential premises.

The OFC can also advise undertakings and the public at large on matters concerning fair trading practices. It can also advise and make proposals and recommendations to the Minister in relation to any matter concerning the exercise of his functions under the Act.

Decisions following investigations concerning restrictive practices and abuse of dominance are taken by the Director, however, in the following cases, the power to take a decision, following a report made by the Director, is vested in the CFT:-

- i. Where it results to the Director, following an investigation, that a serious infringement of Articles 5 and 9 has taken place due to the gravity and duration of the agreement, decision, concerted practice or abusive conduct; and
- ii. Where it results to the Director that an infringement of Article 81 and/or Article 82 of the EC Treaty has occurred.

In the latter two cases, the power to issue cease and desist orders and compliance orders rests solely with the CFT. In other cases, where the Director finds an infringement and takes a decision thereon, the Director may issue cease and desist orders and compliance orders. Decisions concerning admissibility of complaints are taken by the Director. Decisions, cease and desist orders and compliance orders issued by the Director under the Act are subject to '*review*' by the CFT. According to a decision of the CFT (Case 2 of 2003), the word review in the English text of the legislation does not reflect the true meaning of the word used in the Maltese version of the law, where the latter means that a full scale inquiry has to be conducted by the Commission on all the workings of the OFC.

The CFT may, at the request of the Director or of an undertaking or of a complainant through the Director, take interim measures intended to suspend any restrictive practice still under investigation if it is urgently necessary to avoid a situation likely to cause serious, immediate and irreparable prejudice to the interests of any undertaking or to harm the general economic interest.

In the interpretation of the Act, the CFT is obliged to have recourse to the judgements of the European Courts and to the decisions and statements of the European Commission, including interpretative notices on EU competition law. In practice, the OFC also takes into account and relies on the judgements of the European Courts and the decisions and notices of the European Commission when drawing reports and decisions

on investigations carried out.

Under the Control of Concentrations Regulations, decisions are taken by the Director. The decisions of the Director that a concentration falls outside the scope of the Regulations, or that a concentration is lawful, whether with or without conditions and obligations attached, or that a concentration is unlawful, or a decision granting a derogation from the condition that a concentration must not be put into effect until it is declared lawful are subject to review by the Commission.

Offences

Breaches under the Act and under the Regulations on Control of Concentrations constitute offences and give rise to criminal proceedings before the Court of Magistrates. In the case of breaches of Articles 5 and 9 of the Act and of Articles 81 and 82 of the EC Treaty the person so found guilty is liable to a fine from one to ten *per centum* of the turnover of the undertaking in the economic interests of whom the person so guilty was acting. The fine, however, may not be less than €6988.12 (LM 3000). Where the person so found guilty is the Director, manager, secretary or other similar officer of the undertaking concerned, the said person shall be deemed to be vested with the legal representation of the same undertaking which accordingly shall be liable in solidum with the person found guilty for the payment of the said fine.

The Director may assist the Police in the conduct of the prosecution and in the production of the evidence in criminal proceedings instituted by the Police before the Court of Magistrates for an offence against the provisions of the Act.

The Director also has the power to impose compromise penalties as an alternative to court proceedings where a person acts contrary to a cease and desist order or compliance order. There is also the possibility of extinction of criminal liability where the Director enters into an agreement in writing with the offender whereby the offender pays or gives security for the payment of a sum less than the maximum penalty applicable for the offence.

F. Description of any parallel or supplementary legislation, including treaties or undertakings with other countries, involving co-operation or procedures for resolving disputes in the area of restrictive business practices

In May 2004, Malta became a member of the European Union. The OFC is a member of the European Competition Network and has the obligation to co-operate fully with other members within the network.

The OFC and CFT are members of the International Competition Network.

G. Description of the major decisions taken by administrative and or judicial bodies and the specific issues covered

(i) *Commission for Fair Trading*

A significant decision of the CFT is *W.J. Parnis England Limited v Sea Malta Company Limited and Gollcher Company Limited as agents of Grimaldi (Genoa) Line* (10 October 2005, Complaint No 3/2003). This case involved a breach of Articles 5 and 9 of the Maltese Competition Act. In this case two companies, Sea Malta Company Limited (hereinafter 'Sea Malta') and Gollcher Company Limited, as agents of Grimaldi (Genoa) Line (hereinafter 'Gollcher') were shipping companies carrying trailers to and from Malta within the Mediterranean region. At one point the complainant, W.J. Parnis England Limited, introduced a new Ro-Ro service for carrying containers and trailers on the route Genoa/Malta/Tunisia/Genoa and managed to attract several customers to it. Both Sea Malta and Gollcher operated on this route and in order to win back customers threatened those customers that used Parnis England's services, by means of letters and telephone calls that in case they did not use their services on this route any more they would increase the prices charged on other routes.

An investigation by the OFC was carried out and a report finding an infringement of Articles 5 and 9 was submitted to the CFT. The CFT considered that the relevant market in this case was the carriage of trailers by sea with a Ro-Ro system on the route Genoa/Malta/Tunisia/Genoa and rejected the claim of Sea Malta and Gollcher that the relevant market was wider and included other routes. The CFT confirmed that prior to the entry of Parnis England, the market was dominated by Sea Malta and Gollcher. The Commission also found that Parnis England had successfully attempted to penetrate the market and that this caused Sea Malta and Gollcher to retaliate against Parnis England.

In the context of Article 5, the Commission found that Sea Malta and Gollcher had adopted joint and parallel action, in retaliation to the new competition on the market. Together and at the same time and through the same methods, they had threatened those trailer operators who had opted for the services of the new entrant by clearly informing them that they will suffer the consequences of higher rates and prices and delays on the other routes they operated within Europe, which routes were essential for the trailer operators. As a result, the operators who depended on the two companies for the carriage of merchandise by sea, abandoned the services of Parnis England and as a consequence the latter ceased to provide the service because it did not remain viable.

In the context of Article 9, the CFT referred to the cases *French-West African Shipowners Committees*⁷, *P&I Clubs*⁸ and *CEWAL*⁹. In the latter case, the European Commission found a breach of Article 82 because collectively dominant members of a liner conference had engaged in various practices with the intention of eliminating competitors from the market. The findings of abuse were upheld on appeal by the European Court of First Instance¹⁰ and the European Court of Justice¹¹.

The CFT concluded that:-

1. Sea Malta and Gollcher acted in breach of Article 5(1) of the Competition Act as they had engaged in a concerted practice between them with the object or effect of

⁷ [1992] OJ L 134/1, [1993] 5 CMLR 446

⁸ [1999] OJ L 125/12, [1999] 5 CMLR 646 (paragraphs 134-136)

⁹ [1993] OJ L 34/2, [1995] 5 CMLR 198

¹⁰ Cases T-24/93 etc *Compagnie Maritime Belge Transports SA v Commission* [1996] ECR II-1201, [1997] 4 CMLR 273

¹¹ Case C-396/96P [2000] ECR I-1365, [2000] 4 CMLR 1076

preventing, restricting or distorting competition in Malta by fixing prices, by limiting and controlling the market and by sharing the market between them;

2. Sea Malta and Gollcher acted in breach of Article 9 of the Competition Act by abusing of their dominant position and imposing discriminatory tariffs on those operators that used the services of their competitor.

(ii) *Office for Fair Competition*

In 2006 an important decision was issued by the OFC concerning abuse of dominance, whereby the two operators involved were an incumbent, who was a monopolist in the market concerning the supply of CO₂, and the complainant, who was a new entrant on the market.

The complaint concerned a series of distribution agreements concluded between the incumbent and several third parties. In this case the OFC considered the existence of two clauses which were in themselves highly detrimental to competition within the market of CO₂ in that they made it impossible for a new entrant to penetrate the market for the distribution of CO₂. The clauses in this agreement discouraged the purchaser from supplementing his purchases of CO₂ with purchases from other suppliers, where alternative suppliers presented themselves on the market. For this reason, the OFC ruled that the above mentioned agreements created market foreclosure and since they were concluded by a firm in a dominant position the incumbent committed an abuse of a dominant position through its contracts. The OFC found a breach of Articles 5 and 9 of the Competition Act.

Another decision of the OFC concerned a complaint by the Federation of Associations of Travel and Tourism Agents - Malta (hereinafter 'FATTA') against Air Malta plc (hereinafter 'Air Malta'). The said complaint alleged that by unilaterally reducing the commission paid to travel agents progressively from 9% to 4%, Air Malta plc was abusing of its dominant position on the market for the distribution of air transport services, on the ground that the said reduced commission did not cover travel agents' running costs.

Furthermore, it was also alleged that by developing direct sales of their own air transport services, notably through the internet, thus bypassing travel agents, airlines will be allowed to totally control their sales and thus to reduce price transparency, to the prejudice of consumers.

In the first place the OFC observed that, irrespective of the strength or otherwise of its position on the relevant product market, Air Malta was under no obligation in terms of the competition rules to ensure that the commissions it paid to travel agents cover the costs incurred by the latter.

The OFC noted that, there was a clear objective justification for the reduction in travel agency commissions paid by Air Malta, since through the introduction of internet sales Air Malta further developed its own distribution network, which had hitherto consisted solely in its own retail outlets, thereby inevitably decreasing the value of travel agency services as a distributional channel for Air Malta's tickets to the extent that there was a demand for this alternative sales method on the part of consumers.

Furthermore, the complainants' assertion that the reduction in agency commissions,

coupled with the development by Air Malta of its own internet sales system, had “created an unfair playing field, which constrained most of the IATA accredited travel agents to charge their clients a service fee to recoup their costs and forcing them into a competitive disadvantage” was entirely without legal basis, inasmuch as the conduct complained of in actual fact denoted a state of competition which directly benefitted the consumer though it may well result in a general reduction in profits for the travel agency sector. Moreover the OFC considered that, the charging of an additional service fee by travel agents in order to recoup their running costs did not place them at a competitive disadvantage in comparison with Air Malta’s own distribution system, inasmuch as the service fee charged reflects the value of the added service they provide to the consumer.

Lastly, the OFC thought it pertinent to point out that with respect to the complaint filed before the European Commission against IATA and IATA member Airlines by the Group of National Travel Agents’ and Tour Operators’ Associations within the EU (“ECTAA”) and the Guild of European Business Travel Agents (“GEBTA”), on 18 October 2002 – which was eventually withdrawn – the Commission never expressed concern with regard to the reduction in commissions by IATA member airlines to “levels that are unsustainable for agents”, but focused exclusively on IATA’s accreditation criteria, BSP system, its rules on Satellite Ticket Printers and restrictions on travel agents’ access to fares. This clearly signified that the conduct complained of by FATTAA did not raise issues falling within the ambit of Articles 81 or 82 of the EC Treaty.

For the above mentioned reasons the Director of the OFC found that:

1. Irrespective of whether or not it is in a dominant position on the relevant market, Air Malta plc is under no obligation in terms of the Competition Act to ensure that the commissions it pays to travel agents cover their costs; and
2. the reduction in the commission paid by Air Malta plc to travel agents from 9% to 4%, as well as the development by Air Malta of its own internet sales system whereby it may sell its tickets at a price which is lower than that charged by travel agents to their customers, do not infringe Article 9 of the Competition Act.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation or particular parts thereof

The Maltese competition legislation can be accessed at http://www.mcmp.gov.mt/legislation_consumer.asp

A synopsis of some of the decisions of the OFC can be viewed at

http://www.mcmp.gov.mt/consumer_policy_trust.asp

The decisions of the Commission for Fair Trading have been compiled in English in the following publication – *Judgements of the Malta Commission for Fair Trading by Silvio Meli with an introduction by Prof. Richard Whish*, 2006, ISBN 99932-0-0425-0

COMPETITION ACT

CHAPTER 379

COMPETITION ACT

To regulate competition, enable the application of Council Regulation (EC) 1/2003 and provide for fair trading in Malta.

1st February, 1995

ACT XXXI of 1994, as amended by Acts XXVIII of 2000, IV of 2003 and III of 2004; and Legal Notice 425 of 2007.

1. The short title of this Act is the Competition Act.
2. In this Act unless the context otherwise requires " association of undertakings" means a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interest of its members or of persons represented by its members;

"chairman" means the chairman of the Commission;

"Commission" means the Commission for Fair Trading established under article 4;

"Director" means the public officer heading the Office for Fair Competition established under article 3;

"dominant position" means a position of economic strength held by one or more undertakings which enables it or them to prevent effective competition being maintained on the relevant market by affording it or them the power to behave, to an appreciable extent, independently of its or their competitors, suppliers or customers;

"EC Treaty" means the Treaty establishing the European Community;

"European Commission" means the Commission of the European Community;

"group of undertakings" includes:

- (a) the undertaking concerned;
- (b) those undertakings in which the undertaking concerned, directly or indirectly:
 - owns more than half the capital or business assets; or
 - has the power to exercise more than half the voting rights; or
 - has the power to appoint more than half the members of the board of directors or other body or bodies legally representing the undertakings; or
 - has the right to manage the undertakings' affairs;

- (c) those undertakings which have in the undertaking concerned the rights or powers listed in paragraph (b);
- (d) those undertakings in which an undertaking as referred to in paragraph (c) has the rights or powers listed in paragraph (b);
- (e) those undertakings in which two or more undertakings as referred to in paragraphs (a) to (d) jointly have the rights or powers listed in paragraph (b);

"Member States" means all Member States of the European Union;

"Minister" means the Minister responsible for commerce;

"National Competition Authority" means a national competition authority as designated in terms of Article 35(1) of Council Regulation (EC) 1/2003;

"office" means the Office for Fair Competition established by article 3;

"product" includes goods and the supply of services;

"relevant market" means the market for the product whether within Malta or limited to any particular area or locality within Malta, or outside Malta, and whether or not restricted to a particular period of time or season of the year;

"restrictive practice" means an agreement between undertakings, a decision by an association of undertakings or a concerted practice prohibited under article 5 of this Act or Article 81 of the EC Treaty and, or an abuse by one or more undertakings of a dominant position prohibited under article 9 of this Act or Article 82 of the EC Treaty;

"turnover" means the total turnover of an undertaking realised during the preceding financial year on the affected market;

"undertaking" means any person whether an individual, a body corporate or unincorporate or any other entity, pursuing an economic activity, and includes a group of undertakings.

3. (1) There shall be an Office for Fair Competition, which shall be a government department having the following functions, that is to say:
 - (a) to advise undertakings, associations of undertakings and the public in relation to matters concerned with fair trading practices and procedures under this Act;
 - (b) to advise and make proposals and recommendations to the Minister in relation to any matter concerning the exercise of his functions under this Act;
 - (c) to carry out all the functions and duties assigned to it under this Act related to the investigation, determination and suppression of restrictive practices; and
 - (d) generally to exercise the powers conferred upon it under this Act, and as may be assigned to it by the Minister, within the context of this Act.

(2) The Office shall be under the control of a Director. In carrying out the functions of the Office, the Director may delegate any of his powers under this Act to any public officer employed with or attached to his department.

4. (1) There shall be a Commission to be known as the Commission for Fair Trading,

- and which shall be composed of a chairman and two other members appointed by the President on the advice of the Prime Minister.
- (2) The Commission shall have the functions assigned to it by this Act and as may be assigned to it under any other law.
- (3) (a) The chairman shall be a magistrate and the two other members shall be an economist and a certified public accountant;
- (b) More than one magistrate, one economist and one certified public accountant may be appointed to sit on the Commission, but only one magistrate, one economist and one certified public accountant shall sit in any one case.
- (4) (a) The members of the Commission, other than the chairman, hereinafter in this article referred to as "the lay members", shall be appointed for a period of three years and shall be eligible for reappointment.
- (b) The lay members of the Commission may resign their office by letter addressed to the President but may not be removed except by the President acting on the recommendation of the Commission for the Administration of Justice.
- (c) Notice of all appointments to the Commission and of all other changes in its membership shall be published in the Gazette.
- (d) The lay members of the Commission shall receive such remuneration for their services as may be prescribed: provided that such remuneration may not be altered during the tenure of their appointment.
- (e) A person shall not be qualified to be appointed or remain a lay member of the Commission if (i) he is an undischarged bankrupt; or (ii) he has been sentenced to imprisonment for six months or more by any court; or (iii) he has been found guilty for any offence against this Act; or (iv) if he is a Member of the House of Representatives. (f) Any member of the Commission shall before the commencement of any case declare any interest he may have in the proceedings.
- (5) The Minister responsible for justice shall appoint a public officer to be secretary to the Commission. The secretary shall *mutatis mutandis* have the same powers and duties of the Registrar of Courts, and shall take instructions from the chairman in all circumstances that the said registrar in accordance with the Code of Organization and Civil Procedure is to take instructions from a magistrate presiding a particular court.
- (6) (a) The Commission shall have the powers and shall follow the procedures laid out in the Schedule to this Act or in any other law.
- (b) The Commission may with the approval of the Minister make rules not inconsistent with this Act or the provisions of the Schedule, prescribing the procedures and the forms to be followed and used before it.
- (c) In the absence of provisions or rules as aforesaid the Commission shall regulate its own procedures.
5. (1) Subject to the provisions of this Act, the following is prohibited, that is to say any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta and in particular, but without prejudice to the generality of this subarticle,

any agreement, decision or practice which:

- (a) directly or indirectly fixes the purchase or selling price or other trading conditions; or
- (b) limits or controls production, markets, technical development or investment; or
- (c) shares markets or sources of supply; or
- (d) imposes the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, thereby placing them at a competitive disadvantage; or
- (e) makes the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Agreements or decisions prohibited in accordance with subarticle (1) shall be ipso jure null and unenforceable.

(3) The provisions of subarticle (1) shall not apply in the case of (a) any agreement between undertakings; or (b) any decision by an association of undertakings; or (c) any concerted practice, which contributes towards the objective of improving production or distribution of goods or services or promoting technical or economic progress and which allows consumers a fair share of the resultant benefit and which does not: (i) impose on undertakings concerned any restriction which is not indispensable to the attainment of the said objective; or (ii) give the undertakings concerned the possibility of eliminating or significantly reducing competition in respect of a substantial part of the products to which the agreement, decision or concerted practice refers.

(4) The undertaking or association of undertakings claiming the benefit of subarticle (3) shall bear the burden of proving that the conditions of that subarticle are fulfilled.

(5) Article 81 of the EC Treaty shall also apply where any agreements between undertakings, any decision by an association of undertakings or any concerted practice may appreciably affect trade between Malta and any one or more Member States.

(6) The application of subarticles (1), (2) and (3) shall not be deemed to include the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the EC Treaty or which fulfil the conditions of Article 81(3) of the EC Treaty, or which are covered by a Regulation for the application of Article 81(3) of the EC Treaty.

6. (1) Agreements, decisions or concerted practices between undertakings shall not be subject to the prohibition in article 5(1) if the impact of the agreement, decision or practice on the relevant market is minimal. (2) In determining whether such impact is or is not minimal, consideration shall be given to all relevant circumstances including the aggregate share of all the undertakings concerned of the relevant market. (3) The foregoing provisions of this article shall not apply where in a relevant market competition is restricted by the cumulative effect of parallel networks of similar agreements established by several undertakings.

7. Repealed by Act III. 2004.131.
8. (1) The Minister may, after consultation with the Director, by regulations prescribe that there shall be exempted from the provisions of article 5(1) such categories of agreements, decisions and concerted practices as may be specified in the regulations.
- (2) The regulations referred to in subarticle (1) shall only be made where the agreement, decisions or concerted practice satisfy the requirements mentioned in article 5(3).
- (3) Without prejudice to the provisions of subarticle (2) the Minister may in such regulations make an exemption subject to such conditions and limitations as he may deem appropriate.
9. (1) Any abuse by one or more undertakings of a dominant position within Malta or any part of Malta is prohibited.
- (2) Without prejudice to the generality of the provisions of subarticle (1), one or more undertakings shall be deemed to abuse of a dominant position, where it or they (a) directly or indirectly impose an excessive or unfair purchase or selling price or other unfair trading conditions; (b) charge prices which are below the average variable cost price of a product in order to drive rival competitors out of the market; (c) limit production, markets or technical development to the prejudice of consumers; (d) refuse to supply goods or services indiscriminately in order to eliminate a trading party from the relevant market to the prejudice of consumers; (e) apply dissimilar conditions, including price discrimination to equivalent transactions with different trading parties, thereby placing any or some of the trading parties at a competitive disadvantage; (f) make the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (3) For the purpose of determining whether one or more undertakings are in a dominant position, an undertaking which alone or in conjunction with others has a share of at least forty per cent of the relevant market shall, in the absence of proof to the contrary, be deemed to be in a dominant position: Provided that one or more undertakings which alone or in conjunction with others have a share below forty per cent of the relevant market may, notwithstanding the above, be determined to be in a dominant position.
- (4) For the purpose of determining whether the purchase or selling price is excessive or unfair, all relevant factors shall be considered and in particular:
- (a) the price charged for the product (in absolute terms);
 - (b) the percentage increase or increases in the price over the long and short term;
 - (c) the relationship between the price and the cost of the product;
 - (d) the period of time for which the price has been charged;
 - (e) the economic value of the product;
 - (f) the importance of the product to consumers;
 - (g) the economic or other risks associated with bringing the product to the market;

(h) the investment of capital and other resources necessary to bring the product to the market;

(i) the expected, probable or possible changes in the market for the product; and

(j) the price charged for the product by other undertakings in Malta and by the same or other undertakings in other analogous markets.

(5) Article 82 of the EC Treaty shall also apply where any abuse by an undertaking may affect trade between Malta and any one or more Member States.

10. Repealed by Act III. 2004.134.

11. Repealed by Act XXVIII.2000.11.

12. (1) It shall be the duty of the Director to ensure that the provisions of this Act are observed by all, and to gather information that may be necessary for him or the Commission to carry out their functions; and for such purpose he shall have power to carry out investigations of his own motion or at the request of the Minister or upon a reasonable allegation in writing of a breach of the provisions of this Act, by a complainant or at the request of any designated national competition authority of any other Member State or the European Commission.

(2) During the course of any investigation carried out by the Office in accordance with subarticle (1), the Director may request any person to furnish him with any information or document in his possession which the Director has reason to believe is relevant to the matter under investigation, within such time as in the circumstances of the investigation the Director may consider reasonable.

(3) Nothing in subarticle (2) may be construed as authorising the Director to order the production of any document or the disclosure of any information which may be subject to the duty of professional secrecy.

(4) In the course of any such investigation the Director may receive written or verbal statements from witnesses as well as make copies of any document produced to him, and the record of such statements and such copies duly attested by the Director shall be producible as evidence before the Commission.

(5) The Director, duly authorised by a warrant issued by the chairman of the Commission, may, for the purpose of any investigation under this article enter into and search any premises and any other place, or search any means of transport where he has reason to believe that information relevant to the investigation may be found, and in the course of any such search may seize any object or document, or order the non-removal of any object from any such premises, and in connection with any such order may close and seal any or all parts of any premises and any other place, or means of transport, or put any object under seal.

(6) In the course of any search as is referred to in subarticle (5) the Director may request the assistance of the Police; however, in the case of a search which is to be carried out in a residential premises, the Director shall always be accompanied by a Police officer not below the rank of inspector.

(7) Any order given by the Director in accordance with subarticle (5) shall remain in force until it is cancelled by the Director or by the Commission.

(8) No search may be commenced on any premises after 7 o'clock in the evening and before 7 o'clock on the next following morning, unless there is reason to

believe that delay could cause the loss of necessary information and the search is expressly authorised to take place between the said times in the relevant warrant.

(9) Nothing in this article shall be deemed to detract from the powers of the Police under the Criminal Code or under any other law.

(10) Any information disclosed to the Director or any document produced to him during an investigation shall be secret and confidential and may only be disclosed before the Commission in any matter before it, or before a competent court in relation to the prosecution of any offence against this Act.

12A. (1) Where, upon the conclusion of an investigation, it results to the Director that the agreement, decision, concerted practice or abusive conduct investigated is in breach of the provisions of article 5(1) and, or article 9(1), he shall issue a decision finding an infringement, giving his reasons therefor.

(2) Where it results to the Director that a serious infringement of article 5(1) and, or of article 9(1) has taken place due to the gravity and duration of the agreement, decision, concerted practice or abusive conduct which have been investigated, the Director shall make a report to the Commission of the conclusions arrived at by him in the said investigations, giving his reasons therefor and making reference to the evidence in support thereof, which evidence shall at the request of the Commission be produced before it, following which the Commission shall issue a decision thereon.

(3) Where it results to the Director that an infringement of Article 81 and, or Article 82 of the EC Treaty has occurred, subarticle (2) shall mutatis mutandis apply.

13. (1) On issuing a decision finding an infringement under article 12A(1), the Director shall cause a copy of the decision to be delivered on the undertaking or association of undertakings concerned by registered post or such other documented delivery as the Director may deem fit, and he may together with such decision issue a cease and desist order whereby he orders it or them, as the case may be, to cease and desist immediately from participating in such agreement, decision, practice or conduct, and, or a compliance order setting behavioural or structural remedies addressed to it or them, as the case may be, for the purpose of bringing the infringement to an immediate and effective end.

(2) The power to issue a cease and desist order or a compliance order in cases of infringements as defined in article 12A(2) and (3) shall rest solely with the Commission.

(3) Any behavioural or structural remedies set out in a compliance order shall be proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

(4) Structural remedies set out in a compliance order may be imposed only where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

13A.(1) The undertaking or association of undertakings concerned may, within fifteen days from the notification of the decision issued by the Director, request him to

submit the same for review by the Commission and the Director shall forthwith comply with such request.

(2) The undertaking or association of undertakings concerned may within fifteen days from the notification of the cease and desist order or the compliance order issued by the Director, request him to submit the same for review by the Commission, and the Director shall forthwith comply with such request, provided that such review shall not have the effect of suspending the cease and desist order or the compliance order.

14. (1) (a) Where the Director receives a complaint in writing as is referred to in article 12(1), he shall in the first place examine whether such complaint is admissible or otherwise, and where he is of the opinion that the complaint is prima facie inadmissible, he shall not carry out or proceed with the relative investigation.

(b) Where the complainant does not agree with the decision of the Director that the complaint is prima facie inadmissible or the decision of the Director after an investigation that the complaint is not justified, the provisions of article 13A(1) shall *mutatis mutandis* apply.

(2) Where the Commission does not agree that the complaint is inadmissible it shall inform the Director accordingly, and the Director shall thereupon commence or resume the investigations.

15. (1) The Commission may, at the request of the Director or of an undertaking or of a complainant, through the Director, take interim measures intended to suspend any restrictive practice under investigation if it is urgently necessary to avoid a situation likely to cause serious, immediate and irreparable prejudice to the interests of any undertaking, or to harm the general economic interest.

(2) Where the request is made by the Director such request shall be accompanied by a reasoned report stating the measures he deems necessary in order to suspend the practices under investigation.

(3) Where the request is made by a complainant the Commission shall, unless the Director has already done so when he refers the complaint, transmit the request to take interim measures to the Director who shall draw up a reasoned report stating the measures which he deems necessary in order to suspend the practices under investigation.

(4) Where the Director deems that the adoption of interim measures is required, he shall submit the report to the Commission within fifteen days and shall serve a copy of the report by registered post to the undertaking or association of undertakings under investigation which may make written submissions to the Commission on the report within fifteen days of its receipt: provided that the said periods may be abridged by the Commission as it deems fit in the circumstances.

(5) The Commission shall, within ten days from the last date on which the submissions of the undertaking or association concerned are due to be received, by reasoned decision order any interim measure it may deem appropriate in the circumstances.

(6) The decision shall be notified by the secretary to the Commission to the Director and to those undertakings or associations whose activity is being investigated.

(7) An order given under this article shall have immediate effect and shall remain in

force for a period of three months unless it is previously revoked by the Commission or unless the matter under investigation has been determined by the Commission before the said period of three months. Nothing in this subarticle shall preclude the Commission from issuing the same order for a further period or periods of three months: Provided that such order may in no case extend beyond a maximum period of one year.

15A. Repealed by Act III. 2004.138.

15B. Repealed by Act III. 2004.138.

16. Any person who acts in breach of articles 5 and, or 9 of this Act, and, or Articles 81 and, or 82 of the EC Treaty, shall be guilty of an offence under this Act.

17. Any person who acts contrary to a cease and desist order or a compliance order issued by the Director or the Commission in accordance with article 13 shall, without prejudice to any other liability under this Act or any other law, be guilty of an offence against this article.

18. Any person who makes any act contrary to an interim measure issued by the Commission in accordance with article 15, after such measure has been published, shall be guilty of an offence against this article.

19. Any decision or order of the Commission or the Director shall be deemed to have been published where it has been published by notice in the Gazette, or where in relation to any particular individual it has been notified to him either by judicial act or by delivery of a copy thereof by the Director: Provided that where the undertaking or the person against whom the complaint has been made had been given notice of the proceedings before the Commission, in relation to that undertaking or person the decision or order of the Commission in respect of that complaint shall be deemed to have been published on the date on which it was pronounced.

20. Repealed by Act III.2004.143.

21. (1) Any person guilty of an offence against articles 16 or 18, shall, on conviction, be liable to a fine (multa) from one to ten per centum of the turnover of the undertaking in the economic interests of whom the person so guilty was acting, so however the fine shall not be less than six thousand and nine hundred and eighty-eight euro and twelve cents (6,988.12): Provided that where the person so found guilty is the Director, manager, secretary or other similar officer of the aforesaid undertaking the said person shall, for the purposes of this article, be deemed to be vested with the legal representation of the same undertaking which accordingly shall be liable in solidum with the person found guilty for the payment of the said fine.

(2) The fine referred to in subarticle (1) shall be recoverable as a civil debt in favour of the Government by the Director, and the undertaking in the economic interests of whom the person found guilty was acting shall be liable in solidum with the person found guilty for the payment of the said fine.

(3) The provisions of the Probation Act and of article 21 of the Criminal Code shall not apply with respect to offences referred to in subarticle (1).

22. Repealed by Act III.2004.145.
- 22A. (1) Any person guilty of an offence against article 17 shall on conviction be liable to pay a fine (multa) of not less than two hundred and thirty-two euro and ninety-four cents (232.94) and not more than two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) for each day during which the offence persists.
- (2) The provisions of article 21(2) and (3) shall also apply.
23. Any person who in the course of any investigation under this Act or in the course of any proceedings before the Commission knowingly or recklessly -
- (a) gives any false, inaccurate or misleading information; or
 - (b) supplies incomplete information; or
 - (c) being an owner, Director, officer, administrator or manager of an undertaking fails, without reasonable cause, to supply information requested within the time given; or
 - (d) prevents or hinders any investigation; or
 - (e) produces or furnishes, or causes or knowingly allows to be produced or furnished, any document or information which he knows to be false in any material particular,
- shall be guilty of an offence against this article and shall, on conviction, be liable to a fine (multa) of not less than two hundred and thirty-two euro and ninety-four cents (232.94) and not more than two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) or to imprisonment for a term from three to six months, or to both such fine and imprisonment.
24. (1) In criminal proceedings instituted by the Police before the Court of Magistrates for an offence against the provisions of this Act, the Director may assist the Police in the conduct of the prosecution and in the production of the evidence.
- (2) The Director or any officer deputed by him for the purposes of subarticle (1) may nevertheless be produced as a witness but should his evidence be required as part of the case for the prosecution, his evidence shall be heard before that of any other witness for the prosecution unless the necessity of his evidence arises subsequently.
25. Notwithstanding the provisions of the Criminal Code, the Attorney General shall have a right of appeal to the Court of Criminal Appeal from any judgment given by the Court of Magistrates in respect of criminal proceedings arising out of the provisions of this Act.
26. Notwithstanding the provisions of the Criminal Code or of any other law, criminal action for offences under this Act is prescribed by the lapse of five years.
- 26A. Notwithstanding the foregoing provisions of this Act, in the case of an offence against article 17, where the Director after making the investigation that led to the cease and desist order in accordance with article 12A, had not made a report to the Commission in accordance with article 13, the Director may impose a penalty of not less than two hundred and thirty-two euro and ninety-four cents (232.94) and

not more than four thousand and six hundred and fifty-eight euro and seventy-five cents (4,658.75) as an alternative to proceedings in Court.

- 26B. Notwithstanding any other provision of this Act, the Director may, only as far as the provisions of this Act are concerned, enter into an agreement in writing with the offender whereby the said offender pays or gives security to the satisfaction of the Director for the payment of a sum being not less than fifty per centum of the minimum penalty applicable for the offence and not more than seventy per centum of the maximum penalty applicable for the offence as the Director may with the concurrence of the Commission establish and upon the signing of the agreement by the Director and the offender all criminal liability of the offender under this Act with regard to the offence in relation to which the agreement has been entered shall be extinguished:

Provided that where the penalty for the offence is a sum fixed with no minimum or maximum then the sum payable under such agreement shall be fixed as aforesaid in an amount being not less than twenty and not more than seventy per centum of such penalty.

27. Where before any court of civil jurisdiction it is alleged that any agreement or decision is null and unenforceable in accordance with article 5 or, where it is alleged that there is an abuse of a dominant position, in accordance with article 9, that court shall, unless the allegation is admitted by all the parties to the case, stay the proceedings and refer the matter to the Commission which shall have the right to determine the question and the court shall decide the matter in accordance with the decision of the Commission.
28. It shall not be lawful to issue any precautionary warrant referred to in the Code of Organization and Civil Procedure against the Director or the Commission in respect of the exercise of their functions under this Act.
29. Notwithstanding anything contained in this Act the Director may, within the context of a reciprocity agreement in matters of mutual assistance relating to competition practices, pass documents and disclose information in his possession to authorities outside Malta having responsibility in competition matters and who are restricted in divulging such information in an analogous manner and purpose to that of the Director under this Act.
30. (1) Subject to the provisions of subarticle (2), the provisions of this Act shall also apply to any Government departments or to any body corporate established by law or to any company or other partnership in which the Government, directly or indirectly, holds a controlling interest or to which the Government has granted special or exclusive rights in any field.
- (2) Undertakings entrusted with the operation of services of a general economic interest or having the character of a revenue producing monopoly shall be subject to the provisions of this Act insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.
- (3) The Minister may by order in the Gazette declare a specific service entrusted to a particular undertaking to be a service in the general economic interest.

31. No action shall lie against any member of the Commission, the Director, or any of his officers or contractors for any act or omission in connection with this Act done or omitted by him unless such act or omission were done in bad faith.
32. The Minister may from time to time make regulations for the better carrying out of the provisions of this Act and may in particular by such regulations prescribe rules for the control of concentrations including concentrative joint ventures which may prevent, restrict or distort competition within the relevant market.
33. (1) The Minister may by regulations:
 - (a) prescribe the fees payable to the Director in connection with any request made to him under this Act and in connection with procedures before the Commission;
 - (b) exempting any agreement, decision or practice in connection with agriculture and fisheries from the provisions of article 5 under such conditions as he may prescribe.(2) Without prejudice to the provisions of subarticle (1), and the provisions of the European Union Act, the Minister may make regulations enabling the application of Council Regulation (EC) 1/ 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty and may in particular provide for:
 - (a) the power to the Office for Fair Competition to conduct joint investigations, to co-operate, and to exchange information with other national competition authorities;
 - (b) the procedure for co-operation between the Commission, the European Commission and the national courts and competition authorities;
 - (c) the power to waive or reduce the applicable fine in cartel investigations.

SCHEDULE

(Article 4)

Rules of Procedures relative to the Commission for Fair Trading

1. The Commission shall determine any matter before it with fairness and impartiality and in accordance with the provisions of this Act.
2. Before entering upon their functions, the lay members of the Commission shall take before the chairman an oath to perform their functions with fairness and impartiality and in accordance with the provisions of this Act.
3. A member of the Commission shall abstain and may be challenged in the same circumstances, *mutatis mutandis*, as a judge of the superior courts shall abstain or may be challenged in accordance with the Code of Organization and Civil Procedure.
4. Any challenge shall be determined by the chairman. Decisions of the Commission shall state the reasons therefor and clearly indicate the undertakings or categories of undertakings to which they apply.
5. Such decisions may be made to apply limitedly to a particular area, time or season.

6. Any decision of the Commission may be overturned or altered by the Commission where it results that:
 - (a) the information upon which it was based had been false, misleading or incomplete; or
 - (b) market conditions have changed significantly.
7. (a) Procedures before the Commission shall be commenced by a request in writing made by the Director, or by an undertaking or a complainant through the Director according to the provisions of this Act.

(b) Any undertaking which shows that its operations are directly affected by the proceedings before the Commission and any person claiming to be the victim of, or to be adversely affected by, any breach of the provisions of this Act constituting the merits of those proceedings, including a consumer who so claims or a registered consumers association acting on behalf of consumers generally, may request in writing to be admitted to intervene in the proceedings before the Commission at any stage thereof.

(c) For the purposes of paragraph (b) hereof, a registered consumers association means a Consumers Association registered in accordance with the Consumer Affairs Act.
8. Meetings of the Commission shall be held in camera:

Provided that:

 - (a) the Director shall have a right to be present during all meetings;
 - (b) the relevant undertaking and any complainant shall have a right to make submissions on any matter before the Commission, as well as to present any documents or other evidence that may be relevant to the matter;
 - (c) the European Commission in all cases involving the application of Article 81 and, or Article 82 of the EC Treaty shall have a right to make submissions on any matter before the Commission, as well as to present any documents or other evidence that may be relevant to the matter.
9. Before proceeding with any complaint, the Commission shall first determine whether the complaint is admissible, and shall inform the complainant of any such determination.
10. The Commission shall also inform the Director, the relevant undertaking and the complainant of any decision on the matter before it.

Where a report is sent to the complainant, the chairman of the Commission shall ensure that any confidential business information on the undertaking subject of the proceedings is not included in the report.
11. The Commission shall have, exercisable through its chairman, the powers vested in the Civil Court, First Hall, and in particular the power to summon witnesses, the power to appoint expert witnesses and referees and the power to administer the oath.

Where a witness duly summoned fails to appear on the day on which he is

summoned, the chairman may order the Police to arrest such witness and produce him before the Commission to give evidence.

12. Without prejudice to article 19, decisions of the Commission shall be published in such manner as the chairman of the Commission with the concurrence of the Director may determine: Provided that the chairman shall ensure that no business secret of any undertaking shall be disclosed.
13. In the interpretation of this Act, the Commission shall have recourse to its previous decisions, judgements of the Court of First Instance and the Court of Justice of the European Community. It shall also have recourse to relevant decisions and statements of the European Commission including interpretative notices on the relevant provisions of the EC Treaty and secondary legislation relative to competition.

MONTENEGRO

COMMENTARY BY THE GOVERNMENT OF THE REPUBLIC OF MONTENEGRO ON THE COMPETITION LEGISLATION OF THE REPUBLIC OF MONTENEGRO

INTRODUCTION

Montenegro has recognized that competition law is a field of modern business law that regulates the rules of market game, i.e. it establishes which behaviour of market participants is considered as prohibited and prescribes the appropriate sanctions for such behaviour. In line with this, it is clear that Montenegrin long-term development policy is represented throughout its effort to build up the market economy following the example of developed countries in which competition law is deeply rooted. Having in mind these facts, the main sources of development of Montenegrin competition policy and laws have been found in a long business tradition performed under conditions of trade economy of developed countries of Europe and North America.

In relation to the above, special attention should be drawn to the European integration process of Montenegro, begun some time ago but formally institutionalized with negotiations on the Stabilization and Association Agreement with the EU and its Member States, officially started on 8 November 2005. Reconfirming Montenegrin determination to pursue membership in the European Union, where tradition of competition law has being built more than 60 years and competition policy is considered as one of the priorities, it is estimated that it is necessary to establish the competition law system that will satisfy modern, primarily European standards – one of the required conditions for full membership.

HISTORY

Previous legislation in this area was the Antimonopoly Law of the FRY (“Official Gazette FRY”, No. 29/96), which addressed the issue in question in an incomplete and an inappropriate manner in relation to the modern legal standards. As for the applicability of the mentioned Law, the best yardstick is the fact that secondary legislation for its implementation was never submitted for adoption. Furthermore, even there was a federal body, the Antimonopoly Commission, which had been tasked with the implementation of the Law, in Montenegro no specialized body tasked with the implementation of the Law existed in the terms of law implementation, for which reason judicial practice had not recorded a single case where the subject was the breach of this Law.

PRESENT STATUS

Starting from 1 January 2006, Montenegro has a new, modern law framework to implement. On 10 November 2005, the National Parliament passed a new Law on Protection of Competition, published in (“Official Gazette RM”, No. 69/05). It contains provisions on forbidden agreements, abuse of dominant position and control of

concentrations, therefore securing EU compatibility with Articles 81 and 82, as well as EC Merger Regulation. It is important to stress that the National Competition Authority, during the transition period, is settled in, for that purpose, a separate department of the Ministry of Economy, while investigative powers have been delegated to the Market Inspectorate. In between, two regulations have already been prepared and published in the Official Gazette, namely the Regulation on definition of relevant market and the Regulation on notification of concentrations, therefore securing essential preconditions for the implementation of the Law in question.

Below is a short presentation of the most important provisions of the Law and its principles.

DESCRIPTION OF BASIC LEGAL INSTITUTIONS¹

The new Law sets out and regulates basic institutes of competition law and institutional framework for their application by elaborating the subject matter in 6 parts:

Part I Basic provisions – Defines scope and goal of the Law, type of documents and actions that are impairing competition, the competent body for its implementation (state administration body competent for economy matters), territorial and personal application of the Law, and the relevant market in relation to which the evaluation on whether impairment of competition has taken place is being performed.

Part II Impairment of free competition – Defines in detail the types of documents and actions that are impairing competition in the following manner:

1. Forbidden agreements – agreements that are preventing, restricting or distorting competition are forbidden except for cases envisaged in the law where a general or far-reaching interest that would justify a temporary impairment of competition is considered to exist;
2. Abuse of dominant position – it is not forbidden for a specific market participant to develop and grow up to the limit when its business decision cannot influence other market participants which makes him a dominant participant, but the abuse of dominant position at the market is forbidden as, for example, a dominant participant sells for a period of time products below the price of production and distribution costs with the attempt to destroy competition and grab the entire market for himself (dumping) and other similar practices;
3. Control of concentration – is introduced as control of merger of participants at the market which have at the disposal a significant economic and financial power, so it is very probable that by their merger a new participant will be created which will have a dominant position at the market, and such mergers of participants that have as a consequence a impairment of the competition are forbidden, so this is practically a prevention of abuse of the dominant position;

Part III Implementation of Law – Specifies competencies of the competent body and describes in detail the procedure held in front of this authority for particular cases, pointing out specificities compared to general rules of administrative procedure. The main particularity is that decisions of competent body are final so that a party to the procedure may file an administrative dispute before an administrative court.

¹ Extract from Rationale of Proposal of Law for Protection for Competition for the Republic of Montenegro.

Part IV Monitoring – The competent body at the same time shall be responsible for monitoring the enforcement of this Law and other regulations by Law.

Part V Penal provisions – Sets sanctions for breach of the Law. The proposal is specific as it stresses extremely severe penalties for breach of competition rules. This is stressed as impairment of the competition rules represents one of the most severe acts against the economy with far-reaching harmful consequences to the overall society, and those performing violations represent powerful economic entities as a rule, therefore the absence of a strong penalty to prevent possible violators from performing impairments would make senseless the very Law itself. Severe penalties for violators of this Law will represent a significant source of budget revenues as well, helping to eliminate the harmful consequences of the impairment of competition at the market.

Part VI Penal provisions – Defines proceedings in progress, deadlines for adoption of other regulations by law, cessation of application of existing legislation in this area, as well as exact date for entry into force for this Law.

LAW ON PROTECTION OF COMPETITION

PART I

GENERAL PROVISIONS

Subject Matter

Article 1

This Law regulates the mode, proceeding and measures for protection of competition on the relevant market and defines competencies of the body for protection of competition.

Impairment of Competition

Article 2

- (1) Pursuant to this Law, the following acts and practices are considered to impair competition:
 - a) agreements, decisions of associations and concerted practice preventing, restricting or distorting competition;
 - b) abuse of dominant position; and
 - c) concentrations resulting in significant prevention, restriction or distortion of competition, primarily by creating or strengthening dominant position on the market.
- (2) Restrictions of competition referred to in paragraph 1 of this Article shall be identified in each case pursuant to the degree and dynamic of changes in the structure of the relevant market, restrictions and availabilities for new competitors to equally access market, changes resulting in restricted supply of markets, degree of benefits for consumers and other circumstances which influence restriction of competition.
- (3) Detailed criteria referred to in paragraph 1 of this Article shall be regulated by the state administration body competent for economy matters (hereinafter the competent body).

Territorial Application

Article 3

This Law shall apply to acts and practices conducted in the territory of the Republic of Montenegro (hereinafter Montenegro), that is acts or practices occurring as effect of acts or practices conducted abroad and which result in restriction of competition in the territory of Montenegro.

Personal Application

Article 4

- (1) This Law shall apply to all legal entities and natural persons engaged in economic activity and trade of goods or services, which by their acts restrict or may restrict competition (hereinafter undertakings), and in particular to:
 - a) enterprises and other business, regardless of their seat or permanent residence, and natural persons regardless of their nationality or permanent residence;
 - b) other subjects engaged, directly or indirectly, in a permanent, temporary or single economic activity and trade of goods or services, regardless of their legal status, nationality, seat or permanent residence (trade unions, business associations, sports organizations, institutions, cooperatives, exponents of intellectual property rights etc), and
 - c) state administration bodies and local self-government bodies, when directly or indirectly engaged in economic activity and trade of goods or services.
- (2) This Law shall not apply to undertakings providing services of public interest, as well as to such organizations which on the base of act of the authorized body generate income from fiscal revenues, if the application of this Law would obstruct the performance of entrusted activities.

Application to Related Undertakings

Article 5

- (1) For the purpose of this Law, related undertakings shall mean two or more undertakings related in such a manner that one undertaking directly or indirectly, legally or factually, exercises decisive influence on the business decisions of the other undertaking especially on the grounds of a holding majority share in the initial capital, majority votes in management bodies, right to appoint more than half of the members of management bodies and the bodies authorized to act as proxies to undertakings, as well as agreements on transfer of management rights and employment contracts.
- (2) Pursuant to the paragraph 1 of this Article, two or more related undertakings shall be considered as one undertaking.

Relevant Market

Article 6

- (1) A relevant market, within the meaning of this Law, shall consider market comprising relevant product market within the relevant geographic market.
- (2) A relevant product market, within the meaning of this Law, considers a set of goods or services that can be substituted under the reasonable terms from the standpoint of the consumers of goods or services, by reason of their characteristics, intended use and price.
- (3) A relevant geographic market, within the meaning of this Law, considers the

territory within which the undertakings take part in demand or supply process, and where there are homogeneous conditions of competition appreciably different from the conditions of competition in the neighbouring territories.

- (4) The competent body shall prescribe in greater detail criteria for determining a relevant market.

PART II IMPAIRMENTS OF COMPETITION ON THE MARKET

Chapter 1 PROHIBITED AGREEMENTS

Agreements Preventing, Restricting or Distorting Competition

Article 7

- (1) Acts which by their object or effect have or may have the prevention, restriction or distortion of competition on the relevant market, within the meaning of this Law, are agreements, contracts, particular provisions of contracts, explicit or tacit agreements, concerted practices, decisions on associations of undertakings (hereinafter agreements).
- (2) Agreements pursuant to paragraph 1 of this Article shall be prohibited and void, and in particular those that:
 - a) directly or indirectly fix purchase or selling prices or any other operating conditions;
 - b) limit or control production, market, technical development or investments;
 - c) share market or sources of supply;
 - d) apply dissimilar operating conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
 - e) make the conclusion of contracts subject to acceptance of supplementary obligations, which by their nature and commercial usage and practice have no connection with the subject of the contract.
- (3) With exception to paragraph 2 of this Article, agreements between undertakings considered within the meaning of this Law to be related undertakings shall not be prohibited.
- (4) Concerted practice referred to in paragraph 1 of this Article shall mean cooperation between undertakings achieved without conclusion of a formal agreement and replacing competition on the relevant market, and which may take form of direct or indirect contact between undertakings with a result in influence on market behaviour.

Exemptions of Agreements

Article 8

Agreements referred to in paragraph (1) and paragraph (2) of Article 7 may be exempted from prohibition in case they contribute to improvement of the production or distribution or to promotion of technical or economic progress, while allowing consumers a fair share of resulting benefits, and which:

- a) impose only such restrictions as are necessary for the attainment of the above-mentioned objectives, and
- b) do not afford the possibility of eliminating competition in respect of the substantial part of subject goods or services.

Categories of Agreements

Article 9

Pursuant to Article 7 of this Law, agreements may be:

- (1) Horizontal agreements, i.e. agreements among existing or potential undertakings operating on the same level of production or distribution ;
- (2) Vertical agreements, i.e. agreements on terms of purchase, sale or resale among existing or potential undertakings not operating on the same level of production or distribution.

Decisions and measures of the competent body

Article 10

If the competent body, throughout official personnel, ex officio or at the request of interested party, establishes that the agreement prevents, restricts or distorts competition, it will issue decision establishing distortion of competition in accordance with Article 7 paragraphs 1 and 2 of this Law, and it can order a party to the agreement to undertake the measures enabling the establishment of competition on the relevant market and removal of harmful consequences of the prohibited agreement, as well as deadlines for their execution.

Individual Exemption

Article 11

- (1) The competent body throughout official personnel may, at the request of the parties to the agreement and pursuant to Article 8 of this Law, approve exemption of agreement or part of that agreement from prohibition referred to in Article 7 paragraph 2 of this Law (hereinafter individual exemption).
- (2) The burden of proof on the existence of conditions for exemption referred to in paragraph 8 of this Law rests on the claimant.
- (3) The competent body shall prescribe the detailed content of application for individual exemption.

Content and Validity of Individual Exemption

Article 12

- (1) The individual exemption referred to in Article 11 of this Law is approved by decision that determines the time limit of exemptions, and which can determine conditions and prohibition together with the deadline by which they have to be carried out.
- (2) The time limit referred to in paragraph 1 of this Article is determined for the period not longer than necessary to return investment and accumulate reasonable profit, pursuant to the agreement referred to in Article 11 paragraph 1 of this Law.
- (3) The individual exemption referred to in paragraph 1 of this Article, at the request of the party to the agreement, may be renewed if the agreement meets the requirements for exemption prescribed by Article 8 of this Law.
- (4) The decision on renewal of individual exemption shall determine the new time limit, which cannot be longer than the time limit referred to in paragraph 2 of this Article, and can contain conditions and prohibitions which have to be carried out.
- (5) The request for renewal of individual exemption referred to in paragraph 3 of this Article shall be submitted to the competent body by the parties of the agreement, not later than 6 months prior to the expiry of the granted exemption.

Cancellation, Annulment or Amendments of Individual Exemption

Article 13

A decision on individual exemption by the competent body may:

- (1) cancel or amend, if the circumstances on the basis of which the exemption was granted, have changed; or
- (2) annul, if the exemption was granted on the basis of inaccurate or false information, the conditions determined have not been fulfilled, or the exemption is misused.

Exemptions by Categories of Agreements (Block Exemptions)

Article 14

- (1) The Government shall specify conditions for exemptions by categories of agreements and define types of agreements which can be exempted from prohibition pursuant to paragraph 8 of this Law.
- (2) The competent body can, by way of decision, prohibit agreement referred to in paragraph 1 of this Article if, at the request of interested party or ex officio, it establishes that the said agreement does not comply with the conditions referred to in Article 8 of this Law.
- (3) In the case referred to in paragraph (2) of this Article, the burden of proof rests on the applicant, that is the competent body.

Agreements of Minor Importance

Article 15

- (1) Agreements of minor importance that do not have a significant impact on competition shall not be prohibited.
- (2) The agreements referred to in paragraph 1 of this Article, within the meaning of this law, shall mean horizontal agreements between the undertakings whose total market share does not exceed 10% of the relevant market and vertical agreements between the undertakings whose total market share does not exceed 15% of the relevant market.
- (3) Horizontal and vertical agreements that result in distortion of competition on relevant market due to cumulative effect of agreements network that have a similar effect on the market, shall be considered agreements of minor importance if the total market share of those agreements does not exceed 5% of the relevant market.

Prohibited Restrictions of Competition

Article 16

- (1) Horizontal agreements that directly or indirectly have the goal to: fix prices in the case of sale of products to third parties; restrict the sale; allocate the market or undertakings, that is final users, cannot be exempted pursuant to Article 14 and Article 15 of this Law.
- (2) Vertical agreements that cannot be exempted from prohibition referred to in Articles 14 and 15 of this Law are those that, directly or indirectly, have the goal to:
 - (ttttt) impose restrictions on a trader that leads him to sell goods or services at a fixed or minimum price;
 - (uuuuu) restrict territory or undertakings, that is end users to whom a trader may sell good or services, except in the case of:
 - exclusive distribution or exclusive allocation of undertakings, that is end users;
 - restriction of sale to end users by wholesale trader;
 - restrict sale to unauthorized members of selective distributive network;
 - restrict sale of components to competitors of suppliers of those components;

restrict sale to end users by members of selective distributive network;

restrict mutual supply among distributors within selective distributive network;

restrict supplier of components to sell the components as spare parts to end users and service providers.

- (3) With exception to Article 15 of this Law, vertical agreements among competitors cannot be exempted in the case that their goal results in restriction referred to in paragraphs 1 and 2 of this Article.

Obligatory Notification of Agreements

Article 17

- (1) Parties to the agreement are obliged to notify the competent body on the agreement within the period of 15 days from the date of its conclusion, except for the agreements concluded pursuant to Articles 14 and 15 of this Law.
- (2) The form, content of the application and mode of recording the notified agreements shall be regulated by the competent body.

Chapter 2

ABUSE OF DOMINANT POSITION

Notion of Dominant Position

Article 18

- (1) An undertaking has a dominant position on a relevant market, within the meaning of this Law, if it has the power to behave independently of other undertakings, thus being in a position to make business decisions without taking into account business decisions of its competitors, suppliers, buyers or end users of its goods or services.
- (2) Dominant position of an undertaking in a relevant market shall be appraised, taking into account the market share of that undertaking on the relevant market, market shares of its competitors on the same market, the market power of potential competitors and barriers to entry in the relevant market, as well as possible dominant position of the buyer.
- (3) An undertaking having a market share exceeding 50% in the relevant market shall be considered to have a dominant position.
- (4) An undertaking referred to in paragraph 3 of this Article has the right to claim not to be in a dominant position, in which case the burden of proof rests on that undertaking.
- (5) An undertaking with a relevant market share below 50% may also be considered dominant, in which case the burden of proof rest on the competent body, that is on the claimant.

Collective Dominance

Article 19

- (1) Two or more independent undertakings united on the basis of their economic links on the relevant market in such a way that they act jointly as a single undertaking on that market (collective dominance) may have a dominant position.
- (2) Collective dominance of two or more undertakings in a relevant market shall be appraised, taking into account the aggregate market share of those undertakings on the relevant market, market shares of its competitors on the same market, the market power of potential competitors and barriers to entry in the relevant market, as well as the possible dominant position of the buyer.

- (3) Two or more undertakings with an aggregate market share exceeding 60% in the relevant market, within the meaning of this Law, shall be considered to have collectively a dominant position.
- (4) An undertaking referred to in paragraph 3 of this Article has the right to claim not to have collectively a dominant position, in which case the burden of proof rests on the undertaking.
- (5) Two or more undertakings with an aggregate relevant market share below 60% may be considered collectively dominant, in which case the burden of proof rest on the competent body, that is on the claimant.

Prohibition of Abuse of Dominant Position

Article 19

- (1) Abuse of dominant position on the relevant market shall be prohibited.
- (2) Abuse of dominant position on relevant market of goods or services shall be considered as part of acts which prevent, restrict or distort competition, and particularly those which:
 - a) directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions;
 - b) limit production, markets or technical development, thus causing harm to consumers;
 - c) apply dissimilar conditions to identical transactions with different undertakings, thereby placing them at a competitive disadvantage on the market;
 - d) make the conclusions of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial customs, have no connection with the subject of such contracts.

Decisions and Measures of the Competent Body

Article 21

- (1) If the competent body, throughout official personnel, ex officio or at the request of an interested party, establishes that the dominant position has been abused it will issue a decision establishing distortion of competition in accordance with Article 20 of this Law, and it can order the dominant undertaking to carry out the measures enabling the establishment of effective competition on the relevant market and elimination of the harmful consequences of abuse of dominant position, as well as deadlines for their execution.
- (2) The decision referred to in paragraph 1 of this Article cannot order division of the undertaking, divestiture of its assets, shares or equity interest, termination of contract or waiving of rights enabling exercise of prevailing influence on the operations of another undertaking.

Admissibility of Certain Acts

Article 22

- (1) The competent body may, at the request of an undertaking with a dominant position, issue a decision establishing that the particular practice which the undertaking intends to perform is not prohibited pursuant to Article 20, paragraph 2 of this Law.
- (2) The competent body may cancel the decision from paragraph 1 of this Article, if the circumstances on the basis of which the decision was made have changed, or annul the decision if it was granted on the basis of inaccurate and false information.

Chapter 3

CONTROL OF CONCENTRATIONS

Concept of Concentration and Forms of Acquiring Control over Undertaking

Article 23

- (1) Concentrations of undertakings shall be deemed to arise in the following situations:
 - a) establishment of a new undertaking by merger of two or more previously independent undertakings or their parts (merger);
 - b) when one or more natural persons that already have the control over at least one undertaking, or when one or more undertakings, acquire control over the entire or parts of other undertaking;
 - c) establishment of joint control by at least two independent undertakings over a new undertaking that performs on a lasting basis all the functions of an autonomous economic entity and has access to the market (joint venture).
- (2) The control referred to in paragraph 1, items 2 and 3 of this Article shall be deemed to constitute a decisive influence on undertakings' business activities, on the grounds of granted rights, contracts or any other legal or actual facts, in particular the following:
 - a) ownership or disposal over the whole or part of the property of the undertaking;
 - b) contractual authorization or any other grounds enabling decisive influence on the composition, activities or decision-making of another undertaking.
- (3) It shall be considered that the undertaking has acquired control in case of being holder or bearer of rights referred to in paragraph 2 of this Article or in case such rights may be exercised otherwise.
- (4) The forms of control referred to in paragraph 2 of this Article shall be assessed separately or in combination, whereas relevant legal and actual facts shall be taken into account but not the intentions of interested parties.
- (5) Two or more concentrations between identical undertakings realized in the period of less than two years, shall be deemed to constitute one concentration while the date of occurrence of the last of these concentrations shall be considered as date of establishment of subject concentration.

Forms of Acquisition not Considered to be Concentration

Article 24

- (1) The following shall not be considered as concentration of undertakings:
 - a) cases where a banking or other financial institution, with a view to reselling them, temporarily acquires shares or other securities of an undertaking and sells them at the latest within 12 months upon acquiring them, provided that during that period the ownership status has not been used in order to influence the undertaking's business decisions that concern its behaviour toward competitors or is used for that purpose exclusively with the intention of preparing the sale of the respective securities or assets of the undertaking;
 - b) cases of acquisition of control over the undertaking by the persons acting as bankruptcy or liquidation administrator pursuant to regulations governing bankruptcy and liquidation;
 - c) cases where a joint venture is aimed at coordination of market activities between two or more undertakings that remain independent, where such joint venture shall be assessed pursuant to provisions contained in Article 8 of this Law.
- (2) The competent body may extend the period referred to in paragraph 1, item 1 of this Article up to 6 months, at the request of interested bank or other financial institutions that prove that the sale of securities was not reasonably possible with that time period.

Request for Approval of Concentration

Article 25

- (1) Concentration referred to in Article 23 of this Law shall be performed subject to the required approval, issued at the request of an undertaking by the competent body.
- (2) The request referred to in paragraph 1 of this Article shall be submitted provided that:
 - a. the combined total annual income of all undertakings involved in concentration on the market of Republic of Montenegro exceeds the amount of 3 (three) million EUR according to the annual statements of the undertakings for the previous financial year; or
 - b. the combined total annual income of undertakings involved in concentration realized on international market in the previous financial year amounts to 15 (fifteen) million euros according to final accounts of undertakings for the previous financial year, whereby at least one of undertakings involved in concentration is registered on the territory of the Republic of Montenegro.
- (3) In the first year of business activities of the undertakings, the income referred to in paragraph 2 of this Article shall be calculated on the basis of income realized in the current financial year for the period of 12 months.
- (4) For the purpose of calculating the total annual income of the undertakings involved in concentration, income realized in mutual turnover between the undertakings involved in concentration shall not be taken into account.

- (5) Form and contents of the request for issuing approval of concentration shall be prescribed by the competent body.

Calculation of Annual Income for Banks, other Financial
Institutions and Insurance Companies

Article 26

- (1) The total annual income of undertakings concerned pursuant to Article 25 paragraph 2 shall be calculated in the following manner:
- a. for legal entities providing financial services, after deduction of value-added tax (indirect taxes) and other taxes directly related to those items, the sum of following income items shall be used:
 - (i) interest income and similar income;
 - (ii) income from securities:
 - income from shares and other variable yield securities
 - income from participating interest
 - income from shares in affiliated undertakings
 - b. due commissions
 - c. net profit from financial operations and
 - d. other operating income.
- (2) for insurance and other reinsurance companies, the value of gross premiums which shall comprise all amounts received and receivables in respect of insurance and reinsurance contracts issued by or on behalf of the insurance companies, after deduction of taxes charged by reference to the amounts of individual premiums or the total volume of premiums.

Method for Submitting the Request for Concentration Approval

Article 27

- (1) The request referred to in Article 25, paragraph 1 of this Law shall be submitted to the competent body within 7 days upon signing of the agreement, that is publishing of the public offer or acquiring control over the undertaking.
- (2) The request for control over concentration may also be submitted in cases where the undertakings involved in concentration show a serious intention to conclude the contract by signing the statement of intent, or when the undertaking announces the intention to make an offer to purchase shares.
- (3) In case the control over the entire or parts of one or more undertakings is acquired by another undertaking, the request referred to in paragraph 1 of this Article shall be submitted by a party acquiring the control, whereas in all other cases parties involved in concentration shall submit a joint request.

Publication of the Request for Concentration

Article 28

The competent body is obliged to publish the following data upon request in the Official Gazette of the Republic of Montenegro:

- a) name of undertakings involved in concentration;
- b) nature of concentration; and
- c) sector of economy within which the concentration shall be made.

Criteria for Control of Concentration

Article 29

When assessing effects of concentration, the competent body shall evaluate whether such concentration creates or strengthens the dominant position on the market, thus considerably preventing, restricting or distorting competition, taking into account in particular:

- a) structure of relevant market;
- b) existing and potential competitors;
- c) market position of undertakings involved in concentration and their economic and financial power;
- d) possibility to choose supplier and consumer;
- e) legal and other barriers to entry on market;
- f) domestic and international level of competitiveness of parties involved in concentration;
- g) trends for the supply and demand of relevant goods or services;
- h) trends of technical and economic development, and
- i) consumer interest.

Procedures upon the Request for Concentration Approval

Article 30

- (1) The competent body shall, upon the request for concentration approval:
 - a) reject the request for concentration approval if the concentration does not fulfil requirements referred to in Articles 25 and 26 of this Law;
 - b) terminate the procedure if the applicant withdraws the request;

- c) authorize concentration when assessment of its effects based on criteria prescribed in Article 29 of this Law determines that such concentration shall not create or strengthen the dominant position, the consequence of which would be prevention, restriction or distortion of competition to a significant extent;
 - d) authorize concentration prescribing, on its own initiative or at the proposal of the undertakings that some supplementary conditions and obligations must be fulfilled by the parties involved in concentration, within the fixed deadlines prior to or after concentration has been carried out.
 - e) refuse to grant authorization for concentration when assessment of its effects on the basis of criteria from Article 29 of this Law determines that such concentration creates or strengthens the dominant position on the relevant market, thus preventing, restricting or distorting competition to a significant extent.
- (2) Undertakings involved in concentration are obliged to stop realization of concentration until the competent body issues its decision authorizing the intended concentration or until the expiration of periods pursuant to Article 41 paragraph 4 of this Law within which the competent body is obliged to issue the decisions.
 - (3) The competent body can, further to a request containing an explanatory note submitted by the party involved in concentration, authorize on a temporary basis the realization of concentration even before the decision referred to in paragraph 1 of this Article has been made, taking particularly into consideration the consequences caused by termination of such concentration towards undertakings and third parties involved, as well as the degree of potential harm to competition caused by such concentration.

Cancellation, Annulment or Amendments of Decisions

Article 31

- (1) The competent body shall, in the course of procedure started ex officio or at the request of the interested party, cancel the decision conditionally authorizing concentration if the undertakings involved in concentration have not met supplementary conditions or obligations pursuant to Article 30, paragraph 1, item 4), that is annul the decision authorizing, conditionally authorizing or prohibiting concentration if the decision has been granted on the grounds of inaccurate or false information.
- (2) The competent body shall, in the course of procedure started ex officio or at the request of parties, amend the decision conditionally authorizing certain concentrations, when the parties involved in such concentration cannot fulfil some of the conditions imposed on them by decision, owing to circumstances that could not be foreseen, avoided or removed.

Registry

Article 32

- (1) Approved concentrations shall be registered within the competent body.
- (2) The form and the content of the application and model and mode of keeping the

registry referred in to paragraph 1 of this Article shall be regulated by the competent body.

**PART III
IMPLEMENTATION OF THE LAW**

Competencies

Article 33

The activities of the competent body shall be the following:

- 1) to follow competition on the market in general and markets of individual sectors of the economy;
- 2) to suggest policy for competition protection and development and to implement and follow up its implementation;
- 3) to establish competition research methods;
- 4) to grant exemptions from prohibition of individual agreements and authorize concentration of undertakings, under the prescribed conditions, and solve other issues within its competency pursuant to this Law;
- 5) to take decisions in the procedure for determining impairment of competition prescribed by this Law;
- 6) to undertake measures toward undertakings and associations of undertakings for distortion of competition or to prevent such distortions, terminate existing distortions and eliminate harmful effects for undertakings and consumers;
- 7) perform other activities pursuant to this Law.

Collecting Information and Establishing Facts

Article 34

In the proceedings for protection of competition, the competent body shall collect information and establish facts also by way of inspection supervision.

Application of the Law on General Administrative Procedure

Article 35

In the proceedings started for the purpose of protection of competition, for those issues not specifically being regulated by this Law, the provisions of the Law on General Administrative Procedure shall apply.

Conflict of Interest

Article 36

- (1) In addition to cases envisaged by the Law on General Administrative Procedure, a person conducting the procedure or deciding in the procedure for protection of competition shall be exempted from participation in the procedure if he has ownership rights in a business organization that is a party in the procedure.
- (2) A party may request exemption of the person referred to in paragraph 1 of this Article if there are other circumstances causing a justifiable doubt in his impartiality, and especially if he participates in managing the other party, his shareholder or management member, or he is in another close relationship or conflict with a party or person related to the party in the procedure.
- (3) Former employees of the competent body dealing with protection of competition shall not have the right to represent any person in the procedure before the competent body for two years following termination of their employment in the competent body.

Initiation of Proceedings

Article 37

- (1) The competent body shall institute proceedings when, on the basis of collected data and acquired information, it concludes that there are grounds to believe that a practice performed impairs competition pursuant to this Law.
- (2) The competent body shall initiate proceedings on the basis of the request, submitted by undertakings between which an agreement has been concluded, for establishing that a particular agreement is not prohibited pursuant to the provisions of this Law or for exempting a particular agreement from prohibition.
- (3) The competent body may initiate proceedings on the basis of the request, submitted by an undertaking engaged in practice or intending to practice it, for establishing that a particular practice is not prohibited pursuant to the provisions of this Law on abuse of dominant position.
- (4) The competent body may initiate proceedings on the basis of the request for initiation of proceedings against an undertaking involved in a practice causing prevention, restriction or distortion of competition pursuant to this Law, which may be submitted by:
 - a) undertakings to which damage is or can be caused,
 - b) chamber of commerce, association of employers and entrepreneurs,
 - c) consumer protection association, and
 - d) state administration body or body of local self-government.
- (5) The competent body may initiate proceedings on the basis of the request for approval of concentration of undertakings submitted by:
 - a) parties to the concentration in case of merger or joint venture; or

- b) an undertaking acquiring control over another undertaking or part of that undertaking, in all other cases.
- (6) The competent body shall prescribe in greater form and content the request for initiation of proceedings.

Submission of Data

Article 38

- (2) The competent body shall be authorized to request from the undertakings concerned and other indirectly involved persons to submit in writing data significant to define the state of facts for a particular case within 15 days, unless the request allows a longer period of time.
- (3) A person to whom such a request has been made is not eligible to the secrecy obligation in order to refuse disclosure of particular data, but is entitled to be indemnified for the entire damage, including the lost profit, suffered due to disclosure of secret by the competent body to an unauthorized third party.

Cessation of Proceedings

Article 39

The competent body shall pass a conclusion for the cessation of the proceedings when from the collected evidence it is clear that a certain act is not contrary to the provisions of this Law.

Termination of Proceedings

Article 40

- (1) The competent body may issue a decision terminating proceedings instituted ex officio in case competition has been impaired to an insignificant extent, and a party to the proceedings makes an obligatory statement not to continue or repeat the practice or activities preventing, restraining or distorting competition.
- (2) Termination of proceedings may not exceed a period of six months.
- (3) If a party against whom the procedure is conducted does not fulfil or breaches the undertaken obligations before the expiration of period of 6 months or commits a new impairment of competition, the competent body shall continue the procedure.

Time Limits for Decision-making

Article 41

- (1) The competent body shall be obliged to make a decision on proceedings conducted pursuant to provisions of this Law on agreements preventing, restricting or distorting competition and abuse of dominant position within four months upon initiation of the proceedings.
- (2) Exceptionally, the deadline referred to in paragraph 1 of this Article may be extended by a decision of the competent body.

- (3) An appeal cannot be submitted against the decision referred to in paragraph 2 of this Article.
- (4) The competent body shall be obliged to make a decision in the procedure of control of concentration within:
 - (i) 25 business days after the decision is made, in accordance with Article 30, paragraph 1, items 1 and 2;
 - (ii) 115 business days after the decision is made, in accordance with Article 30, paragraph 1, items 3 and 4;
 - (iii) 130 business days after the decision is made, in accordance with Article 30, paragraph 1, item 5, provided that the deadline is counted as of the day of request submission, that is the day of its supplementation, if the request was originally submitted with incomplete data.
- (5) When the competent body fails to make a decision within the deadline referred to in paragraphs 1, 2 and 4 of this Article, it shall be considered that acts and practices against which the proceedings are conducted are allowed under this Law.

Measures

Article 42

At the time competent body decides that an agreement is resulting in prevention, restriction or distortion of competition, or that dominant position has been abused, it shall issue an order referred to in Articles 10 and 21 of this Law, namely:

- 1) temporarily, for a period not longer than three months, prohibit trade in certain goods or services on the relevant market;
- 2) temporarily, for a period not longer than four months, prohibit conducting business if, contrary to the prohibition referred in to Article 1 of this Article, the undertaking continues to engage in trade in goods or services on the relevant market.

PART IV **SUPERVISION**

Article 43

The competent body shall be responsible for supervising the enforcement of this Law and other regulations by Law.

PART V **PENALTY CLAUSES**

Infringements

Article 44

- (1) A pecuniary fine in the amount from 200-fold to 300-fold of the minimum wage in the Republic of Montenegro shall be imposed on enterprises and other business, state administration body or local self-government body, if it:
 - (vvvvv) concludes or applies the prohibited or void agreement, thus causing prevention, restriction or distortion of competition (Article 7, paragraphs 1

and 2);

(wwwww) within the prescribed period of time, fails to meet requirements from the decision allowing conditional individual exemption (Article 12 paragraphs 1 and 4);

(xxxxx) does not sell the shares which it holds on a temporary basis with a view to reselling them within the set period of 12 months at the longest from the date of the acquisition of such shares, or within the extended period of time (Article 24 paragraph 1 item 1);

(yyyyy) fails to submit to the competent body in prescribed form a required request for approving concentration, or performs concentration without granted approval (Article 25, paragraph 2 and Article 30, paragraph 1, items 1 and 5);

(zzzzz) within the determined deadline, before or after concentration was realized, fails to meet additional requirements and obligations conditional for approval of concentration (Article 30, paragraph 1, item 4);

(aaaaa) does not stop realization of concentration for the time the competent body issues the decision approving intended concentration or until expiration of deadlines within which competent body was obliged to issue a decision (Article 30 paragraph 2)

- (2) A pecuniary fine in the amount from 10-fold to 20-fold of the minimum wage in the Republic of Montenegro shall be imposed, as well on natural persons or other responsible persons of enterprises or other business, state administration body or local self-government body, for the infringements referred to in paragraph 1 of this Article.
- (3) If the undertaking, by the infringement referred to in paragraph 1 of this Article, has incurred damage or has failed to fulfil the obligation or acquired illegal gain, the amount of pecuniary fine shall be up to 10-fold the amount of incurred damage, unfulfilled obligation or acquired illegal gain.
- (4) If a natural person or responsible person in enterprise or other business, state administration body or local self-government body has acquired illegal gain greater than the prescribed maximum pecuniary fine or prescribed fine referred to in paragraph 2 of this Article, a pecuniary fine in the amount of up to two-fold the acquired illegal gain shall be imposed.

Article 45

- (1) A pecuniary fine in the amount from 150-fold to 200-fold of the minimum wage in the Republic of Montenegro shall be imposed on enterprises and other business, state administration body or local self-government body, which:
 - 1) fails to notify an agreement within the 15 days of the day that it was concluded (Article 17);
 - 2) fails to act in accordance with the request made by the competent body to submit or inform it on the requested data (Article 38);
- (2) A pecuniary fine in the amount from 10-fold to 20-fold of the minimum wage in the Republic of Montenegro shall be imposed on natural person or other responsible

person of enterprises or other business, state administration body or local self-government body, for the infringements referred to in paragraph 1 of this Article.

- (3) If the undertaking, by the infringement referred to in paragraph 1 of this Article, has incurred damage or has failed to fulfil the obligation or acquired illegal gain, the amount of pecuniary fine shall be up to five-fold the amount of incurred damage, unfulfilled obligation or acquired illegal gain.
- (4) If a natural person or responsible person in enterprises or other business, state administration body or local self-government body has acquired illegal gain greater than the prescribed maximum pecuniary fine or prescribed fine referred to in paragraph 2 of this Article, a pecuniary fine in the amount of up to two-fold of the acquired illegal gain shall be imposed.

Protective Measures

Article 46

- (1) For the infringement referred to in Articles 44 and 45 of this Law, protective measures, confiscation of the subject matter involved and prohibition to perform economic activities shall be imposed.
- (2) Prohibition to perform economic activities referred to in paragraph 1 of this Article shall be imposed for a period of time from one month up to one year.

PART VI

TRANSITIONAL AND FINAL PROVISIONS

Proceedings in Progress

Article 47

- (1) The proceedings initiated under the regulations that cease to be in effect with the application day of this Law shall be completed in accordance with this Law.
- (2) Parties to the agreements concluded until the effective date of this Law shall be obliged to notify them to the competent body within 130 days of the entry into force of this Law.

Bylaws

Article 48

Regulations by law necessary for implementation of this Law shall be adopted within six months of the entry into force of this Law.

Cessation of the Application of Existing Regulations

Article 49

On the first day of application of this Act, Antimonopoly Law (Official Gazette of FRY, no. 29/96) shall cease to apply.

Entry into Force

Article 50

This Law shall enter into force on the eighth day upon its publication in the Official Gazette of the Republic of Montenegro, and shall apply from 1 January 2006.

MOROCCO

COMMENTARY BY THE GOVERNMENT OF MOROCCO ON "LOI SUR LA LIBERTÉ DES PRIX ET LA CONCURRENCE"

A. Exposé des motifs de l'adoption de la loi

1) La concurrence est le meilleur processus de régulation de l'économie de marché. Depuis 1982, le Royaume du Maroc a entamé une politique de libéralisation de son économie:

- Libéralisation du commerce extérieur;
- Libéralisation des prix;
- Vaste programme de privatisation;
- Démonopolisation de grands secteurs publics et stratégiques (énergie, transports, télécommunications, export/import de denrées de base...);
- Redistribution des rôles: le privé est le principal promoteur économique.

L'État passe de l'État gérant (de l'économie) à l'État garant (du bon fonctionnement des mécanismes du marché et de l'ordre public économique).

La loi sur la concurrence est perçue comme l'instrument de régulation le plus approprié.

2) La loi sur la concurrence incite à l'optimisation des ressources aussi bien au niveau de la production (meilleure allocation) qu'à celui de la distribution (meilleur rapport qualité/prix).

3) La concurrence constitue un élément de mise à niveau de l'économie marocaine (face à la mondialisation et au libre échange) incitant à la performance et à la compétitivité.

4) La loi sur la concurrence est protectrice des PME/PMI face aux grands groupes, aux monopoles et aux pratiques anticoncurrentielles (ententes, abus de domination et mergers).

B. Objectifs de la loi

- Garantir la liberté des prix et leur formation par le libre jeu de la concurrence;
- Garantir la liberté d'accès de tous les opérateurs à toute activité;
- Protéger les intérêts économiques des consommateurs;
- Généraliser la transparence, la loyauté et le fair-play dans les relations économiques et les échanges;

- Répandre et enraciner la culture concurrence;
- Se conformer aux engagements auxquels le Maroc a librement souscrit (Traité d'association à l'Union européenne, CNUCED, OMC, UMA...).

C. Pratiques soumises au suivi

La loi ne parle pas de contrôle qui est un concept dépassé puisque lié à la réglementation et comporte une connotation répressive.

La loi sur la concurrence n'interdit rien a priori. Elle suit et lutte contre les pratiques abusives sur la base de "la règle de raison" ou "règle de bilan" au cas par cas.

Deux types de pratiques sont spécifiés :

1) Les PAC : pratiques anticoncurrentielles qui sont :

- Les ententes (art. 6);
- L'abus de position dominante (art. 7);
- La dépendance économique.

2) La PRC : pratiques restrictives de la concurrence qui imposent la transparence (affichage des prix, de la qualité facturation généralisée...) et la loyauté (non-discrimination, refus de vente, vente liée, imposition de conditions injustes, prix prédateurs, publicité mensongère, rupture injustifiée de relations commerciales...).

B. Suivi des concentrations à partir d'un seuil de vigilance (de 40 %). Tout projet de concentration au-delà de ce seuil doit être notifié aux autorités en charge de la concurrence.

D. Champ d'application

Le champ d'application (Art. 2) est universel : la loi s'applique à tous les secteurs, toutes les personnes physiques ou morales, privées ou publiques et sur tout le territoire national et même aux opérations d'exportation de nature à nuire à la concurrence sur le marché domestique ou à l'activité d'un exportateur (entente dirigée contre lui par exemple).

Toutefois cette universalité du champ d'application est limitée par des exceptions pour des raisons :

1) Structurelles :

- Situation de monopole de droit ou de fait;
- Disposition réglementaire (subvention et fixation de prix de denrées de base par exemple).

2) Conjoncturelles :

- Difficultés d'approvisionnement, flambée anormale de prix, crise aiguë locale ou internationale.

Toutefois, et en vue de garantir la sécurité juridique des opérateurs, le retour à la réglementation limitée (6 mois) doit être justifié et requérir l'avis du Conseil de la concurrence, "gardien du temple".

E. Mécanisme d'application

1) Organe gouvernemental : le suivi de la concurrence est une des prérogatives du Premier Ministre qui aura à son service une Direction des prix et de la concurrence ayant pour mission de suivre le fonctionnement des marchés et des secteurs et l'évolution des prix (enquêteurs).

Les projets de concentration sont également notifiés au Premier Ministre et instruits par la Direction des prix et de la concurrence (études et évaluation des impacts).

2) Organe spécial : le Conseil de la concurrence qui aura à connaître des PAC (ententes, domination, dépendance), du retour à la réglementation et des concentrations.

Son avis doit être requis par le Premier Ministre.

Comme il aura un pouvoir consultatif très large auprès du Parlement du gouvernement des opérateurs, des chambres professionnelles, des syndicats, des conseils régionaux, des associations de consommateurs et des tribunaux compétents.

3) Les tribunaux : pour la célérité et la bonne application de la loi, le Ministère de la justice est favorable à la création de chambres spécialisées en concurrence pour juger les cas litigieux.

F. Lois parallèles

- Loi sur les marchés publics (obligation d'appel à la concurrence, ouverture des marchés à tous, transparence dans la passation des marchés publics);
- Loi de régulation des télécommunications avec la création d'un organe spécialisé, l'ANRT : Agence nationale de régulation des télécoms;
- Article 36 de l'accord d'association avec l'Union européenne qui incite à la convergence et l'harmonisation des dispositions réciproques en matière de concurrence;
- Souscription aux accords de l'OMC dont les dispositions en matière de concurrence;
- Accord de libre-échange avec la Tunisie, l'Égypte, la Libye..., et en général dans le cadre de l'UMA (Union du Maghreb).

G. Principales décisions

La loi adoptée par le Parlement sera appliquée dans une année.

La première année sera consacrée à la pédagogie, à la communication pour la diffusion des nouvelles règles et à la formation des structures devant être en charge de cette nouvelle et ambitieuse mission.

Jusqu'à présent, il n'y a pas de décision d'application majeure en la matière.

H. Bibliographie

Les principales références sur lesquelles s'est basée l'élaboration du texte sur la concurrence sont :

1) La tradition musulmane :

- Le Coran interdit textuellement le monopole, la fraude, les abus de toute sorte, l'entente nuisible à la communauté ainsi que l'usure;
- La tradition du prophète insiste sur la transparence (l'affichage de la qualité et des prix "montrez-les") ainsi que sur la loyauté dans les relations;
- Le deuxième khalife Omar a institué la "HISBA" ou le "suivi" des marchés en vue de la moralisation de relations économiques et commerciales et a mis à la tête de cette institution, il y a 14 siècles, une femme (Achifa Bent Abdou Allah).

2) Les législations modernes :

- La loi antitrust américaine;
- L'ordonnance française de 1986;
- La loi tunisienne sur la concurrence;
- Le SET de la CNUCED ou loi modèle.

3) L'École européenne :

Pour le Maroc, la concurrence est un outil de régulation et non pas une fin en soi. La concurrence, en incitant à l'optimisation et à la performance, constitue un facteur de développement, par l'instauration d'un climat propice à l'investissement et l'encouragement d'une dynamique d'émulation incitative au progrès et à la répartition.

MAROC

LOI NO 06-99 SUR LA LIBERTE DES PRIX ET DE LA CONCURRENCE

PRÉAMBULE

La présente loi a pour objet de définir les dispositions régissant la liberté des prix et d'organiser la libre concurrence. Elle définit les règles de protection de la concurrence afin de stimuler l'efficacité économique et d'améliorer le bien-être des consommateurs. Elle vise également à assurer la transparence et la loyauté dans les relations commerciales.

TITRE PREMIER CHAMP D'APPLICATION

Article premier

La présente loi s'applique :

- (1) À toutes les personnes physiques ou morales qu'elles aient ou non leur siège ou des établissements au Maroc, dès lors que leurs opérations ou comportements ont un effet sur la concurrence sur le marché marocain ou une partie substantielle de celui-ci;
- (2) À toutes les activités de production, de distribution et de service;
- (3) Aux personnes publiques dans la mesure où elles interviennent dans les activités citées au paragraphe 2 ci-dessus comme opérateurs économiques et non dans l'exercice de prérogatives de puissance publique ou de missions de service public;
- (4) Aux accords à l'exportation dans la mesure où leur application a une incidence sur la concurrence sur le marché intérieur marocain.

TITRE II DE LA LIBERTE DES PRIX Article 2

Les prix des biens, des produits et des services sont déterminés par le jeu de la libre concurrence sous réserve des dispositions des articles 3, 4 et 83 ci-après.

Article 3

Dans les secteurs ou les zones géographiques où la concurrence par les prix est limitée en raison soit de monopole de droit ou de fait, soit de difficultés durables d'approvisionnement, soit de dispositions législatives ou réglementaires, les prix peuvent être fixés par l'administration après consultation du Conseil de la concurrence prévu à l'article 14 ci-dessous. Les modalités de leur fixation sont déterminées par voie réglementaire.

Article 4

Les dispositions des articles 2 et 3 ci-dessus ne font pas obstacle à ce que des mesures temporaires contre des hausses ou des baisses excessives de prix, motivées par des circonstances exceptionnelles, une calamité publique ou une situation manifestement anormale du marché dans un secteur déterminé, peuvent être prises par l'administration, après consultation du Conseil de la concurrence. La durée d'application de ces mesures ne peut excéder six (6) mois prorogables une seule fois.

Article 5

À la demande des organisations professionnelles représentant un secteur d'activité ou sur l'initiative de l'administration, les prix des produits et services dont le prix peut être réglementé peuvent faire l'objet d'une homologation par l'administration après concertation avec lesdites organisations.

Le prix du produit ou service concerné peut alors être fixé librement dans les limites prévues par l'accord intervenu entre l'administration et les organisations intéressées.

Si l'administration constate une violation de l'accord conclu, elle fixe le prix du produit ou service concerné dans les conditions fixées par voie réglementaire.

TITRE III DES PRATIQUES ANTICONCURRENTIELLES

Article 6

Sont prohibées, lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, les actions concertées, conventions, ententes ou coalitions expresses ou tacites, sous quelque forme et pour quelque cause que ce soit, notamment lorsqu'elles tendent à :

- (1) Limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises;
- (2) Faire obstacle à la formation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse;
- (3) Limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique;
- (4) Répartir les marchés ou les sources d'approvisionnement.

Article 7

Est prohibée, lorsqu'elle a pour objet ou peut avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises :

- (1) D'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci.

L'abus peut notamment consister en refus de vente, en ventes liées ou en conditions de vente discriminatoires ainsi que dans la rupture de relations commerciales établies, au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées. Il peut consister également à imposer directement ou indirectement un

caractère minimal au prix de revente d'un produit ou d'un bien, au prix d'une prestation de services ou à une marge commerciale.

L'abus peut consister aussi en offres de prix ou pratiques de prix de vente aux consommateurs abusivement bas par rapport aux coûts de production, de transformation et de commercialisation, dès lors que ces offres ou pratiques ont pour objet ou peuvent avoir pour effet d'éliminer un marché, ou d'empêcher d'accéder à un marché, une entreprise ou l'un de ses produits.

Article 8

Ne sont pas soumises aux dispositions des articles 6 et 7 ci-dessus les pratiques :

- (1) Qui résultent de l'application d'un texte législatif ou d'un texte réglementaire;
- (2) Dont les auteurs peuvent justifier qu'elles ont pour effet de contribuer au progrès économique et que ses contributions sont suffisantes pour compenser les restrictions de la concurrence et qu'elles réservent aux utilisateurs une partie équitable du profit qui en résulte, sans donner aux entreprises intéressées la possibilité d'éliminer la concurrence pour une partie substantielle des produits et services en cause. Ces pratiques ne doivent imposer des restrictions à la concurrence que dans la mesure où elles sont indispensables pour atteindre cet objectif de progrès.

Certaines catégories d'accords ou certains accords, notamment lorsqu'ils ont pour objet d'améliorer la gestion des petites ou moyennes entreprises ou la commercialisation par les agriculteurs de leurs produits, peuvent être reconnus comme satisfaisants aux conditions prévues au paragraphe 2 du premier alinéa ci-dessus par l'administration après avis du Conseil de la concurrence.

Article 9

Tout engagement ou convention se rapportant à une pratique prohibée en application des articles 6 et 7 ci-dessus est nul de plein droit.

Cette nullité peut être invoquée par les parties et par les tiers; elle ne peut être opposée aux tiers par les parties; elle est éventuellement constatée par les tribunaux compétents à qui l'avis du Conseil de la concurrence, s'il en est intervenu un, doit être communiqué.

TITRE IV DES OPERATIONS DE CONCENTRATION ECONOMIQUE

Article 10

Tout projet de concentration ou toute concentration de nature à porter atteinte à la concurrence, notamment par création ou renforcement d'une position dominante, est soumis par le Premier Ministre à l'avis du Conseil de la concurrence.

Ces dispositions ne s'appliquent que lorsque les entreprises qui sont parties à l'acte, ou qui en sont l'objet, ou qui leur sont économiquement liées ont réalisé ensemble, durant l'année civile précédente, plus de 40 % des ventes, achats ou autres transactions sur un marché national de biens, produits ou services de même nature ou substituables, ou sur une partie substantielle de celui-ci.

Article 11

Une concentration au sens du présent titre résulte de tout acte, quelle qu'en soit la forme, qui emporte transfert de propriété ou de jouissance sur tout ou partie des biens, droits et obligations d'une entreprise ou qui a pour objet ou pour effet de permettre à une entreprise ou à un groupe d'entreprises d'exercer, directement ou indirectement, sur une ou plusieurs autres entreprises une influence déterminante.

Article 12

Les entreprises sont tenues de notifier au Premier Ministre tout projet de concentration. La notification peut être assortie d'engagements.

Le silence gardé pendant deux (2) mois vaut décision tacite d'acceptation du projet de concentration, ainsi que des engagements qui y sont joints le cas échéant.

Ce délai est porté à six (6) mois si le Premier Ministre saisit le Conseil de la concurrence.

Le Premier Ministre ne peut saisir le Conseil de la concurrence après l'expiration du délai prévu à l'alinéa 2 ci-dessus, sauf en cas de non-exécution des engagements dont la notification précitée est éventuellement assortie.

Durant ce délai, les entreprises concernées ne peuvent mettre en œuvre leur projet.

Les organismes visés au paragraphe 2 de l'article 15 ci-après peuvent également informer le Premier Ministre qu'une opération de concentration s'est réalisée en contravention aux dispositions du premier alinéa ci-dessus.

Article 13

Les dispositions du présent titre ne sont applicables qu'aux actes passés ou conclus postérieurement à la date de la présente loi.

TITRE V DU CONSEIL DE LA CONCURRENCE

Article 14

Il est créé un Conseil de la concurrence aux attributions consultatives aux fins d'avis, de conseils ou de recommandations.

Chapitre premier De la compétence du Conseil de la concurrence

Article 15

Le Conseil de la concurrence peut être consulté par :

- (1) Le Gouvernement, pour toute question concernant la concurrence;
- (2) Dans la limite des intérêts dont ils ont la charge, les conseils de régions, les communautés urbaines, les chambres de commerce, d'industrie et de services, les chambres d'agriculture, les chambres d'artisanat, les chambres de pêches maritimes,

les organisations syndicales et professionnelles ou les associations de consommateurs reconnues d'utilité publique, sur toute question de principe concernant la concurrence;

- (3) Les juridictions compétentes sur les pratiques anticoncurrentielles définies aux articles 6 et 7 ci-dessus et relevées dans les affaires dont elles sont saisies.

Article 16

Le Conseil de la concurrence est obligatoirement consulté sur tout projet réglementaire instituant un régime nouveau ou modifiant un régime en vigueur ayant pour effet :

- (1) De soumettre l'exercice d'une profession ou l'accès à un marché à des restrictions quantitatives;
- (2) D'établir des monopoles ou d'autres droits exclusifs ou spéciaux sur le territoire du Maroc ou dans une partie substantielle de celui-ci;
- (3) D'imposer des pratiques uniformes en matière de prix ou de conditions de vente;
- (4) D'octroyer des aides de l'État ou des collectivités locales.

Article 17

Le Conseil de la concurrence exerce en outre les attributions définies par la présente loi en matière de concentrations, de pratiques anticoncurrentielles visées aux articles 6 et 7 ci-dessus, ainsi qu'en matière de prix.

Chapitre II De la composition du Conseil de la concurrence

Article 18

Le Conseil de la concurrence est composé de membres dont :

- Six (6) membres représentant l'administration;
- Trois (3) membres choisis en raison de leur compétence en matière de concurrence ou de consommation;
- Trois (3) membres exerçant ou ayant exercé leurs activités dans les secteurs de production, de distribution et de services.

Article 19

Le président est nommé par le Premier Ministre.

Les autres membres du Conseil de la concurrence sont nommés pour cinq (5) ans par décret sur proposition de l'administration et des organismes concernés.

Leur mandat est renouvelable.

Article 20

Le président exerce ses fonctions à plein temps.

Il est soumis aux règles d'incompatibilité prévues pour les emplois publics.

Tout membre du Conseil de la concurrence doit informer le président des intérêts qu'il détient et des fonctions qu'il exerce dans une activité économique.

Aucun membre du Conseil de la concurrence ne peut donner avis dans une affaire où il a un intérêt ou s'il représente ou a représenté une partie intéressée.

Article 21

Sont placés auprès du Conseil de la concurrence, à la demande de son président, des fonctionnaires classés au moins dans l'échelle de rémunération No 10 ou dans un grade équivalent pour remplir les fonctions de rapporteurs.

Un rapporteur général est désigné par le président du Conseil parmi les rapporteurs.

Article 22

Le rapporteur général anime et suit le travail des rapporteurs.

Les rapporteurs sont chargés d'examiner les affaires qui leur sont confiées par le président du Conseil de la concurrence.

Article 23

Le Conseil de la concurrence établit son règlement intérieur qui fixe notamment les conditions de son fonctionnement et de son organisation.

Le Conseil de la concurrence adresse chaque année au Premier Ministre un rapport d'activité. Les avis, les recommandations et les consultations rendus en application de la présente loi sont annexés à ce rapport.

Chapitre III

DE LA PROCEDURE DEVANT LE CONSEIL DE LA CONCURRENCE

Section 1

De la procédure relative aux pratiques anticoncurrentielles

Article 24

Le Premier Ministre, ou les organismes visés au deuxième paragraphe de l'article 15 ci-dessus pour toute affaire qui concerne les intérêts dont ils ont la charge, peuvent saisir le Conseil de la concurrence de faits qui leur paraissent susceptibles de constituer des infractions aux dispositions des articles 6 et 7 ci-dessus.

Article 25

Le Conseil de la concurrence examine si les pratiques dont il est saisi constituent des violations aux dispositions des articles 6 et 7 ci-dessus ou si ces pratiques peuvent être justifiées par l'application de l'article 8 ci-dessus. Il communique son avis au Premier Ministre ou aux organismes dont émane la demande d'avis, et recommande, le cas échéant, les mesures, conditions ou injonctions prévues par la présente section.

Il ne peut être saisi de faits remontant à plus de cinq (5) ans s'il n'a été fait aucun

acte tendant à leur recherche, leur constatation ou leur sanction.

Article 26

Le Conseil de la concurrence peut, lorsque les faits lui paraissent de nature à justifier l'application de l'article 67 ci-dessous, recommander au Premier Ministre de saisir le Procureur du Roi près le tribunal de première instance compétent aux fins de poursuites conformément audit article.

Cette transmission interrompt la prescription de l'action publique.

Article 27

Le Conseil de la concurrence peut déclarer, par décision motivée, sa saisine irrecevable s'il estime que les faits invoqués n'entrent pas dans le champ de sa compétence ou ne sont pas appuyés d'éléments suffisamment probants.

Le Conseil de la concurrence peut décider, après que l'auteur de la saisine ait été mis en mesure de consulter le dossier et de faire valoir ses observations, qu'il n'y a pas lieu de poursuivre la procédure.

Cette décision du Conseil est transmise à l'auteur de la saisine et aux personnes dont les agissements ont été examinés au regard des articles 6 et 7 ci-dessus.

Article 28

Le président du Conseil de la concurrence désigne un rapporteur pour l'examen de chaque affaire.

Article 29

Le président du Conseil de la concurrence peut demander à l'administration de procéder à toutes enquêtes qu'il juge utiles.

Le président du Conseil peut également, chaque fois que les besoins de l'enquête l'exigent, faire appel à toute expertise nécessitant des compétences techniques particulières.

Article 30

Le rapporteur procède à l'examen de l'affaire.

Il peut procéder à l'audition des parties en cause.

Le rapport du rapporteur doit contenir l'exposé des faits et, le cas échéant, les infractions relevées, ainsi que les éléments d'information et les documents ou leurs extraits, sur lesquels il se fonde.

Le rapport et les documents mentionnés à l'alinéa ci-dessus sont communiqués aux parties en cause par lettre recommandée avec accusé de réception aux fins de présenter leurs observations.

Article 31

Les parties en cause doivent présenter par écrit leurs observations sur le rapport

dans un délai mois courant à compter de la date de la réception de la lettre recommandée visée à l'article précédent.

En outre, le Conseil de la concurrence peut les inviter à présenter des observations orales et leur demander de répondre aux questions qui leur seraient posées.

Article 32

Le Premier Ministre peut, par décision motivée et sur recommandation du Conseil de la concurrence, après que celui-ci ait entendu les parties en cause, ordonner des mesures conservatoires qui ne peuvent être demandées qu'accessoirement à une demande d'avis préalable.

La demande de mesures conservatoires peut être présentée à tout moment de la procédure et doit être motivée.

Ces mesures peuvent comporter la suspension de la pratique concernée ainsi qu'une injonction aux parties de revenir à l'état antérieur. Elles doivent rester strictement limitées à ce qui est nécessaire pour faire face à l'urgence.

Ces mesures ne peuvent intervenir que si la pratique dénoncée porte une atteinte grave et immédiate à l'économie du pays, à celle du secteur intéressé, à l'intérêt des consommateurs ou aux entreprises lésées.

Ces mesures sont notifiées par lettre recommandée avec accusé de réception à l'auteur de la demande et aux personnes contre lesquelles la demande est dirigée.

Article 33

Le président du Conseil de la concurrence communiquer toute pièce mettant en jeu le secret des affaires, sauf dans le cas où la communication, ou la consultation de ces documents, est nécessaire à la procédure ou à l'exercice des droits des parties en cause. Les pièces considérées sont retirées du dossier.

Article 34

Sera punie d'une amende de 10 000 à 100 000 dirhams la divulgation par l'une des parties en cause des informations concernant une autre partie ou un tiers et dont elle n'aura pu avoir connaissance qu'à la suite des communications ou consultations auxquelles il aura été procédé.

Article 35

Les parties en cause peuvent assister aux séances du Conseil.

Elles peuvent demander à être entendues par le Conseil de la concurrence.

Le Conseil de la concurrence peut entendre toute personne dont l'audition lui paraît susceptible de contribuer à son information.

Le rapporteur général peut présenter des observations orales.

Le rapporteur général et les rapporteurs assistent aux séances du Conseil sans voix délibérative.

Article 36

Le Premier Ministre peut, par décision motivée et sur recommandation du Conseil de la concurrence, ordonner aux intéressés de mettre fin aux pratiques anticoncurrentielles dans un délai déterminé ou imposer des conditions particulières.

Il peut saisir le Procureur du Roi près le tribunal de première instance compétent aux fins de poursuite conformément aux dispositions de l'article 70 ci-dessous.

Article 37

Si les injonctions ou les conditions prévues à l'alinéa 1 de l'article 36 ci-dessus ou si les mesures conservatoires prévues à l'article 32 ci-dessus ne sont pas respectées, le Premier Ministre peut, par décision motivée et sur recommandation du Conseil de la concurrence, saisir le Procureur du Roi près le tribunal de première instance compétent aux fins de poursuite conformément aux dispositions de l'article 70 ci-dessous.

Article 38

Les juridictions communiquer au Conseil de la concurrence, sur sa demande, copie des procès-verbaux, des rapports d'enquête ou de tout document ayant un lien direct avec les faits dont le Conseil de la concurrence est saisi.

Le Conseil de la concurrence peut être consulté par les juridictions sur les pratiques anticoncurrentielles définies aux articles 6 et 7 ci-dessus et relevées dans les affaires dont elles sont saisies. Il ne peut donner un avis qu'après une procédure contradictoire. Toutefois, s'il dispose d'informations déjà recueillies au cours d'une procédure antérieure, il peut émettre son avis sans avoir à mettre en œuvre la procédure prévue à la présente section.

Les avis émis en application du présent article ne peuvent être publiés, le cas échéant, qu'après qu'une décision ne devienne définitive.

Article 39

La prescription de l'action publique est interrompue dans les conditions de droit commun, y compris par la rédaction des procès-verbaux visés à l'article 62.

Article 40

Les recours contre les décisions du Premier Ministre prises en application de la présente section, sauf celles visées aux articles 26 (1er alinéa), 36 (2ème alinéa) et 37, sont portés devant la juridiction administrative compétente.

Article 41

Le Premier Ministre peut en outre, sur recommandation du Conseil de la concurrence, ordonner que les décisions prises en application de la présente section soient publiées intégralement ou par extraits dans un ou plusieurs journaux habilités à publier les annonces légales, ou publications qu'il désigne, et affichées dans les lieux qu'il indique :

Aux frais de la partie qui a contrevenu aux dispositions des articles 6 ou 7 ci-dessus;

Aux frais du demandeur des mesures s'il s'agit de mesures conservatoires.

Le Premier Ministre peut également prescrire, sur recommandation du Conseil de la concurrence, l'insertion du texte intégral de sa décision dans le rapport de gestion établi par les gérants, le conseil d'administration ou le directoire sur les opérations de l'exercice.

Section 2

De la procédure relative aux opérations de concentration économique

Article 42

Lorsque le Premier Ministre saisit le Conseil de la concurrence d'un projet de concentration ou d'une opération de concentration, il en avise les entreprises parties à l'acte.

Le Conseil de la concurrence apprécie si le projet de concentration ou la concentration apporte au progrès économique une contribution suffisante pour compenser les atteintes à la concurrence. Le Conseil tient compte de la compétitivité des entreprises en cause au regard de la concurrence internationale.

Article 43

Le Premier Ministre peut, par décision motivée, et à la suite de l'avis du Conseil de la concurrence, enjoindre aux entreprises, dans un délai déterminé :

- Soit de ne pas donner suite au projet de concentration ou de rétablir la situation de droit antérieure;
- Soit de modifier ou compléter l'opération ou de prendre toute mesure propre à assurer ou à établir une concurrence suffisante.

La réalisation de l'opération peut également être subordonnée à l'observation de prescriptions de nature à apporter au progrès économique et social une contribution suffisante pour compenser les atteintes à la concurrence.

Ces injonctions et prescriptions s'imposent quelles que soient les stipulations des parties.

Article 44

Les décisions prises en application de l'article 43 précédent ne peuvent intervenir qu'après que les parties intéressées aient été mises en mesure de présenter leurs observations en réponse au rapport établi par le rapporteur et ce, dans un délai d'un mois courant à compter de la réception dudit rapport.

Article 45

Le Conseil de la concurrence peut, en cas d'exploitation abusive d'une position dominante, proposer au Premier Ministre d'enjoindre par décision motivée, à l'entreprise ou au groupe d'entreprises en cause, de modifier, de compléter ou de résilier, dans un délai déterminé, tous accords et tous actes par lesquels s'est réalisée la concentration de la puissance économique qui a permis les abus même si ces actes ont fait l'objet de la procédure prévue à la présente section.

Article 46

La procédure applicable aux décisions du Premier est celle prévue à l'article 30 ci-dessus et aux articles 33 à 35 ci-dessus.

Les décisions du Premier Ministre sont motivées et publiées au "*Bulletin officiel*", avec l'avis du Conseil de la concurrence.

À défaut de la notification prévue à l'article 12 ci-dessus et en cas de non-respect des engagements prévus au premier alinéa de l'article 12 ci-dessus ainsi que du non-respect des décisions ci-dessus, le Premier Ministre peut, après consultation du Conseil de la concurrence, saisir le Procureur du Roi près le tribunal de première instance compétent aux fins de poursuites conformément à l'article 70 ci-dessous.

Les recours contre les décisions du Premier Ministre prises en application de la présente section, sauf celles de saisir le Procureur du Roi prévues à l'alinéa précédent, sont portés devant la juridiction administrative compétente.

TITRE VI DES PRATIQUES RESTRICTIVES DE LA CONCURRENCE

Chapitre premier De la protection et de l'information des consommateurs

Article 47

Tout vendeur de produit ou tout prestataire de services doit par voie de marquage, d'étiquetage, d'affichage ou par tout autre procédé approprié, informer le consommateur sur les prix et les conditions particulières de la vente ou de la réalisation de la prestation.

Les modalités d'information du consommateur sont fixées par voie réglementaire.

Article 48

Le vendeur de produits ou le prestataire de services est tenu de délivrer une facture, un ticket de caisse ou tout autre document en tenant lieu à tout consommateur qui en fait la demande.

Toutefois dans certains secteurs dont la liste est fixée par voie réglementaire, la délivrance d'une facture pourra être rendue obligatoire.

Les dispositions des alinéas 3 à 7 de l'article 51 ci-dessous sont applicables aux factures prévues par le présent article.

Article 49

Il est interdit de :

- Refuser à un consommateur la vente d'un produit ou la prestation d'un service, sauf motif légitime;
- Subordonner la vente d'un produit à l'achat d'une quantité imposée ou à l'achat concomitant d'un autre produit ou d'un autre service;

- Subordonner la prestation d'un service à celle d'un autre service ou à l'achat d'un produit.

Article 50

Il est interdit de vendre ou d'offrir à la vente des produits ou des biens, d'assurer ou d'offrir une prestation de services aux consommateurs donnant droit à titre gratuit, immédiatement ou à terme, à une prime consistant en produits, biens ou services sauf s'ils sont identiques à ceux qui font l'objet de la vente ou de la prestation.

Cette disposition ne s'applique pas aux menus objets ou services de faible valeur ni aux échantillons. La valeur de ces objets, services ou échantillons, est déterminée par voie réglementaire.

Ne sont pas considérés comme primes au sens du premier alinéa ci-dessus :

- Le conditionnement habituel du produit, les biens, produits ou prestations de services qui sont indispensables à l'utilisation normale du produit, du bien ou du service faisant l'objet de la vente;
- Les prestations de service après-vente et les facilités de stationnement offertes par les commerçants à leurs clients;
- Les prestations de services attribuées gratuitement si ces prestations ne font pas ordinairement l'objet d'un contrat à titre onéreux et sont dépourvues de valeur marchande.

Chapitre II

De la transparence dans les relations commerciales entre professionnels

Article 51

Tout achat de biens ou produits ou toute prestation de services entre professionnels doit faire l'objet d'une facturation.

Le vendeur est tenu de délivrer la facture dès la réalisation de la vente ou de la prestation du service. L'acheteur doit réclamer la facture.

La facture doit être rédigée en double exemplaire prénumérotée et tirée d'une série continue ou éditée par un système informatique selon une série continue.

Le vendeur et l'acheteur doivent en conserver chacun un exemplaire, pendant cinq (5) ans à compter de la date d'établissement de la facture, et ce sans préjudice des dispositions prévues par la législation fiscale en vigueur.

Sous réserve de l'application de toutes autres dispositions législatives ou réglementaires en vigueur, notamment les numéros d'immatriculation au registre du commerce, montant du capital social et adresse du siège social, numéro d'identification fiscale, numéro d'article à l'impôt des patentes, la facture doit mentionner :

- Le nom, la dénomination ou raison sociale des parties ainsi que leur adresse;
- La date de la vente du produit ou de la prestation de services et, le cas échéant, la date de livraison;

- Les quantités et la dénomination précise des produits ou services;
- Les prix unitaires hors taxes ou toutes taxes comprises des biens ou produits vendus et des services rendus;
- Les réductions accordées et leur montant chiffrable lors de la vente ou de la prestation de services, quelle que soit leur date de règlement;
- Le montant total toutes taxes comprises;
- Les modalités de paiement.

Il est interdit de délivrer des factures comportant de faux renseignements quant aux prix, quantité et qualité des produits ou marchandises vendus ou des services rendus.

Le refus de délivrer facture peut être constaté par tout moyen, notamment par une mise en demeure sous forme de lettre recommandée ou par procès-verbal dressé par tout agent de la force publique.

Article 52

Tout producteur, prestataire de services, importateur ou grossiste est tenu de communiquer à tout acheteur de produit ou demandeur de prestation de services pour une activité professionnelle qui en fait la demande, son barème de prix et ses conditions de vente. Celles-ci comprennent les conditions de règlement et, le cas échéant, les réductions accordées quelle que soit leur date de règlement.

Cette communication s'effectue par tout moyen conforme aux usages de la profession.

Article 53

Est interdit le fait par toute personne d'imposer, directement ou indirectement, un caractère minimal au prix de revente d'un produit ou d'un bien, au prix d'une prestation de services ou à une marge commerciale.

Article 54

Il est interdit à tout producteur, importateur, grossiste ou prestataire de services :

- (1) De pratiquer, à l'égard d'un partenaire économique ou d'obtenir de lui des prix, des délais de paiement, des conditions de vente ou des modalités de vente ou d'achat discriminatoires et non justifiés par des contreparties réelles en créant de ce fait, pour ce partenaire, un désavantage ou un avantage dans la concurrence;
- (2) De refuser de satisfaire aux demandes des acheteurs de produits ou aux demandes de prestations de services, pour une activité professionnelle, lorsque ces demandes ne présentent aucun caractère anormal et qu'elles sont faites de bonne foi;
- (3) De subordonner la vente d'un produit où la prestation d'un service pour une activité professionnelle, soit à l'achat concomitant d'autres produits, soit à l'achat d'une quantité imposée, soit à la prestation d'un autre service;
- (4) Dans les villes où existent des marchés de gros et des halles aux poissons :

- a) De ravitailler les grossistes, semi-grossistes ou détaillants en fruits, légumes ou poissons destinés à la consommation et vendus en l'état et qui ne seraient pas passés par le carreau de ces marchés et de ces halles;
- b) De détenir, de mettre à la vente ou de vendre des fruits, légumes ou poissons destinés à la consommation et vendus en l'état et qui ne seraient pas passés par le carreau de ces marchés et de ces halles.

Exception est faite pour les denrées susvisées importées ou destinées à l'exportation ou à l'industrie.

Chapitre III Du stockage clandestin

Article 55

Sont considérées comme stockage clandestin et sont interdites :

- (1) La détention par des commerçants, industriels, artisans ou agriculteurs de stocks de marchandises ou de produits qui sont dissimulés par eux à des fins spéculatives et en quelque local que ce soit;
- (2) La détention en vue de la vente d'un stock de marchandises ou de produits quelconques, par des personnes non inscrites au registre du commerce ou n'ayant pas la qualité d'artisan aux termes du dahir No 1-63-194 du 5 safar 1383 (28 juin 1963) formant statut des chambres d'artisanat ou qui ne peuvent justifier de la qualité de producteur agricole;
- (3) La détention, en vue de la vente, par des personnes inscrites au registre du commerce ou ayant la qualité d'artisan aux termes du dahir précité, d'un stock de marchandises ou de produits étrangers à l'objet de leur industrie ou commerce ou activité tel que cet objet résulte de leur patente ou de leur inscription sur les listes électorales des chambres d'artisanat;
- (4) La détention, en vue de la vente, par des producteurs agricoles d'un stock de marchandises ou de produits étrangers à leur exploitation.

Sera considéré comme détenu en vue de la vente pour l'application des paragraphes 2, 3 et 4 ci-dessus, tout stock de marchandises ou de produits non justifié par les besoins de l'activité professionnelle du détenteur et dont l'importance excède manifestement les besoins de l'approvisionnement familial appréciés selon les usages locaux.

TITRE VII DISPOSITIONS PARTICULIERES RELATIVES AUX PRODUITS OU SERVICES DONT LE PRIX EST REGLEMENTE

Article 56

Les prix peuvent être fixés soit en valeur absolue soit par application d'une marge bénéficiaire applicable à un produit ou service au stade considéré de la commercialisation, soit par tout autre moyen.

Quand les marges bénéficiaires sont exprimées en valeur absolue, elles s'ajoutent au prix de revient. Lorsqu'elles sont exprimées en pourcentage elles s'appliquent, sauf dispositions contraires, au prix de vente.

Les modalités d'application des dispositions du présent article sont fixées par voie réglementaire.

Article 57

Peut être rendue obligatoire et soumise à déclaration la détention, à quelque titre que ce soit, des marchandises ou produits dont les prix sont réglementés en application de la présente loi, quelles que soient leur origine, provenance et destination.

Ces marchandises et produits peuvent bénéficier de ristournes effectuées par la Caisse de compensation ou être soumis à des prélèvements compensatoires versés à cette même Caisse.

Les modalités d'application des dispositions du présent article sont fixées par l'administration.

Article 58

Les conditions de détention des marchandises ou produits dont les prix sont réglementés en application de la présente loi ainsi que, le cas échéant, le mode de présentation pour leur exposition ou leur mise en vente peuvent être prescrites par l'administration.

Article 59

Est interdite et est considérée comme stockage clandestin la détention de stocks de marchandises ou de produits qui n'ont pas été déclarés alors qu'ils auraient dû l'être en application de l'article 57 ci-dessus.

Article 60

Constituent des majorations illicites de prix pour les marchandises, produits ou services dont les prix sont réglementés :

- (1) Les ventes, offres de vente, propositions de vente, conventions de vente faites ou contractées à un prix supérieur au prix fixé;
- (2) Les achats, offres d'achat, propositions d'achat, conventions d'achat faits sciemment à un prix supérieur au prix fixé;
- (3) Le fait, lorsque plusieurs intermédiaires interviennent à un même stade du circuit, de se répartir une marge supérieure à la marge limite autorisée pour ce stade. Dans ce cas, ces intermédiaires sont solidairement responsables.

TITRE VIII DES ENQUETES ET SANCTIONS

Chapitre premier Des enquêtes

Article 61

Pour l'application des dispositions de la présente loi, des fonctionnaires de l'administration habilités spécialement à cet effet et les agents du corps des contrôleurs des prix peuvent procéder aux enquêtes nécessaires.

Ils doivent être assermentés et porteurs d'une carte professionnelle délivrée par l'administration selon les modalités fixées par voie réglementaire.

Les fonctionnaires visés au présent article sont astreints au secret professionnel sous peine des sanctions prévues à l'article 446 du Code pénal.

Article 62

Les enquêtes peuvent donner lieu à l'établissement de procès-verbaux et le cas échéant de rapports d'enquête.

Les procès-verbaux et les rapports d'enquête sur les pratiques visées aux articles 6 et 7 ci-dessus établis par les fonctionnaires et agents précités sont transmis à l'autorité qui les a demandés.

Les procès-verbaux constatant des infractions aux dispositions des titres VI et VII sont transmis au Procureur du Roi compétent.

Article 63

Les procès-verbaux énoncent la nature, la date et le lieu des constatations ou des contrôles effectués. Ils sont signés par le(s) enquêteur(s) et par la ou les personne(s) concernée(s) par les investigations. En cas de refus de celle(s)-ci de signer, mention en est faite au procès-verbal. Un double est laissé aux parties intéressées. Ils font foi jusqu'à preuve du contraire.

Les procès-verbaux sont éventuellement accompagnés d'un ordre de blocage provisoire en cas d'infraction aux dispositions du chapitre III du titre VI et de celles de l'article 59 ci-dessus.

Les marchandises ou les produits bloqués peuvent être laissés à la garde du contrevenant s'il s'agit de denrées périssables à charge par lui d'en verser la valeur estimative fixée au procès-verbal ou être transportées après inventaire et estimation en tout lieu désigné à cet effet.

Les procès-verbaux sont dispensés des formalités et droits de timbre et d'enregistrement. Ils sont rédigés dans les plus courts délais pour les enquêtes visées à l'article 64 ci-après, et sur-le-champ pour celles visées à l'article 65 ci-après.

En ce qui concerne les enquêtes visées à l'article 64 ci-dessous, les procès-verbaux doivent indiquer que le contrevenant a été informé de la date et du lieu de leur rédaction et que sommation lui a été faite d'assister à cette rédaction.

La convocation du contrevenant est consignée dans un carnet à souches ad hoc et comporte mention de sa date de remise, les nom et prénom du contrevenant, l'adresse et la nature de son commerce ainsi que la sommation prévue ci-dessus.

La sommation est considérée comme valablement faite lorsque la convocation a été remise à l'un des employés ou à toute personne chargée à un titre quelconque de la direction ou de l'administration de l'entreprise ou bien, sans remplir des fonctions de direction ou d'administration, qui participe à un titre quelconque à l'activité de ladite entreprise. Mention de cette remise est portée sur la convocation.

Dans le cas où le contrevenant n'a pu être identifié, les procès-verbaux sont dressés contre inconnu.

Article 64

Les enquêteurs peuvent accéder à tous locaux, terrains ou moyens de transport à usage professionnel, demander la communication des livres, des factures et tous autres documents professionnels et en prendre copie, recueillir sur convocation ou sur place les renseignements et justifications.

L'action des enquêteurs s'exerce également sur les marchandises ou les produits transportés. À cet effet, ils peuvent requérir pour l'accomplissement de leur mission l'ouverture de tous colis et bagages lors de leur expédition ou de leur livraison en présence du transporteur et, soit de l'expéditeur, soit du destinataire ou en présence de leur mandataire.

Les entrepreneurs de transport sont tenus de n'apporter aucun obstacle à ces opérations et de présenter les titres de mouvements, lettres de voiture, récépissés, connaissements et déclarations dont ils sont détenteurs.

Les enquêteurs peuvent demander à l'administration de désigner un expert agréé auprès des tribunaux pour procéder à toute expertise contradictoire nécessaire.

Article 65

Les enquêteurs ne peuvent procéder aux visites en tous lieux ainsi qu'à la saisie de documents, que dans le cadre d'enquêtes demandées par l'administration et sur autorisation motivée du Procureur du Roi dans le ressort duquel sont situés les lieux à visiter. Lorsque ces lieux sont situés dans le ressort de plusieurs juridictions et qu'une action simultanée doit être menée dans chacun de ces lieux, une autorisation unique peut être délivrée par l'un des procureurs du Roi compétents.

Le Procureur du Roi du ressort doit en être avisé.

La visite et la saisie s'effectuent sous l'autorité et le contrôle du Procureur du Roi qui les a autorisées. Il désigne un ou plusieurs officiers de police judiciaire, et au besoin une femme lors des visites des locaux à usage d'habitation, chargés d'assister à ces opérations.

La visite, qui ne peut commencer avant 5 heures ou après 21 heures, est effectuée en présence de l'occupant des lieux ou de son représentant.

Les enquêteurs, l'occupant des lieux ou son représentant ainsi que l'officier de police judiciaire peuvent seuls prendre connaissance des pièces et documents avant leur saisie.

Les inventaires et mises sous scellés des pièces saisies sont réalisés conformément aux dispositions du Code de procédure pénale.

Les originaux du procès-verbal et de l'inventaire sont transmis au Procureur du Roi qui a autorisé la visite. Les pièces et documents qui ne sont plus utiles à la manifestation de la vérité sont restitués à l'occupant des lieux.

Article 66

Les enquêteurs habilités au titre de la présente loi peuvent, sans se voir opposer le secret professionnel, accéder à tout document ou élément d'information détenu par les administrations, les établissements publics et collectivités locales.

Chapitre II Des sanctions pénales

Article 67

Sera punie d'un emprisonnement de deux (2) mois à ans et d'une amende de 10 000 à 500 000 dirhams ou de l'une de ces deux peines seulement toute personne physique qui, frauduleusement ou en pleine connaissance de cause, aura pris une part personnelle et déterminante dans la conception, l'organisation, la mise en œuvre ou le contrôle de pratiques visées aux articles 6 et 7 ci-dessus.

Article 68

Sera puni d'un emprisonnement de deux (2) mois à deux (2) ans et d'une amende de 10 000 à 500 000 dirhams ou de l'une de ces deux peines seulement le fait, en diffusant, par quelque moyen que ce soit, des informations mensongères ou calomnieuses, en jetant sur le marché des offres destinées à troubler les cours ou des suroffres faites aux prix demandés par les vendeurs, ou en utilisant tout autre moyen frauduleux, d'opérer ou de tenter d'opérer la hausse ou la baisse artificielle du prix de biens ou de services ou d'effets publics ou privés.

Lorsque la hausse ou la baisse artificielle des prix concerne des denrées alimentaires, des grains, farines, substances farineuses, boissons, produits pharmaceutiques, combustibles ou engrais commerciaux, l'emprisonnement est d'un (1) à trois (3) ans et le maximum de l'amende est de 800 000 dirhams.

L'emprisonnement peut être porté à cinq (5) ans et l'amende à 1 000 000 dirhams si la spéculation porte sur des denrées alimentaires ne rentrant pas dans l'exercice habituel de la profession du contrevenant.

Article 69

Dans tous les cas prévus aux articles 67 et 68 ci-dessus, le coupable peut être frappé, indépendamment de l'application de l'article 87 du Code pénal, de l'interdiction d'un ou de plusieurs des droits mentionnés à l'article 40 du même Code.

Article 70

En cas d'infraction aux dispositions des articles 6 et 7 ci-dessus et en cas de non-respect de la notification et des engagements mentionnés à l'alinéa 1 de l'article 12

ci-dessus ainsi que du non-respect des décisions prévues à l'article 46 ci-dessus, les personnes morales peuvent être reconnues pénalement responsables lorsque les circonstances de l'espèce le justifient, notamment la mauvaise foi des parties en cause ou la gravité de leurs infractions et sans préjudice des sanctions civiles susceptibles d'être appliquées par les tribunaux compétents.

La peine encourue est une amende dont le montant est, pour une entreprise, de 2 % à 5 % du chiffre d'affaires hors taxes réalisé au Maroc au cours du dernier exercice clos. Si le contrevenant n'est pas une entreprise, l'amende est de 200 000 à 2 000 000 dirhams.

Si l'entreprise exploite des secteurs d'activité différents, le chiffre d'affaires à retenir est celui du ou des secteurs où a été commise l'infraction.

Le montant de l'amende doit être déterminé individuellement pour chaque entreprise ou organisme sanctionné en tenant compte de la gravité des faits reprochés et de l'importance des dommages causés à l'économie, ainsi que de la situation financière et de la dimension de l'entreprise ou de l'organisme sanctionné. Cette amende est déterminée en fonction du rôle joué par chaque entreprise ou organisme en cause.

En cas de récidive dans un délai de cinq (5) années, le montant maximum de l'amende applicable peut être porté au double.

Article 71

Les infractions aux dispositions du chapitre premier du titre VI et des textes pris pour leur application sont punies d'une amende de 1 200 à 5 000 dirhams.

Les infractions aux dispositions du chapitre II du titre VI, à celles des articles 57, 58 et 60 ci-dessus et aux textes pris pour leur application sont punies d'une amende de 5 000 à 100 000 dirhams.

Article 72

Sont punies d'une amende de 100 000 à 500 000 dirhams et d'un emprisonnement de 2 mois à 2 ans les infractions aux dispositions des articles 55 et 59 de la présente loi.

La confiscation des marchandises objets de l'infraction et celle des moyens de transport peut également être prononcée.

Article 73

Toute personne responsable de la disparition d'une marchandise ou d'un produit ayant fait l'objet d'un ordre de blocage conformément aux dispositions du deuxième alinéa de l'article 63 est passible d'une amende pouvant atteindre une somme égale à 10 fois la valeur de la marchandise ou du produit disparu.

Article 74

En cas de condamnation pour stockage clandestin, le tribunal peut prononcer à titre temporaire et pour une durée qui ne peut être supérieure à trois mois la fermeture des magasins ou bureaux du condamné.

Il peut aussi interdire au condamné à titre temporaire et pour une durée maximum d'un an, l'exercice de sa profession ou même d'effectuer tout acte de commerce.

Pendant la durée de la fermeture temporaire, le contrevenant continuera à assurer à son personnel les salaires, pourboires, indemnités ou avantages de toute nature dont il bénéficiait à la date de la fermeture du fonds.

Toute infraction aux dispositions d'un jugement prononçant soit la fermeture soit l'interdiction d'exercer la profession ou d'effectuer tout acte de commerce est punie d'une amende de 1 200 à 200 000 dirhams et d'un emprisonnement de un (1) mois à deux (2) ans ou de l'une de ces deux peines seulement.

Article 75

Pendant la durée de l'interdiction prévue à l'article 74 ci-dessus, le condamné ne peut, sous les peines édictées au quatrième alinéa dudit article, être employé à quelque titre que ce soit dans l'établissement qu'il exploitait même s'il l'a vendu, loué ou mis en gérance. Il ne peut non plus être employé dans l'établissement qui serait exploité par son conjoint.

Article 76

Sera punie d'un emprisonnement de deux (2) mois à deux (2) ans et d'une amende de 5 000 à 200 000 dirhams ou de l'une de ces deux peines seulement toute personne qui aura :

- Fait opposition à l'exercice des fonctions des enquêteurs visés à l'article 61 ci-dessus;
- Refusé de communiquer aux enquêteurs visés à l'article 61 ci-dessus des documents ainsi que la dissimulation et la falsification de ces documents.

Toute personne qui donne sciemment de faux renseignements ou fait de fausses déclarations aux organismes compétents ou aux personnes habilitées à constater les infractions ou refuse de leur fournir les explications et justifications demandées est punie des peines prévues au premier alinéa ci-dessus.

Les injures et voies de fait commises à l'égard des personnes visées à l'alinéa précédent sont punies des peines prévues au premier alinéa ci-dessus.

Article 77

Les dispositions de l'article 146 du Code pénal relatives aux circonstances atténuantes ne sont pas applicables aux peines d'amende prononcées en vertu de la présente loi.

Article 78

Dès qu'une condamnation prononcée en application des articles 67 à 70 ci-dessus est devenue irrévocable, un extrait du jugement ou de l'arrêt est adressé sans frais au Premier Ministre pour information.

Article 79

Le tribunal peut ordonner la publication et l'affichage de sa décision ou l'une de ces mesures seulement conformément aux dispositions de l'article 48 du Code pénal, rendue en application du présent chapitre aux frais du condamné sans que la durée de l'affichage ne dépasse un (1) mois et sans que les frais de publication ne dépassent le maximum de l'amende.

Article 80

Les poursuites pénales engagées en application des titres VI et VII de la présente loi sont exercées par voie de citation directe et le tribunal compétent statue à sa plus prochaine audience.

Il est statué d'urgence sur l'appel.

Article 81

Le tribunal peut condamner solidairement les personnes morales au paiement des amendes prononcées contre leurs dirigeants en vertu des dispositions de la présente loi et des textes pris pour son application.

Article 82

Les dispositions pénales de la présente loi ne sont applicables que si les faits qu'elles répriment ne peuvent recevoir une qualification pénale plus grave en vertu des dispositions du Code pénal.

TITRE IX DISPOSITIONS TRANSITOIRES ET DIVERSES

Chapitre premier Dispositions transitoires

Article 83

Les dispositions de l'article 2 de la présente loi ne s'appliquent pas aux produits et services dont la liste et dont le prix ont été fixés en application de la loi No 008-71 sur la réglementation et le contrôle des prix et les conditions de détention et de vente des produits et marchandises.

La réglementation des prix de ces produits et services peut être maintenue pour une période transitoire de 5 ans courant à compter de la date d'entrée en vigueur de la présente loi.

Demeurent à titre transitoire en vigueur les arrêtés fixant, en application de la loi No 008-71 précitée, les prix des produits et des services visés au premier alinéa ci-dessus jusqu'à leur abrogation conformément à la réglementation en vigueur.

Les conditions de fixation des prix desdits produits et services sont fixées conformément à la réglementation en vigueur.

Article 84

Les infractions aux dispositions des titres VI et VII de la présente loi et des textes pris pour leur application concernant les produits et services visés au premier alinéa de l'article 83 ci-dessus sont constatées par les agents du corps des contrôleurs des prix.

Sont transmis, les procès verbaux des infractions aux dispositions du titre VII de la présente loi et des textes pris pour son application et concernant les produits et services visés au premier alinéa de l'article 83 ci-dessus.

Sont transmis au Procureur du Roi les procès-verbaux des infractions aux dispositions du titre VI de la présente loi et des textes pris pour son application et concernant les produits et services visés à l'alinéa précédent.

Article 85

Les procès-verbaux visés au deuxième alinéa de l'article 84 ci-dessus sont transmis sans délai de la préfecture ou de la province où l'infraction a été constatée.

Article 86

Les infractions aux dispositions du titre VII de la présente loi et des textes pris pour son application peuvent faire l'objet soit de transactions, soit de sanctions administratives, soit de sanctions judiciaires.

Article 87

Seul le droit de transiger. La décision de transaction est prise après avis du chef du service extérieur de l'administration dont relève la marchandise, le produit ou le service concerné, copie de cet avis est jointe au dossier.

Le droit de transiger ne peut plus être exercé dès que le dossier a été transmis au tribunal de première instance compétent.

Article 88

La transaction passée sans réserve éteint l'action de l'administration.

Si des paiements échelonnés ont été admis, des mainlevées partielles de l'ordre de blocage prévu au deuxième alinéa de l'article 63 ci-dessus ne pourront être délivrées qu'au fur et à mesure des paiements libératoires effectués par le contrevenant.

Article 89

La transaction doit être constatée par écrit en autant d'originaux qu'il y a de parties ayant intérêt distinct.

Les actes de transaction sont dispensés de la formalité et des droits d'enregistrement.

Article 90

Les sanctions administratives sont prononcées par arrêté pris après avis du chef du service extérieur de l'administration dont relève la marchandise, le produit ou le service concerné.

Copie de cet avis est jointe au dossier du contrevenant.

Article 91

Les sanctions administratives sont :

- (1) Un avertissement par lettre recommandée avec accusé de réception;
- (2) Une amende qui, sans pouvoir excéder 100 000 dirhams, pourra atteindre 20 fois le montant du chiffre d'affaires hebdomadaire moyen du contrevenant, calculé sur la base du dernier exercice, et à laquelle pourra s'ajouter, le cas échéant, le montant des sommes indûment perçues pendant la durée de l'infraction, à savoir la différence entre le prix auquel le produit ou le service aurait dû être vendu et celui auquel il l'a été réellement.

Toutefois en cas d'infraction aux textes pris pour l'application de l'article 58 ci-dessus, l'amende est de 1 000 à 5 000 dirhams.

En cas de stockage clandestin, les sanctions prévues au paragraphe 2 du premier alinéa ci-dessus peuvent, en outre, être accompagnées de la confiscation de tout ou partie du stock.

Article 92

Peut ordonner, si elle le juge opportun, l'affichage ou l'insertion dans les journaux qu'elle désigne, des arrêtés ou des extraits d'arrêté prononçant la confiscation des marchandises ou produits ou infligeant une sanction pécuniaire.

En cas de suppression, de dissimulation, de laceration totale ou partielle des affiches apposées en exécution du présent article, le contrevenant est passible des peines prévues à l'article 325 du Code pénal.

Article 93

Les marchandises ou les produits confisqués sont mis à la disposition de l'administration des domaines qui procède à leur aliénation dans les conditions fixées par les lois et règlements en vigueur.

Article 94

La décision infligeant au contrevenant, à titre d'amende administrative, le paiement des sommes prévues au paragraphe 2 de l'alinéa premier de l'article 91 ci-dessus constitue un titre exécutoire, sauf transaction dans les conditions prévues par la présente loi ou saisine de la commission centrale visée à l'article 96 ci-après.

Article 95

Il n'est pas prévu de sursis en matière de sanctions administratives.

Article 96

Un recours est ouvert, devant une commission centrale, au contrevenant sanctionné par application du paragraphe 2 du premier alinéa de l'article 91 ci-dessus d'une amende comportant paiement, à la fois, d'une somme calculée sur la base de son chiffre d'affaires

et des sommes indûment perçues par lui pendant la durée de l'infraction.

La commission centrale précitée est composée de représentants de l'administration et peut s'adjoindre dans chaque affaire, à titre consultatif, toute personne qualifiée.

Le recours fait l'objet d'une requête adressée, par lettre recommandée, au président de la commission et doit contenir un exposé des moyens invoqués par le contrevenant à l'appui de ses conclusions.

Il doit être exercé dans un délai de trente (30) jours à dater de la notification infligeant le paiement d'une amende, telle que définie au premier alinéa du présent article.

La commission centrale entend le contrevenant ou son mandataire et peut soit confirmer, soit modifier le montant de l'amende. Elle rend sa décision dans les trois mois suivant sa saisine.

La décision est notifiée au contrevenant.

Article 97

À défaut de transaction ou de sanction administrative, transmet le dossier au Procureur du Roi compétent pour la suite judiciaire à donner.

Article 98

Dès le prononcé d'une condamnation, avis en est donné par le Procureur du Roi ou le Procureur général du Roi. Dès que la condamnation est irrévocable, un extrait du jugement ou de l'arrêt est adressé sans frais par le Procureur du Roi ou le Procureur général du Roi.

Chapitre II Dispositions diverses

Article 99

Les associations de consommateurs reconnues d'utilité publique peuvent se constituer partie civile ou obtenir réparation sur la base d'une action civile indépendante du préjudice subi par les consommateurs.

Article 100

Tous les délais prévus par la présente loi sont des délais francs.

Article 101

Sont abrogées les dispositions :

- De la loi No 008-71 du 21 cha'ban 1391 (12 octobre 1971) sur la réglementation et le contrôle des prix et les conditions de détention et de vente des produits et marchandises, telle qu'elle a été modifiée et complétée;
- Des articles 289, 290 et 291 du Code pénal.

Toutefois, demeurent en vigueur les textes pris pour l'application de la

loi No 008-71 précitée, dans la mesure où ils ne contredisent pas les dispositions de la présente loi et ce jusqu'à leur abrogation.

Article 102

Les références aux dispositions abrogées par l'article 101, contenues dans les textes législatifs ou réglementaires en vigueur s'appliquent aux dispositions correspondantes édictées par la présente loi.

Article 103

La présente loi entrera en vigueur à compter de la date de sa publication au *Bulletin officiel*.

NEW ZEALAND

COMMENTARY BY THE GOVERNMENT OF NEW ZEALAND ON NEW ZEALAND'S COMPETITION LEGISLATION

A. Reasons for the introduction of the legislation

New Zealand's primary competition laws were enacted in 1986, but there have been a variety of such laws since 1905. Between 1958 and 1986 the trade practices law was based primarily on United Kingdom legislation. This type of legislation was formalistic, consisting of lists of practices that could be investigated, and generally only preventing those considered contrary to the public interest.

A change of approach was made with the enactment of the Commerce Act 1986 and the Fair Trading Act 1986. These Acts were developed during a period of wide ranging reforms designed to increase the competitiveness and efficiency of the New Zealand economy by reducing government control and direct regulation of business activity. The aim of the legislation was to ensure that private regulation did not replace the recently removed public regulation of markets.

The new approach was to avoid industry-specific regulations as much as possible and to rely on general rules that apply across all sectors. The Commerce Act has general prohibitions on arrangements or practices that have an anticompetitive purpose or effect. The Fair Trading Act contains provisions relating to deceptive conduct, unfair practices, and standards for safety and consumer information.

B. Objectives of the legislation

The objective of the Commerce Act 1986 is to promote competition in markets in New Zealand for the long term benefit of consumers. It seeks to achieve this objective through legislation which:

- prohibits the establishment or operation of business arrangements which substantially lessen competition;
- prohibits firms from taking advantage of a substantial degree of market power for anticompetitive purposes;
- provides for the scrutiny of mergers and takeovers to prevent a substantial lessening of competition; and,
- provides for price control in markets where there is an absence of competition.

The Act has a presumption in favour of competition because pro-competitive practices usually increase efficiency and therefore increase overall consumer welfare. However, practices can be authorised if it is shown that there are public benefits that outweigh the anticompetitive detriments.

The objective of the Fair Trading Act is to ensure that consumers receive appropriate and accurate information that they need to make informed choices, which are

a necessary prerequisite to competition in the marketplace. The Act also protects ethical traders, as such traders are detrimentally affected when their competitors engage in deceptive or unfair trading practices.

C. Practices subject to control

(i) Restrictive Trade Practices

Sections 27 and 28 in Part II of the Commerce Act prohibit contracts, arrangements, or understandings that have the purpose, effect or likely effect of substantially lessening competition.

Section 29 prohibits contracts, arrangements, or understandings between competitors that contain exclusionary provisions unless it can be shown that the provision does not substantially lessen competition. Contracts, arrangements, or understandings that fix, control, or maintain the prices of goods or services are deemed to substantially lessen competition by sections 30 and 34. Sections 37 and 38 prohibit resale price maintenance.

Any of these anticompetitive arrangements may be authorised by the Commerce Commission if it is shown that the public benefits outweigh the anticompetitive detriments.

Section 36 provides that no person who has a substantial degree of market power shall take advantage of that power for the purpose of restricting entry into a market, preventing or deterring any person from engaging in competitive conduct in a market, or eliminating any person from a market. Such conduct can not be authorised.

Part II of the Commerce Act does not contain prohibitions against monopolisation. Monopoly power is permitted, but anticompetitive use of that power is not.

Sanctions for contraventions of the restrictive trade practice provisions include:

- pecuniary penalties of up to \$10 million or 3 times the illegal gain for bodies corporate, and up to \$500,000 on an individual (who may not be indemnified in respect of those penalties in the case of contraventions of section 30);
- injunctions or cease and desist orders restraining companies or individuals from conduct that breaches the Act; and
- awards of compensatory and exemplary damages to any person who has suffered loss or damage by a breach of the Act.

(ii) Business Acquisitions

Acquisitions of shares or assets of a business are prohibited under Part III of the Commerce Act if the transaction has the effect, or would be likely to have the effect, of substantially lessening competition.

The Act provides a system of voluntary pre-notification of business acquisitions. Parties may apply to the Commerce Commission for a clearance or authorisation before proceeding with a business acquisition. A clearance confirms that the acquisition will not result in substantially lessening competition. An authorisation allows anticompetitive

acquisitions that result in net benefits to the public. The Commission has 10 working days in which to decline or grant a clearance, and 60 working days to decline or grant an authorisation. These timeframes may be extended with the agreement of the applicant and the Commerce Commission.

Failure to gain a clearance or an authorisation does not make implementation of an acquisition unlawful, but will mean that it may be subject to legal challenge by the Commission or third parties.

Sanctions for contraventions of Part III of the Act include:

- pecuniary penalties of up to \$5 million for bodies corporate and up to \$500,000 for an individual;
- injunctions or cease and desist orders to prevent acquisitions from taking place;
- orders for a person or company to divest specified assets or shares; and
- awards of compensatory damages to any person who has suffered loss or damage for breaches of the Act.

(iii) Consumer Protection

The Fair Trading Act 1986 prohibits misleading or deceptive conduct, false representations, unfair practices and substandard goods and services. The prohibitions are not limited to dealings with consumers but also include transactions between businesses.

The main provisions are the following:

- people in trade are prohibited from engaging in misleading or deceptive conduct generally (section 9);
- certain types of false or misleading representations are prohibited, including about employment (section 12), goods or services, including false claims that goods or services are of a particular price, standard, quality, origin or history or that they have particular uses or benefits or that they have any particular endorsement or approval (section 13);
- certain unfair trading practices are prohibited, including pyramid selling, referral selling, and bait advertising (sections 17 to 24); and
- consumer information and product safety standards are specified (sections 27 to 33).

Breach of the Fair Trading Act may result in a fine, injunction or awards of compensatory damages. The Courts may also order corrective advertising or statements at the expense of the person or company that breached the Act. Other civil orders may be made declaring any contract or part of a contract to be void, varying a contract, or directing a person to refund money or to pay compensation.

D. Scope of the application of the legislation

(i) Liable Persons

Section 3(1A) provides that the Commerce Act applies to markets in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

Penalties, damages, or injunctions may be sought against persons who contravene the decisions relating to restrictive trade practices and business acquisitions.

Penalties, damages, or injections may also be sought against those persons who aid, abet, counsel, induce or attempt to induce, or conspire with, or are in any way, directly or indirectly, knowingly concerned in or are a party to a contravention by another person.

(ii) Exemptions

Application to the Crown is limited to instances where the Crown engages in trade, except that the Crown shall not be liable to pay a pecuniary penalty and shall not be liable to be prosecuted for an offence under the Act.

Practices which are specifically authorised by other statutes or by orders in council are exempted from the trade practices prohibitions in Part II of the Commerce Act. In addition, there are exemptions for agreements restricting competition between partners; agreements between interconnected bodies corporate; agreements to protect the goodwill of a business being sold; agreements to comply with product quality standards; agreements relating to remuneration, conditions of employment, hours of work, or working conditions of employees; agreements relating exclusively to exports from New Zealand; and actions undertaken by groups of consumers.

Further exemptions apply to provisions relating exclusively to the carriage of goods to and from New Zealand by sea, and to conduct in accordance with a statutory intellectual property right.

(iii) Extra-territorial Application

Section 4 of the Commerce Act extends the application of the Act to any conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

There are also specific provisions extending the application of the Act to trans-Tasman abuses of market power. These provisions reflect a Closer Economic Relations agreement between New Zealand and Australia, which has led to the dismantling of most government-imposed barriers to trade between the countries. Accordingly, there is an increasing volume of trans-Tasman trade and business acquisitions that have effects on the competitive process in both countries.

The legislation provides for cooperation between the Commerce Commission and the Australian Trade Practices Commission in relation to the investigation of anticompetitive conduct occurring in one country and affecting a market for goods in the other country. Under sections 98H(2) and 99A of the Commerce Act the two Commissions may receive information and documents on behalf of each other. The

Evidence Act 1908, the Judicature Act 1908, and the Reciprocal Enforcement of Judgments Act 1934 have been amended to allow the courts in each country to assist the other in hearing cases relating to anticompetitive practices. The Australian courts can serve subpoenas in New Zealand, and vice-versa. Submissions to the court can be made by video-link or telephone, and judgments, orders, and injunctions are readily enforceable by either court. In addition, the relevant court will be able to sit in the other country in appropriate cases.

(iv) Existence and Effect of Agreements

The provisions prohibiting practices that substantially lessen competition generally refer to contracts, arrangements, and understandings. A “contract” means an agreement enforceable at law. “Arrangements and understandings” describe something less than a formal contract, such as an arranged plan which may not be enforceable at law.

Two elements are required – there must be a “meeting of minds”, shown by some form of communication between the parties, and some indication of intention or expectation to act in a certain way. Conduct is an important indicator, and may include evidence of parallel conduct, similar pricing structures, joint action, opportunities for the parties to reach an understanding (such as industry meetings), or evidence of collusion between the parties.

E. Enforcement machinery

Public enforcement of competition law is the responsibility of the Commerce Commission. The Commission may initiate an investigation into an alleged breach of the Commerce Act either following a complaint or as a result of its own surveillance activities. Investigations are similar to criminal enquiries.

The Commission has the following investigation powers:

- power to obtain information by requiring persons to furnish in writing certain information, to produce certain documents; or to appear before the Commission to give evidence;
- power to obtain and execute search warrants and to require assistance to locate the information required; and
- power to impose a confidentiality order.

Once an investigation has been concluded, and a breach has been found, the Commission has a number of enforcement options available to it to assist in achieving compliance. The Commission may:

- issue a warning;
- administratively settle with the party or parties who must agree to modify their behaviour and provide formal signed undertakings to this effect;
- seek an injunction or impose a cease and desist order restraining any person from activities that breach the Act; or

- initiate proceedings in the High Court.

Private individuals or bodies corporate may also take action in the High Court against breaches of the Commerce Act.

Commerce Act cases are civil proceedings. The High Court is empowered to receive statements, documents and information in evidence that would not otherwise be admissible where such evidence may assist the Court to deal effectively with the matter. In certain cases, High Court decisions can be appealed to the Court of Appeal.

F. Parallel and supplementary legislation

(i) Controlled goods or services

Parts IV and V of the Commerce Act provide for goods and services to be subject to price control. If any goods or services are declared to be controlled, the Commerce Commission may authorise the supply or acquisition of those goods or services subject to price, revenue or quality measures.

Part IVA of the Act provides for the Commerce Commission to impose price control on large electricity lines businesses on its own initiative, rather than make a recommendation to the Minister of Commerce. The Commission is to decide on thresholds for imposing price control for large electricity lines businesses. In addition, the Commission must check disclosed asset values of electricity lines businesses and conduct a review of the valuation methodologies, which is currently optimized deprival value.

(ii) Essential facilities

New Zealand primarily relies on the Commerce Act 1986 to regulate access to essential facilities. The Act is complemented by industry-specific information disclosure regulations designed to make transparent the performance of businesses with market power, and the threat of heavier handed regulation, such as price control, if monopoly power is abused.

There is however industry specific regulation in a number of sectors. The Electricity Industry Reform Act 1998 provides for the restructure of the electricity industry to facilitate competition and restrict relationships between electricity lines and supply businesses that may not be at arms length.

The Electricity Industry Act 2001 is primarily aimed at encouraging the electricity industry to develop its own solutions to ensure that electricity is delivered in an efficient, fair, reliable and environmentally sustainable manner to all consumers. However, if the industry fails to meet these objectives, the Act provides for the government to intervene and regulate to impose requirements. The regulation that may be imposed is wide reaching, and includes the establishment of an Electricity Governance Board which may make rules over the operation of electricity markets.

Further specific regulation in the telecommunications sector is pending.

(iii) International Co-operation

As a Member of the O.E.C.D., New Zealand complies with the 1986 Recommendations on international co-operation relating to the notification of investigations or proceeding to other Member countries if their interest may be affected. The criteria are whether an investigation or proceeding relates to the conduct of a person resident or carrying business in another member country, or whether the conduct is likely to have an effect on competition in a market in another member country.

G. Further information

Requests for further information should be sent to:

The Director
Competition and Enterprise Branch
Ministry of Economic Development
P.O. Box 1473
Wellington
New Zealand

Phone No. (644) 472 0030
Fax No. (644) 499 1791
website: med.govt.nz

or to the:

Commerce Commission
P.O. Box 2351
Wellington
New Zealand

Phone No. (644) 471 0180
Fax No. (644) 471 0771
website: comcom.govt.nz

Publications

The Commerce Commission publishes brochures and pamphlets relating to the operation of the Commerce Act and the Fair Trading Act. Further information is available on the Commission website www.comcom.govt.nz.

The analysis below of the Commerce Act 1986 and the Fair Trading Act 1986, as well as texts of these acts and of appropriate amendments acts are available at the Internet website <http://www.knowledge-basket.co.nz>.

COMMERCE ACT 1986 005

Commenced: 1 May 1986

ANALYSIS

Analysis

Title

1 Short Title and commencement

2 Interpretation

3 Certain terms defined in relation to competition

4 Application of Act to conduct outside New Zealand

5 Application of Act to the Crown

6 Application of Act to Crown corporations

7 Law relating to restraint of trade and breaches of confidence not affected

I: The Commerce Commission

8 Establishment of Commission

9 Membership of Commission

10 Terms and conditions of appointment

11 Associate members

12 Deputy Chairman and acting Deputy Chairman

13 Termination of appointment of members

14 Disclosure of financial interests

15 Meetings of Commission

16 Chairman may direct Commission to sit in Divisions

17 Assent to determination

18 Officers of Commission

19 Money to be appropriated by Parliament for purposes of this Act

20 Funds of Commission

21 Bank accounts

22 Accounts and audit

23 Investment of money

24 Exemption from income tax

25 Functions of Commission in relation to dissemination of information

26 Commission to have regard to economic policies of Government

II: Restrictive Trade Practices

Practices Substantially Lessening Competition

27 Contracts, arrangements, or understandings substantially lessening competition prohibited

28 Covenants substantially lessening competition prohibited

29 Contracts, arrangements, or understandings containing exclusionary provisions prohibited

Price Fixing

30 Certain provisions of contracts, etc., with respect to prices deemed to substantially lessen competition

31 Joint venture pricing exempt from application of section 30

32 Certain recommendations as to prices for goods and services exempt from application of section 30

33 Joint buying and promotion arrangements exempt from application of section 30

34 Certain provisions of covenants with respect to prices deemed to substantially lessen competition

Practices Substantially Lessening Competition Conditional Upon Authorisation

35 Contracts or covenants subject to authorisation not prohibited under certain conditions

Use of Dominant Position in a Market

36 Use of dominant position in a market

Resale Price Maintenance

37 Resale price maintenance by suppliers prohibited

38 Resale price maintenance by others prohibited

39 Recommended prices

40 Withholding the supply of goods

41 Preventing the supply of goods

42 Special evidentiary provisions in respect of certain resale price maintenance practices

43 Statutory exceptions

44 Other exceptions

45 Exceptions in relation to copyright, patents, plant varieties, registered designs, and trade marks

46 Saving in respect of mergers or takeovers

III: Mergers and Takeovers

47 "Merger or takeover proposal" defined

48 Certain other terms defined

49 Application to building societies

50 Certain merger or takeover proposals require clearance or authorisation

51 Contracts subject to condition of clearance or authorisation

IV: Control of Prices

Declaration of Price Control

- 52 "Controlled goods or services" defined
- 53 Governor-General may impose price control in circumstances of restricted competition
- 54 Commission may report to Minister as to price control

Authorised Prices for Controlled Goods or Services

- 55 Controlled goods or services not to be supplied except in accordance with authorised price

Miscellaneous Provisions

- 56 Records to be kept for pricing purposes
- 57 Other Acts relating to price control not affected

V: Authorisations and Clearances

Restrictive Trade Practices

- 58 Commission may grant authorisation for certain restrictive trade practices
- 59 Authorisation not to be granted in relation to contracts, etc., made before determination by Commission
- 60 Procedure for applications for authorisation of restrictive trade practices
- 61 Determination of applications for authorisation of restrictive trade practices
- 62 Commission to prepare draft determination in relation to restrictive trade practices
- 63 Commission may grant provisional authorisation
- 64 Procedure at conference
- 65 Commission may vary or revoke authorisations

Merger or Takeover Proposals

- 66 Commission may grant clearances or authorisations for merger or takeover proposals
- 67 Commission may grant clearance or authorisation of merger or takeover proposal which has been implemented
- 68 Conferences in relation to merger or takeover proposals
- 69 Clearances and authorisations of mergers and takeover proposals to be notified to New Zealand Stock Exchange

Authorisation of Prices for Controlled Goods or Services

- 70 Authorised prices for controlled goods or services to be determined by Commission
- 71 Commission may authorise provisional price
- 72 Alternative undertakings as to prices of controlled goods or services
- 73 Considerations to be observed by Commission
- 74 Conferences in relation to authorisation of price for controlled goods or services

VI: Enforcement, Remedies, and Appeals

Jurisdiction of Courts

- 75 Jurisdiction of High Court
- 76 Jurisdiction of District Courts
- 77 Additional lay members of High Court for purposes of appellate jurisdiction in respect of Commission determinations
- 78 Lay members of High Court in certain cases
- 79 Evidence not otherwise admissible

Restrictive Trade Practices

- 80 Pecuniary penalties
- 81 Injunctions may be granted by Court for contravention of Part II
- 82 Actions for damages for contravention or Part II

Mergers and Takeovers

- 83 Contravention of section 50 an offence
- 84 Injunctions may be granted by Court for contravention of Part III
- 85 Court may order divestiture of assets in respect of contravention of Part III

Control of Prices

- 86 Contravention of section 55 an offence
- 87 Injunctions may be granted by Court for contravention of Part IV

Injunctions Generally

- 88 General provisions relating to granting of injunctions
- 89 Other orders
- 90 Conduct by servants or agents

Appeals From Determinations of Commission

- 91 Appeals in relation to determinations by Commission
- 92 Persons entitled to appeal
- 93 Determination of appeals
- 94 Court may refer appeals back for reconsideration
- 95 Provisions pending determination of appeal
- 96 Court may order proceedings to be heard in private
- 97 Appeal to Court of Appeal in certain cases

VII: Miscellaneous Provisions

- 98 Powers to obtain information, documents, and evidence
- 99 Powers of Commission to take evidence

- 100 Powers of Commission to prohibit disclosure of information, documents, and evidence
- 101 Notices
- 102 Service of notices
- 103 Failure to comply with notices, etc.
- 104 Determinations of Commission
- 105 Delegation by Commission
- 106 Proceedings privileged
- 107 Annual report
- 108 Regulations
- 109 Commission may prescribe forms
- 110 Repeals, revocations, savings, and consequential amendments
- 111 Transitional provisions in respect of certain contracts, arrangements, or understandings
- 112 Transitional provisions in respect of goods and services subject to price control under Commerce Act 1975
- 113 Transitional provisions in respect of goods and services subject to price restraint under regulations made under Commerce Act 1975
- 114 Transitional provisions in respect of milk pricing
- 115 Savings in respect of certain provisions of Commerce Act 1975
- 116 Winding up of Commerce Commission established under Commerce Act 1975
- 117 Members of Commerce Commission established under Commerce Act 1975 deemed to be members of Commission
- 118 Lay members of Administrative Division of High Court appointed pursuant to Commerce Act 1975 deemed to be lay members of Administrative Division of High Court appointed under this Act

Schedule(s)

- 1 FIRST SCHEDULE: Classes of Merger or Takeover Proposals Requiring Prior Clearance or Authorisation by the Commission
- 2 SECOND SCHEDULE: Enactments Amended
- 3 THIRD SCHEDULE: Enactments Repealed
- 4 FOURTH SCHEDULE: Orders and Notices Revoked

Fair Trading Act 1986 121

Commenced: 1 Mar 1987

ANALYSIS

Analysis

Title

- 1 Short Title and commencement
- 2 Interpretation
- 3 Application of Act to conduct outside New Zealand
- 4 Application of Act to the Crown
- 5 Application of Act to Crown corporations
- 6 Functions of Commission in relation to dissemination of information
- 7 Money to be appropriated by Parliament for purposes of this Act
- 8 Annual report

I: Misleading and Deceptive Conduct, False Representations, and Unfair Practices

Misleading and Deceptive Conduct

- 9 Misleading and deceptive conduct generally
- 10 Misleading conduct in relation to goods
- 11 Misleading conduct in relation to services
- 12 Misleading conduct in relation to employment

False Representations

- 13 False representations
- 14 False representations and other misleading conduct in relation to land
- 15 Limited application of sections 9 to 14 of this Act to news media
- 16 Certain conduct in relation to trade marks prohibited

Unfair Practices

- 17 Offering gifts and prizes
- 18 Trading stamp schemes prohibited
- 19 Bait advertising
- 20 Referral selling
- 21 Demanding or accepting payment without intending to supply as ordered
- 22 Misleading representations about certain business activities
- 23 Harassment and coercion
- 24 Pyramid selling schemes
- 25 Provisions of this Part of this Act not limited by reference to other provisions of this Part of this Act
- 26 Importation of goods bearing false trade description or false trade mark prohibited

II: Consumer Information

- 27 Consumer information standards
- 28 Standards may be declared to be consumer information standards

III: Product Safety

- 29 Product safety standards
- 30 Standards may be declared to be product safety standards
- 31 Unsafe goods
- 32 Compulsory product recall
- 33 Importation of certain goods prohibited

IV: Safety of Services

- 34 Meaning of "services"
- 35 Safety standards in respect of services
- 36 Standards may be declared to be services safety standards

V: Enforcement and Remedies

Jurisdiction of Courts

- 37 Jurisdiction of High Court
- 38 Jurisdiction of District Courts
- 39 Jurisdiction of Small Claims Tribunals

Offences

- 40 Contraventions of provisions of Part I, Part II, Part III, and Part IV an offence

Civil Proceedings

- 41 Injunctions may be granted by Court for contravention of Part I, Part II, Part III, and Part IV
- 42 Order to disclose information or publish advertisement
- 43 Other orders
- 44 Defences
- 45 Conduct by servants or agents
- 46 Finding in proceedings to be evidence

VI: Miscellaneous Provisions

- 47 Powers to obtain documents and inspect goods
- 48 Proceedings privileged
- 49 Repeals and consequential amendments
- 50 Saving of other laws

Schedule(s)

- 1 FIRST SCHEDULE: Enactment Amended
- 2 SECOND SCHEDULE: Enactments Repealed
- 3 THIRD SCHEDULE: Orders and Notices Revoked

POLAND

COMMENTARY OF THE GOVERNMENT OF POLAND ON THE POLISH COMPETITION LEGISLATION

A. Description of the reasons for the introduction of the legislation.

The end of the 1980s marked the fall of the communism and put an end to centrally planned economies in a number of central European countries; it also heralded the beginning of the transformation process.

In 1990, Poland adopted the so-called “Balcerowicz Plan”, which contained a range of measures aimed at the rapid transformation of the Polish economy into a system based on the principle of free and competitive market.

From the very beginning of the transformation period, the implementation of sound and fully enforceable competition policy was perceived as an indispensable step on the road to a free and competitive markets.

Apart from the principles of the “Balcerowicz Plan”, the introduction of the competition policy in Poland was also one of the several steps taking place in the broader context of the gradual liberalization of the Polish economy, which was also launched in the early 1980s. Before 1990, the liberalization process was very mild and affected only the chosen sectors (i.e. internal trade, food services, tourist services and crafts).

The successful introduction of a competition policy into the Polish economic life would not be possible without a sound and enforceable competition law.

The **Law on Counteracting Monopolistic Practices in National Economy** was adopted on 28 January 1987. This Act was an interim solution as it did not cover every aspect of competition policy - its main focus was rather on anti-competitive practices. Simultaneously, drafting began of the new fully-fledged competition law has begun.

A new competition law was introduced in 1990.¹² To a large extent, the 1990 Act followed standard European competition concepts, as it covered the three main areas of competition policy: i.e. anti-competitive agreements; abuse of dominant position; and control of concentrations. However, it included some features which were designed to address Poland’s specific needs stemming from the transformation process.

The 1990 Act served as the backbone of Polish competition policy in the decade that followed. However, in 1998 work began on a new competition act as Poland began to prepare to accede to the EU — a development that made it necessary to align Polish law with the *acquis communautaire*, as well to respond to changes occurring in a maturing Polish economy. The new **Act on Competition and Consumer Protection** was adopted by the Polish Parliament on 15 December 2000 (‘2000 Act’); this Act now provides the legal framework for the enforcement of the Polish competition policy.

¹² Act of February 24, 1990, on Counteracting Monopolistic Practices and Protection of Consumers’ Interests (‘1990 Act’).

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation.

The ultimate goal of Polish competition policy is “*to provide for the conditions necessary for the development of unrestrained, competitive and equal relationships among the economic actors*”.¹³ This objective needed to be pursued “*as free and unrestrained competition is one of the indispensable pillars of every economic system based on principle of free market and high economic effectiveness*”.¹⁴

Poland's competition policy was aimed at:

- reinforcing competition in structurally uncompetitive sectors;
- supervising the concentration level of the Polish economy;
- strengthening the role of competition in Polish economic life;
- limiting economic distortions caused by state aid; and
- promoting the rules for fair competition, as well as the economic freedom of choice among Polish market players.

In Poland, this policy was closely linked to the country's consumer protection policy, as both of them fall within the jurisdiction of the Office for Competition and Consumers' Protection (OCCP), thereby combining the economic nature of the competition act with some of the social goals of the consumers' protection policy, for example:

- improving consumer health and economic security;
- expanding consumer choice;
- dealing with the social costs of consumption, i.e. the externalities of the market process.

In conclusion, the general rationale behind the situation depicted above is the OCCP's recognition of the **long-term consistency between competition policy goals and the protecting the interests of consumers.**

Two distinct levels have evolved with regard to the objectives set in Polish competition law.

Throughout the 1990s the responsibilities of the OCCP were broadened on a regular basis; the most important change occurred in 1996 when it was given the responsibility for consumer protection policy and, in 2000, broader powers in the area of state aid surveillance. One of the side-effects of this process was the need to align competition policy objectives with the newly incorporated objectives.

¹³ Outlines for the Polish Competition Policy for the years 2002-2003, Office for the Competition and Consumers' Protection, Warsaw 2001 (Section IV).

¹⁴ *Ibid.*

The second driving force behind these changes in Poland's competition policies was the economic transition was experiencing. At the beginning of the 1990s, the overwhelming majority of OCCP's actions dealt with the control of concentration and privatization issues. Later on, as Polish markets liberalized and the economy as a whole gradually matured, the competition law objectives evolved in order to keep up with the new developments.

C. Description of the practices, acts or behaviour subject to control, indicating for each:

- (a) **The type of control – for example, outright prohibition, prohibition in principle or examination on a case-by-case basis;**

Generally speaking, there are three kinds economic activities which fall within the scope of Polish competition law, these are:

Anti-competitive practices (with the exception of the abuse of dominant position)

In Polish jurisdiction anti-competitive practices are **prohibited in principle**.

By virtue of 2000 Act all “*agreements, which have as their object or effect elimination, restriction or any other infringement of competition on the relevant market shall be prohibited*”.¹⁵ The Act in question specifies what is covered by the term “agreement”, namely:

- **agreements** concluded between entrepreneurs, between their associations or certain provisions of such agreements;
- **concerted practices** undertaken in any form by two or more entrepreneurs or their associations;
- **resolutions or other acts** of the associations of entrepreneurs or their statutory organs.¹⁶

The same law states that all such agreements shall be made “*in their entirety or in the respective part null and void*”.¹⁷

However, the above prohibition **does not refer to agreements of minor importance**¹⁸ e.g., horizontal agreements in which the combined market share of the parties does not exceed 5% and vertical agreements where combined market share does not exceed 10%).¹⁹

In addition to the above *de minimis* rule, the 2000 Act provides the Council of Ministers with the right to **block exempt** certain categories of practices whenever they “*contribute to improvement of the production, distribution of products or to technical or*

¹⁵ Article 5.1 (if not stated otherwise all articles refer to the currently binding 2000 Act).

¹⁶ Article 4.4.

¹⁷ Article 5.2.

¹⁸ Article 6.1.

¹⁹ The market share is calculated, based on the year preceding the calendar year in which such agreement is concluded.

economic progress and ensure to the buyer or user fair share of benefits resulting thereof.”²⁰

Furthermore, the above practices may not “*impose upon the entrepreneurs concerned, restrictions which are not indispensable to the achievement of these objectives*”.²¹ Likewise, they may not “*afford these entrepreneurs the possibility to eliminate competition on the relevant market in respect of a substantial part of the products in question.*”²²

"Block-exempted" agreements fall into five categories, namely:²³

- technology transfer agreements;
- vertical agreements;
- R&D agreements;
- specialization agreements;
- insurance sector agreements; and
- automotive sector agreements.

The President of the OCCP may also issue a decision exempting a specific practice not covered by any existing block-exemption regulations, although the practice must fulfill the same criteria as practices exempted by the regulations.²⁴

Concentration Control

The control of concentration also falls into the category of behaviours which are **prohibited in principle**.

Article 19.1 of the 2000 Act states that the President of the OCCP “*shall prohibit, by way of a decision, to perform the concentration which results in creation or strengthening of a dominant position, in consequence of which the competition on the market would be significantly restricted*”.

Anti-competitive concentration may however be allowed, whenever it “*contributes to the economic development or technical progress*” or “*it may have a favourable impact on the national economy.*”²⁵

This prohibition only covers a small fraction of all the concentration agreements which are concluded each year in Poland. This is due to the **notification procedure**, which sets clear the criteria of the obligation to notify the intended concentration to the

²⁰ Article 7.1.

²¹ Article 7.1.1.

²² Article 7.1.2.

²³ For the detailed list of block exemption regulations issued by the Council of Ministers, please refer to the bibliography listed in section H (a).

²⁴ Article 11.2.

²⁵ Article 19.2.

OCCP. Only those concentrations are notified which might threaten competition on their relevant markets.

The concentration agreement shall be notified whenever “*the combined turnover of the entrepreneurs participating in the concentration exceeds 50 million EURO in the fiscal year preceding the year of the notification.*”²⁶ In that case, however, agreement may still be excluded from notification obligation:

- if in case of acquisition the turnover of the passive party did not exceed 10 million EURO within the territory of the Republic of Poland during any of two fiscal years preceding the notification; or
- if the combined market share of entrepreneurs intending to concentrate does not exceed 20%; or
- if the temporary acquisition has been carried out by the financial institution within the framework of its normal activities (i.e. investing in stocks and shares on its own account or on the account of the others), with a purpose of reselling the acquired assets²⁷; or
- if the temporary acquisition has been carried out by the entrepreneur in order to secure the liabilities (though the entrepreneur may not execute any rights on the acquired stock bar the right to sale); or
- if the acquisition has been carried out as a result of the bankruptcy proceeding (the buyer of the firm may not however be its competitor nor belong to the competing capital group); or
- if the merger occurs within a single capital group.²⁸

Abuse of dominant position

Polish competition law **explicitly forbids** any form of anti-competitive behaviour by market player holding a dominant position. Article 8.1 states that: “*the abuse of a dominant position on the relevant market by one or more entrepreneurs shall be prohibited.*”

Moreover, by virtue of the Article 8.3, any “*legal actions, which constitute abuse of a dominant position shall be in their entirety or in the respective part null and void*”.

Case-by-Case approach

Under Polish legislation, a **case-by-case approach does not qualify as an independent type of control**. However it does play a very important role as it is employed for all the proceedings carried out by the OCCP in cases of prohibition in principle and outright prohibition.

²⁶ Article 12.1.

²⁷ In such cases, however, the resale must occur within one year of the purchase date, at which time the asset holder may not execute any rights on possessed stock other than those necessary for facilitating the resale.

²⁸ Enumeration based on Articles 13.1 – 13.6.

- (b) *The extent to which practices, acts or behaviours in section D, paragraphs 3 and 4, of the "Set of Principles and Rules" are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example controls concerning misleading advertising.*

Technically speaking, none of the practices enumerated in Section D, paragraphs 3 and 4 of the "Set of Rules and Principles" are excluded from the scope of Poland's competition law. This is explained by the fact that the 2000 Act establishes an **open catalogue** of anti-competitive practices, which is constantly expanded through the outcomes of OCCP's investigations.

However, the geographic scope of Polish competition law is limited only to the territory of the Republic of Poland. Therefore, the 2000 Act does not provide any grounds for special consideration in regard of "*adverse effects*", that the scrutinized practice might have on "*international trade particularly that of the developing countries and on economic development of these countries*", as described in UNCTAD's Set of Principles and Rules on Competition (Section D, § 3 and 4).

In conclusion, the practices in question are fully covered by Polish competition law whenever they affect Polish territory.

The additional practices mentioned in the second part of the question are regulated by the **Act of 16 April 1993, on Combating Unfair Competition** (1993 Act), which states that "*all actions of the entrepreneur contrary to the existing law, violating at same time the interests of other entrepreneurs or consumers are to be considered as unfair competition*". The law in question, *inter alia*, forbids the following types of practices:²⁹

- false or incorrect enterprise naming;
- false or incorrect indications on a product's place of origin;
- false or incorrect product branding;
- abuse of enterprise business confidential information;
- production and distribution of copy-cat products;
- limiting the access of third parties to the market;
- bribing public servants;
- misleading advertising; and
- coercing third parties into terminating a contract.

The above list enumerates only those practices applying to whole economy, but the 1993 Act also prohibits a number of sector-specific practices.

²⁹ Article 3.2.

D. Description of the scope of application of the legislation, indicating:

- (a) ***Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;***

Polish Competition Law does not make any distinction between transactions in goods and transactions in services.

As for exclusions, three types provided in Article 3 and 6 of 2000 Act, e.g.:

Exclusions allowed by virtue of separate acts

So far, the only areas of Polish economic activities excluded by virtue of the separate acts is the state lottery and certain areas of agricultural production.

In addition to the ongoing liberalization process temporary exclusions have been established in a certain sectors such as telecommunications, the postal sector, the railways, and air transportation. Most of these exclusions are in the process of being phased out or will be phased out in the near future.

Exclusions based on collective labour agreements

Exclusions based on collective labour agreements have been introduced as a protective measure to cushion the negative impact that liberalization might have on the employment situation in certain sectors.

Exclusions of agreements of minor importance³⁰

An example of this type of exemption is to be found above in section C (a).

- (b) ***Whether it applies to all practices, acts or behaviour having effects on the country in questions, irrespective of where they occur;***

As it has been already stated in section C (b), Polish competition law applies to all: *“competition-restrictive practices and anti-competitive concentrations of entrepreneurs and associations thereof, where such practices or concentrations cause or may cause effects on the territory of the Republic of Poland.”³¹*

- (c) ***Whether it is dependent on the existence of an agreement, or on such agreement being put into effect.***

Under Polish competition law the sole existence of an anti-competitive agreement - even if it not put into practice - is a breach of the law and provides the OCCP with necessary legal grounds to take punitive action.

³⁰ Article 6.

³¹ Article 1.2.

E. Description of the enforcement machinery (administrative and/or judicial), indicating any notification and registration agreements, and principal powers of the body or bodies involved.

Polish law designates two institutions as competition policy enforcers, they are the **Office for Competition and Consumers Protection** and the **Court for Competition and Consumers' Protection**.

Office for Competition and Consumers' Protection (administrative body)

The OCCP forms a part of central public administration. It is headed by a President who is chosen by an independent panel of experts. The President is nominated by the Prime Minister for the period of five years and reports directly to him. The President is the principal decision maker and the OCCP plays a supportive role. The Act in 2000 gives the President to power to:

- enforce Polish competition law;
- monitor concentration level of the Polish economy;
- design or provide advice on any legal acts which even partially fall into the scope of the competition policy;
- prepare governmental programmes on the development of competition policy;
- *ex-ante* advisory capacity regarding any anti-dumping measures undertaken by the Ministry of Economy;
- cooperation with foreign and domestic institutions in the area of competition protection.

The OCCP has nine regional branches in addition to its headquarters in Warsaw. OCCP Directors are empowered to launch investigations and issue decisions on behalf of its President.

Investigations are held in two stages, namely an **explanatory investigation** and **anti-monopoly investigation**.³² The latter is usually launched once it has been established that an infringement has been determined at the explanatory investigation stage (except in the case of concentration cases).³³

³² Article 42.1.

³³ Article 42.2-42.3.

The explanatory investigation can be launched only on an *ex-officio* basis and “should last no longer than 30 days from its institution.”³⁴ The anti-monopoly investigation may be launched *ex-officio* or upon the complaint. Proceedings may last no longer than two months in concentration cases, and cannot exceed four months in antitrust cases. During both types of investigations OCCP's President may:

- request information from the legal or natural persons;³⁵
- hear witnesses;³⁶
- carry out the on-spot inspections (including dawn raids);³⁷
- request information from public administration bodies.³⁸

Upon completion of the anti-monopoly investigation the President takes a decision and can, if necessary impose a fine, which can be appealed by the parties to the Court for Competition and Consumers' Protection within 14 days from the date of receiving the President's decision.³⁹

Court for Competition and Consumers' Protection (judicial body)

The Polish Competition and Consumers' Protection Court has been carved out from the general judiciary in 1990. The Court carries out two tasks.

Firstly, it acts as Court of First Instance and hears the appeals of decisions taken by the President of the OCCP. This court can confirm the President's decision or overrule it entirely or in part. If the court overrules a decision, it can issue a decision of its own, reviewing not only the evidence examined by the OCCP, but also other evidence presented directly to the court.

Secondly, by giving interpretations of law, it plays very important role as a policy maker in the field of competition.

Importantly, in order to ensure a consistent application of policy, the Competition and Consumers Protection Court has the power to hear appeals from sectoral regulators.⁴⁰ The Court's rulings might be appealed only to the Supreme Court.

The appeal system was modified at the end of 2003 in fulfillment of the Constitutional Tribunal's judgment. According to the judgment the appeal to the court of second instance will be made possible so that appeals from the judgments of Competition and Consumers' Protection Court will be heard by the Appeal Court, and appeals (i.e. cassation) from the Appeal Court will be heard by the Supreme Court.

³⁴ Article 43.4.

³⁵ Article 45.

³⁶ Article 56.

³⁷ Articles 57-61.

³⁸ Article 64.

³⁹ Article 78.

⁴⁰ Energy Regulatory Authority, Regulatory Authority for Telecommunications and Post.

This modification will align the appeals system in competition cases with the general appeals system prescribed in other civil cases - Polish civil procedure has a three-tiered instance system, two instances being appeal instances.

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices.

Until 2004, Poland has not signed any foreign cooperation agreements with binding effect on the core competition policy enforcement.⁴¹

There are, however, three pieces of parallel legislation (below), which have fostered OCCP's inter-institutional cooperation:

- Act of 10 April 1997 on Energy Law;
- Act of 21 July 2000 on Telecommunications Law;
- Act of 27 June 1997 on Railroad Transportation.

The above Acts established sectoral regulators ⁴² with whom OCCP cooperates to ensure a constant presence of competition policy principles in regulatory policies, as well as to maintain overall coherence in enforcement of the Polish competition law.

Poland became a member of the European Union in May 2004. This meant that OCCP acquired the status of a fully-fledged member of the European Competition Network (ECN), thereby accepting the obligation to fully cooperate with other members of this body. As an ECN member OCCP is, in certain situations, obliged to apply EU competition law into its proceedings.

G. Description of a major decisions taken by the administrative and/or judicial bodies, and the specific issues covered

Legal Services Sector

The case against the Polish National Notary Council (PNNC) was initiated *ex officio*. The PNNC was charged with anti-competitive practices. The complaint of unfair competition concerned an amendment to the PNNC Code of Ethics to tempt consumers with lower prices. Under Polish law, a notary does not have the right to charge fees above the amounts set by the Ministry of Justice. In practice, however, the amendment to the PNNC Code of Ethics also prohibited charging fees below the level set by the Ministry of Justice.

In response to the charges of the OCCP, PNNC issued a statement saying that the sole reason behind the amendment was to restrain unfair advertisements. On 20 May 2002 the OCCP's President imposed a fine of 36,000 PLN (EUR 8,381) on the PNNC. The PNNC has appealed the OCCP's decision to the Competition and Consumers

⁴¹ All existing cooperation agreements though very useful do not provide grounds for a legal cooperation.

⁴² In case of railroad transportation the regulatory competences rest with the Ministry of infrastructure, though the separate regulator is to be created in the nearby future.

Protection Court, but it has yet to render a judgment on this case.

Gas Distribution Sector

One of the most significant cases heard by the President of the OCCP in 2002 related to a case in the gas distribution sector. On 3 April 2001, Bartimpex filed a complaint against the Polish Oil and Gas Mining Company (PGNiG). The President of the OCCP opened a case against PGNiG to investigate a case of suspected abuse of dominant position.

Bartimpex SA is a major Polish gas trader and recently entered into an agreement with German Ruhrgas Energie Beteiligungs (Ruhrgas) and PGNiG to build a pipeline going across Poland and linking the western European and Russian gas distribution systems.

All three firms signed a letter of intention paving the way for the beginning of works on the above-mentioned investment. PGNiG as a Polish gas supplier and trader with a dominant position in the Polish market, played a vital role in this cooperation scheme as it agreed to send the bulk of its gas exports via the new pipeline.

However, not long after signing the letter of intent PGNiG changed its mind and decided to withdraw from the agreement and, in the process, rendered the whole agreement economically unviable; the other participating parties also abandoned the project.

In its complaint Bartimpex stated that PGNiG's decision clearly breached the Polish Energy Law in which the Third Party Access clause was embedded, thereby imposing on an obligation on PGNiG to provide other market players with the means to enter and effectively operate on the markets, in which PGNiG held a dominant position.

The charges brought by Bartimpex were upheld by the OCCP. On 24 December 2002, the President of the OCCP issued a 'cease and desist' order regarding this practice along with a fine of 105.657 PLN (EUR 24.598).⁴³

Cable TV services sector

On 6 July 2002 the President of the OCCP issued a decision declaring that Aster City Cable TV had abused its dominant position on the relevant market by imposing onerous contract terms on its customers, thereby making an unjustifiably high profit.

Once the investigation was completed charges were brought against the Aster City Cable TV; these covered the lack of formal avenues which the firm's customers could claim damages for not being provided with services (whenever the gap in services providing was shorter than three days); and providing a TV signal of inferior quality.

Aster City Cable TV adjusted its rules in order to comply with the 'cease and desist' order issued by the President of the OCCP.

⁴³ EUR rate published by National Bank of Poland on 07.05.2003: 1 EUR = 4.2953 PLN.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation or particular parts thereof.

(a) Legal Acts

1. Act of 15 December 2000, on Competition and Consumers' Protection (Official Journal No. 122, items 1319).
2. Act of 16 April 1993, on Combating Unfair Competition (O.J. no. 93/47, item 211).

(b) Secondary Legislation

1. Regulation of the Council of Ministers of 28 June 2001, on the calculation of the turnover of entrepreneurs participating in the concentration.
2. Regulation of the Prime Minister of 3 April 2002, on the mode of notifying the intention of concentration by entrepreneurs.
3. Regulation of the Council of Ministers of 18 September 2001 concerning the detailed mode and procedure of inspection of undertakings and association of undertakings in the case of proceedings before the President of the OCCP.
4. Regulation of the Prime Minister of 5 May 2001, on the administrative fees to be paid when filing the motion to institute the proceedings.
5. Regulation of the Prime Minister of 26 March 2002, on the territorial and material jurisdiction of the OCCP Delegations.
6. Regulation of the Prime Minister of 29 March 2001, on the mode and procedure for organizing contest to select the President of the Office for Competition and Consumers Protection.

(c) Block exemptions

1. Regulation of the Council of Ministers of 30 July 2002, on the exemption of certain categories of agreements concluded between entrepreneurs in connection with the performance of insurance activity from the prohibition on competition restrictive agreements.
2. Regulation of the Council of Ministers of 30 July 2002, on the exemption of certain categories of technology transfer agreements from the prohibition on competition restrictive agreements.
3. Regulation of the Council of Ministers of 13 August 2002, on the exemption of certain categories of specialization and research and development agreements from the prohibition on competition restrictive agreements.
4. Regulation of the Council of Ministers of 13 August 2002, on the exemption of certain categories of vertical agreements from the prohibition on competition restrictive agreements.

5. Regulation of the Council of Ministers of 28 January 2003, on the exemption of certain categories of agreements concluded between entrepreneurs operating in the motor vehicle sector from the prohibition on competition restrictive agreements (the regulation will enter into force as of 1 May 2004).

(d) Governmental Publications

1. OCCP: “Prohibition of Anticompetitive Practices” (brochure issued under the aegis of PHARE twining project, available in Polish language only).
2. OCCP: “Preventive Control of Concentration” (brochure issued under the aegis of PHARE twining project, available in Polish language only).
3. OCCP: “How to utilize State aid?” (brochure issued under the aegis of PHARE twining project, available in Polish language only).
4. OCCP: “How to grant State aid?” (brochure issued under the aegis of PHARE twining project, available in Polish language only).
5. OCCP: “Outlines for the Polish Competition Policy for the years 2002-2003”
6. OCCP: Yearly Reports

ACT
of 15 December 2000
ON COMPETITION AND CONSUMER PROTECTION

Title I
GENERAL PROVISIONS

Article 1

1. The Act determines conditions for the development and protection of competition as well as the rules of undertaken in the public interest protection of entrepreneurs' and consumers' interests.
2. The Act governs the rules and measures of counteracting competition restricting practices and anticompetitive concentrations of entrepreneurs and associations thereof, where such practices or concentrations cause or may cause effects on the territory of the Republic of Poland.
3. The Act also defines the authorities competent in competition and consumer protection issues.

Article 2

1. The Act is without prejudice to the rights vested based on provisions concerning protection of intellectual and industrial property rights, in particular provisions on the protection of inventions, decorative and industrial patterns, topography of integrated circuits, trade marks, geographic designations, copyright and neighbouring rights.
2. The Act shall apply to the concluded between entrepreneurs:
 - 1) agreements, in particular licensing agreements, as well as to other than agreements practices of exercising rights referred to in section 1,
 - 2) agreements concerning information undisclosed to the general public related to:
 - a) technical and technological information,
 - b) rules of organisation and management - in relation to which steps were taken in order to prevent their disclosure, where such agreements result in the unjustified limitation of freedom of business activity of the parties or in significant restriction of competition on the market.

Article 3

Provisions of the Act shall not apply to:

- 1) restrictions of competition exempted by virtue of separate legal acts,
- 2) collective labour agreements.

Article 4

For the purpose of this Act the following shall mean:

- 1) entrepreneur - entrepreneur in the meaning of provisions of the act of 19 November 1999 - Law on business activity (O.J.L. of 1999, No 101, item 1178 and of 2000, No.86, item 958) as well as:
 - a) natural and legal person as well as organisational unit without legal status, organising or rendering services of public utility nature, which are not business activity in the meaning of provisions on business activity,
 - b) natural person exercising profession on its own behalf and account or performing activity in the frame of exercising such profession,
 - c) natural person being in a possession of stocks or shares ensuring at least 25% of votes in organs of at least one entrepreneur or having control, in the meaning of item 13, over at least one entrepreneur, even if not conducting business activity in the meaning of provisions on business activity, provided that this person is undertaking further activities subject to control of concentrations referred to in Article 12,
- 2) associations of entrepreneurs - chambers, associations and other organisations associating entrepreneurs referred to under item 1 as well as associations thereof.
- 3) dominant entrepreneur - shall mean the entrepreneur which:
 - a) disposes, directly or indirectly, of the majority of votes at the assembly of partners or at the general assembly, also in the capacity of a depositary or user, or in the managing organ of the other (dependent) entrepreneur, also on the basis of agreements concluded with other persons, or
 - b) is empowered to appoint or recall the majority of members of the management or of the supervisory board of another entrepreneur (dependent) also on the basis of agreements concluded with other persons, or
 - c) more than a half of the members of management of a capital company are at the same time members of management of another entrepreneur (dependent entrepreneur), or
 - d) disposes directly or indirectly of the majority of votes in dependent personal company or at the general assembly of dependent co-operative, also on the basis of agreements concluded with other persons, or
 - e) has a decisive impact on the activities of another (dependent) entrepreneur, in particular pursuant to agreement stipulating managing another (dependent) entrepreneur or remitting by him profit.
- 4) agreements:
 - a) agreements concluded between entrepreneurs, between associations

thereof and between entrepreneurs and their associations or certain provisions of such agreements,

- b) concerted practices undertaken in any form by two or more entrepreneurs or associations thereof,
 - c) resolutions or other acts of the associations of entrepreneurs or their statutory organs,
- 5) distribution agreements - agreements concluded between entrepreneurs acting at the different stages of the economic process aimed at purchase of products for further resale,
 - 6) products - things as well as all forms of energy, securities and other property rights, services as well as construction works,
 - 7) prices - prices including also charges in the nature of prices, profit margins, commissions and mark-ups,
 - 8) relevant market - market of products, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered on the area in which, by reason of their nature and characteristics, existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous,
 - 9) dominant position - position of the entrepreneur which allows him to prevent the efficient competition on the relevant market thus enabling him to act in a significant degree independently from competitors, contracting parties and consumers; it is assumed that entrepreneur holds a dominant position where his market share exceeds 40%,
 - 10) competitors - entrepreneurs which at the same time release or may release for free circulation, purchase or may purchase products on the relevant market,
 - 11) consumer - person who concludes a contract with entrepreneur for the purpose directly unrelated to the business activity,
 - 12) consumer organisations - independent of entrepreneurs and associations thereof social organisations which statutory tasks include protection of consumer interests, provided their tasks do not consist in conducting business activity,
 - 13) taking over the control - any form of direct or indirect acquisition of powers which, individually or jointly, taking into account all legal or factual circumstances, enable to exercise decisive influence upon given entrepreneur or entrepreneurs; in particular, such powers are created by:
 - a) ownership of entirety or part of the property of the entrepreneur,
 - b) rights or agreements according decisive influence upon composition, voting or decisions of the entrepreneur's organs,

- 14) capital group - all entrepreneurs which are directly or indirectly controlled by one entrepreneur,
- 15) income - income attained in the taxation year preceding the day of initiating the proceedings by virtue of the present Act, in the meaning of income tax provisions binding the entrepreneur,
- 16) average salary - average monthly wages within the industry sector in the last month of a quarter preceding the day of issuance of a decision of the President of the Office for Competition and Consumer Protection, published by the President of the Central Bureau for Statistics pursuant to separate provisions.

Title II

PROHIBITION OF COMPETITION RESTRICTING PRACTICES

Chapter I

Prohibition of competition restricting agreements

Article 5

1. The agreements which have as their object or effect elimination, restriction or any other infringement of competition on the relevant market shall be prohibited, in particular those consisting in:
 - 1) fixing, directly or indirectly, prices and other conditions of purchase or sales of products,
 - 2) limiting or controlling production or supply as well as technical development or investments,
 - 3) sharing markets of supply or purchase,
 - 4) application in similar transactions with third parties onerous or not homogenous contract terms, thus creating for these parties diversified conditions of competition,
 - 5) making conclusion of an agreement subject to acceptance or fulfilment by the other party of another performance, having neither substantial nor customary relation with the subject of the agreement,
 - 6) limiting access to the market or eliminating from the market entrepreneurs which are not party to the agreement,
 - 7) fixing conditions of a bid made by entrepreneurs participating in a tender, in particular in relation to the scope of works or price.
2. The agreements referred to in section 1 shall be in their entirety or in the respective part null and void, with the reservation of Articles 6 and 7.

Article 6

1. The prohibition of agreements referred to in Article 5 shall not apply to:
 - 1) agreements concluded between competitors which combined market share in the year preceding calendar year in which such agreement is concluded does not exceed 5%,
 - 2) agreements concluded between entrepreneurs acting at different stages of the economic process which combined market share in the year preceding calendar year in which such agreement is concluded does not exceed 10%.
2. In relation to distribution agreements concluded by the entrepreneur with at least two other entrepreneurs, combined market share of these entrepreneurs referred to in section 1 shall be aggregated.

Article 7

1. The Council of Ministers may, by way of a regulation, exempt from the prohibition stipulated in Article 5 agreements which contribute to improvement of the production, distribution of products or to technical or economic progress and ensure to the buyer or user fair share of benefits resulting thereof, and which:
 - 1) do not impose upon the entrepreneurs concerned restrictions which are not indispensable to the achievement of these objectives,
 - 2) do not afford these entrepreneurs the possibility to eliminate competition on the relevant market in respect of a substantial part of the products in question.
2. In the regulation referred to in section 1, the Council of Ministers shall define:
 - 1) conditions which are to be satisfied for the agreement to be considered exempted from the prohibition,
 - 2) clauses which existence is not considered to infringe Article 5,
 - 3) clauses which existence constitute the infringement of Article 5,
 - 4) period during which the exemption shall apply.

Chapter II

Prohibition of abuse of a dominant position

Article 8

1. The abuse of a dominant position on the relevant market by one or more entrepreneurs shall be prohibited.
2. The abuse of a dominant position may, in particular consist in:
 - 1) direct or indirect imposition of unfair prices, including predatory prices or prices glaringly low, significantly delayed payment terms or other conditions of purchase or sale of products,

- 2) limiting production, supply or technical development to the detriment of contractors or consumers,
 - 3) application in similar transactions with third parties onerous or not homogenous contract terms, thus creating for these parties diversified conditions of competition,
 - 4) making conclusion of the agreement subject to acceptance or fulfilment by the other party of another performance having neither substantial nor customary relation with the subject of agreement,
 - 5) counteracting formation of conditions necessary for emergence or development of the competition,
 - 6) imposition by the entrepreneur of onerous contract conditions, yielding to this entrepreneur unjustified profits,
 - 7) creating for consumers onerous conditions of redress.
3. Legal actions which constitute abuse of a dominant position shall be in their entirety or in the respective part null and void.

Chapter III

Decisions in cases of competition restricting practices

Article 9

The President of the Office for Competition and Consumer Protection, hereinafter referred to as "the President of the Office", shall issue the decision assessing the practice as restricting the competition and ordering to refrain from it where he finds the infringement of the prohibition defined in Article 5 in the scope not exempted pursuant to Articles 6 and 7, or infringement of Article 8.

Article 10

1. The decision referred to in Article 9 shall not be issued if the market behaviour of the entrepreneur or association thereof does no longer infringe the provisions of Article 5 or Article 8, in particular by reason of the permanent decrease of their market share.
2. In the case referred to in section 1, the President of the Office shall issue a decision assessing the practice as restricting competition and shall declare it discontinued.
3. The burden of proof in relation to the circumstances referred to in section 1 shall rest on the entrepreneur or association thereof.

Article 11

1. Where the President of the Office shall not find the infringement of Article 5 or Article 8, he shall issue a decision stating that the practice restricting competition have not been applied.
2. The decision referred to in section 1 shall be issued by the President of the Office also in the case where the agreement meets the conditions referred to in Article 7

section 1 but is not covered by the Regulation of the Council of Ministers referred to in Article 7.

Title III
CONCENTRATION OF ENTREPRENEURS

Chapter I
Control of concentration

Article 12

1. The intention of concentration is subject to the notification to the President of the Office in the case where combined turnover of the entrepreneurs participating in the concentration in the marketing year preceding the year of the notification exceeds 50 million EURO.
2. The obligation referred to in section 1 concerns the intention of:
 - 1) merger of two or more independent entrepreneurs,
 - 2) taking over - by way of acquisition or entering into a possession of stocks, other securities, shares, of the entirety or a part of the property or in any other way obtaining direct or indirect control over one or several entrepreneurs,
 - 3) creation by entrepreneurs of one joint entrepreneur.
3. The obligation to notify the intention of concentration referred to in section 1 shall also apply to:
 - 1) taking over or acquisition of stocks or shares of another entrepreneur resulting in achieving at least 25% of votes at a general assembly or assembly of partners,
 - 2) assuming by the same person the function of a member of the managing or controlling body of the competing entrepreneurs,
 - 3) initiating to exercise the rights arising from stocks or shares taken over or acquired without prior notification in accordance with Article 13, items 3 and 4.

Article 13

The obligation to notify the intention of concentration shall not apply where:

- 1) the turnover of the entrepreneur:
 - a) over which the control is to be taken in accordance to Article 12, section 2, item 2,
 - b) whose stocks or shares are to be taken over or acquired as defined in Article 12, section 3, item 1,
 - c) whose rights to stocks or shares are to be exercised in accordance with Article 12, section 3, item 3
- did not exceed, on the territory of the Republic of Poland, during any

of two marketing years preceding the notification the equivalent of 10 million EURO,

- 2) combined market share of entrepreneurs intending to concentrate does not exceed 20%,
- 3) the financial institution, the normal activities of which include investing in stocks and shares of other entrepreneurs, for its own account or for the account of others, acquires on a temporary basis stocks and shares with a view to reselling them provided that such resale takes place within one year of the date of acquisition and that:
 - a) this institution does not exercise the rights arising from these stocks or shares, except from the right to dividend, or
 - b) exercises these rights solely in order to prepare the resale of the entirety or a part of the entrepreneurs, its property, or these stocks and shares,
- 4) the entrepreneur acquires on a temporary basis stocks and shares with a view to securing debts, provided that such entrepreneur does not exercise the rights arising from these stocks or shares, except from the right to sell,
- 5) such concentration arises as an effect of bankruptcy or composition proceedings, except from the operations where the control is to be taken over by the competitor or participant of the capital group to which belong competitors of the to-be-taken over entrepreneur,
- 6) concentration of the entrepreneurs participating in the same capital group.

Article 14

The concentration performed by a dependent entrepreneur is considered as performed by a dominant entrepreneur.

Article 15

The turnover referred to in Article 12, section 1 and Article 13, item 1 shall include the turnover of entrepreneurs directly participating in the concentration as well as of the remaining entrepreneurs participating in the capital groups in which entrepreneurs directly taking part in the concentration participate.

Article 16

The Council of Ministers shall define, by way of a regulation, the method of calculating turnover referred to in Article 12, section 1 and Article 13, item 1 taking into account specificity of the activity conducted by entrepreneurs, in particular accountancy rules applicable to individual entrepreneurs, including banks, insurers and investment funds.

Chapter II
Decisions in cases of concentration

Article 17

The President of the Office, by way of a decision, shall issue a permission to perform the concentration which will not result in creation or strengthening of a dominant position, thus will not significantly restrict competition on the market.

Article 18

1. The President of the Office, by way of a decision, shall issue a permission to perform the concentration, provided that after fulfilment by the entrepreneurs intending to perform concentration of the requirements stipulated in section 2, a dominant position will not be created or strengthened, as a result of which the competition on the market will not be significantly restricted.
2. The President of the Office may impose upon the entrepreneur or entrepreneurs intending to perform the concentration an obligation, or accept their obligation, in particular:
 - 1) to divest the entirety or a part of the property of one or more entrepreneurs,
 - 2) to suppress the control over entrepreneur or entrepreneurs not participating directly in the concentration, in particular by way of divesting the determined set of stocks or shares or by recalling from his function the member of managing or controlling body of the one or more entrepreneurs,
 - 3) to grant competitor an exclusive licence
 - determining in the decision referred to in section 1 the time limit for meeting the requirements.
3. In the decisions referred to in section 1, the President of the Office shall impose upon the entrepreneur or entrepreneurs the obligation to provide information about fulfilment of such requirements, in a time limit appointed in the decision.

Article 19

1. The President of the Office shall prohibit, by way of a decision, to perform the concentration which results in creation or strengthening of a dominant position, in consequence of which the competition on the market would be significantly restricted, with the reservation of section 2.
2. The President of the Office shall issue, by way of a decision, permission to perform concentration resulting in creation or strengthening of a dominant position despite significant restriction of competition, in the case when renouncing prohibition is justified, in particular where concentration:
 - 1) will contribute to the economic development or technical progress,
 - 2) it may have a favourable impact on the national economy.

Article 20

1. The President of the Office may withdraw the decisions referred to in Article 17, Article 18, section 1 and Article 19, section 2 if they were based on unreliable information for which entrepreneurs participating in the concentration were responsible or where entrepreneurs did not comply with conditions referred to in Article 18, section 2 and 3. In the case of withdrawal of the decision the President of the Office shall pronounce on the substance of the case.
2. Where, in the cases referred to in section 1, the concentration is already performed and restitution of the competition on the market is otherwise impossible, the President of the Office may, by way of a decision, defining time limit for its implementation under conditions defined in the decision, order in particular:
 - 1) separation of the merged entrepreneur under conditions defined in the decision,
 - 2) divestiture of the entirety or a part of the entrepreneur's property,
 - 3) divestiture of stocks or shares ensuring the control over the entrepreneur or entrepreneurs or dissolution of the company over which the entrepreneurs have joint control,
 - 4) recalling from the function of the member of a managing or controlling body of the entrepreneurs participating in the concentration.
3. The decision referred to in section 2 cannot be issued after the lapse of 5 years since the day the concentration was performed.
4. In the case when the intention of concentration have not been notified to the President of the Office as stipulated in Article 12 section 1, the provisions of sections 2 and 3 shall apply respectively.

Article 21

The decisions referred to in Article 17, 18, section 1 or in Article 19, section 2 shall expire if within the time limit of 3 years from issuance of the decision a concentration is not performed.

Article 22

The President of the Office, upon a motion of the financial institution, may extend, by way of a decision, the time limit referred to in Article 13, item 3 where it will prove that resale of stocks or shares was not possible or economically unjustified before the lapse of one year since their acquisition.

Article 23

The Registry court, acting pursuant to the separate provisions, shall make entry into the register where:

- 1) the President of the Office shall, by way of a decision, give permission to perform the concentration,
- 2) the entrepreneur proves that the intention of concentration is not subject to notification.

Title IV
ORGANISATION OF COMPETITION AND CONSUMER PROTECTION

Chapter I
The President of the Office

Article 24

1. The President of the Office shall be the central government administration organ competent in the protection of competition and consumers. The Prime Minister shall supervise activities of the President of the Office.
2. The Prime Minister shall appoint, for the period of 5 years, the President of the Office, selected by way of a contest, from among the persons with university education, in particular in the field of law, economy or business administration, distinguished by their theoretical knowledge and practical experience in the scope of market economy and competition and consumer protection.
3. The Prime Minister shall define, by way of a regulation, mode and procedures for organising the contest referred to in section 2. The Prime Minister shall define composition of the contest board and exigencies towards members thereof, having in mind the necessity to ensure impartiality of the election of the President.
4. The member of the contest board may not be a person who within the last three years was performing function in the organs of the entrepreneur being in possession of a dominant position or was representing his interest, or a person not giving a guarantee of impartiality in performance of the function in public interest.
5. The President of the Office may be recalled by the Prime Minister before the term of office in the case of:
 - 1) assuming relation of work, with the exception of employment as professor at the university or in scientific institution,
 - 2) undertaking business activity in a capacity of entrepreneur or assuming function of a member of managing or controlling body of the entrepreneur,
 - 3) condemnation by a lawful judgement for the offence committed in deliberate guilt,
 - 4) flagrant infringement of his responsibilities,
 - 5) resigning of his office.
6. The President of the Office shall perform his tasks supported by the Office for Competition and Consumer Protection, hereinafter referred to as “the Office”.

Article 25

The Prime Minister shall appoint and recall Vice-Presidents of the Office, upon a motion of the President of the Office.

Article 26

1. The scope of the activities of the President of the Office shall include:
 - 1) exercising control over the observance by entrepreneurs of the provisions of the present Act,
 - 2) issuance, in the cases stipulated in the Act, of decisions in the matters of counteracting competition restricting practices, concentrations or separations of entrepreneurs as well as decisions concerning financial fines,
 - 3) conducting studies on the concentration level in the economy and on the market behaviour of entrepreneurs,
 - 4) elaboration of the draft government programmes for the development of the competition and of the draft government consumer protection policy,
 - 5) monitoring the public aid granted to the entrepreneurs pursuant to separate provisions,
 - 6) assessment of the efficiency and effectiveness of the public aid granted to the entrepreneurs as well as of the effects of granted aid in the field of competition,
 - 7) co-operation with foreign and international organisations and authorities in the scope of competition protection,
 - 8) elaboration and submission to the Council of Ministers of the draft legal acts concerning competition restricting practices, development of the competition or conditions for its emergence as well as protection of consumer interests,
 - 9) giving an opinion on the draft legal acts concerning competition restricting practices, development of the competitions or conditions for its emergence as well as protection of consumer interests,
 - 10) submitting to the Council of Ministers periodical reports on the enforcement of the government programmes for competition development and consumer policy,
 - 11) addressing entrepreneurs and associations thereof in the matters of the protection of the rights and interests of consumers,
 - 12) undertaking activities resulting from the provisions on combating unfair competition,
 - 13) addressing specialised units and relevant bodies of the State supervision for undertaking control of observance of consumer rights,
 - 14) surveillance over the safety of products intended for consumer use in the scope of the Act on general product safety,
 - 15) co-operation with the territorial self-government authorities and with national and international social organisations which statutory tasks include the protection of consumer interests,

- 16) giving assistance to the self-government authorities on voivodship (provincial) and powiat (district) levels and to organisations which statutory tasks include protection of consumer interests, in the scope of the government consumer policy,
- 17) initiating checks on products and services to be performed by consumer organisations,
- 18) elaborating and editing publications and educational programmes promoting awareness of consumer rights,
- 19) enforcement of the international obligations of the Republic of Poland in the scope of co-operation and exchange of the information in the field of competition protection and public aid granted to the entrepreneurs,
- 20) collecting and disseminating judgements pronounced in the cases in the field of competition and consumer protection,
- 21) performance of other tasks defined by the present Act or by separate acts.

Article 27

1. The President of the Office shall issue the Official Journal of the Office for Competition and Consumer Protection.
2. The decisions and resolutions of the President of the Office, as well as judgements of the District Court in Warsaw – the anti-monopoly court, hereinafter referred to as “anti-monopoly court” and of the Supreme Court in cases of cassation of the judgements of the anti-monopoly court, or their sentences with the omission of information constituting business secrecy of the undertaking and of other secrecy protected under separate provisions, may be in their entirety or part published in the Official Journal of the Office for Competition and Consumer Protection.
3. In the Official Journal of the Office for Competition and Consumer Protection shall be also published information, communications, notices, explanations and interpretations having significant importance for the application of the provisions encompassed by the scope of the activities of the President of the Office.

Article 28

1. The Office shall be composed of the Head Office in Warszawa and of the Office delegations in Bydgoszcz, Gdansk, Katowice, Kraków, Lublin, Poznan, Warszawa and Wroclaw.
2. The Office delegations shall be managed by their directors.
3. The Prime Minister shall determine, by way of a regulation, territorial and material jurisdiction of the Office delegations in the scope of the activities of the President of the Office, taking into consideration character and number of cases arising on the relevant territory.
4. In addition to the matters within their jurisdiction the Office delegations may deal with other cases entrusted by the President of the Office.

5. In particularly justified circumstances the President of the Office may take over the case within the jurisdiction of a given delegation or delegate it to be dealt with by the indicated delegation.
6. Decisions and resolutions within the jurisdiction of delegations and in cases delegated by the President of the Office pursuant to section 5, are issued by the directors of delegations on behalf of the President of the Office.

Article 29

The organisation of the Office shall be defined by the statute granted by the Prime Minister, by way of a regulation.

Article 30

1. The Trade Inspection shall be subordinated to the President of the Office.
2. The President of the Office shall sanction the policy of the Trade Inspection and the draft plans of inspections of national dimensions submitted by the Chief Inspector of the Trade Inspection.
3. The President of the Office may order the Trade Inspection to proceed with the inspection or to exercise other tasks included in the scope of his activities.
4. The President shall perform periodical assessments of the activities of the Trade Inspection based on the reports submitted by this Inspection and shall address the conclusions of such assessments to the Chief Inspector of the Trade Inspection.

Article 31

The President of the Office may make public information concerning results of the control of The Trade Inspection as well as information about activities undertaken by virtue of the provisions of Article 26, items 11 and 12, with the omission of information constituting secrecy of the undertaking as well as of other secrecy protected under separate provisions.

Chapter II

Territorial self-government and consumer organisations

Article 32

The tasks in the field of the protection of consumer interests in the scope determined by the Act and by separate provisions shall be performed also by the territorial self-government as well as by consumer organisations and other institutions, which statutory tasks include the protection of consumer interests.

Article 33

The task of the territorial self-government in the field of consumer protection shall consist in promoting consumer education, in particular by way of introducing elements of consumer awareness into educational programmes in the public schools.

Article 34

1. The tasks of the district (powiat) self-government in the field of the protection of consumer rights shall be performed by the district (municipal) consumer advocate, hereinafter referred to as “consumer advocate”.
2. The districts may, by way of an agreement, create one common post of the consumer advocate.

Article 35

1. The consumer advocate shall be appointed by the district council or town council in towns with district status, hereinafter referred to as “the council”.
2. The consumer advocate shall be appointed from among persons with university education, in particular in law or economy and with minimum five years of professional experience.
3. The consumer advocate shall be subordinated directly to the council and report to the council.
4. The organisational status of the consumer advocate shall be determined by the district statute or regulations.

Article 36

1. The consumer advocate shall be employed in the district starosty.
2. All functions in the scope of labour law in relation to the consumer advocate shall be performed by the starost.
3. The working and payment conditions of the consumer advocate shall be determined by the council.
4. The rules on the remuneration of the consumer advocate shall be governed by the provisions on self-government employees.

Article 37

1. The tasks of the consumer advocate shall, in particular include the following:
 - 1) providing free of charge consumer advice and legal information in the scope of protection of consumer interests,
 - 2) bringing forward motions for proclaiming and amending local regulations in the scope of consumer protection,
 - 3) addressing entrepreneurs in cases pertaining protection of consumer rights and interests,
 - 4) co-operation with the territorially competent Office delegations, with organs of Trade Inspection and with consumer organisations,
 - 5) performance of other tasks prescribed by the present Act and by separate provisions.

2. The consumer advocate may in particular bring an action on consumers behalf and, with their consent, join lawsuits in cases pertaining protection of consumer interests.
3. In the cases concerning misdemeanours to the detriment of consumers, the consumer advocate is acting as a public prosecutor in the meaning of provisions of the Misdemeanour Code.
4. The entrepreneur addressed by the consumer advocate acting pursuant to provisions of section 1, item 3, is under an obligation to provide the advocate with requested explanations and information and to assume an attitude in relation to comments and opinion of the advocate.
5. The provisions of Article 63 of the Code of Civil Proceedings shall apply, respectively, to the consumer advocate.

Article 38

1. The consumer advocate shall submit to the council for approval annual report on his/her activities in the previous year by 31 May of each year.
2. The consumer advocate shall remit the report approved by the council referred to in section 1 to the territorially competent Office delegation.
3. The consumer advocate shall be obligated to constantly present to the Office delegations the relevant conclusions and inform about problems concerning consumer protection which require undertaking activity on the government administration level.

Article 39

1. The consumer organisations shall represent consumer interests in relation to the public and self-government administration bodies and may participate in the implementation of the government consumer policy.
2. The organisations referred to in section 1 are, in particular, entitled to:
 - 1) expressing opinion on the draft legal acts and other documents concerning rights and interests of consumers,
 - 2) elaborating and disseminating consumer educational programmes,
 - 3) performing tests of products and services and publishing their results,
 - 4) editing periodicals, research studies, folders and leaflets,
 - 5) providing free of charge consumer advice and free of charge assistance in consumer redress,
 - 6) participating in works on standardisation,
 - 7) implementing government tasks in the field of consumer protection, commissioned to them by the government and self-government administration bodies,
 - 8) applying for allocation of public funds for the implementation of tasks referred

to in item 7.

Article 40

The government and self-government administration bodies shall be obliged to consult consumer organisations on the issues concerning the directions of activities aimed at the protection of consumer interests.

Article 41

The amount of yearly targeted budget allocation, in the meaning of the act of 26 November 1998 on public finance (O.J.L. of 1999 No 155, item 1014, No 38, item 360, No 49, item 485, No 60, item 778 and No 100, item 1255 and O.J.L of 2000. No 6, item 69, No 12, item 136 and No 48, item 550), granted from the State budget for implementation of tasks referred to in Article 39, section 2, item 7 shall be determined in the Budgetary Act in the part of the State budget falling under disposal of the President of the Office.

Title V

PROCEEDINGS BEFORE THE PRESIDENT OF THE OFFICE

Chapter I

General provisions

Article 42

1. The proceedings before the President of the Office shall be conducted as explanatory investigation or anti-monopoly investigation.
2. The explanatory investigation may precede instituting the anti-monopoly investigation.
3. The provisions of section 2 shall not apply to the cases of concentration.

Article 43

1. The President of the Office may institute *ex officio*, by way of a resolution, the explanatory investigation where circumstances indicate the possibility of an infringement of the provisions of the present Act, in the matters concerning given economy sector and in the cases concerning protection of consumer interests.
2. The explanatory investigation shall be aimed at:
 - 1) preliminary assessment if there was an infringement of provisions of the Act giving grounds to institute anti-monopoly investigation, including assessment if the case has an anti-monopoly character,
 - 2) market research, including defining its structure and concentration level,
 - 3) assessment if the legitimate interests of the consumers have been infringed, thus justifying taking actions foreseen by separate legal acts.
3. The closure of the explanatory investigation shall be done by way of a decision.
4. The explanatory investigation should last no longer than 30 days from its

institution.

Article 44

1. The anti-monopoly investigation in the cases of competition restricting practices and of control of concentrations shall be instituted upon a motion or *ex officio*.
2. The provision of section 1 shall apply to the imposition of fines referred to in Chapter VI.

Article 45

1. Upon request of the President of the Office entrepreneurs or association thereof shall be obligated to provide all necessary information.
2. The request referred to in section 1 should include:
 - 1) indication of the scope of such information and the relevant time period,
 - 2) indication of the object of the request,
 - 3) time limit for providing information,
 - 4) instruction about sanctions for non delivering information or for providing false or misleading information.

Article 46

1. Only the original document or its copy certified by public administration body, notary, attorney at law, legal adviser or authorised employee of the entrepreneur may serve as the documentary evidence in the proceedings before the President of the Office.
2. The evidence in the proceedings before the President of the Office shall constitute the document drawn up in the Polish language, with the reservation of section 3.
3. Where such document has been drawn up in a foreign language also the translation into Polish of this document or of its part intended to serve as the evidence in the proceedings should be submitted, certified by a sworn translator.

Article 47

1. The party adducing witness evidence is obligated to precisely indicate facts subject to confirmation by the testimony of individual witnesses and to indicate the data to allow proper summons of the witnesses.
2. The President of the Office, when summoning a witness, shall indicate in his summons name, surname and domicile of the summoned, place and date of giving the explanation, parties and subject of the case as well as provisions on penal sanctions for false testimony.

Article 48

1. The testimony of a witness, after its entry to the protocol, shall be read before a witness and, depending on circumstances, completed or verified based on his/her comments.

2. The protocol of the hearings of a witness shall be signed by the witness and by the employee of the Office carrying on the hearings.

Article 49

1. In cases requiring special information, the President of the Office having heard proposals of the parties concerning number of experts and their choice, may summon one or more experts in order to seek their opinion.
2. The expert in the meaning of section 1 may be also a legal person specialised in the relevant field.

Article 50

Until the termination of the activities of an expert each party may request him/her to be excluded from the proceedings for the same reasons as may be invoke to exclude the employee of the Office. The party lodging a request to exclude an expert after the works have been initiated has an obligation to give an appearance of verisimilitude that the reason justifying the exclusion arose thereafter or was unknown to the party beforehand.

Article 51

The President of the Office may order to present to an expert the case records and the subject of inspection. The provisions of Article 63, sections 1 and 3 shall apply respectively.

Article 52

1. The opinion of an expert should contain its justification.
2. The experts may submit their joint opinion.

Article 53

1. The President of the Office shall accord to an expert the remuneration in accordance with the provisions on costs of expert's evidence in court proceedings, with the reservation of section 3.
2. The President of the Office may impose upon a party the obligation to pay an advance on account of the expert's expenses.
3. Where the investigation is instituted *ex officio* and terminated by a decision referred to in Article 11, section 1, the costs of the expert's remuneration shall be born by the State Treasury.

Article 54

1. The President of the Office may address a scientific or scientific-research institute to issue an opinion.
2. In its opinion this institute shall indicate person or persons who carried the research and issued the opinion.
3. The provisions of Articles 51 and 53, section 2 and 3 shall apply respectively.

Article 55

1. During the proceedings the President of the Office may held hearing.
2. The hearing referred to in section 1 shall be in open court, with the exception of such hearing or its part in course of which information subject to business secrecy or other secrecy protected by virtue of separate provisions are being examined.
3. The President of the Office may summon for the hearing and examine parties, witnesses as well as ask for expert opinion.
4. In the case of hearing in camera the provisions of Articles 153, 154 and 479¹⁰ of the Code of civil proceedings shall apply respectively.

Article 56

The President of the Office may address territorially competent regional court to examine witnesses and obtain an expert opinion, where it is supported by the character of the evidence or consideration of significant inconvenience or significant costs of obtaining the evidence. When addressing the court for providing evidence, the President of the Office shall issue a decision in which he shall define:

- 1) the court which is to provide evidence,
- 2) means of evidence,
- 3) facts to be established.

Article 57

1. During the proceedings before the President of the Office the authorised employee of the Office or of the Trade Inspection, hereinafter referred to as “inspector”, may perform the inspection of each entrepreneur or association thereof, hereinafter referred to as “controlled”, in the scope encompassed by these proceedings.
2. The authorisation to perform an inspection should include:
 - 1) name, surname and post of the inspector as well as his/her identity or professional card number,
 - 2) indication of the controlled,
 - 3) indication of the subject and scope of the inspection,
 - 4) indication of date of initiating the inspection and scheduled date of its termination,
 - 5) instruction about sanctions for the lack of co-operation during the inspection.
3. The authorisation to perform the inspection referred to in section 1 is issued, respectively: by the President of the Office and, upon a motion of the Chief Inspector of the Trade Inspection, by the voivodship inspectors of the Trade Inspection.
4. The inspector is obligated to produce to the person representing the controlled the authorisation to perform the inspection and professional identity card. In the case

of the absence of the person authorised to represent the controlled, authorisation to perform the inspection and professional identity are shown to the employee or person active on the place where inspection is initiated. The copy of the authorisation to perform an inspection shall remain with the controlled.

5. The inspector is entitled to:
 - 1) enter the premises, buildings, rooms or other quarters and means of transportation belonging to the controlled,
 - 2) request to render accessible files, books and all kinds of documents or data carriers related to the subject of inspection as well as duplicates and extracts thereof and also to make notes,
 - 3) request persons referred to in Article 59, section 1, to provide oral explanations relevant for the subject of inspection.
6. The Council of Ministers shall determine, by way of a regulation and taking into consideration objectives of the inspection, the detailed mode and procedure of the inspection, including mode of drafting inspection protocol.

Article 58

1. In the course of the inspection the inspectors may also search the premises or things, pursuant to the permission of the anti-monopoly court, issued upon a motion of President of the Office. During the search the inspector may be assisted by functionaries of other State control bodies or the Police from the unit territorially competent considering the entrepreneur's premises.
2. The anti-monopoly court shall issue within 48 hours the decision in the case referred to in section 1. To the decision of the anti-monopoly court the right of complaint shall not apply.
3. The Police, upon instruction of the President of the Office, shall perform functions referred to in section 1.
5. In the matters not regulated by the Act, the provisions on search of the Code of penal proceedings shall apply.

Article 59

1. The controlled or the person authorised to represent him as well as the user of living quarters referred to in Article 91, section 1 are obliged to:
 - 1) provide the requested information,
 - 2) enable access to business premises and buildings, rooms and other quarters or means of transportation of the controlled,
 - 3) render accessible files, books and all kinds of documents or other data carriers belonging to the controlled.
2. The person referred to in section 1 may refuse to provide information or to co-

operate during the inspection solely were it would expose him/her or his/her spouse, ascendants, descendants, siblings and related in the same line or degree as well as persons being with this party in the privity of adoption, custody or wardship to penal liability. The right to abstain from providing information or co-operation during the inspection shall continue after the termination of marriage or the dissolution of the privity of adoption, custody or wardship.

Article 60

1. During the inspection referred to in Article 57, section 1 the President of the Office may issue a seizure order in view to secure files, books, all kind of documents or data carriers as well as other things which may serve as the evidence in the case.
2. The inspector shall summon the person being in a possession of the objects referred to in section 1 to deliver them voluntarily and, in the case of refusal, may carry their collection in the course of administrative execution proceedings.
3. The resolution on the seizure of objects shall be subject to complaint of the persons which rights have been infringed. The lodging of a complaint does not suspend enforcement of the decision.

Article 61

1. The objects subject to seizure, delivered, collected or found during the inspection, after being examined and entered into the protocol of seizure, should be taken away or deposited with the trustworthy person, with the indication of the obligation to present them upon each request of the organ performing the inspection.
2. The protocol of seizure should contain indication of the case to which the seizure or search are related, exact hour of initiating and terminating the action, detailed list of detained objects and, where appropriate, their description and moreover, reference to the resolution of the President of the Office about a seizure. The protocol shall be signed by the executor and the representative of the controlled.
3. The executor of the seizure of the objects referred to in section 1 shall be obligated to immediately present to the interested persons the receipt specifying which objects and by whom have been detained and to inform without delay the entrepreneur whose objects have been detained.
4. The detained objects should be immediately returned upon assessment of their uselessness for the carried investigation or upon abrogation by the anti-monopoly court of the seizure order.

Article 62

1. The President of the Office, upon request of the party or *ex officio*, by way of a resolution, may to the necessary extend restrict for the remaining parties the right to inquiry into the evidence attached to the case files, where rendering this material accessible would threaten with a disclosure of the business secrecy as well as of other secrets protected by separate provisions.
2. The restriction referred to in section 1 shall also apply to materials included to the

investigation pursuant to Article 65, section 3.

3. The decision issued pursuant to section 1 shall be subject to complaint.
4. The party lodging a motion to restrict for the remaining parties the right to inquiry into the evidence shall submit to the President of the Office also a version of a document which does not contain restricted information referred to in section 1, with appropriate annotation.
5. The version of a document not including restricted information referred to in section 1, with appropriate annotation, shall be made accessible to the parties.

Article 63

1. The information obtained during the investigation by the employees of the Office are subject to the protection pursuant to provisions on the protection of undisclosed information.
2. The provision of section 1 shall not apply to the information generally accessible to the public, information about initiating the proceedings, with the exception of proceedings in cases concerning concentration with participation of public companies, in the meaning of provisions on public circulation of securities, and to information on issuance of the decision terminating the investigation and its findings.
3. The employees of the Office shall be under obligation to protect business secrecy as well as other secrets protected by virtue of separate provisions, knowledge about which they acquired during the proceedings.

Article 64

The public administration bodies are under obligation to render accessible to the President of the Office the files being in their possession as well as information relevant to the proceedings before the President of the Office.

Article 65

1. The information acquired in the course of the proceedings cannot be used for other proceedings conducted on the basis of separate provisions.
2. The provision of section 1 does not apply to the penal proceedings conducted under public complaint procedures as well as other proceedings carried by the President of the Office.
3. The President of the Office shall inform parties about including to the evidence information acquired in the course of other proceedings.

Article 66

When issuing the decision terminating the proceedings, the President of the Office shall take into consideration only the charges to which parties could assume their position.

Article 67

The President of the Office shall decide, by way of a resolution, upon discontinuance of the investigation in the case of the following:

- 1) withdrawal of a motion to order renunciation of the competition restricting practices,
- 2) withdrawal of a notification of the intention to perform concentration of entrepreneurs,
- 3) inaction of the mover preventing carrying on the investigation in the cases of competition restricting practices,
- 4) desistance from imposing the fine referred to in Article 101, section 2, item 2, Article 102 and Article 103.

Article 68

With the reservation of Article 93, the investigation shall not be instituted, where 5 years have elapsed since the end of the year when:

- 1) infringement of the provisions of the Act took place,
- 2) decision about imposition of fine became legally binding.

Article 69

1. In the case of proceedings instituted upon a motion, the losing party shall be obligated to reimburse to the other party, upon its request, the expenses necessary for expedient legal redress and expedient defence, including costs of opinion of experts and scientific institutes.

2. The necessary expenses of the proceedings carried on by the party personally or by the plenipotentiary, who is not attorney at law or legal adviser, shall include travel costs incurred by the party or its plenipotentiary to visit the seat of the President of the Office.

3. The necessary expenses of the proceedings of the party represented by the attorney at law or legal adviser shall include his/her fees, however not higher than those resulting from payment rates determined by the separate provisions and expenses of one lawyer as well as costs of personal appearance of the party upon summons of the President of the Office.

Article 70

1. Where the requests contained in a motion for instituting proceedings are only partially met, the expenses incurred by the parties shall be mutually compensated or proportionally shared. However, the President of the Office may impose upon one of the parties the obligation to reimburse all the expenses if the motion of the other party was not taken into account only in its insignificant part.

2. In the case of conciliation between the parties, the expenses of the proceedings shall

cancel each other out, unless the parties decide otherwise.

Article 71

1. The reimbursement of expenses shall be due to the entrepreneur or association thereof against which the proceedings are instituted upon a motion despite the assessment, by way of a decision, of infringement of the provisions of the Act, where such entrepreneur or association thereof give no grounds for the institution of the proceedings and admit, at the moment of the first action undertaken before the President of the Office after receiving information about instituting the investigation, the legitimacy of charges.

2. The costs of necessary opinions of experts and scientific institutes in the cases related to concentrations shall be born by the entrepreneurs participating in the concentration.

Article 72

Where proceedings are initiated *ex officio* and result in the assessment by the President of the Office of the infringement of provisions of the Act, entrepreneur or association thereof which perpetrate this infringement shall be obliged to bear the costs of the proceedings.

Article 73

In the cases particularly justified the President of the Office may impose upon the losing party the obligation to reimburse only a part of the expenses or desist from charging costs.

Article 74

Regardless of the result of proceedings, the President of the Office may impose upon a party the obligation to reimburse expenses due to its unreliable or clearly unfair behaviour, in particular costs resulting from avoiding to give explanation or submitting untruthful explanation, concealment or delayed presentation of the evidence.

Article 75

The President of the Office shall decide upon costs by way of a resolution, which may be included in the decision terminating the proceedings.

Article 76

The claim for reimbursement shall expire if in the time limit appointed by the President of the Office, not shorter than 7 days, the party does not submit a list of expenses or a request for reimbursement in conformity with separate provisions.

Article 77

1. The motions for instituting anti-monopoly proceedings before the President of the Office are subject to dues which are to be covered by entrepreneurs and associations thereof.

2. Where the motion is filed without dues being remitted, the President of the Office shall summon a mover to effect the payment within 7 days, with instruction that non-payment of dues will result in leaving the motion without being examined.
3. The anti-monopoly proceedings may be instituted irrespective of the dues not being paid, where it is justified by important considerations concerning competition protection or consumer interests.
4. In the case referred to in section 3 the dues shall be subject to collection under provisions on administrative execution of payments.
5. In the case of the unquestionable incapacity of the entrepreneur, in particular being natural person, or of the association of entrepreneurs, to remit dues, the President of the Office may, upon their motion, relieve them from the dues, in part or in the entirety.
6. The Prime Minister determines, by way of a regulation, the amount of dues referred to in section 1 and mode of their payment, in particular the amount of rates, taking into consideration their division into motions concerning competition restricting practices and concentration as well as the mode of effecting payment of dues.

Article 78

- 1 The decision of the President of the Office is subject to appeal to the anti-monopoly court, lodged within two weeks from the date when the decision has been delivered.
2. The provisions of the Code of Civil Proceedings concerning proceedings in economic cases shall apply to the proceedings in cases of appeal against decisions of the President of the Office.
3. In the case where the appeal against decision is lodged, the President of the Office shall without delay remit it to the anti-monopoly court together with case files.
4. Where the President of the Office considers the appeal to be justified, he may - without remitting files to the court - abrogate or change his decision in its entirety or in part, about which without delay he shall inform the party by sending a new decision, which may be appealed against.
5. Prior to the remittance of the appeal to the anti-monopoly court or the abrogation or the change of the decision pursuant to section 4, the President of the Office may also, in justified cases, perform additional activities aimed at clarification of objections contained in the appeal.
6. Provisions of sections 1-5 shall apply, respectively, to the resolutions of the President of the Office which are subject to complaints, however a complaint is to be lodged within one week as of the day of the remittance of the resolution.

Article 79

Legal means for shaking decision foreseen in the Code of administrative proceedings and concerning resumption of proceedings, abrogation, change or assessment of invalidity of decisions shall not apply to the decision of the President of the Office.

Article 80

To the matters not regulated by the present Act the provisions of the Code of administrative proceedings shall apply, with the reservation of Article 81.

Article 81

To the matters concerning the evidence in the proceeding before the President of the Office in the scope not regulated in the present chapter, Articles 227-315 of the Code of civil proceedings shall apply respectively.

Article 82

The entrepreneur shall inform the President of the Office about proceedings instituted against him abroad based on assumption of performance of competition restricting activities and shall remit to the President of the Office a copy of the judgement.

Article 83

The provisions of the present chapter shall apply respectively to the cases of imposition of fines for infringements of the provisions of the Act.

Chapter 2

Anti-monopoly proceedings in cases of competition restricting practices

Article 84

1. The motion for instituting the anti-monopoly investigation related to suspicion of the infringement of the provisions of the Act may be lodged by:
 - 1) entrepreneur or association of entrepreneurs, which prove their legal interest,
 - 2) territorial self-government body,
 - 3) organ of State inspection,
 - 4) consumer advocate,
 - 5) consumer organisation.
2. The motion referred to in section 1 shall be lodged in writing together with justification and indication of the legal basis with copies in a number enabling their presentation to the remaining parties to the proceedings. The mover is obliged to give to the infringement of the provisions of the Act the appearance of verisimilitude.
3. The President of the Office informs the parties about instituting proceedings.

Article 85

1. The President of the Office may, by way of a decision, refuse to institute the anti-monopoly proceedings if according to the information contained in a motion and being in

a possession of the President of the Office clearly results that the prohibition provided for in Article 5 has not been infringed in the scope not exempted pursuant to Articles 6 and 7, or prohibition defined in Article 8.

2. Prior to issuing the decision on instituting or refusing to institute the anti-monopoly proceedings, the President of the Office may proceed with the explanatory investigation referred to in Article 43 aimed at obtaining additional information necessary to decide upon instituting or refusing to institute the anti-monopoly proceedings.

3. President of the Office shall refuse, by way of a decision which is subject to a complaint, to institute anti-monopoly proceedings where the motion is lodged by a person not authorised in conformity with Article 84 section 1.

4. The President of the Office may refuse to institute anti-monopoly proceedings, by way of a resolution which may be complained against, in the following cases:

- 1) in the case when a mover fails to provide in the fixed time limit information necessary to decide upon instituting or refusal to institute the proceedings,
- 2) where a motion fails to meet the requirements referred to in Article 84 section 2.

Article 86

The party to the investigation shall be a person who applies for the issuance of a decision in the matters concerning competition restricting practices or against whom the proceedings on application of competition restricting practices or infringement of other provisions of the Act are instituted.

Article 87

1. The President of the Office may allow for the participation in the proceedings in the character of the interested entity the following:

- 1) entrepreneur aggrieved in the result of the activities constituting the infringement of the provisions of the Act,
- 2) party to the agreement subject to the investigation,
- 3) another entity which files a motion and proves its legal interest or which admission to the participation in the proceedings will contribute to the clarification of the case.

2. The admittance or refusal to admit to the participation in the proceedings in a character of the interested entity shall be effected by way of a resolution which is subject to complaint.

3. The interested entity shall be entitled to give explanation as to the circumstances of the case.

4. The interested entity shall be authorised to the inquiry in the files, in the scope which is necessary to protect its rights and without prejudice to business secrecy as well as to other secrets protected pursuant to separate provisions.

5. The President of the Office shall inform the interested entity about the way the case is solved. Such entity shall not have the right of appeal or complaint.

Article 88

In the course of the proceedings before the President of the Office the parties may agree to conciliate, provided that it is without prejudice to the public interest.

Article 89

1. In cases of minor importance for the protection of competition and consumers, where on the basis of circumstances of the case, information contained in the motion or information giving grounds to institute investigation *ex officio* as well as based on hitherto adjudication in the anti-monopoly cases, the President of the Office shall assess that infringement of the prohibition of the competition restricting practices is unquestionable, he may, after instituting the anti-monopoly investigation, summon the entrepreneur or association of entrepreneurs against whom the investigation is instituted to acknowledge such infringement of the relevant provisions of the Act.

2. In the case of the acknowledgement referred to in section 1, the President of the Office without investigation of the evidence shall issue the decision ordering to abandon the infringement. The provisions of Article 101, section 2, item 1 shall not apply.

3. The right of appeal shall not apply to the decision referred to in section 2.

4. The provisions of sections 1, 2 and 3 shall not apply to:

- 1) agreements referred to in Article 5, section 1, concluded between competitors,
- 2) in the case of abuse of a dominant position by the entrepreneur whose market share exceeds 80%,
- 3) where during last 3 years preceding the institution of the anti-monopoly investigation the infringement by the entrepreneur or association of entrepreneurs of the prohibition referred to in Article 5 in the scope not exempted under Articles 6 or 7, or the prohibition provided for in Article 8 has been assessed by the final decision of the President of the Office or by the legally binding court judgement.

Article 90

The President of the Office may issue a decision or a part of it under pain of immediate enforcement, where it is necessary for the protection of competition or important interest of consumers.

Article 91

1. Where there are trustworthy bases for suspicion that the objects, files, books, documents and other data carriers which may have an impact on the assessment of facts substantial for the ongoing investigation are kept in the living quarters, the anti-monopoly court may, upon a motion of the President of the Office, give permission to make a search by functionaries of the Police from the unit competent in view of the localisation of these

living quarters.

2. The search referred to in section 1 shall be performed also with the participation of the inspector. Provision of Article 57, sections 2 and 3 shall apply respectively.
3. The anti-monopoly court shall give permission referred to in section 1 by way of a resolution which is not subject of appeal.
4. On the basis of the order of the anti-monopoly court, the Police shall perform the activities referred to in section 1.

Article 92

The anti-monopoly proceedings in the matters of competition restricting practices should be terminated not later than within 4 months as of the day of their institution. The provisions of Articles 35-38 of the Code of administrative proceedings shall apply respectively.

Article 93

The proceedings in the matters of application of competition restricting practices shall not be instituted where since the end of the year in which they have been abandoned one year have elapsed.

Chapter 3 Proceedings in the cases of concentration

Article 94

1. Every person who notifies, in conformity with section 2, the intention of concentration shall be a party to the proceedings.
2. The intention of concentration shall be notified by:
 - 1) merging entrepreneurs jointly - in the case referred to in Article 12, section 2, item 1,
 - 2) entrepreneur taking over the control - in the case referred to in Article 12, section 2, item 2,
 - 3) jointly all entrepreneurs participating in creation of a joint entrepreneur - in the case referred to in Article 12, section 2, item 3,
 - 4) entrepreneur taking over or acquiring stocks or shares - in the case referred to in Article 12, section 3, item 1,
 - 5) entrepreneur in whose managing or controlling body the person already performing function of the member of managing or controlling body of another entrepreneur is assuming the function - in the case referred to in Article 12, section 3, item 2,
 - 6) respectively financial institution or entrepreneur who acquired stocks or shares in order to secure liabilities - in the case in Article 12, section 3, item 3.

3. In the case where a concentration is performed by a dominant entrepreneur by intermediary of at least two dependent entrepreneurs, the notification of intention of concentration shall be filed by a dominant entrepreneur.
4. The notification referred to in section 1 should be effected in the time limit of 7 days since the day the agreement is concluded or since another action is undertaken, on the bases of which the concentration takes place.
5. The Council of Ministers shall determine, by way of a regulation, the detailed conditions to be met by the notification of intention of concentration, including list of information and documents which this notification should contain, taking into consideration the specificity of activities conducted by different entrepreneurs and, in particular by financial institutions.

Article 95

1. The President of the Office may, by way of a resolution which is not subject to complaint, admit to the participation in the proceedings in the character of interested entity a person who proves its legal interest, in particular:
 - 1) entrepreneur over whom another entrepreneur takes over the control,
 - 2) entity disposing of stocks or shares,
 - 3) entity disposing of the property.
2. The interested entities are authorised to provide explanations and documents relevant for the assessment of the case.
3. The provision of Article 87, section 5 shall apply respectively.

Article 96

1. The President of the Office may:
 - 1) return within 14 days the notification of the intention of concentration shall it fail to meet the requirements with which it should comply,
 - 2) summon the party notifying the intention of concentration to eliminate the indicated errors in the notification or to supplement necessary information, in the appointed time limit.
2. The President of the Office may present to the entrepreneur or association of entrepreneurs participating in the concentration the requirements referred to in Article 18, section 2, appointing the time limit for adopting attitude towards the proposal; the failure to reply or negative answer shall result in the issuance of the decision referred to in Article 19, section 1.

Article 97

1. The anti-monopoly proceedings in concentration cases should be terminated not later than within 2 months since their institution, with the reservation of section 2.
2. In the case of the intention to acquire stocks admitted to the public circulation the proceedings referred to in section 1 should be terminated not later than within 14 days since their institution.

3. The time limits appointed in sections 1 and 2 shall not include periods of waiting for the notifications of the remaining participants to the concentration as well as periods for eliminating errors or supplementing information referred to in Article 96, section 1, item 2 as well as for adopting attitude towards conditions proposed by the President of the Office referred to in Article 18, section 2.

Article 98

1. The entrepreneurs which intention of concentration is subject to notification are under obligation to refrain from proceeding with concentration until the issuance of the decision of the President of the Office or the lapse of the time limit in which such a decision should be issued.
2. The legal action pursuant to which the concentration is to be effected may be performed under condition of the issuance by the President of the Office, by way of a decision, of the approval or after the lapse of the time limit referred to in Article 97.
3. The realisation of the public offer to purchase or exchange of stocks, notified to the President of the Office under procedure stipulated in Article 12, section 1, shall not be considered as an infringement of the obligation referred to in section 1, provided the buyer does not exercise the voting rights arising from the acquired stocks or exercises them solely in order to maintain full value of his capital investment or to prevent the substantial damage which might affect the entrepreneurs participating in the concentration.

Article 99

In the case where the President of the Office shall conceive the information about the concentration being effected with the infringement of the obligation referred to in Article 12, he may institute the investigation *ex officio*.

Article 100

In the case of non-compliance with the decision referred to in Article 20, section 1 or 4, the President of the Office may, by way of a decision, accomplish a separation of the entrepreneur. To the separation of a company the provisions of Articles 528-550 of the act of 15 September 2000 – Code of commercial companies (O.J.L. of 2000, No 94, item 1037) shall apply respectively. The President of the Office has the competence of the bodies of companies participating in the separation. Moreover, the President of the Office may apply to the court for the annulment of the agreement or for undertaking other legal means aimed at restoring the previous status.

TITLE VI FINES

Article 101

1. The President of the Office shall impose upon the entrepreneur, by way of a decision, the fine equivalent from 1.000 up to 50.000 EURO, where this entrepreneur, even unintentionally:
 - 1) fails to comply with the obligation to notify the intention of concentration

referred to in Article 12,

- 2) after taking over or acquiring stocks or shares exercises the rights arising from these stocks or shares, thus infringing provisions of Article 13, sections 3 and 4,
 - 3) is in a possessions of stocks or of shares after the lapse of the period referred in Article 13, item 3,
 - 4) undertakes activities from which he should abstain after having effected the notification pursuant to Article 98, section 1.
2. The President of the Office may impose upon the entrepreneur, by way of a decision, the fine:
- 1) in the amount equivalent to 1.000 up to 5.000.000 EURO, but not exceeding 10% of the annual income attained in the year of account preceding the year of imposing the fine, where he infringes the prohibition defined in Article 5 in the scope not exempted under Articles 6 and 7, or if he infringes the prohibition defined in Article 8,
 - 2) in the amount equivalent to 200 up to 5.000 EURO where he, even unintentionally:
 - a) in the motion referred to in Article 22 or in the notification referred to in Article 94, section 2 declared false data,
 - b) failed to provide information requested by the President of the Office pursuant to Article 18, section 3 or Article 45, or provided false or misleading information,
 - c) does not co-operate in the inspection carried on within the framework of the investigation pursuant to Article 57, with the reservation of Article 59, section 2,
 - d) did not fulfil obligation foreseen in Article 82.
3. The provisions of sections 1 and 2 shall also apply to the association of entrepreneurs. Where the association of entrepreneurs does not attain any income, the President of the Office may fix the fine in the amount up to fiftyfold of the average salary.

Article 102

1. The President of the Office may impose upon the entrepreneurs, by way of a decision, the fine in the amount equivalent from 10 up to 1.000 EURO for each day of laches in the execution of the decision issued pursuant to Article 9, 18 section 1, Article 19, section 1 and Article 20, section 2 and 4, the resolutions issued pursuant to Article 60, section 1 or judgements of the anti-monopoly court pronounced by virtue of Article 479³¹ § 3 of the Code of civil proceedings; the fine shall be imposed counting from the date indicated in the decision.
2. The provisions of section 1 shall apply to the associations of entrepreneurs. Where the association of entrepreneurs does not attain any income, the fine for each

commenced month of non execution of the decision, resolution or of the court judgement within the time limit shall be fixed by the President of the Office in the amount up to fiftyfold of the average salary.

Article 103

1. The President of the Office may, by way of a decision, impose upon a person performing managerial function or belonging to the managing body of the entrepreneur or association of entrepreneurs the fine in the amount up to tenfold of the average salary, where this person deliberately or unintentionally:
 - 1) did not execute the decisions, resolutions or judgements referred to in Article 102,
 - 2) did not notify the intention of concentration referred to in Article 12.
2. The President of the Office may impose upon the persons referred to in Article 59, section 1, the fine referred to in section 1, for non providing the information or providing false or misleading information, requested by the President of the Office pursuant to Article 45, with the reservation of Article 59, section 2, and also for the lack of co-operation in the inspection carried within the frameworks of the investigation pursuant to Article 57, with the reservation of Article 59, section 2, as well as upon the witnesses for unjustified refusal to testify.

Article 104

When fixing the amount of the fines referred to in Articles 101-103 the duration, gravity and circumstances of the previous infringement of the provisions of the Act should be particularly taken into account.

Article 105

1. The fines referred to in Articles 101-103 are to be paid out of the income after taxation or out of another form of the surplus of revenues over expenses decreased by the taxes.
2. The execution of the fine imposed by the President of the Office shall be suspended until validation of the decision about its imposition.
3. Financial means originating from the fines referred to in Articles 101-103 shall constitute income of the State Treasury.
4. The fine is to be paid within 14 days from the validation of the decision of the President of the Office.
5. In the case of the ineffective lapse of the time limit referred to in section 4, the fine shall be subject to collection on the bases of the provisions on administrative execution proceedings.
6. In the case of delay in the payment of a fine the interest shall not be collected.

Article 106

1. Upon a motion of the entrepreneur, association of entrepreneurs or persons referred to in Article 103, the President of the Office may, by way of a resolution which is not subject to appeal, accord to the respite for payment of the fine or to

the payment on the instalment plan, taking into account important interests of the mover.

2. The President of the Office may abrogate, by way of a resolution which is not subject to appeal, the respite for payment of the fine, where new or previously unknown circumstances, substantial for the settlement, are disclosed.

**TITLE VII
AMENDMENTS TO THE EXISTING PROVISIONS**

Article 107

The following amendments shall be introduced into the act of 17 November 1964 – the Code of civil proceedings (O.L.J. of 1964, No 43, item 296, of 1965, No 15, item 113, of 1974 No 27, item 157 and No 39, item 231, of 1675 No 35, item 234, of 1982 No 11, item 82 and No 30, item 210, of 1983 No 5, item 33, of 1984 No 45, item 241 and 242, of 1985 No 20, item 86, of 1987 No 21, item 123, of 1988 No 41, item 324, of 1989 No 4, item 21 and No 33, item 175, of 1990 No 14, item 88, No 34, item 198, No 53, item 306, No 55, item 318 and No 79, item 464, of 1991 No 7, item 24, No 22, item 92, No 115, item 496, of 1993 No 12, item 53, of 1994 No 105, item 509, of 1995 No 83, item 417, of 1996 No 24, item 110, No 43, item 189, No 73, item 350 and No 149, item 703, of 1997 No 43, item 270, No 54, item 348, No 75, item 471, No 102, item 643, No 117, item 752, No 121, item 769 and 770, No 133, item 882, No 139, item 934, No 140, item 940 and No 141, item 944, of 1998 No 106, item 668 and No 117, item 757, of 1999 No 52, item 532 and of 2000 No 22, item 269 and 271, No 48, item 552 and 554, No 55, item 665, No 73, item 852 and No..., item):

1. Article 479¹ 2, item 3 shall read as follows:

"3) being in the courts' competence on the bases of the provisions on competition protection, Energy Law, Telecommunications Law and the provisions on rail transport,"

- 2) Chapter 2, Division IVa, Title VII, Book One of the first part shall read as follows:

Chapter 2
Proceedings in cases in the field of competition protection

Article 479²⁸

1. The District Court in Warsaw – the anti-monopoly court shall be the competent forum in the matters of:

- 1) appeals against the decision of the President of the Office for Competition and Consumer Protection, in the present chapter referred to as “the President of the Office”,
- 2) complaints against resolutions issued by the President of the Office in the course of proceedings conducted by virtue of the provisions of the Act of 15 December 2000 on competition and consumer protection (O.J.L No 122, item 1319) or pursuant to separate provisions,

- 3) complaints against resolutions issued by the President of the Office in the course of proceedings in prevention conducted by virtue of the Act on competition and consumer protection,
 - 4) complaints against resolutions issued in the course of execution proceedings conducted in order to enforce obligations resulting from decisions and resolutions issued by the President of the Office.
2. The appeal against decisions of the President of the Office shall be lodged by his intermediary before the anti-monopoly court in a time limit of two weeks since the day the decision is delivered.
 3. The appeal against the decision of the President of the Office should meet the requirements foreseen for a lawsuit citation and contain description of the sued decision, citation of raised objections, compact grounds thereof , indication of the evidence as well as contain a motion for the change of the decision in its entirety or in part.

Article 479²⁹.

1. Parties to the proceedings before the anti-monopoly court shall be the President of the Office, the entity being a party to the proceedings before the President of the Office as well as the person lodging a complaint.
2. In the proceedings before the anti-monopoly court may take part as participants the entities admitted to the participation in the proceedings before the President of the Office in a capacity of interested entities.
3. The employee of the Office for Competition and Consumer Protection may act as a plenipotentiary of the President of the Office.

Article 479³⁰

In the case where an appeal against the decision of the President of the Office is being lodged, the anti-monopoly court may, upon a motion of the appealing party, suspend the enforcement of the decision until settlement of the case. The resolution may be issued in the course of the proceedings in camera.

Article 479³¹

1. The anti-monopoly court shall dismiss an appeal against a decision of the President of the Office where there are no grounds to admit it.
2. The anti-monopoly court shall dismiss an appeal lodged after the lapse of the time limit for its submission, inadmissible for other reasons as well as where errors in the appeal are not eliminated in the appointed time limit.
3. The anti-monopoly court, when admitting an appeal against a decision, shall change the decision in its entirety or in part and rule on the substance of the case.

Article 479³².

1. Complaints against resolutions of the President of the Office are to be lodged to the anti-monopoly court in the time limit of one week since such resolution is delivered.
2. The provisions of Article 479²⁸ § 2 and 3 as well as Articles 479³⁰ and 479³¹ shall apply to complaints against resolutions of the President of the Office respectively.

Article 479³³

1. In the course of the proceedings before the anti-monopoly court a business secrecy and other secrets protected by virtue of separate provisions shall be protected.
2. The anti-monopoly court may, by way of a resolution, disclose to the party to the proceedings the information protected in the proceeding before the President of the Office as a business secrecy of the another party solely where:
 - 1) circumstances giving grounds to issuance by the President of the Office of the resolution restricting the right to inquiry into evidence attached by the parties into the case files have changed significantly,
 - 2) the party which business secrecy is protected have expressed its consent.
3. The court, upon request of the party or *ex officio*, may to the necessary extend restrict for the remaining parties the right to inquiry into the evidence attached to the case files in the course of the proceedings, where rendering this material accessible would threaten with a disclosure of the business secrecy or other secrets protected by virtue of separate provisions.
4. The restriction of the right to inquiry into the evidence referred to in § 3 shall not apply to the President of the Office.
5. The resolution referred to in § 2 and 3 shall not be subject to appeal.

Article 479³⁴

In the proceedings before the anti-monopoly court the President of the Office shall not be under obligation to pay court dues and to reimburse costs of the proceedings.

Article 479³⁵

1. To the judgement of the anti-monopoly court the provisions of Articles 387 and 388 shall apply respectively.
2. The judgement of the anti-monopoly court shall be subject to cassation by the Supreme Court, irrespective of the value of the subject of complain.”
3. After Chapter 3, Division Iva, Title VII, Book One of the first part the following Chapters 4-6 shall be inserted:

Chapter 4

Proceedings in cases in the field of regulation in the energy sector

Article 479⁴⁶

The District Court in Warsaw - the anti-monopoly court shall be the competent forum in the matters of :

- 1) appeals against decisions of the President of the Office for Energy Regulation, hereinafter in this chapter referred to as “the President of the Office”,
- 2) complaints against resolutions issued by the President of the Office in the course of proceedings conducted by virtue of the act of 10 April 1997 – Energy Law (O.J.L. of 1997 No 54, item 348 and No 158, item 1042, of 1998 No 94, item 594, No 106, item 668 and 162, item 1126, of 1999 No 88, item 980, No 91, item 1042 and No 110, item 1255 and of 2000 No 43, item 489 and No 48, item 555) or based on separate provisions.

Article 479⁴⁷

1. The appeal against decisions of the President of the Office shall be lodged by his intermediary before the anti-monopoly court in a time limit of two weeks since the day the decision is delivered.
2. The anti-monopoly court shall dismiss the appeal lodged after the lapse of a time limit for its submission or where it is inadmissible for other reasons.

Article 479⁴⁸

1. The President of the Office without delay shall remit the appeal together with the case files to the anti-monopoly court.
2. Where the President of the Office considers the appeal to be justified, he may – without remitting files to the court – abrogate or change his decision in the entirety or in part, about which without delay he shall inform the party by sending his new decision, against which the party may appeal.

Article 479⁴⁹

The appeal against decisions of the President of the Office should meet the requirements foreseen for a lawsuit citation and contain description of the sued decision and value of the subject of dispute, citation of raised objections, compact grounds thereof, indication of the evidence as well as contain a motion for the change of decision in its entirety or in part.

Article 479⁵⁰

1. Parties to the proceedings in the field of energy regulation shall also be the President of the Office and the interested entity.
2. The interested entity shall be the person, whose rights or obligations depend on the settlement of the proceedings. Where the interested entity is not summoned to take part in the proceedings, the anti-monopoly court shall summon her upon a motion of the party or *ex officio*.

Article 479⁵¹

The employee of the Office for Energy Regulation may act as a plenipotentiary of the President of the Office.

Article 479⁵²

In the case where an appeal against the decision of the President of the Office is

being lodged, the anti-monopoly court may, upon a motion of the appealing party, suspend the enforcement of the decision until settlement of the case. The resolution may be issued in the course of the proceedings in camera.

Article 479⁵³

1. The anti-monopoly court shall dismiss an appeal against a decision of the President of the Office where there are no grounds to admit it.
2. The anti-monopoly court, when admitting an appeal against a decision, shall change the decision in its entirety or in part and rule on the substance of the case.

Article 479⁵⁴

In the proceedings before the anti-monopoly court the President of the Office shall not be under obligation to pay court dues and to reimburse costs of the proceedings.

Article 479⁵⁵

The provisions of Article 479³² § 1 and Articles 479⁴⁷-479⁵⁴ shall apply, respectively, to the complaints against resolutions of President of the Office.

Article 479⁵⁶

1. To the judgement of the anti-monopoly court the provisions of Articles 387 and 388 shall apply respectively.
2. The judgement of the anti-monopoly court shall be subject to cassation by the Supreme Court, irrespective of the value of the subject of complain.

Chapter 5

Proceedings in cases in the field of regulation in telecommunications sector

Article 479⁵⁷

The District Court in Warsaw - the anti-monopoly court shall be the competent forum in the matters of :

- 1) appeals against decisions of the President of the Office for Telecommunications Regulation, hereinafter in this chapter referred to as “the President of the Office”,
- 2) complaints against resolutions issued by the President of the Office in the course of proceedings conducted by virtue of the act of 21 July 2000 – Telecommunications Law (O.J.L. No 73 item 852) or based on separate provisions.

Article 479⁵⁸

1. The appeal against decisions of the President of the Office shall be lodged by his intermediary before the anti-monopoly court in a time limit of two weeks since the day the decision is delivered.
2. The anti-monopoly court shall dismiss the appeal lodged after the lapse of a time limit for its submission or where it is inadmissible for other reasons.

Article 479⁵⁹

1. The President of the Office without delay shall remit the appeal together with the case files to the anti-monopoly court.
2. Where the President of the Office considers the appeal to be justified, he may – without remitting files to the Court – abrogate or change his decision in the entirety or in part, about which without delay he shall inform the party by sending his new decision, against which the party may appeal.

Article 479⁶⁰

The appeal against decisions of the President of the Office should meet the requirements foreseen for a lawsuit citation and contain description of the sued decision and value of the subject of dispute, citation of raised objections, compact grounds thereof, indication of the evidence as well as contain a motion for the change of decision in its entirety or in part.

Article 479⁶¹

1. Parties to the proceedings in the field of telecommunications regulation shall also be the President of the Office and the interested entity.
2. The interested entity shall be the person, whose rights or obligations depend on the settlement of the proceedings. Where the interested entity is not summoned to take part in the proceedings, the anti-monopoly court shall summon her upon a motion of the party or *ex officio*.

Article 479⁶²

The employee of the Office for Telecommunications Regulation may act as a plenipotentiary of the President of the Office.

Article 479⁶³

In the case where an appeal against the decision of the President of the Office is being lodged, the anti-monopoly court may, upon a motion of the appealing party, suspend the enforcement of the decision until settlement of the case. The resolution may be issued in the course of the proceedings in camera.

Article 479⁶⁴

1. The anti-monopoly court shall dismiss an appeal against a decision of the President of the Office where there are no grounds to admit it.
2. The anti-monopoly court, when admitting an appeal against a decision, shall change the decision in its entirety or in part and rule on the substance of the case.

Article 479⁶⁵

In the proceedings before the anti-monopoly court the President of the Office shall not be under obligation to pay court dues and to reimburse costs of the proceedings.

Article 479⁶⁶

The provisions of Article 479³² § 1 and Articles 479⁵⁸- 479⁶⁵ shall apply,

respectively, to the complaints against resolutions of the President of the Office.

Article 479⁶⁷

1. To the judgement of the anti-monopoly court the provisions of Articles 387 and 388 shall apply respectively.
2. The judgement of the anti-monopoly court shall be subject to cassation by the Supreme Court, irrespective of the value of the subject of the complain.

Chapter 6 Proceedings in cases in the field of regulation in rail transport sector

Article 479⁶⁸

The District Court in Warsaw - the anti-monopoly court shall be the competent forum in the matters of :

- 1) appeals against decisions of the President of the Office for Rail Transport, hereinafter in this chapter referred to as “the President of the Office”,
- 2) complaints against resolutions issued by the President of the Office in the course of proceedings conducted by virtue of the act of 27 June 1997 on rail transport (O.J.L. of 1997 No 96, item 591, of 1998 No 106, item 668, of 1999 No 84, item 934 and of 2000, No 84, item 948 and No, item....) or based on separate provisions.

Article 479⁶⁹

1. The appeal against decisions of the President of the Office shall be lodged by his intermediary before the anti-monopoly court in a time limit of two weeks since the day the decision is delivered.
2. The anti-monopoly court shall dismiss the appeal lodged after the lapse of a time limit for its submission or where it is inadmissible for other reasons.

Article 479⁷⁰

1. The President of the Office without delay shall remit the appeal together with the case files to the anti-monopoly court.
2. Where the President of the Office considers the appeal to be justified, he may – without remitting files to the Court – abrogate or change his decision in the entirety or in part, about which without delay he shall inform the party by sending his new decision, against which the party may appeal.

Article 479⁷¹

The appeal against decisions of the President of the Office should meet the requirements foreseen for a lawsuit citation and contain description of the sued decision, the value of the subject of dispute, citation of raised objections, compact grounds thereof,

indication of the evidence as well as contain a motion for the change of decision in its entirety or in part.

Article 479⁷²

1. Parties to the proceedings in the field of regulation in rail transport sector shall also be the President of the Office and the interested entity.
2. The interested entity shall be the person, whose rights or obligations depend on the settlement of the proceedings. Where the interested entity is not summoned to take part in the proceedings, the anti-monopoly court shall summon her upon a motion of the party or *ex officio*.

Article 479⁷³

The employee of the Office for Rail Transport Regulation may act as a plenipotentiary of the President of the Office.

Article 479⁷⁴

In the case where an appeal against the decision of the President of the Office is being lodged, the anti-monopoly court may, upon a motion of the appealing party, suspend the enforcement of the decision until settlement of the case. The resolution may be issued in the course of the proceedings in camera.

Article 479⁷⁵

1. The anti-monopoly court shall dismiss an appeal against a decision of the President of the Office where there are no grounds to admit it.
2. The anti-monopoly court, when admitting an appeal against a decision, shall change the decision in its entirety or in part and rule on the substance of the case.

Article 479⁷⁶

In the proceedings before the anti-monopoly court the President of the Office shall not be under obligation to pay court dues and to reimburse costs of the proceedings.

Article 479⁷⁷

The provisions of Article 479³² § 1 and Articles 479⁶⁹- 479⁷⁵ shall apply, respectively, to the complaints against resolutions of the President of the Office.

Article 479⁷⁸

1. To the judgement of the anti-monopoly court the provisions of Articles 387 and 388 shall apply respectively.
2. The judgement of the anti-monopoly court shall be subject to cassation by the Supreme Court, irrespective of the value of the subject of complain.

Article 108

Article 20 of the act of 20 June 1985 – Law on organisation of common courts (O.J.L. of 1994, No 7, item 25, No 77, item 355, No 91, item 421, No 105, item 509, of 1995 No 34, item 163, No 81, item 406, of 1996 No 77, item 367, of 1997 No 75, item 471, No 98, item 604, No 106, item 679, No 117, item 751, 752 and 753, No 121, item 769, No 124, item 782, No 133, item 882, of 1998 No 98, item 607, No 160, item 1064, No 162, item 1118 and 1125, of 1999 No 20, item 180, No 60, item 636, No 75, item 853, No 83, item 931, No 110, item 1255 and of 2000 No 48, item 551, No 50, item 580, No 56, item 678) - shall read as follows:

“Article 20. The Minister of Justice, by way of regulation, shall establish in the District Court in Warsaw a separate organisational unit competent in the cases in the fields of protection of competition, regulation in energy, telecommunications and rail transport sectors.”

Article 109

In the act of 30 April 1993 on national investment funds and their privatisation (O.J.L. of 1993 No 44 item 202, of 1994 No 84 item 385, of 1997 No 70 item 164, No 47 item 298 and No 107 item 691) the following amendments shall be introduced:

1) Article 25 shall read as follows:

“Article 25.1. The managing company shall neither at the same time render managerial services on behalf of two or more funds nor be the shareholder of the fund on which behalf it renders managerial services without obtaining prior consent of the President of the Office for Competition and Consumer Protection.

2. The member of the supervisory board or of the management of the fund shall not be allowed to assume at the same time the function of the member of the supervisory board or of the management of another fund. The above prohibition shall apply to the proxies respectively.

3. In the case of the infringement of the obligations and prohibitions referred to in sections 1 and 2, the President of the Office for Competition and Consumer Protection may issue the decision imposing on the respective member of the management of a given fund or managing company the fine in the amount not exceeding the half of the income of this person for the last taxation year. The appeal against the decision of the President of the Office for Competition and Consumer Protection shall be examined according to the procedure set up in Article 78 of the act of 15 December 2000 on competition and consumer protection (O.J.L No 122, item 1319).”

2) Article 27 shall read as follows:

“Article 27. The prohibitions referred to in Article 25 sections 1 and 2 shall also

include the entities dominant or dependent in relation to the managing company, in the meaning of Article 4, item 3 of the act referred to in Article 25, section 3.”

3) After Article 28 the following Article 28a shall be added:

“Article 28a. In the scope not regulated by this Chapter, the provisions of the act of 15 December 2000 on competition and consumer protection shall apply.”

TITLE VIII TRANSITIONAL AND FINAL PROVISIONS

Article 110

1. As of the day the present Act is coming into force the first term of office of the President of the Office holding this post on that day shall begin, without prejudice to sections 2 and 3.
2. The term of office referred to in section 1 shall be abbreviated by the period for which the President of the Office has been holding this post before the Act becomes effective.
3. The Prime Minister may recall the President of the Office within 3 months as of the day the Act comes into force. During this period the restrictions referred to in Article 24, section 5 shall not apply.

Article 111

As of the day the present Act comes into force, Directors and Deputy Directors of the Office delegations shall become members of the civil service corps and their hitherto work relations established by way of the appointment based on rules defined in the act of 24 February 1990 on counteracting monopolistic practices and protection of consumer interests (O.J.L. of 1999 No 52, item 547 and of 2000 No 31, item 381, No 60, item 704) shall be transformed into work relations by virtue of the work contract for unlimited duration, only that the post of Vice-Director of the delegation shall change to the post of Deputy Director.

Article 112

When fixing the amount of the fine referred to in Article 104 also the fact of the infringement of the provisions of the act of 24 February 1990 on counteracting monopolistic practices and protection of consumer interest shall be taken into account within the period of 5 years as of the day the present Act enters into force.

Article 113

The investigations instituted by virtue of the provisions of the act of 24 February 1990 on counteracting monopolistic practices and protection of consumer interest shall be carried pursuant to the provisions of the present Act.

Article 114

The implementing regulations issued on the bases of the act of 24 February 1990 on counteracting monopolistic practices and protection of consumer interests shall remain in force until the time they will be superseded by the regulations issued pursuant to the present Act, in the scope in which they are not contradictory to its provisions, but not longer than for the period of 12 months from its entering into force.

Article 115

The value of EURO referred to in the provisions of the Act shall be converted into zloties according to average rate of foreign currencies published by the National Bank of Poland on the last day of the year preceding the year in which the intention of concentration is notified or fine imposed.

Article 116

Wherever in the separate provisions the anti-monopoly authority or the Anti-monopoly Office are being mentioned, it should be understood as the President of the Office for Competition and Consumer Protection.

Article 117

The act of 24 February 1990 on counteracting monopolistic practices and protection of consumer interests expires (O.J.L. of 1999 No 52 item 547 and of 2000 No 31 item 381, No 60 item 704).

Article 118

The Act comes into force as of 1 April 2001, except for Article 41 which shall come into force as of 1 January 2001.

PORTUGAL

COMMENTARY BY THE GOVERNMENT OF PORTUGAL ON THE PORTUGUESE COMPETITION LEGISLATION

The legal framework for competition in Portugal was fully reformed in 2003. Two legal instruments supported the reform: Decree-Law 10/2003, of January 18, and Law 18/2003, of June 11.

A. The Portuguese Competition Authority - Decree-Law 10/2003

One of the main purposes of the review of the competition legal framework in Portugal was to reform the institutional structure for enforcement of competition rules.

To this extent Decree-Law 10/2003 replaced the two former entities entrusted with competition enforcement - the “Competition Council” and the “General Directorate for Commerce and Competition” - by a new single entity: the “Competition Authority” (*Autoridade da Concorrência*), to which was assigned the mission of “...assuring the enforcement of competition rules in Portugal, on the basis of respect for the principle of the market economy and that of free competition, taking into consideration the efficient functioning of the markets, the effective allocation of resources and the interests of the consumer...”.

Created as a public corporation, the Portuguese Competition Authority (PCA) has been granted statutory independence for the performance of its tasks vis-à-vis the Government. The autonomy granted to manage its finances and assets, and the requirements in relation to the members of its Board with regard to their nomination, the duration of their mandate and the rules on incompatibility and impediment strengthen the independent nature of this new agency.

Nevertheless, the acts of the PCA with financial impact, such as the activities plan and budget and the annual report on its activities and accounts were subject to administrative supervision of the minister responsible for economic affairs. However, the statute of independence of the PCA is not substantially affected thereof, since the funding of its budget is to be ensured by revenues from earmarked funds, user fees and fines, with a marginal recourse to general revenue.

The PCA is composed of two bodies: the Board (*Conselho*) and the Single Auditor (*Fiscal Único*).

The Board is the PCA’s highest body, being responsible for the enforcement of competition rules and for the management of the Authority’s staff. It is composed of one chairperson and two or four other members (two at the present state) appointed by resolution of the Council of Ministers. Such members must be persons of recognized competence, with experience in the fields relevant to the fulfillment of the PCA's duties.

The members of the Board are nominated for a mandate of five years, renewable for five more years. On the first nomination or after the dissolution of the Board, some of its members are nominated for a period of three years and the remaining ones for a period of five years.

The Single Auditor, a chartered accountant or a firm of chartered accountants, is responsible for the control of the financial aspects of the PCA's activities. The Single Auditor is appointed by a joint order of the ministers responsible for finance and economic affairs for a period of three years, renewable for an equal period of three years.

In order to perform its mission, the PCA is entrusted with supervisory and regulatory powers along with powers to impose penalties.

Within the exercise of *supervisory powers*, the PCA investigates and decides, *inter alia*, on proceedings concerning mergers. Within the scope of *regulatory powers* it may issue general recommendations and guidelines or may approve or propose the adoption of regulations. Finally, the PCA is granted powers to investigate practices likely to infringe competition law and to decide on the correspondent proceedings by imposing the appropriate penalties.

As far as merger control and proceedings on anticompetitive practices in regulated sectors are concerned, the powers granted to the PCA are to be carried out in cooperation with the respective regulatory agencies.

The PCA's decisions may only be challenged before the courts. However, merger prohibition decisions may be appealed to the minister responsible for economic affairs, who may approve the prohibited merger whenever the resulting benefits to fundamental national economic interests exceed the inherent disadvantages for competition.

B. Competition Act - Law 18/2003

In June 2003, a new Competition Act came into force – Law 18/2003, of 11 June, which has undertaken the review of the substantive and procedural rules of Portuguese competition law.

1. Anticompetitive practices

Law 18/2003 introduced some significant changes to the legal framework of anticompetitive behavior.

As to prohibition of *collusive practices*, Law 18/2003 requires now that collusive practices have an appreciable impact on competition, which allows the so-called “cases of minor importance” to be disregarded. Furthermore, Law 18/2003 provides now automatic justification for agreements that, though not affecting trade between Member States, fulfill the remaining application requirements of any Community block exemption regulation.

On the issue of *abuse of a dominant position*, Law 18/2003 eliminated the market share based presumption of dominant position contained in the earlier legislation. On the other hand, the abusive nature of a non justified refusal to provide access to an essential facility was emphasized in this new Act by adding this type of conduct to the shortlist of abuses of dominant position already provided for in the previous law.

In what refers to the *abuse of economy dependency* - the other form of abuse of economic power provided for in Portuguese competition legislation - Law 18/2003 requires now that it has an effect on the functioning of the market or on the structure of competition to qualify as a restrictive practice.

Significant changes were also introduced to the *regime of penalties* for anticompetitive practices. Fines are now set in relation to the total turnover of the undertakings concerned and the application of periodic penalty payments is also admissible under Law 18/2003.

Finally, *limitation periods* have been extended to five years vis-à-vis the three years provide for under the ancient regime.

2. Mergers

Merger control was also reviewed under Law 18/2003. All sectors of activity, including banking and insurance, are now submitted to merger control under the new Competition Act. As a matter of fact, until the coming into force of Law 18/2003 mergers in the banking and insurance sectors fell out the scope of competition law, concentrations in these markets being only scrutinized by the correspondent regulatory agencies.

As to requirements for prior notification, thresholds based either on the market share (over 30%) or on the aggregate turnover (€ 150 million) of the undertakings concerned in Portugal remain the basic criteria for notification. However, as far as the turnover thresholds are concerned, Law 18/2003 requires now, in addition, that at least two of the undertakings taking part in the merger have a turnover that exceeds EUR 2 million.

The rule on merger appraisal has also changed under the new Competition Act. Indeed, under the previous legislation a merger which adversely affected competition within the national market could be cleared, should the undertakings succeed to make the argument on the contribution of the envisaged merger to their competitiveness at an international level. According to Law 18/2003, mergers that create or strengthen a dominant position which may result in significant barriers to effective competition in the national market shall be prohibited, enhancement of international competitiveness being just one of the criteria to take into consideration when evaluating the impact of a merger on competition.

Finally, several procedural issues were revisited under the reform undertaken by Law 18/2003.

Merger proceedings are now divided into two phases: the first phase with duration of 30 working days and a second phase, with duration of 90 working days, which is only to be opened if the merger is likely to produce anticompetitive effects. Since most cases are decided in the first phase, this has allowed a significant shorting of the time limits for deciding on mergers when compared with which were set out before the coming into force of Law 18/2003.

Furthermore, third parties are now fully allowed to participate in merger proceedings on their own initiative, the publication of the essential elements of the merger, within 5 working days after its notification, becoming mandatory with Law 18/2003.

Penalties for infringements of merger control rules have been also revised, in line with the reform of sanctions applying to anticompetitive behavior mentioned above. Thus, fines are now set in relation to the total turnover of the undertakings concerned and the application of periodic penalty payments has also become admissible.

First Amendment to Law 18/2003

The Portuguese Competition Act has been amended by Decree Law No. 219/2006, of 2 November 2006, a statute enacted mainly to transpose EC Directive 2004/25/EC regarding public bids. The two amended provisions of the Act, articles 9 and 36, concerned merger control. The new wording of article 9(2), clarifies the seven working days deadline for filing of the notification in case of public bids. Moreover, a new paragraph 3 was introduced in article 9 establishing the possibility of a pre-notification assessment of a transaction by the Competition Authority. This paragraph was complemented on 3 April 2007 with the adoption by the Competition Authority of guidelines on the procedure of pre-notification. Finally, the new wording of article 36 of the Act has shortened the phase II review period (formerly 90 working days, counted from the date of the decision to open such phase II and extendible if requests for additional information are made by the Competition Authority). According to such new wording a phase II in-depth investigation must be completed within a maximum of 90 working days, counted from the date the notification was filed and this deadline may only be extended up to a maximum of 10 working days if requests for additional information are made by the Competition Authority.

Guidelines for a Prior Evaluation of Mergers

In 2007, the PCA enacted guidelines for a prior evaluation of mergers. Based on PCA's experience and on the European Commission's experience in enforcing the EC Merger Regulation and the Commission Guidelines issued in this area, the PCA adopted a set of guidelines aiming to inform the undertakings of the procedure set out for the applications of prior evaluation of mergers⁴⁴. Prior evaluation is an optional procedure for undertakings, offering the opportunity, if needed, to hold discussions with the PCA officials on the legal and procedural aspects of the operation envisaged, in an informal and absolutely confidential manner, and, when possible, seeking to identify the most problematic competition aspects of the projected merger.

The new procedure does not imply that any formal decision is taken by the PCA on the merit from the point of view of merger control, but may lead to a shorter phase I in case the merger is notified and will tend to prevent gaps and inaccuracies in the information supplied on the notification form, limiting the need for additional information requests.

When a prior evaluation application has been received, it is the PCA's responsibility to decide, within a reasonable period of time, on the appropriate type of contact it will have with the requesting undertakings, taking into account the complexity of the operation in question, and in accordance with the information that has been gathered.

In most cases the PCA will arrange preliminary meetings with the requesting undertakings, for them to outline the merger operation and to provide for a discussion of the main features of the operation.

Following the assessment of a prior evaluation request, the PCA will take a position limited by the information provided by the undertakings involved. This position does not prevent the PCA from adopting a final decision of a different nature at the end of the

⁴⁴ The Guidelines are available at the PCA website: www.autoridadedaconcorrenca.pt.

future merger control proceeding initiated by the formal notification of a merger operation.

Simplified Decision for Merger Operations

Also in 2007, PCA introduced a simplified decision procedure that seeks to expedite the analysis of less complex mergers. This new procedure consists of a simplified form of decision-making, which will be limited to the key elements of the analysis that are strictly necessary to a final decision by the PCA⁴⁵.

Among the cases that may lead to a simplified decision are the following *i*) if there is no significant change in the competitive structure of the market; *ii*) the establishment of a joint company, qualified as a merger, whose economic activity in the national market is deemed to be negligible or non-existent or without significant horizontal and/or vertical effects; and *iii*) a transaction which does not qualify as a merger or does not meet the criteria of prior mandatory notification.

The simplified procedure will not be applied where there are third interested parties or where there is otherwise a need of holding a public hearing of interested parties.

3. Leniency

Law No. 39/2006, of 25 August

In 2006, Law No. 39/2006, of 25 August, introduced the Leniency regime in Portugal, which includes granting of immunity from or a special reduction in a fine imposed to an infringement of both the Portuguese Competition Law and Articles 81 and 82 of the EC Treaty. According to the Law, total immunity is available for the first member of a cartel to come forward with evidence of an alleged cartel, before PCA has started an investigation. A reduction in penalty of at least 50 per cent is available when the undertaking is the first to come forward with information/evidence of an existent cartel, but does it after PCA has started an investigation and before issuing the statement of objections. Moreover, a reduction in penalty of up to 50 per cent would be granted to the second member of the cartel that provides PCA with evidence of the alleged cartel which, in PCA's view, represents significant added value with the respect to the evidence in PCA's possession at the time of the application, and before issuing the statement of objections.

Furthermore, the Leniency law provides an incentive for a cartel member to come forward with information related to any other cartel in which it may be involved with. Therefore, under the Leniency Law if an undertaking that is already being investigated in connection with one cartel comes forward with information that enables it to be granted immunity in relation to a second cartel, then it may receive a reduction or an additional reduction in the penalty applied in connection with the first cartel.

Both immunity and reduction of fines applicants must cooperate fully and on a continuous basis from the time of their submission of an application with PCA until the conclusion of the case. This duty of cooperation includes, for example: *i*) provide PCA promptly with all the relevant information and evidence that comes into the applicant

⁴⁵ The Guidelines on the Simplified Decision Procedure are available at www.autoridadedaconcorrenca.pt.

possession and control; *ii*) stand ready to reply promptly to any PCA request that may contribute to the establishment of the relevant facts; *iii*) cease its involvement in the cartel from the time it comes forward with the information; and *iv*) not disclose the fact or the content of the application submitted to PCA to other cartel members.

Regulation No. 214/2006, of 22 November

Following Law No. 39/2006, of 25 August, the PCA enacted the administrative procedure for the new leniency legislation, Regulation No. 214/2006, of 22 November. By setting out the mechanisms for the granting of immunity from, or a reduction of, infringement fines, the procedure is expected to contribute to enhance anti-cartel enforcement, which remains a key strategic priority.

This procedure sets forth the written form for the submission of an application, as well as a “*marker system*” and the possibility of “*summary applications*”, when the infringement affects more than three Member States, if the applicant has presented or is about to present an application to the European Commission (Communication on Cooperation, paragraph 14, JO C 101 27.04.2004, p. 43).

The PCA’s final position on the leniency application is taken in the decision that terminates the case. The granting of immunity or a reduction of fine depends on the fulfilment of all requirements established in Law No. 39/2006, namely full and continuous cooperation with the PCA.

LAW 18/2003 OF 11 JUNE 2003

Assembly of the Republic Law No. 18/2003 of 11 June

APPROVING THE LEGAL FRAMEWORK FOR COMPETITION

Pursuant to Article 161 c) of the Constitution, the Assembly of the Republic makes the following decree, which shall stand as a general law of the Republic:

CHAPTER I The rules of competition

SECTION I General provisions

Article 1 Scope

1. This act is applicable to all economic activities carried out on a permanent or occasional basis in the private, public or co-operative sectors.
2. With the exception of the international obligations of the Portuguese state, this act is applicable to restrictive competition practices and concentrations between undertakings which take place or have or may have effects in the territory of Portugal.

Article 2

Concept of an undertaking

1. For the purposes of this Act, an undertaking is considered to be any entity exercising an economic activity that consists of the supply of goods and services in a particular market, irrespective of its legal status or the way in which it functions.
2. A group of undertakings is considered as a single undertaking if, though legally distinct, they make up an economic unit or maintain ties of interdependence or subordination among themselves arising from the rights or powers set out in Article 10 (1).

Article 3

Services of general economic interest

1. Public undertakings and those to which the state has granted special or exclusive rights are covered by the provisions of this Act, without prejudice to the provisions of the following paragraph.
2. Undertakings legally charged with the management of services of general economic interest or which have the nature of legal monopolies are subject to the provisions of this Act, insofar as the application of these rules does not constitute an impediment in law or in fact to fulfilment of the particular mission entrusted to them.

SECTION II
Prohibited practices

Article 4
Prohibited practices

1. Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, of which the object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market, are prohibited, in particular those which:
 - (a) Directly or indirectly fix purchase or selling prices or interfere with their establishment by free market forces, thus causing them artificially either to rise or fall;
 - (b) Directly or indirectly fix other transaction conditions effected at the same stage or different stages of the economic process;
 - (c) Limit or control production, distribution, technical development or investments;
 - (d) Share out markets or sources of supply;
 - (e) Systematically or occasionally apply discriminatory pricing or other conditions to equivalent transactions;
 - (f) Directly or indirectly refuse to purchase or sell goods or services;
 - (g) Subject the signing of contracts to the acceptance of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Except in such cases as are considered justified, under the terms of Article 5, practices prohibited under paragraph 1 are null and void.

Article 5
Justification of prohibited practices

1. Practices referred to in Article 4 may be considered justified when they contribute to improving the production or distribution of goods and services or promoting technical or economic development, provided that, cumulatively, they:
 - (a) Offer the users of such goods or services a fair part of the benefit arising therefrom;
 - (b) Do not impose on the undertakings in question any restrictions that are not indispensable to attain such objectives;
 - (c) Do not grant such undertakings the opportunity to suppress the competition in a substantial part of the goods or services market in question.
2. The practices provided for in Article 4 may be the subject of prior assessment by the Competition Authority, hereinafter referred to as the Authority, according to the procedure to be established by the regulations to be approved by the Authority in accordance with its Statutes.
3. Practices prohibited by Article 4 are considered justified when, though not

affecting trade between Member States, they satisfy the remaining application requirements of a Community regulation adopted under Article 81 (3) of the Treaty establishing the European Community.

4. The Authority may withdraw the benefit referred to in paragraph 3 if, in a particular case, it ascertains that a practice covered by it has effects incompatible with the provisions of paragraph 1.

Article 6 **Abuse of a dominant position**

1. One or more undertakings shall not engage in the abusive exploitation of a dominant position in the national market or a substantial part of it, with the object or effect of preventing, distorting or restricting competition.
2. The following are to be understood as having a dominant position in the market for a particular good or service:
 - (a) An undertaking that is active in a market in which it faces no significant competition or in which it predominates over its competitors;
 - (b) Two or more undertakings that act in concert in a market in which they face no significant competition or in which they predominate over third parties.
3. The following in particular may be considered abusive:
 - (a) Any of the forms of behaviour referred to in Article 4 (1);
 - (b) The refusal, upon appropriate payment, to provide any other undertaking with access to an essential network or other infrastructure which the first party controls, when, without such access, for factual or legal reasons, the second party cannot operate as a competitor of the undertaking in a dominant position in the market upstream or downstream, always excepting that the dominant undertaking demonstrates that, for operational or other reasons, such access is not reasonably possible.

Article 7 **Abuse of economic dependence**

1. Insofar as it may affect the functioning of the market or the structure of the competition, one or more undertakings shall not engage in the abusive exploitation of the economic dependence on it or them of any supplier or client on account of the absence of an equivalent alternative.
2. The following in particular may be considered abusive:
 - (a) Any of the forms of behaviour laid out in Article 4 (1)
 - (b) The unjustified cessation, total or partial, of an established commercial relationship, with due consideration being given to prior commercial relations, the recognised usage in that area of economic activity and the contractual conditions established.
3. For the purposes of paragraph 1, an undertaking is understood as having no equivalent alternative when:

- (a) The supply of the good or service in question, in particular that of distribution, is provided by a restricted number of undertakings; and
- (b) The undertaking cannot obtain identical conditions from other commercial partners in a reasonable space of time.

SECTION III

Concentrations between undertakings

Article 8

Concentrations between undertakings

1. For the purposes of this Act, a concentration between undertakings shall be understood to exist:
 - (a) In the case of a merger between two or more hitherto independent undertakings;
 - (b) In the case that one or more individuals who already have control of at least one undertaking or of one or more undertakings acquire control, directly or indirectly, of the whole or parts of one or several other undertakings.
2. The establishment or acquisition of a joint undertaking shall constitute a concentration between undertakings, within the meaning of subparagraph b) of the paragraph above, inasmuch as the joint undertaking fulfils the functions of an independent economic entity on a lasting basis.
3. For the purposes of the paragraphs above, control shall be constituted by any act, irrespective of the form which it takes, which, separately or jointly and having regard to the circumstances of fact or law involved, implies the ability to exercise a determining influence on an undertaking's activity, in particular:
 - (a) Acquisition of all or part of the share capital;
 - (b) Acquisition of rights of ownership, use or enjoyment of all or part of an undertaking's assets; c) Acquisition of rights or the signing of contracts which grant a decisive influence over the composition or decision-making of an undertaking's corporate bodies.
4. The following are not held to constitute a concentration between undertakings:
 - (a) The acquisition of shareholdings or assets under the terms of a special process of corporate rescue or bankruptcy;
 - (b) The acquisition of a shareholding merely as a guarantee;
 - (c) The acquisition by credit institutions of shareholdings in non-financial undertakings, when such acquisition is not covered by the prohibition in Article 101 of the General Regulations for Credit Institutions and Financial Institutions approved by Decree-Law No. 298/92 of 31 December.

Article 9

Prior Notification

1. Concentrations between undertakings are subject to prior notification when one of the following conditions is fulfilled:
 - (a) Their implementation creates or reinforces a share exceeding 30% of the national market for a particular good or service or for a substantial part of it.
 - (b) In the preceding financial year, the group of undertakings taking part in the concentration have recorded in Portugal a turnover exceeding EUR 150 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of these undertakings exceeds two million euros.
2. The concentrations covered by this Act shall be notified to the Authority within seven working days of conclusion of the agreement or, where relevant, by the publication date of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest.

Article 10

Market share and turnover

1. Calculation of the market share and turnover provided for in Article 9 shall take into account, accumulatively, the turnover of:
 - (a) Undertakings taking part in the concentration;
 - (b) Undertakings in which such undertakings dispose, directly or indirectly, of: A majority holding in the share capital; More than half the votes; The ability to nominate more than half the members of the management or supervisory bodies; The power to manage the undertaking's business;
 - (c) Undertakings which, in the participating undertakings, separately or jointly, have the rights or powers specified in subparagraph b);
 - (d) Undertakings in which an undertaking referred to in subparagraph c) has the rights or powers specified in subparagraph b);
 - (e) Undertakings in which various undertakings referred to in subparagraphs a) to d) jointly dispose, among themselves or with third-party undertakings, of the rights or powers specified in subparagraph b).
2. If one or more undertakings involved in the concentration jointly dispose of the rights or powers specified in paragraph 1 b), the calculation of the turnover for the undertakings taking part in the concentration:
 - (a) Shall not take account of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings taking part in the concentration or any other undertaking connected to them within the meaning of paragraph 1 b) to e);
 - (b) Shall take account of the turnover from the sale of products or provision of services between the joint undertaking and any other third-party undertaking and such turnover shall be attributed to each of the undertakings participating in the concentration in the part corresponding to its division into equal parts for all the undertakings controlling the joint undertaking.
3. The turnover referred to in the preceding paragraph includes the value of products sold and services provided to undertakings and consumers within the territory of Portugal, net of taxes directly related to the turnover, but does not include transactions carried out between the undertakings referred to in the same

paragraph.

4. By way of derogation from the provisions of paragraph 1, if the concentration consists of the acquisition of parts, with or without their own legal personality, of one or more undertakings, the turnover to be taken into account with regard to the transferor or transferors shall solely be that relating to the parts involved in the transaction.
5. The turnover shall be substituted:
 - (a) In the case of credit and other financial institutions, by the sum of the following items of income, as they are defined by the applicable legislation:
 - (i) Interest and equivalent income;
 - (ii) Income from securities;
 - (iii) Income from shares and other variable-yield securities;
 - (iv) Income from equity investment;
 - (v) Income from parts of the capital in associated undertakings; iii) Commission received;
 - (vi) Net profit from financial operations;
 - (vii) Other operating income.
 - (a) In the case of insurance undertakings, by the value of gross premiums written, paid by residents of Portugal, which shall include all amounts received or receivable in respect of insurance contracts issued by or on behalf of such undertakings, including premiums paid to re-insurers, except for the taxes or levies charged on the basis of the amount of the premiums or their total volume.

Article 11

Suspension of concentrations

1. A concentration subject to prior notification shall not be put into effect before it has been notified and has been the object of an explicit or tacit decision of non-opposition.
2. The validity of any legal transaction carried out in contravention of the provisions of this section depends on the explicit or tacit authorisation of the concentration.
3. The provisions of the preceding paragraphs do not impede the implementation of a public bid to purchase or an exchange offer that has been notified to the Authority in accordance with Article 9, provided that the acquirer does not exercise the voting rights attached to the securities in question or exercises them solely to protect the full value of its investments on the basis of a derogation granted under the terms of the following paragraph.
4. At the request, duly substantiated, of the participating undertaking or undertakings, presented prior to or subsequently to the notification, the Authority may grant a derogation from the obligations provided for in paragraphs 1 or 3, after considering the consequences for the participating undertakings of suspending the concentration or the exercise of voting rights and the negative effects of the derogation for the competition. The derogation may, if necessary, be accompanied

by conditions and obligations intended to guarantee effective competition.

Article 12

Appraisal of concentrations

1. Without prejudice to the provisions of paragraph 5 of this article, concentrations notified in accordance with Article 9 shall be appraised in order to determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese market, in the interests of the intermediate and final consumer.
2. The appraisal referred to in paragraph 1 shall take into account the following factors in particular:
 - (a) The structure of the relevant markets and the existence or absence of competition from undertakings established in such markets or in distinct markets;
 - (b) The position of undertakings participating in the relevant market or markets and their economic and financial power, in comparison with their main competitors;
 - (c) The potential competition and the existence, in law or in fact, of entry barriers to the market;
 - (d) The opportunities for choosing suppliers and users;
 - (e) The access of the different undertakings to supplies and markets;
 - (f) The structure of existing distribution networks;
 - (g) Supply and demand trends for the products and services in question;
 - (h) Special or exclusive rights granted by law or attached to the nature of the products traded or services provided;
 - (i) The control of essential infrastructure by the undertakings in question and the access opportunities to such infrastructure offered to competing undertakings;
 - (j) Technical and economic progress provided that it is to the consumer's advantage and does not create an obstacle to competition;
 - (k) The contribution that the concentration makes to the international competitiveness of the Portuguese economy.
3. Authorisation shall be granted to concentrations that neither create nor strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it.
4. A prohibition shall be imposed on concentrations that create or strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it.
5. A decision which authorises a concentration also covers the restrictions directly related to the implementation of the concentration and necessary therefor.
6. In the cases provided for in Article 8 (2), if the object or effect of creating the joint

undertaking is to co-ordinate the competitive behaviour of undertakings that remain independent, such co-ordination is assessed under the provisions of Articles 4 and 5 of this Act.

SECTION IV
State Aid

Article 13
State Aid

1. The aid granted to undertakings by a state or any other public body must not significantly restrict or affect competition in the whole or in part of the market.
2. At the request of any interested party, the Authority may scrutinize any aid or aid project and formulate such recommendations for the Government as it deems necessary to eliminate the negative effects on competition of such aid.
3. For the purposes of this article, compensatory payments made by the state in return for the provision of a public service, whatever the form of such payments, shall not be considered aid.

CHAPTER II
Competition Authority

Article 14
Competition Authority

The Competition Authority shall ensure compliance with competition rules, within the limits of the attributions and competences that are assigned to it by law.

Article 15
Sectoral regulatory authorities

The Competition Authority and the sectoral regulatory authorities shall work together to apply the competition legislation, in accordance with Chapter III of this Act.

Article 16
Report

On an annual basis, the Competition Authority shall draw up a report on its activities and the exercise of its powers and competences, in particular in relation to its powers to sanction, supervise and regulate. It shall send this report to the Government, which shall forward it at that moment to the Assembly of the Republic, in readiness for publication.

CHAPTER III
Procedure

SECTION I
General Provisions

Article 17
Powers of investigation and inspection

1. In exercising its powers to sanction and supervise, the Authority, represented by its institutional bodies and employees, enjoys the same rights and powers and is subject to the same duties as criminal police institutions and is able, in particular:
 - (a) To question the legal representatives of the undertakings or associations of undertakings involved and to ask them for documents and other elements of information that the Authority deems useful or necessary for clarification of the facts;
 - (b) To question the legal representatives of other undertakings or associations of undertakings and any other persons whose declarations it deems relevant and to request them to supply documents and other information;
 - (c) To search for, examine, gather, copy or take extracts from written or other documentation, at the premises of the undertakings or associations of undertakings involved, whether or not such documentation is in a place that is reserved or not freely accessible to the public, whenever such inquiries prove necessary for the obtaining of evidence;

- (d) To seal the premises of the undertakings in which elements of written or other documentation are to be found or are liable to be found, for the period and to the extent strictly necessary for the inquiries referred to in the preceding paragraph;
 - (e) To require any other public administration services, including criminal police bodies, through the proper ministerial channels, to provide the co-operation necessary for the full discharge of their duties.
2. The investigations provided for in paragraph 1 c) require a warrant from the legal authorities, requested beforehand by the Authority in an application that is duly substantiated. The decision shall be handed down within 48 hours.
 3. The Authority's employees who, externally, perform the investigations provided for in paragraph 1 a) to c) shall carry with them:
 - (a) With respect to subparagraphs a) and b), credentials issued by Authority stating the purpose of the investigation;
 - (b) With respect to subparagraph c), the credentials referred to in the preceding subparagraph and the warrant provided for in paragraph 2.
 4. Whenever necessary, the persons alluded to in the preceding paragraph may request the action of the police authorities.
 5. When persons summoned to make declarations to the Authority fail to attend, such failure shall not prevent the case from proceeding.

Article 18

Request for information

1. Whenever, in exercising the powers to sanction and supervise afforded by the law, the Authority requests undertakings or associations of undertakings or any other persons or bodies to provide necessary documents or other information, this request shall include the following information:
 - (a) The legal basis and the purpose of the request;
 - (b) The period within which the information should be communicated or the documents provided;
 - (c) The penalties applicable in the case of non-compliance with the request;
 - (d) The instructions that undertakings should identify information which they consider confidential, with due justification. In this case, they should enclose a non-confidential copy of the documents containing such information.
2. Information and documents requested by the Authority in pursuance of this Act should be provided within 30 days, unless, with a properly substantiated decision, the Authority lays down a different period.

Article 19

Penalty procedures

Without prejudice to the provisions of this Act, the penalty procedures respect the principle that parties involved are given a hearing, the principle of the adversarial system

and other general principles applicable to the procedure and administrative action contained in the Administrative Procedure Code, approved by Decree-Law No. 442/91 of 15 November, in the wording of Decree-Law No. 6/96 of 31 January and contained, if applicable, in the general regime for administrative offences, approved by Decree-Law No. 433/82 of 27 October, in the wording of Law No. 109/2001 of 24 December.

Article 20

Supervisory procedures

Unless provided for otherwise by this Act, the decisions adopted by the Authority under the supervisory powers conferred on it by the law follow the common administrative procedure laid down in the Administrative Procedure Code.

Article 21

Regulatory procedures

1. Before issuing any externally effective regulation, adopted under the regulatory powers provided for in Article 7 (4) of its statutes, the Authority shall publicize the proposal of the regulation on the Internet for public discussion purposes, for a period of not less than 30 days.
2. In the preamble to the regulations provided for in the paragraph above, the Authority shall justify its options, particularly with reference to the opinions expressed during the public discussion period.
3. The provisions of the paragraphs above shall not be applicable in urgent cases, for which the authority may decide to shorten the period allowed or dispense with it, on grounds which it shall cite.
4. Authority regulations containing externally effective rules are published in the 2nd Series of the official gazette, the *Diário da República*.

SECTION II

Proceedings relating to prohibited practices

Article 22

Applicable law

1. Proceedings for infringement of the provisions of Articles 4, 6 and 7 are governed by the provisions of this section and Section 1 of this Chapter and, subsidiarily, by the general regime for administrative offences.
2. The provisions of the preceding paragraph are also applicable, with the necessary adaptations, to the proceedings for infringement of Articles 81 and 82 of the Treaty establishing the European Community which are initiated by the Authority or in which the Authority is called to intervene, under the powers conferred on it by Article 6 (1) g) of Decree-Law No. 10/2003 of 18 January.

Article 23

Notifications

1. Notifications are carried out personally, if necessary with the assistance of the police authorities, or by registered letter with recorded delivery, sent to the head office, principal establishment or address in Portugal of the undertaking or its legal representative or to the place of business of its legal agent, nominated for the purpose.
2. When the undertaking has no main office or establishment in Portugal, the notification is carried out by registered letter with recorded delivery to the company headquarters or principal establishment.
3. When it is not possible to carry out the notification, in accordance with the provisions of the paragraphs above, the notification is considered to have been carried out on the 3rd and 7th working day after despatch, respectively, with the sanction applicable being stated in the act of notification.

Article 24 **Opening of the inquiry**

1. Whenever the Authority becomes aware, from whatever source, of possible practices prohibited by Articles 4, 6 and 7, it shall initiate an investigation, within the scope of which it shall carry out the inquiries necessary to identify such practices and their agents.
2. All direct, indirect or independent administrative services of the state, as well as independent administrative authorities, have the duty to inform the Authority if they become aware of facts which may be described as restrictive competitive practices.

Article 25 **Inquiry decision**

1. When the inquiry is complete, the Authority shall decide:
 - (a) To take no further action, should it deem that there is not sufficient evidence of infringement;
 - (b) To initiate proceedings by notifying the accused undertakings or associations of undertakings, should it conclude from the investigations carried out that there is sufficient evidence of infringement of the competition rules.
2. If the investigation has been instituted on the grounds of an accusation by any interested party, the Authority may not annul the proceedings without previously informing the accusing party of its intentions, granting it a reasonable period to make its position known.

Article 26 **Taking evidence for the case**

1. In the notification referred to in Article 25 (1) b), the Authority shall set a reasonable period for the accused to make its position known in writing with respect to the accusations and other questions that may concern the decision for the

- case and with respect to the proof produced, as well as a reasonable period for the accused to request the further inquiries for evidence that they consider proper.
2. At the request of the accused undertakings or associations of undertakings, presented to the Authority within 5 days of notification, the hearing in written form to which the preceding paragraph refers may be completed or replaced by an oral hearing. This hearing shall take place on the date set by the Authority for the purpose, though in no circumstances before expiry of the period initially set for the hearing in written form.
 3. The Authority may refuse to carry out further inquiries for evidence whenever the evidence requested is clearly irrelevant or the purpose purely dilatory.
 4. The Authority may officially order further inquiries to gather evidence, even subsequently to the hearing referred to in paragraphs 1 and 2, provided that it guarantees the accused compliance with the principle of the adversarial system.
 5. In gathering evidence, the Authority shall safeguard the legitimate interests of undertakings by not revealing their business secrets.

Article 27 **Interim measures**

1. Whenever the investigation indicates that the practice which is the subject of the proceedings may cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for thirdparty interests, the Authority may, at any moment in the investigation or evidence-taking, preventively order the immediate suspension of the practice or take any other provisional measures that are necessary to immediately re-establish the competition or are indispensable for the useful effect of the decision to be pronounced at the close of the proceedings.
2. The measures provided for in this article may be adopted officially by the Authority or at the request of any party concerned and shall remain in force until revoked by the Authority and, in all cases, for a period not exceeding 90 days, unless, for sound reasons, an extension is granted.
3. Without prejudice to the provisions of paragraph 5, before the measures referred to in the preceding paragraphs are adopted, the parties concerned shall be heard, unless such action shall put the objective or effectiveness of the preventive order at serious risk.
4. Whenever a market which is subject to sectoral regulation is in question, the Authority shall request the respective regulatory authority's prior opinion, which shall be delivered within a maximum of five working days.
5. The provisions of paragraph 4 shall not prevent the Authority, in urgent cases, provisionally determining the measures that are essential to re-establish or maintain effective competition.

Article 28 **Completion of the evidence-taking**

1. When the evidence-taking is complete, on the basis of the report by the department gathering the evidence, the Authority shall make a final decision in which it may,

depending on the case:

- (a) Order that no further action on the case be taken;
 - (b) Declare that a practice restricting competition exists and, in this case, order the offender to adopt the preventive measures necessary for this practice or its effects to cease, within the period laid down;
 - (c) Apply the fines and other penalties provided for in Articles 43, 45 and 46; d) Authorise an agreement, under the terms and conditions of Article 5.
2. Whenever practices affecting a market which is subject to sectoral regulation are in question, before a decision is made pursuant to paragraph 1 b) to d), the respective sectoral regulatory authority shall provide a prior opinion, which shall be delivered within a reasonable period of time prescribed by the Authority.

Article 29
Co-ordination with sectoral regulatory authorities

1. Whenever, in accordance with Article 24 of this Act, the Authority is aware of facts occurring in an area subject to sectoral regulation which may be described as practices restricting competition, it shall immediately report such facts to the competent sectoral regulatory authority for the subject matter, for the latter authority to state its opinion within a reasonable period of time, to be set by the Authority.
2. Whenever, within the scope of its attributions and without prejudice to the provisions of Article 24 (2), a sectoral regulatory authority officially or at the request of regulated bodies appraises issues that may constitute an infringement of this Act, it shall immediately inform the Authority of the case and supply the essential facts.
3. In the cases referred to in the preceding paragraphs the Authority may, with a duly substantiated decision, defer its decision to open or proceed with an inquiry or proceedings for the period that it considers appropriate.
4. Before reaching its final decision, the sectoral regulatory authority shall inform the Authority of its draft proposals, in order that the Authority may state its opinion within a reasonable period of time prescribed by the sectoral authority.

SECTION III
Control procedure for concentrations between undertakings

Article 30
Applicable law

The control procedure for concentrations between undertakings is governed by the provisions of this section, Section 1 of this Chapter and, subsidiarily, the Administrative Procedure Code.

Article 31
Presentation of a notification

1. Prior notification of concentrations between undertakings shall be presented to the Authority by the persons or undertakings referred to in Article 8 (1) a) and b).
2. Joint notifications shall be presented by a common representative with powers to send and receive documents on behalf of all the notifying parties.
3. The notification shall be presented in accordance with the form approved by the Authority and shall contain the information and documents which it demands.

Article 32
Effective date of notification

1. Without prejudice to the following paragraph, the notification shall be effective on the date of payment of the fee due under the terms of Article 57.

2. Whenever the notification documents or information are incomplete or inaccurate, having regard for the information that should be supplied under Article 31 (3), the Authority shall invite the authors of the notification, in writing and within seven working days, to complete or rectify the notification within the period it stipulates. In this case the notification shall be effective on the date on which the Authority receives the information or documents.
3. The Authority may forgo presentation of certain information and documents if they are not considered necessary for appraisal of the concentration.

Article 33 Publication

Within five days of the date on which it is effective, the Authority shall publish the essential elements of the notification in two national newspapers, at the expense of the authors of the notification, so that any interested third parties may present their observations within the prescribed time, which may not be less than 10 days.

Article 34 Evidence-taking

4. Within 30 days of the date on which the notification is effective, the Authority shall complete the evidence-taking for the respective proceeding.
5. If in the course of the evidence-taking it becomes necessary for additional information or documents to be supplied or for those that have been supplied to be corrected, the Authority shall communicate this fact to the authors of the notification, setting a reasonable time limit for them to supply the information in question or to carry out the essential corrections.
6. The communication provided for in paragraph 2 suspends the period referred to in paragraph 1, with effect from the first working day immediately after that on which it is sent. The suspension shall terminate on the day immediately after receipt by the Authority of the information requested.
7. In the course of the evidence-taking, the Authority shall request any other public or private bodies to provide any information that it considers appropriate for the decision on the case. This information shall be delivered within the time limits the Authority prescribes.

Article 35 Decision

1. Within the time limit referred to in Article 34 (1), the Authority shall decide:
 - (a) The concentration is not covered by the obligation of prior notification referred to in Article 9; or
 - (b) Not to oppose the concentration; or
 - (c) To initiate an in-depth investigation, when it considers that the concentration in question, in the light of the evidence gathered, may create or strengthen a dominant position which may result in significant barriers to effective

competition in the Portuguese market or in a substantial part of it, in the light of the criteria defined in Article 12.

2. The decision referred to in paragraph 1 b) shall be taken whenever the Authority concludes that, as it was notified or following the authors of the notifications' amendments, the concentration is not liable to create or strengthen a dominant position which may result in significant barriers to effective competition in the Portuguese market or in a substantial part of it.
3. The decisions taken by the Authority pursuant to paragraph 1 b) may contain conditions and obligations intended to guarantee compliance with the commitments accepted by the authors of the notification with a view to ensuring that effective competition is maintained.
4. The lack of a decision within the period referred to in paragraph 1 shall be interpreted as a decision of non-opposition to the concentration.

Article 36 **In-depth investigation**

1. Within a maximum of 90 days of the decision date referred to in Article 35 (1) c), the Authority shall carry out the additional inquiries that it considers necessary.
2. The provisions of Article 34 (2) to (4) shall, in particular, be applicable to the inquiries referred to in the preceding paragraph.

Article 37 **Decision after the in-depth investigation**

1. Until the end of the period prescribed in Article 36 (1), the Authority may decide:
 - (a) Not to oppose the concentration;
 - (b) To prohibit the concentration, prescribing appropriate measures, should the concentration have already gone ahead, to re-establish effective competition, particularly the de-merging of the undertakings or the assets grouped together or the cessation of control.
2. The provisions of Article 35 (2) and (3) shall be applicable, with due adaptations, to the decision referred to in paragraph 1 a).
3. The lack of a decision within the period referred to in paragraph 1 shall stand as a decision of nonopposition to the concentration.

Article 38 **The right of the parties to be heard**

1. Before the decisions referred to in Articles 35 and 37 are taken, the authors of the notification and the opposing parties shall be heard.
2. In the decisions of non-opposition referred to in Article 35 (1) b) and Article 37 (1) a), when not accompanied by conditions and obligations, the Authority may, in the absence of opposing parties, forgo the opportunity to hear the notification authors.

3. For the purposes of this article, opposing parties shall be considered those who, within the proceeding, have shown themselves to be against the concentration in question.
4. While the parties are being heard, the calculation of the time limits referred to in Articles 34 (1) and 36 (1) shall be suspended.

Article 39

Co-ordination with the sectoral regulatory authorities

1. Whenever a concentration of undertakings affects a market that is subject to sectoral regulation, before reaching a decision pursuant to Article 35 (1) or Article 37 (1), depending on the cases, the Competition Authority shall ask the respective regulatory authority to state its opinion, within a reasonable period prescribed by the Authority.
2. The provisions of the preceding paragraph shall not affect the exercise by the sectoral regulatory authorities of the powers that, within the scope of their specific duties, are legally conferred on them in relation to the concentration in question.

Article 40

Official proceedings

1. Without prejudice to the application of the relevant penalties, the following are subject to official proceedings:
 - (a) Concentrations of which the Authority becomes aware and which, in not complying with the provisions of this Act, have not been subject to previous notification;
 - (b) Concentrations for which the explicit or tacit decision of non-opposition was grounded on information, provided by the participants in the concentration, which was false or inaccurate with regard to essential circumstances for the decision;
 - (c) Concentrations in which there has been total or partial disregard for the obligations or conditions imposed at the time of the decision of non-opposition.
2. In the case of subparagraph a) of the preceding paragraph, the Authority shall notify the undertakings of the position of non-compliance so that they may notify the concentration under the terms of this Act, within a reasonable period prescribed by the Authority, which may also decide on the fine to be applied under Article 46 b).
3. In the cases of 1 a) and 1 b), the Authority is not subject to the periods prescribed in Articles 32 and 37 of this Act.
4. In the cases falling under 1 c), the Authority's decision to initiate official proceedings is effective from the date of its communication to any of the undertakings or persons participating in the concentration.

Article 41

Nullity

Legal acts relating to a concentration are null and void insofar as they contravene the Authority's decisions which have:

- (a) Prohibited the concentration;
- (b) Imposed conditions on its implementation; or
- (c) Ordered appropriate measures to re-establish effective competition.

CHAPTER IV

Infringement and penalties

Article 42

Qualification

Without prejudice to the criminal responsibility and administrative measures which exist, infringements of the regulations laid down in this Act and of the Community law regulations which the Authority has the responsibility of enforcing are administrative offences punishable under the provisions of this Chapter.

Article 43

Fines

1. The following constitute an administrative offence with a fine that may not exceed 10% of the previous year's turnover for each of the undertakings participating in the infringement:
 - (a) Infringement of Articles 4, 6 and 7;
 - (b) The execution of concentrations of undertakings which have been suspended under the terms of Article 11 (1) or that have been prohibited by a decision adopted pursuant to Article 37 (1) b);
 - (c) Disregard of a decision ordering preventive measures, pursuant to Article 27;
 - (d) Disregard of the conditions or obligations imposed on undertakings by the Authority in pursuance of Article 11 (4), Article 35 (3) and Article 37 (2).
2. In the case of associations of undertakings the fine provided for in paragraph 1 shall not exceed 10% of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behaviour.
3. The following constitute an administrative offence with a fine that may not exceed 1% of the previous year's turnover for each of the undertakings:
 - (a) Failure to notify a concentration subject to prior notification according to Article 9;
 - (b) Failure to supply or the supply of false, inaccurate or incomplete information in response to a request by the Authority in the exercise of its powers of sanction or supervision;
 - (c) Failure to co-operate with the Authority or obstruction of its exercise of the powers provided for in Article 17.

4. If witnesses, specialists or representatives of the complainant or non-compliant undertakings fail to attend, without justification, in proceedings for which they have been properly notified, the Authority may apply a fine not exceeding 10 units of account.
5. In the cases provided for in the preceding paragraphs, if the administrative offence is the omission to comply with a legal duty or an order issued by the Authority, the application of the fine does not discharge the offender from compliance with the duty, if compliance is still possible.
6. Negligence is punishable.

Article 44 **Criteria for determining the fine**

The fines referred to in Article 43 are set in relation to the following circumstances, amongst others:

- (a) The gravity of the infringement for the maintenance of effective competition in the Portuguese market;
- (b) The advantages that the offending undertakings have enjoyed as a result of the infringement;
- (c) The repeated or occasional nature of the infringement;
- (d) The extent of participation in the infringement;
- (e) Co-operation with the Authority, until the close of the administrative proceedings;
- (f) The offender's behaviour in eliminating the prohibited practices and repairing the damage caused to the competition.

Article 45 **Additional penalties**

Should the gravity of the infringement so justify, the Authority shall, at the offender's expense, publish the decision taken in proceedings initiated in pursuance of this Act, in the official gazette, the *Diário da República*, or in a Portuguese newspaper with national, regional or local circulation, depending on the relevant geographical market in which the prohibited practice had its effects.

Article 46 **Periodic penalty payments**

Without prejudice to Article 43, in the following cases the Authority may decide, when justifiable, to apply a periodic penalty payment of up to 5% of the average daily turnover in the last year, for each day of delay, calculated from the date prescribed in the decision:

- (a) non-compliance with a decision of the Authority imposing a penalty or ordering the application of certain measures;
- (b) Failure to notify a concentration subject to prior notification according to Article 9;
- (c) Failure to supply information or the supply of misleading information in the prior notification of a concentration of undertakings.

Article 47 Responsibility

1. For the offences provided for in this Act the following may be held responsible: individuals, legal persons, regardless of the regularity of their constitution, companies and associations without legal personality.
2. Legal persons and their equivalents, in the terms of paragraph 1, shall be responsible for the offences provided for in this Act when the facts have been carried out on their behalf or on their account or in the exercise of duty by members of their corporate bodies, their representatives or their employees,.
3. The directors of legal persons and equivalent bodies shall be subject to the penalty prescribed for the author, especially attenuated, when they know or should know of the infringement yet fail to take the appropriate measures to terminate it immediately, unless a more serious penalty is applicable in pursuance of another legal provision.
4. Undertakings which are part of an association of undertakings that is subject to a fine or a periodic penalty payment according to Articles 43 and 46 are jointly and severally responsible for payment of the fine.

Article 48 Periods of Limitation

1. Proceedings for an administrative offence are subject to a period of limitation of:
 - (a) Three years in the cases provided for in Article 43 (3) and (4);
 - (b) Five years in other cases.
2. The period of limitation for penalties is five years from the date on which the decision determining its application becomes final or res judicata, except in the case provided for in Article 43 (4), for which it is three years.
3. The period of limitation is suspended or interrupted in the cases provided for in Articles 27-A and 28 of Decree-Law No. 433/82 of 27 October, in the wording of Decree-Law No. 109/2001 of 24 December.

CHAPTER V
Appeals

SECTION I
Administrative offence proceedings

Article 49
Legal regime

Unless otherwise provided for by this Act, the following articles and, subsidiarily, the general regime for administrative offences are applicable to the lodging, processing and judgement of the appeals provided for in this section.

Article 50
Jurisdiction and effects

1. The Tribunal de Comércio de Lisboa (Lisbon Commercial Court) shall hear appeals against the Authority's decisions to apply fines or other penalties provided for by the law, with suspensive effect.
2. The same court shall hear appeals against the other decisions, orders and measures taken by the Authority, solely with devolutive effect, according to the terms and limits prescribed in Article 55 (2) of Decree-Law No. 433/82 of 27 October.

Article 51
Procedural regime

1. When an appeal has been lodged against one of its decisions, the Authority shall forward the records to the Public Prosecution Service within 20 working days. It may also enclose further statements.
2. Without prejudice to Article 70 of Decree-Law No. 433/82 of 27 October, in the wording of Decree Law No. 244/95 of 14 September, the Authority may also enclose other particulars or information which it considers relevant to the decision in question and may offer proof.
3. The Authority, the Public Prosecution Service or the accused may object to the court's decision being made by order, without a court hearing.
4. Withdrawal of the accusation by the Public Prosecution Service requires the Authority's agreement.
5. If there is a court hearing, the court shall make its decision on the basis of the evidence presented in the hearing as well as on the proof produced in the administrative phase of the offence proceedings.
6. The Authority has the right to appeal, independently, against appealable decisions arising from an objection.

Article 52
Appeal against the decisions of the Lisbon Commercial Court

1. Appealable decisions of the Lisbon Commercial Court, in accordance with the general regime for administrative offences, may be challenged in the Lisbon Court of Appeal, of which the decision shall be final.
2. There is no ordinary appeal against the judgement of the Lisbon Appeal Court.

SECTION II
Administrative procedures

Article 53
Procedural regime

The provisions of the following articles and, subsidiarily, the Administrative Court Procedural Code regulations on objections to administrative acts, are applicable to the lodging, processing and judgement of the appeals referred to in this section.

Article 54
Jurisdiction and effects of the appeal

1. The Lisbon Commercial Court shall hear appeals against the Authority's decisions in the administrative proceedings to which this Act refers and against the ministerial decision provided for in Article 34 of Decree-Law No. 10/2003 of 18 January, with such appeals being treated as special administrative action.
2. The appeals provided for in paragraph 1 have a purely devolutive effect, unless they are granted, exclusively or accumulatively with other provisional measures, suspensive effect by way of the order covering the provisional measures.

Article 55
Appeal against Lisbon Commercial Court decisions

1. Judicial appeals against Lisbon Commercial Court's decisions in the administrative actions to which this section refers shall be lodged with the Lisbon Appeals Court and, those against the latter court's decision, though limited to matters of law, with the Supreme Court of Justice.
2. If the judicial appeal solely concerns matters of law, the appeal shall be lodged directly with the Supreme Court of Justice.
3. The appeals provided for in this article have a devolutive effect.

CHAPTER VI

Fees

Article 56

Fees

1. The following are subject to a fee:
 - (a) Appraisal of concentrations between undertakings which are subject to compulsory prior notification according to Article 9;
 - (b) Appraisal of agreements between undertakings under the prior assessment procedure provided for in Article 5 (2);
 - (c) The issue of certificates;
 - (d) The issue of opinions;
 - (e) Any other acts that constitute a service provided by the Authority to private bodies.
2. Fees are set, settled and charged under the terms defined in the Authority's regulations.
3. Enforced payment of debts arising from the failure to pay fees shall be carried out by means of a tax foreclosure action, with the certificate issued by the Authority for this purpose serving as a writ of execution.

CHAPTER VII

Final and transitional provisions

Article 57

Amendment to Law No. 2/99 of 13 January

Article 4 (4) of Law No. 2/99 of 13 January shall now be worded as follows:

«Article 4

(...)

1. (...)
2. (...)
3. (...)
4. The Competition Authority's decisions on concentrations between undertakings in which bodies referred to in the preceding paragraph have a holding are subject to a binding prior opinion of the Alta Autoridade para a Comunicação Social (Media Authority), which shall be negative when the free expression and confrontation of the different opinion trends are demonstrably in question.»

Article 58

Transitional regulation

Until entry into force of the Administrative Court Procedural Code, approved by Law No. 15/2002 of 22 February, the regulations on objections to administrative acts presently in force are subsidiarily applicable to the lodging, processing and judgment of

the appeals referred to in Section II of Chapter V.

Article 59

Legislation repealed

1. Decree-Law No. 371/93 of 29 October is repealed.
2. Legislation granting competition protection responsibilities to bodies other than those provided for in Community law and the present Act are repealed.
3. Until publication of the Authority's regulations to which Article 5 (2) of this Act refers Ministerial Order No. 1097/93 of 29 October shall remain in force.

Article 60

Review

1. The legal framework for competition established in this Act and in the law establishing the Authority shall be adapted to take account of the development of the Community regime applicable to undertakings, according to Articles 81 and 82 of the Treaty which established the European Community and the regulations on the control of concentrations between undertakings.
2. The Government shall make the necessary legislative amendments after hearing the Competition Authority.

Approved on 10 April 2003.

The President of the Assembly of the Republic, João Bosco Mota Amaral.

Promulgated on 26 May 2003

Let it be published.

The President of the Republic, JORGE SAMPAIO

Countersigned on 28 May 2003

The Prime Minister, José Manuel Durão Barroso

SERBIA

COMMENTARY BY THE GOVERNMENT OF THE REPUBLIC OF SERBIA ON THE SERBIAN LAW ON PROTECTION OF COMPETITION

The Law, which was enacted and entered into force in 2005, is fully compliant with the EU competition legislation. Its objective is to protect competition, in order to provide for equal market conditions, economic efficiency, and social welfare and for the benefit of the consumer.

In order to achieve the objectives, the Law shall apply to the acts of all kinds of persons, including the State and its bodies, which have an effect on competition in the Republic of Serbia (“the criteria of effect”). Hence, the Law shall not apply to the State aid regime, to be regulated by separate legislation. Also, the new banking legislation provides for particular competition rules and for the authority of the National Bank of Serbia in the banking and financial sector.

The Law regulates violations of competition by agreements, abuse of dominant position and concentrations (I) and establishes an independent regulatory body, the Commission for Protection of Competition (II).

I Violations of competition

a. The general principle in the field of restrictive agreements that distort competition is an interdiction, with the possibility of individual and collective exemptions, subject to notification. An individual exemption may be authorized by the Commission whilst the bylaws provide for collective exemptions of certain types of horizontal and vertical agreements, in compliance with the criteria provided for by the Law according to EU practice and legislation. Any exemption may be retired by the Commission if, in a particular case, there is proof of unauthorized violation of competition.

b. The Law bans abuse of dominant position. Such a position is defined through a set of criteria among which market share is a benchmark. A market share over 40% places the burden of the proof on the company that wishes to demonstrate that it is not dominant, whereas a market share under 40% places the burden of the proof on the Commission that wishes to demonstrate the domination of a company. The domination may be individual or collective, but only an abuse, defined as practice of restriction, distortion or prevention of competition, shall be prohibited.

c. The Law provides for control of concentrations. Concentration is defined as statutory change, direct or indirect acquisition of control or as establishment of joint control of market participants, whereas control is defined as ownership of the whole or part of the property or as contractual authorization enabling decisive influence over a market participant. Only a significant concentration may be subject to interdiction and is therefore to be authorized. Such a concentration may be that of local Serbian companies with a combined total annual income in excess of 10 million euros; it may also be a concentration of foreign and Serbian companies with a combined total annual world income in excess of 50 million euros. Finally, only such concentrations that have been established to have a negative effect on competition shall receive a negative decision

(interdiction). The effects of concentration are evaluated through a set of economic and legal criteria provided for by the Law.

II Commission for Protection of Competition

The authority in charge with all competition matters is an independent regulatory body, the Commission. It is responsible directly to the National Parliament and is fully separate from the Government. The Commission is funded by the National Budget, its own revenues and donations.

The Commission consists of the Council (the decision-making body) and the Technical Service (in charge of procedural matters). The Council has five members appointed by the National Parliament. In order to establish full independence, each of the bodies authorized by the Law (the Association of Lawyers, the Association of Economists, the Bar, the Chamber of Commerce and the Government.) shall propose two candidates for the Council to Parliament.

The Commission takes individual decisions in application of the Law (interdictions and authorizations of restrictive agreements, interdictions of abuse of dominant position, interdictions and authorizations of concentrations). It is involved in drafting and proposing competition legislation and bylaws; it monitors and analyses conditions of competition; it issues opinions on all competition matters; it facilitates international cooperation; it cooperates with all interested State and other bodies, etc. Hence, General Courts are in charge of penalties for restrictions of competition that are provided for by the Law as a percentage of annual income.

LAW ON PROTECTION OF COMPETITION
I GENERAL PROVISIONS
Content and Aim

Article 1

This Law regulates the protection of competition on market in order to provide identical conditions for undertakings, with the aim of improving economic efficiency and accomplishing economic welfare for society as a whole, particularly consumers' benefits, as well as the establishment of the Commission for Protection of Competition (hereinafter the Commission).

Violation of Competition
Article 2

Pursuant to this Law, practices and acts of the enterprises and other natural and legal persons as well as other undertakings violating competition, are the following:

- (1) Agreements, which considerably prevent, restrict or distort competition;
- (2) Abuse of dominant position, and
- (3) Concentration causing considerable prevention, restriction or distortion of competition, particularly as a result of the creation, i.e. strengthening of a dominant position on the market.

Considerable prevention, restriction or distortion of competition from para 1, items 1 and 3 of this Article, shall be assessed for each actual case, pursuant to the level and schedule of the changes in the structure of the relevant market; restrictions and possibilities of the equal conditions for access to market of the new competitors; reasons for withdrawal from the market by the existing competitors; changes restricting the possibilities for market supply; level of consumers' benefits and other circumstances causing violation of competition.

The Government of the Republic of Serbia (hereinafter the Government) prescribes in more detail criteria from para 2 of this Article.

Implementation

Article 3

This Law shall be implemented for practices and acts conducted in the territory of the Republic of Serbia, i.e. for practices and acts conducted in the territory of the State Union Serbia and Montenegro or abroad, having as a result, practices and acts in cases when such practices distort competition on the market of the Republic of Serbia or distort competition which may influence the trade between member states of State Union Serbia and Montenegro.

Scope of Application

Article 4

This Law shall apply to all legal and natural persons and Government bodies, institutions for regional autonomy and local self-government that are engaged, directly or indirectly, in trade of goods or services, and which by their acts and practices violate or may violate competition (hereinafter undertakings) in particular to:

- (1) Business enterprises, entrepreneurs and other forms of enterprises, regardless of their form of ownership and seat, and entrepreneurs, in addition, regardless of their nationality and permanent residence;
- (2) Other natural and legal persons who are engaged, directly or indirectly, in a permanent, single or temporary trade of goods and/or services, regardless of their legal status, form of ownership, nationality, seat or permanent residence, such as trade unions, business associations, sports organizations, institutions, cooperatives, exponents of intellectual property rights, etc;
- (3) Government bodies, institutions for regional autonomy and local self-government, when directly or indirectly engaged in trade of goods or services.

This Law shall not apply to business enterprises, other forms of enterprises and entrepreneurs engaged in economic activities of general economic interest, as well as to such institutions entrusted with fiscal monopoly, if the application of this Law would obstruct the performance of activities of general economic interest, i.e. entrusted activities.

Enforcement to Related Undertakings

Article 5

This Law shall also apply to related undertakings.

Pursuant to this Law, two or more undertakings shall be considered as related undertakings when one of them directly or indirectly exercises decisive influence on the management of other undertakings, particularly on the grounds of holding majority share capital, exercises more than half of the voting rights in management boards and has a right to appoint more than half of the members of the management or supervisory board and the bodies authorized to act as proxies for undertakings and agreements on the transfer of controlling interest.

Two or more related undertakings pursuant to this Law shall be considered as a single undertaking.

Relevant Market

Article 6

Pursuant to this Law, the relevant market is a market involving a relevant product market in a relevant geographic market.

Pursuant to this Law, a relevant product market is a set of goods and/or services that can be substituted for each other under reasonable terms from the standpoint of the consumers of said goods and/or services, particularly with regard to their quality, normal use and price.

Pursuant to this Law, a relevant geographic market is the territory within which the undertakings have been included in the demand or supply process and where the competition environment is homogeneous enough and significantly different in relation to the neighbouring territory.

The Government prescribes in more detail criteria defining relevant market.

II DISTORTION OF COMPETITION

1. Acts Preventing, Restricting or Distorting Competition

Definition

Article 7

Pursuant to this Law, acts, the object or effect of which is or may be to considerably prevent, restrict or distort competition on relevant market, are agreements, contracts, single provisions of agreements, explicit or tacit agreements, concerted practices, decisions on the associations of undertakings (hereinafter agreements).

Agreements referred to in para 1 of this Article shall be null and void, in particular those which:

- (1) Directly or indirectly fix purchase or selling prices or any other trading conditions;
- (2) Limit or control production, market, technical development or investments;
- (3) Share market or sources of supply;
- (4) Apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- (5) Make the conclusion of contracts subject to acceptance of supplementary obligations, which by their nature and commercial usage have no bearing on the subject of the contract.

Agreements referring to para 1 of this Article may be horizontal or vertical.

Pursuant to this Law, horizontal agreements are agreements among existing and potential undertakings operating on the same production or supply level.

Pursuant to this Law, vertical agreements are agreements referring to the terms of supply, sale or resale among existing and/or potential undertakings not operating on the same production or supply level.

Article 8

If the Commission, ex officio or at the request of an interested party, establishes that the agreement, or some of its provisions considerably prevent, restrict or distort competition, it shall make a decision establishing a violation of Article 7 paras 1 and 2 of this Law.

Decisions based on para 1 of this Article shall contain obligatory measures for the parties to the agreement as well as the time limits for their fulfilment enabling the establishment of competition on the relevant market and the elimination of the harmful consequences of the prohibited agreement.

Individual Exemption

Article 9

The Commission may, at the request of the parties to the agreement, grant an exemption from prohibition to a particular agreement or to part of such an agreement (hereinafter individual exemption) in the event that such agreement or part of such agreement contributes to the improvement of production or distribution i.e. to the promotion of technical or economic progress while allowing consumers a fair share of the resulting benefits, imposing only such restrictions as are necessary for the attainment of these objectives without affording the possibility of eliminating competition in respect of the substantive part of the subject goods or services.

The burden of proof concerning the existence of terms for individual exemptions contained in para 1 of this Article, shall be borne by the applicant.

The Government shall regulate in more detail the content of notification for individual exemption.

The applicant shall pay compensation in the amount determined by the tariff referred to in Article 50, para 4 of this Law for issuance of act upon the applicant's submission of request referred to in para 1 of this Article.

Article 10

Individual exemption referred to in Article 9 of this Law shall be granted by the decision containing also the validity period for which an individual exemption has been granted; such individual exemption cannot be longer than five years.

At the request of parties to the agreement individually exempted by the decision from para 1 of this Article and submitted at least four months before the expiry of the validity of the exemption granted, the time limit of validity period for the exemption may be further extended for an additional period that cannot exceed five years.

Article 11

The Commission may cancel the decision referred to in Article 10 of this Law, in case the circumstances on the basis of which the exemption was granted have changed, i.e. annul the decision in cases the exemption was granted on the basis of inaccurate and untrue information or the exemption granted has been misused.

Group Exemptions

Article 12

The Government prescribes in more detail the conditions for group exemptions and determines certain categories of agreements to be exempted from prohibition in case they are in compliance with the conditions set out in Article 9, para 1 of this Law, as well as other conditions stipulated by this Law.

Exemption referred to in para 1 of this Article shall not apply to a particular agreement which is a part of certain categories of agreements group exempted from prohibition, in case the Commission, ex officio or at the request of interested parties, establishes that the agreement does not comply with the provision referred to in Article 9, para 1 of this Law, as well as other conditions stipulated by this Law.

In case referred to in para 2 of this Article, the burden of proof is on the applicant, i.e. the Commission.

Article 13

Horizontal agreements, in particular agreements on specialization, research and development, and cooperation, may be exempted from prohibition on the grounds of provisions referred to in Article 12 para 1 of this Law, provided that they are in effect on the entire territory of the Republic of Serbia and not concluded for periods longer than 7 years.

Article 14

Vertical agreements, in particular agreements on:

- (1) Exclusive sale or supply;
- (2) Exclusive distribution;
- (3) Exclusive allocation of clients,
- (4) Selective distribution;

- (5) Distribution or franchise services that are prohibited due to the provisions on exclusive distribution or supply,
- (6) Exclusive representation, whereby the proxy undertakes trading risk,
- (7) Restriction of sale to end users by wholesale merchant, and
- (8) Transfer of technology,

may be exempted from prohibition on the grounds of provisions referred to in Article 12 para 1 of this Law, in case they are not concluded for periods longer than 5 years and are in effect on the entire territory of the Republic of Serbia.

Agreements referred to in para 1 of this Article may be exempted from prohibition pursuant to Article 12 para 1 of this Law in case they are concluded for periods longer than 5 years and are in effect in particular parts of the territory of the Republic of Serbia.

Notification of Agreements Which May be Exempted from Prohibition

Article 15

As for agreements referred to in Article 7 para 1 of this Law which may be exempted from prohibition pursuant to this Law, except agreements concluded pursuant to Article 12 para 1 of this Law, parties to such an agreement are obliged to notify the Commission about it, within the period of 15 days from the date of its conclusion.

Parties to the agreement may submit the request in order to be established whether particular agreement is not prohibited pursuant to Article 7 paras 1 and 2 of this Law.

The Commission shall issue a resolution based on its decision concerning the request referred to in para 2 of this Article.

If, upon the issuance of the decision referred to in para 2 of this Article establishing that the agreement is not prohibited, the circumstances on the basis of which such decision was made have changed, the Commission may cancel the decision or annul it in case the decision was granted on the basis of inaccurate and untrue information, the facts of which were established by additional investigation.

The applicant shall pay fees in the amount determined by the Tariff referred to in Article 50 para 4 of this Law for issuance of decision from para 3 of this Article.

2. Abuse of dominant position

Dominant Position

Article 16

An undertaking has a dominant position on a relevant market if it has the power to behave independently of other undertakings, thus being in a position to make business

decisions without taking into account business decisions of its competitors, purchasers or suppliers and/or end users, their goods and/or services.

An undertaking with a relevant market share exceeding 40% may or may not be considered dominant, depending, among other things, on the undertaking's share on the relevant market, a competing undertaking's shares on that same market, barriers to entry to the relevant market and strength of potential competitors, as well as possible dominant position of the buyer.

An undertaking with a relevant market share below 40% may be considered dominant and in such case the burden of proof is on Commission, i.e. the applicant, to prove the undertaking's dominant position.

The burden of proof is on the undertaking with a relevant market share exceeding 40%, to prove that its position is not dominant pursuant to para 2 of this Article.

A relevant market share shall be determined on the grounds of all relevant economic criteria defining the position of undertakings in relation to other undertakings, in particular as concerns quantity of goods and/or services and income realized from trade of goods and/or services.

Collective Dominance

Article 17

Two or more independent undertakings united on the basis of their economic relations on relevant market and acting jointly as a single undertaking may have a dominant position (collective dominance).

Two or more undertakings with an aggregate relevant market share exceeding 50% may or may not be considered dominant, depending, among other things, on the undertaking's share on the relevant market, a competing undertaking's shares on that same market, barriers to entry to the relevant market and strength of potential competitors, as well as the possible dominant position of the buyer.

Two or more undertakings with an aggregate relevant market share below 50% may be considered to be dominant and in such case the burden of proof is on the Commission, i.e. the applicant.

Two or more undertakings with an aggregate relevant market share exceeding 50% bear the burden of proof that they are not dominant, pursuant to para 2 of this Article.

Prohibition of Abuse of Dominant Position

Article 18

The abuse of dominant position on relevant market is prohibited.

The abuse of dominant position on relevant market of goods and/or services is considered to be part of practices which restrict, distort or prevent competition, particularly such which:

- (1) Directly or indirectly impose unreasonable purchase or selling price or other unreasonable conditions;
- (2) Limit production, markets or technical development, thus causing harm to consumers;
- (3) Apply dissimilar conditions to identical transactions with other trading parties, thereby placing them at a competitive disadvantage on the market;
- (4) Make the conclusions of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial customs, have no connection with the subject of such contracts.

Article 19

If the Commission, ex officio or at the request of interested parties, establishes that the dominant position has been abused, it shall make a decision establishing a violation under Article 18 of this Law.

Decisions based on para 1 of this Article shall contain measures obligatory for the undertakings enabling the establishment of competition on the relevant market and elimination of harmful consequences of the abuse of dominant position as well as the time limits for their fulfilment.

Pursuant to the decision referred to in para 2 of this Article, divestiture of business enterprise i.e. other forms of enterprise, transfer of its assets, shares and participating interest, termination of agreement or waiving of rights enabling exercise of prevailing influence on another undertaking, cannot be ordered.

Article 20

At the request of the undertaking with a dominant position in the relevant market, the Commission may issue a decision establishing that a particular practice which such undertaking intends to take is not a practice abusing a dominant position, pursuant to Article 18 of this Law.

The Commission may cancel the decision based on para 1 of this Article in case the circumstances on the basis of which the decision was made have changed, or annul in case the decision was granted on the basis of inaccurate and untrue information.

The applicant shall pay the contribution in the amount determined by the Tariff referred to in Article 50 para 4 of this Law for issuance of decision based on para 1 of this Article.

3. Concentration

Definition

Article 21

The following shall be considered as concentration of undertakings:

- (1) Status changes of undertakings, pursuant to the Law on Business Enterprises,
- (2) Direct or indirect acquisition of control over the whole or a part of another undertaking by one or more undertakings;
- (3) Establishment and joint control by at least two independent undertakings over a new undertaking acting on a fully independent and long-term basis and having an access to the market (joint venture).

The control referred to in para 1, item 2 of this Article is deemed to constitute a decisive influence on undertakings' business activities, on the grounds of granted rights, agreements or any other legal or actual facts, in particular the following:

- (1) Ownership over or disposal with the whole or part of the property of the undertaking;
- (2) Contractual authorization or any other grounds enabling a decisive influence on the composition, activities or decision-making of another undertaking.

It shall be considered that the undertaking has acquired control in case it is the holder or bearer of rights referred to in para 2 of this Article or in case such rights may be exercised otherwise.

The forms of control referred to in para 2 of this Article shall be assessed independently or one in relation to another, whereas relevant legal and actual facts shall be taken into account but not the intention of interested parties.

Two or more concentrations between identical undertakings realized in the period of less than two years shall be deemed to constitute one concentration, while the date of occurrence of the last of these concentrations shall be considered as valid.

Article 22

The following shall not be considered as concentration of undertakings:

- (1) In cases where a banking or other financial institution temporarily acquires a share or participating interest for further resale, provided that it offers it for resale at the latest within 12 months from the date of acquisition and provided that during that period the ownership status has not been used in order to influence the undertaking's business decisions that concern its conduct;

- (2) In cases of acquisition of control over an undertaking by the persons acting as receivers;
- (3) In cases where a joint venture is aimed at coordination of market activities between two or more undertakings maintaining their legal autonomy, whereas such joint venture shall be assessed pursuant to provisions contained in Article 7 of this Law.

The Commission may extend the time limit referred to in para 1, item 1 of this Article at the request of a party acquiring shares or a participating interest, provided that the acquiring party proves that the resale of shares and participating interest was not reasonably possible within the set time limit.

Request for Authorization of Concentration

Article 23

Concentrations referred to in Article 21 of this Law shall be carried out upon approval issued by the Commission at the request of undertakings.

Requests referred to in para 1 of this Article shall be submitted subject to:

- (1) The combined total annual income of all undertakings involved in concentration on the market of the Republic of Serbia exceeding the amount of 10 (ten) million EUR in Dinar countervalue at the rate of exchange as of the date of making the annual calculation of the undertakings for the previous financial year, or
- (2) The combined total annual income of undertakings involved in concentration realized on international market in the previous financial year exceeding the amount of 50 (fifty) million EUR in Dinar countervalue at the rate of exchange as of the date of making the annual calculation, whereby at least one of the undertakings involved in concentration has to be registered on the territory of the Republic of Serbia.

In the first year of business activities of the undertakings, the income referred to in para 2 of this Article shall be calculated on the basis of income realized in the current financial year for the period of 12 months.

For the purpose of calculating the total annual income of the parties involved in concentration referred to in para 2 of this Article, income realized in mutual turnover between parties involved in concentration shall not be taken into account.

Parties involved in concentration are obliged to terminate realization of concentration until the Commission issues its decision authorizing the intended concentration or until the expiration of a period of 4 months from the date on which the request for authorization of concentration has been submitted.

The Government regulates in more detail the content and manner of submission of request for authorization of concentrations.

Article 24

Total annual income for undertakings providing financial services, as well as insurance and other reinsurance companies referred to in para 2 of Article 23 of this Law, shall be calculated in the following way:

- (1) For legal entities providing financial services, after deduction of turnover tax, value-added tax (indirect tax charges) and other taxes directly related to those items, the sum of following income items shall be used:
 - (1) Interest income and similar income;
 - (2) Income from securities (income from shares and other variable yield securities, income from participating interest, income from shares in related undertakings);
 - (3) Commissions receivables;
 - (4) Net profit from financial operations;
 - (5) Other operating income;
- (2) For insurance and other reinsurance companies, the value of gross premiums which shall comprise all amounts received and receivables in respect of insurance and reinsurance contracts issued by or on behalf of the insurance companies, after deduction of taxes charged by reference to the amounts of individual premiums or the total volume of premiums.

Time Limit and Submission of Request for Authorization of Concentration by the Relevant Party

Article 25

Requests contained in para 1, Article 23 of this Law shall be notified to the Commission within the period of 7 days upon signing of agreement or announcing public bid, i.e. offer or acquiring control.

Requests referred to in para 1 of this Article may be submitted when the parties display serious intentions to conclude agreement, sign the letter of intention or announce their intention to make an offer for purchase of shares.

In cases where control over the whole or part of one or more undertakings is acquired by some other undertaking, notification shall be submitted by the undertaking acquiring control, while in all other cases notification shall be made jointly by the parties involved in concentration.

Article 26

The Commission is obliged to publish the data contained in the Request for Authorization of Concentration in the Official Gazette of the Republic of Serbia;

however, if the concentration is of significance for the integrated market of State Union SCG, the data shall be published in the Official Gazette of SCG.

Data referred to in para 1 of this Article which are to be published shall contain:

- (1) Name of undertakings involved in concentration;
- (2) Nature of concentration;
- (3) Economic sector within which the concentration shall be made.

Decision to be Issued upon the Request for Authorization of Concentration

Article 27

The Commission may, if requested, issue a decision:

- (1) Disregarding the request in case the notified concentration does not fulfil the conditions referred to in Articles 23 and 24 of this Law;
- (2) Suspending the procedure in case the parties involved in concentration withdraw their request;
- (3) Authorizing concentration when assessment of its effects on the basis of criterion from Article 28 of this Law evaluates that such concentration will not cause considerable prevention, restriction or distortion of competition, particularly as a result of the creation, i.e. strengthening, of dominant position on market;
- (4) Conditionally authorizing concentration, provided that some supplementary conditions are fulfilled by the parties involved in concentration, within the fixed period prior to or after the concentration has been carried out;
- (5) Refusing to grant authorization for concentration if the concentration causes considerable prevention, restriction or distortion of competition, particularly as a result of the creation, i.e. strengthening, of dominant position on market.

The Commission can temporarily authorize the realization of procedure for concentration even before the issuance of decision referred to in para 1 of this Article at the request containing explanatory note submitted by the party involved in concentration, taking particularly into account consequences caused by termination of concentration towards parties and third parties involved, as well as the degree of potential harm to competition caused by such concentration.

The applicant shall pay contribution in the amount determined by the Tariff referred to in Article 50 para 4 of this Law for issuance of act from para 1 of this Article.

Article 28

When assessing effects of intended concentration, the Commission shall evaluate whether such concentration causes considerable prevention, restriction or distortion of competition, particularly as a result of the creation, i.e. strengthening, of dominant position on market, taking into account the following indicators:

- (1) Structure of relevant market;
- (2) Existing and potential competitors;
- (3) Market position of parties involved in concentration and their economic and financial power;
- (4) Whether there is a possibility to choose supplier and consumer;
- (5) Legal and other barriers to entry on relevant market;
- (6) Domestic and international level of competitiveness of parties involved in concentration;
- (7) Supply and demand of relevant goods and/or services;
- (8) Technical and economic development and
- (9) Consumers' interests.

Article 29

The Commission shall annul the decision authorizing concentration in case the parties involved in concentration have not met the supplementary conditions or obligations pursuant to Article 27 para 1 item 4 of this Law, i.e. cancel the authorization or conditional authorization of concentration in cases when a decision has been granted on the grounds of inaccurate or untrue information.

The Commission shall amend the decision authorizing such concentrations conditionally, when parties involved cannot fulfil some of the conditions imposed on them by decision, owing to circumstances which could not be foreseen, avoided or prevented.

Entry into Register

Article 30

Concentrations which are entered into register pursuant to the Law and which, in line with this Law, are subject to authorization require, along with the application for registration, the decision of the Commission containing the authorization of relevant concentration.

III COMMISSION FOR THE PROTECTION OF COMPETITION

Concept and Status

Article 31

The Commission is an independent and autonomous organization entrusted with public competencies within the scope defined by this Law.

The Commission is a legal person.

The seat of the Commission is in Belgrade.

Article 32

The Commission is responsible to the National Parliament of the Republic of Serbia (hereinafter Parliament) for its work and shall submit to it its annual report of the activities.

The report referred to in para 1 of this Article shall be submitted at the latest by the end of February of the current year, for the preceding year.

Decision-making Body

Article 33

The Council of the Commission (hereinafter Council) is a decision-making body responsible for making all decisions and other acts within the competency of the Commission.

The President of the Council is responsible for representing and acting on behalf of the Commission; however, when the President is prevented from performing his/her duties, the Deputy is responsible for carrying out the activities of the President.

In case the Deputy is prevented from carrying out the activities of the President of the Council, he/she shall be replaced by the eldest member of the Council.

The President of the Council i.e. Deputy of the President may assign, in whole or in part, the responsibility for representation of Commission to another member of the Council, but only upon a decision made by the Council.

Technical Service

Article 34

The Technical Service of the Commission (hereinafter Service) performs professional activities within the competency of the Commission pursuant to this Law, Statute, Regulations and other acts of the Commission.

The Head of Service is in charge of the Technical Service.

The Head of Service is elected from among the employees of the Service and is appointed on the basis of a majority vote of the Council.

The Head of Service (hereinafter Head) may be appointed from any person who holds a university degree in legal or economic field, provided that he/she has a specific knowledge in the field of protection of competition.

The Head of Service is responsible for the Service's activities to the Council.

The Law regulating the rights, obligations and responsibilities of all employees shall be applied to the rights and obligations of employees of the Service.

Scope of Activities

Article 35

The Commission shall perform the following activities within its competency:

- (1) Make decisions concerning the rights and obligations of the undertakings, pursuant to this Law;
- (2) Be involved in making the regulations regulating the issue of competition protection;
- (3) Propose to Government the passing of regulations for implementation of this Law;
- (4) Monitor and analyse conditions concerning competition on particular markets and in particular sectors;
- (5) Issue its opinion to the competent authorities concerning draft regulations as well as existing regulations violating competition;
- (6) Issue its opinion concerning the implementation of regulations in the field of protection of competition;
- (7) Facilitate international cooperation referring to international commitments undertaken relating to protection of competition, and cooperate with international competition authorities in order to gather data;
- (8) Cooperate with Government bodies, institutions for regional autonomy and local self-government in order to provide conditions for consistent implementation of this Law and other regulations referring to the matters of significance for the protection of competition;
- (9) Take action in order to develop awareness of the importance of the protection of competition;

- (10) Keep a record of notified agreements and undertakings with a dominant position on the market as well as concentration of undertakings, pursuant to this Law;
- (11) Initiate, conduct and monitor realization of measures providing protection of competition;
- (12) Perform other activities pursuant to this Law.

The Commission shall perform activities referred to in para 1, items 1,2,3,4,5,6,7,8,11 and 12 of this Article, as entrusted activities.

Composition of the Council and Appointment

Article 36

The Council consists of five members appointed from among prominent experts within the legal or economic field, provided that they have specific knowledge in the field of protection of competition.

The members of the Council are appointed by the Parliament at the proposal of Institutions entrusted to propose the members of the Council (hereinafter Institutions)

Relative Institutions are:

- 1) Association of Lawyers of Serbia;
- 2) Association of Economists of Serbia;
- 3) The Bar of Serbia;
- 4) Chamber of Commerce of Serbia;
- 5) Government of the Republic of Serbia.

Institutions decide independently on proposals concerning membership candidates, while the Government makes its decision at the proposal of the Minister in charge of trade operations.

Article 37

Each Institution submits its proposal with at least two candidates for membership of the Council to the competent Committee of Parliament. Each proposal has to be signed and sealed by the Institution and contain the names, addresses and general background information of the proposed candidates.

In case the proposal containing the list of candidates does not comply with the regulations of this Law, the competent Committee of the Parliament shall not accept it and shall request the Institution to harmonize the proposal with this Law within the period of 15 days.

The President of Parliament, at least 20 days prior to the making of decisions concerning the appointment of Council members, has to announce all existing lists of candidates containing their general background information, submitted by Institutions.

Competent Committees of Parliament may, prior to the making of decision concerning the appointment of the members of the Council, organize public debates with proposed candidates in order to gain insight into their capabilities to perform activities within the competency of the Commission.

Parliament appoints only one out of two proposed candidates from each valid proposal.

Article 38

Member of Council cannot be eligible for appointment in case such person:

- (1) Is over 65 years old at the time of appointment;
- (2) Is related to member of Council in a straight bloodline, i.e. in the transversal line up to and including the second degree;
- (3) Is a Member of Parliament of the State Union Serbia and Montenegro (SCG), Member of Parliament of the Republic of Serbia and Member of Parliament of the Autonomous Region;
- (4) Is an elected, assigned and appointed person in bodies and institutions of the State Union SCG, Republic of Serbia or holds any other official post;
- (5) Is a political party official;
- (6) Is an entrepreneur, or a person involved in management or operations of a legal person engaged in economic activities;
- (7) Has been tried for a criminal offence, thus damaging the reputation of the Council, for corruption, deceit, stealing, or any other criminal offence making him/her unworthy of holding such function, regardless of the imposed punitive sanctions, or such person has been sentenced by court to imprisonment for a period longer than six months;

Before the appointment, the candidate is obliged to give a written statement to Institute confirming that there are no obstacles relating to his/her appointment, as mentioned in para 1, items 2,3,4,5 and 6 of this Article;

The candidate is obliged to submit, along with the written statement from para 2 of this Article, evidence from para 1, items 1 and 7 of this Article in its original form or certified copy.

Article 39

Members of Council do not represent Institutions, but they perform their duties responsibly and independently with due diligence pursuant to this Law and regulations made according to this Law.

Members of Council shall cease to hold the position only for the reasons and according to the procedure defined by this Law.

Article 40

Members of Council are appointed for a five-year term of office.

As an exemption from para 1 of this Article, as concerns the appointment of the first members of Council, two members shall be appointed for a period of three years, two members for a period of four years and one member for a period of five years. On the appointment of the initial composition of Council, the Institutions' lists of candidates from which the candidates are to be appointed with a three i.e. four-year term of office shall be determined by lots drawn by the President of Parliament.

The same person cannot be appointed as a member of the Council more than twice in a row.

Article 41

The mandate of the member of Council shall cease upon:

- (1) The expiry of the period to which the member was appointed;
- (2) Relief due to the reasons stipulated by this Law;
- (3) His/her death.

Article 42

The Parliament shall relieve the member of Council from office at the proposal of the Council or at least twenty Members of the Parliament of the Republic of Serbia, if such member:

- (1) Is incapable of performing his/her duties within the permanent period of six months, due to illness confirmed by the medical findings;
- (2) Gave false and untrue information relating to his/her general background or has failed to state facts provided for pursuant Articles 38 and 47 of this Law;
- (3) No longer fulfils the conditions for appointment, if any of the circumstances contained in Article 38 of this Law has occurred;
- (4) Has failed to or refused to perform his/her duties within the permanent period of six months or within the period of twelve months, whereas in the said period

he/she did not perform his/her duties for at least six months with intervals;

(5) Performed his/her duties contrary to the provisions of this Law;

(6) Issued facts contrary to Article 55, para 2 of this Law;

(7) Submitted his/her written resignation to Parliament.

Article 43

When the proposal for the relief of the member of Council has been submitted, the Council may issue a decision to suspend the member of Council against whom the decision for relief has been made, until Parliament has made its decision. However, such period cannot be longer than six months.

Article 44

The President of Parliament shall issue a notice for submittal of proposals containing the list of candidates for the member of Council at the latest six months before the expiry of term of office of the member of Council and submit it to Institutions which have provided proposals for the candidates whose term of office expire, pursuant to Article 41, item 1 of this Law.

Institutions shall, within the period of two months from the date of submittal of notice, submit to Parliament their proposals for candidates.

Parliament shall make a decision on the appointment of new members of Council before the expiration of term of office of the existing members.

In case of relief, i.e. termination of the term of office pursuant to Article 41, items 2 and 3 of this Law, the Institution which has proposed the member for appointment shall, without delay, and at the latest within the period of three months, submit to Parliament its proposal for the candidate to fill the vacant position in the Council. The Parliament shall, within the period of two months from the date of submission of the proposal, appoint the member of Council, with the term of office for the period of five years.

Article 45

Activities of the Council concerning all matters are open, pursuant to the regulations stipulating transparency of work of Government authorities and judiciary bodies.

The decisions of the Council shall be made on the basis of a majority vote of the members present, if at least three members (quorum) are present.

In case of equal number of votes by the present members supporting a particular case, a decisive vote shall be the vote of the President, while in case of his/her absence a decisive vote shall be the vote of the Deputy of the President

A member not in agreement with the decision issued on particular case can single out his/her opinion and present it in writing or orally, on the record.

Article 46

The President of the Council is responsible for managing and organizing the activities of the Council, signing the decisions and other acts, monitoring their execution and performing any other activities provided for by this Law, Statute, Book of Regulations and other acts of the Commission.

The President and the Deputy President shall be elected by the Council among its members, on the basis of a majority vote by present members of the Council.

Conflict of interest

Article 47

Members of the Council i.e. employees within the Commission, shall be considered as officials pursuant to the Law stipulating conflicts of interest relating to their performance of public duties.

Former members or former employees are not authorized to act on behalf of any person in proceedings conducted before the Council for at least two years following the relief of duty as member or employee, i.e. their term of office in the Council.

Before appointment, the member of the Council i.e. employee shall give a written statement confirming that there are no obstacles relating to his/her appointment, as defined in para 1 of this Article.

Members of the Council shall inform the President, and employees shall inform the Head of Service, of interests they have or have acquired in economic activities, particularly concerning participating interests which they have in business enterprises i.e. industries and accordingly, cannot participate in decision-making relating to cases where they have such interests.

Compensation

Article 48

The President and the members of the Council are entitled to compensation in money for their activities.

The criteria for establishing of the amount of compensation is determined by the Statute, taking into consideration the amount of salary of the President, i.e. judge of the Supreme Court of the Republic of Serbia.

Statute and Other Acts of the Commission

Article 49

The Council passes the Statute of the Commission and other acts defining more closely the internal organization and manner of work of the Commission.

The Statute of the Commission shall be confirmed by the Government.

The Statute shall be published in the Official Gazette of the Republic of Serbia.

Financing of the Commission

Article 50

Funds necessary for establishment and the first year of activities of the Commission will be provided from the budget of the Republic of Serbia.

Funds necessary for the activities of the Commission shall be provided out of income generated from activities, particularly from:

- (1) Compensation to be paid to the Commission pursuant to the provisions of this Law;
- (2) Donations, except for donations referred to in para 3 of this Article;
- (3) Income gained by sale of publications of the Commission;
- (4) Other sources pursuant to the Law.

Funds necessary for the activities of the Commission cannot be provided from donations given by the undertakings to which this law is being applied.

Compensation referred to in para 2 item 1) of this Article shall be determined by the tariff set by the Commission and confirmed by the Government.

The tariff referred to in Para 4 of this Article shall be published in the Official Gazette of the Republic of Serbia.

Article 51

Financing of the Commission shall be made according to the Financial Plan prepared by the Commission for each year and submitted to Government at the latest by 1 November of the current year for the next year.

The Financial Plan shall contain total costs and expenditures of the Commission, including allocations relating to reserve funds, as well as factors on the basis of which the cost of salary shall be determined.

Total expenditures of the Commission contained in the Financial Plan, including reserves, cannot be higher than the expenditures necessary for the efficient implementation of the Law.

The surplus in income in relation to expenditures generated by the Commission shall be paid to the Republic's budget.

The surplus in expenditures in relation to income generated by the Commission shall

be covered by reserves and in case such funds are not sufficient – by the budget of the Republic.

The Financial Plan is to be confirmed by the Government.

The Balance sheet of the Commission shall be subject to the annual auditing made by an independent authorized auditor. The Commission shall issue its balance sheet at the latest three months following completion of the financial year.

Application of Law regulating General Administrative Procedure

Article 52

In the proceedings before the Commission, unless otherwise regulated by this Law, the provisions of the General Administrative Procedure Act shall apply.

Decisions made by the Commission shall be final.

Against the final decision of the Commission, an administrative appeal may be lodged with the competent court.

The President of the Council shall issue resolutions.

Against the resolution referred to in para 4 of this Article, an appeal may be lodged with the Council, within three days from the date the resolution has been delivered.

Exemption

Article 53

In addition to the reasons for exemption defined by the Law regulating General Administrative Procedure, parties to the proceedings can request the exemption of the member of Council or an employee if he/she has an interest in property or manages the undertaking which is a party to the proceeding, or he/she is on friendly terms or in conflict with the party involved in the proceedings, its shareholder, or is a member of management board or supervisory board of the party to the proceedings, or is in close relations or conflict with a party to the proceedings or a person related to that party.

The President of the Council shall decide on exemption of the member of the Council and employee.

The Council shall make a decision on exemption of the President of the Council.

Right to Access to Files and Disclosure of Information within the Procedure

Article 54

Requests for access to files shall be submitted in writing or orally, and a record made.

A party can request that the other interested persons may not be allowed to inspect certain notes on the cases or information contained in them, if such notes and information are considered to be State, military, official or business secrets.

The President of the Council or the member appointed by him shall make a resolution on the request for access or the request not to allow the access to the file.

A resolution denying access to the file can also contain an order to the party to prepare the documents without information considered as business secrets, in order to make them accessible.

Persons notifying the Commission of conduct preventing, restricting or distorting competition are entitled to information on the proceedings and have a right of access to file within the period of 15 days from the date of announcement of the decision of the Commission on the case the notification refers to.

Collecting and Secrecy of Data

Article 55

The Commission is authorized to request from the parties to the proceedings and any other undertakings to provide the Commission with the data necessary to define the state of facts for a particular case, including data relating to State, military, official or business secrets.

Collected data representing State, military, official or business secrets cannot be made public or disclosed to third persons, unless written approval has been obtained from the persons to whom the relevant data refer to.

Institution of the Proceedings ex officio

Article 56

The Commission shall make the resolution on instituting the proceedings ex officio requesting the Service to conduct it, if the Commission finds, on the grounds of information or otherwise, that the practice concerned is likely to cause distortion of competition pursuant to the provisions of this Law.

The Commission may institute the proceedings ex officio if it finds that the practice concerned is likely to cause:

- Considerable distortion, restriction or prevention of market competition; and
- It proves likely that the notifying party has insufficient funds to initiate and conduct the proceedings or that conduct of proceedings ex officio is necessary in order to protect its identity.

Resolutions on instituting proceedings ex officio shall be made by the President of the Council.

Institution of the Proceedings upon the Request of the Party

Article 57

The Commission is authorized to institute the proceedings upon the request for establishment whether a particular agreement is not prohibited or a particular agreement is exempted from the prohibition, submitted by undertaking i.e. undertakings between which an agreement has been concluded.

The Commission is authorized to institute the proceedings upon the request for establishment whether a particular practice is not prohibited pursuant to this Law on abuse of dominant position, submitted by an undertaking engaged in such practice or intending to practice it.

The Commission is authorized to institute the proceedings upon the request for initiation of proceedings against the undertakings involved in practice causing prevention, restriction or distortion of competition, submitted by:

- 1) Undertakings to whom damage is made or can be made,
- 2) Chamber of Commerce, association of employers and entrepreneurs,
- 3) Consumer protection association, and
- 4) State administration bodies and regional and local self-government authority units.

The Commission is authorized to institute the proceedings upon the request for authorization of concentration, submitted by:

- 1) Parties to the concentration in case of status changes of undertakings or joint venture;
- 2) An undertaking or undertakings acquiring the control over another undertaking or a part of an undertaking.

Resolution on Initiation of Proceedings upon the Request

Article 58

The President of the Council is obliged to issue a resolution on initiation of proceedings upon request within the period of 8 days from the date of submission of request by the party.

Within the period set in para (1) of this Article, the President of the Council shall make a resolution on dismissal of request if the request has been submitted by an unauthorized person or the practice stated in the request is not a practice restricting, preventing or distorting competition.

Response to the Request

Article 59

When the proceedings before the Commission involve the parties with contrary interests, the Commission is obliged to provide the party against which the proceedings are conducted with the request and resolution on the initiation of proceedings.

The party is entitled to supply its own response to the request within the period set by the Commission, which cannot be shorter than 8 days.

Summary Proceedings

Article 60

The Commission can make a resolution immediately, without conducting an investigation procedure, if:

- 1) Parties with contrary interests are not involved in the proceedings;
- 2) The party in its request supplies facts or submits evidence on the basis of which it is possible to establish the facts or relevant circumstances or if the facts and circumstances can be established on the grounds of facts found by the Commission;
- 3) In the procedure initiated upon the request for authorization of concentration, on the grounds of submitted evidence and other facts found by the Commission, it is justifiably assessed that the concentration will not cause considerable prevention, restriction or distortion of competition, particularly as a result of the creation, i.e. strengthening, of dominant position on market;
- 4) It is not necessary to hold a special hearing of the party in order to protect its rights i.e. legal interests.

Inquiry

Article 61

An employee appointed by the Head of Service shall carry out an inquiry within the time set in the resolution on instituting proceedings and submit a report to the Council.

In carrying out inquiries, an employee appointed by the Head of Service shall request documentation containing data which may contribute to solving the issue, conduct an inspection or other necessary acts in order to establish legal grounds; in carrying out inquiries, an employee is entitled to request statements from parties, witnesses and experts, and responsible persons or persons who were responsible previously, employees and previously employed persons of the undertaking against which the proceedings are conducted, as well as from all other persons disposing of the facts relevant to the procedure, but he/she shall not be entitled to hold oral hearings.

Right to Search Premises and Temporary Confiscation of Documents and Materials

Article 62

If there is a reasonable doubt that a party to the proceeding or any other parties involved hold documents or other instruments relevant to the establishment of material facts in the proceedings, the Commission may request the competent authority to issue a warrant ordering the search of business or any other premises of the party to the proceeding or any other parties involved and for temporary confiscation of documents and objects relevant to the establishment of material facts.

Interim Measures

Article 63

Where there is a danger of significant restraint of competition or it is necessary for protection of interests of the parties to the proceedings, a party to the proceedings and other parties involved are entitled to submit to the Commission the proposal containing the establishment of interim measures.

Pursuant to the proposal referred to in para 1 of this Article, the Commission shall, on the basis of its decision, suspend all actions harmful to competition and impose measures to eliminate their harmful effects.

Interim measures referred to in para 2 of this Article may be in effect until the making of the final administrative act.

Oral Hearing

Article 64

The Council is obliged to hold an oral hearing in the following cases:

- 1) two or more parties of contrary interests are involved in the case,
- 2) a witness or an expert is to be summoned to give their statements.

Commission may decide to hold an oral hearing upon the request of the party or upon its own initiative in cases when it deems useful for verifying disputable facts.

Oral hearings may be held when more than half of the members of Council are present.

Termination of Proceedings

Article 65

The Commission may decide to terminate proceedings instituted ex officio in case the competition has been restrained to an insignificant extent, while the party against which the proceedings have been conducted, shall obligatorily state not to continue or

repeat the practice or activities significantly preventing, restraining or distorting competition and to compensate or eliminate any damage caused.

Termination of proceedings may not exceed six months.

In case the party against which the proceedings have been conducted does not fulfil or breaches its undertaken obligations before the expiry of six months, or in the meantime it repeats the practice violating the competition, the Commission shall continue its proceedings.

Time limits for Decision-making

Article 66

The Commission shall make a decision establishing violations referred to in Article 8, para 1 and Article 19, para 1 of this Law, when the agreement or some of its provisions considerably prevent, restrict or distort competition, or when dominant position is abused, as well as a decision on exemption from prohibition of the agreement referred to in Article 9, para 1 of this Law, within the period not exceeding:

- 1) four months following the day of the submission of request, in proceedings instituted at the request of the party,
- 2) six months following the day of the resolution on institution of the proceedings conducted ex officio.

The Commission is obliged to make a decision upon the request for the authorisation of concentration within the period of four months following the day of submission of request.

The Commission is obliged to make a decision authorising concentration within the period of one month following the day of submission of request (summary procedure).

Monitoring the Enforcement of Decisions

Article 67

The Technical Service is obliged to monitor the enforcement of decisions terminating the procedure and decisions containing terms, conditions and restrictions for the party concerned and enforcement of all other decisions on the basis of which the procedure before the Commission has been terminated.

If, in the course of monitoring, the enforcements of decision referred to in para 1 of this Article, it is considered that the party concerned does not observe conditions and restrictions imposed to it, the Technical Service shall, without delay, but not later than eight days, inform the Council about such case.

Decisions relating to Administrative Measures

Article 68

In case the undertaking fails to act pursuant to measures and time limits contained in decisions referred to in Article 8, para 2 and Article 19, para 2 of this Law, the Commission is obliged to make a decision imposing on the relevant undertaking the following administrative measures:

- 1) temporary prohibition of trade of particular type of goods and/or services on relevant market, not exceeding the period of three months;
- 2) temporary prohibition of operations not exceeding the period of four months, if, in spite of the prohibition referred to in item 1) of this Article, the undertaking continues with the trade of goods and/or services on relevant market.

Publication of Decisions

Article 69

Decisions of the Commission shall be published in the Official Gazette of the Republic of Serbia.

Data considered to be an official, business, state or military secret contained in the decision, shall be excluded from the publication.

IV PENALTY CLAUSE

Request for Initiation of Infringement Procedure

Article 70

Provisions of the Law regulating infringements shall be applied in the infringement procedure.

The Commission shall submit to the relevant infringement authority the request for initiation of infringement procedure against undertakings performing acts relating to prevention, restriction or distortion of competition.

Infringements

Article 71

The undertaking shall be fined from 1% to 10% of its total annual income realised in the preceding financial year for the infringement committed, if it:

- 1) concludes or applies agreement which is null and void (Article 7);
- 2) fails to act in accordance with the decision proclaiming the agreement null and void or abuse of dominant position (Articles 8 and 19);
- 3) abuses dominant position on relevant market (Article 18);

- 4) pursues the activities relating to the implementation of the concentration without authorization for concentration (Article 23);
- 5) pursues the activities relating to the implementation of the concentration pursuant to the authorisation for concentration issued on the basis of incorrect or untrue information, i.e. deceit Article 29, para 1);
- 6) fails to act in accordance with the decision referred to in Article 63, para 2;
- 7) fails to act in accordance with the decision referred to in Article 68.

If the agreement concluded or applied by the association of undertakings shall cause considerable prevention, restriction or distortion of competition, total annual income realised in the precedent financial year of all undertakings members of association shall be taken into account when assessing the amount of fine to be imposed.

The fines imposed to association of undertakings may be jointly and severally paid by the members of the association in case the association is unable to effect payment or does not possess its own capital.

For the infringement referred to in para 1 of this Article, the responsible person of legal person concerned shall be fined an amount from 1% to 10% of the total annual income calculated pursuant to the regulations on income taxes of citizens for the precedent financial year.

An undertaking party to the agreement referred to in Article 7 para 1 of this Law, as well as a responsible person of the legal person, may be exempted from penalty, provided that it brings to the attention of the Commission the existence of such agreement and its participants prior to the making of the resolution on instituting the proceedings against the said undertaking.

Article 72

For the infringement committed, the undertaking shall be fined an amount from 1% to 3% of the total annual income realised in the precedent financial year, if it:

- 1) fails to notify agreement which may be exempted from prohibition (Article 15);
- 2) fails to act in accordance with the request made by the Commission to submit to or inform the Commission of the requested data or provides incorrect, incomplete or false information (Article 55).

For the infringement committed referred to in para 1 of this Article, the responsible person of the legal person shall be fined an amount from 1% to 3% of the total annual income calculated pursuant to the regulations on income taxes of citizens for the preceding financial year.

Protective Measures

Article 73

For the infringement referred to in Article 71 para 1 of this Law, the following protective measures shall be applied to the undertaking concerned: confiscation of the subject matter involved and prohibition to perform certain economic activities.

For the infringement referred to in Article 71 para 1 of this Law, the following protective measure shall be applied to the responsible person of the legal person in question: prohibition to perform certain duties.

Statute of Limitations

Article 74

A time limit set by the statute of limitations for infringements referred to in Article 71 paras 1 and 4 of this Law shall come into force upon the expiry of 5 years from the date the infringement was committed.

A time limit set by the statute of limitations for infringements referred to in Article 72 of this Law shall come into force upon the expiry of 3 years from the date the infringement was committed.

V. TRANSITIONAL AND FINAL PROVISIONS

Article 75

Relative Institutions are obliged to submit their proposals for the members of Council to the Parliament within the period of 30 days from the date this Law comes into effect.

In case any of the relative Institutions does not submit its proposal for the members of Council within the period referred to in para 1 of this Article, the Government shall, instead of the relative Institution, submit its proposal within an additional period of 15 days.

Within the period of 60 days from the date of expiration of submission of proposal for the members, Parliament shall appoint the members of the Council.

Within the period of 15 days from the date of their appointment, the appointed members of the Council shall elect the President of the Council.

The Council shall, within the period of 30 days from the date of its establishment, prepare the Statute and submit it to the Government for its approval.

The Commission shall commence its activities on the date of the establishment of Council.

On the date of the commencement of its activities, the Commission shall take over employees from the Ministry of Trade, Tourism and Services engaged in the activities relating to prevention of monopolistic behaviour, as well as objects, files, equipment and working tools necessary for their work.

Until the commencement of activities by the Commission, the activities within the field of protection of competition shall be performed by the Ministry in charge of trade operations.

Article 76

Procedures initiated under the regulations ceasing to be in effect on the date this Law enters into force, shall be processed pursuant to this Law.

Article 77

On the day when this Law enters into force, the Antimonopoly Law (Official Gazette of FRY, no. 29/96) shall cease to be in effect.

Article 78

This Law shall enter into force on the eighth day following its publication in the 'Official Gazette of the Republic of Serbia.'

SINGAPORE

COMMENTARY BY THE GOVERNMENT OF SINGAPORE ON SINGAPORE COMPETITION LEGISLATION

A. Description of the reasons for the introduction of the legislation

1. Competition is a key tenet of Singapore's economic policy. Singapore believes that market competition spurs businesses to be more efficient, innovative, and responsive to customers' needs. This leads to customers enjoying higher quality, lower prices, and more choices through a wider range of products and services. The overall economy therefore benefits from greater productivity gains and more efficient resource allocation. Where appropriate, Singapore had liberalised sectors of the economy to competition, such as broadcasting, energy and telecommunications overseen by sectoral competition regulators.

2. In February 2003, the Economic Review Committee (ERC) (a joint public-private sector committee initiated by the Singapore Government) recommended that a generic competition law be enacted to create a conducive environment for businesses, big and small, to compete on an equal footing. The Singapore Government accepted the recommendation and decided to introduce generic competition laws to enhance Singapore's competitiveness.

3. The Competition Act ("the Act") was enacted on 19 Oct 2004.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation

4. The objectives of the Act include:

- (i) maintaining and enhancing efficient market conduct and promoting the overall productivity, innovation and competitiveness of markets in Singapore;
- (ii) eliminating or controlling practices that have adverse effects on competition in Singapore;
- (iii) promoting and sustaining competition in markets in Singapore; and
- (iv) promoting a strong competitive culture and environment throughout the economy in Singapore; and
- (v) advising government and public agencies on national needs and policies on competition matters generally.

5. The Act came into force in three phases. The first phase saw the establishment of the competition authority, the Competition Commission of Singapore ("CCS") on 1 January 2005. Later, the Act was amended viz the Competition (Amendment) Act 2005 to strengthen CCS' enforcement powers. The prohibitions against anticompetitive

agreements and abuse of dominant position then came into force on 1 January 2006 (the second phase). Finally, the prohibition against mergers and anticipated mergers which substantially lessen competition came into force on 1 July 2007 (the third phase) after the amendments made by the Competition (Amendment) Act 2007.

6. Such a phased approach was meant not only to give time for CCS to build up its resources, capability and expertise, but also to allow the business community to review their business practices to ensure that they are in compliance with the Act. In enforcing the Act, CCS' focus is on activities that have an appreciable adverse effect on competition in Singapore. In assessing whether an action is anti-competitive, CCS will also give consideration to whether it generates net economic benefits. To provide guidance to businesses and industry on how CCS will interpret and give effect to the Act, CCS has published over ten guidelines to-date.

C. Description of the practices, acts or behaviour subject to control, indicating for each:

- (1) The type of control – for example, outright prohibition, prohibition in principle or examination on a case-by-case basis; and
- (2) The extent to which the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covered by controls relating specifically to consumer protection – for example, controls concerning misleading advertising.

7. The Act contains three main prohibitions:

- (i) Section 34 prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices that have as their object or effect the appreciable restriction, prevention or distortion of competition within Singapore.
- (ii) Section 47 prohibits conduct that amounts to an abuse of a dominant position.
- (iii) Section 54 prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition (“SLC”) in Singapore.

8. Section 34 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices (collectively “agreements”) which have the object or effect of preventing, restricting or distorting competition within Singapore. Such agreements may be oral or written and need not necessarily be legally binding. Examples of such prohibited agreements include:

- (i) directly or indirectly fixing purchase or selling prices or any other trading conditions;
- (ii) limiting or controlling production, markets, technical development or investment;

- (iii) sharing markets or sources of supply;
- (iv) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (v) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

9. Section 47 prohibits conduct by undertakings which amount to an abuse of a dominant position in any market in Singapore. Examples of such abuse include:

- (i) predatory behaviour towards competitors;
- (ii) limiting production, markets, or technical development to the prejudice of consumers;
- (iii) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

10. CCS will consider all relevant factors in assessing whether an undertaking has a dominant position. This includes evaluating its market shares, barriers to entry and other constraints on market power. For clarity, there is no prohibition against an undertaking being in a dominant position in Singapore.

11. Whether an undertaking has abused its dominant position is a question of fact. Commonly recognized examples of abusive behaviour include predatory pricing, foreclosure or a refusal to supply. In assessing cases of alleged abuse, CCS will also consider the dominant undertaking's justification for its conduct, subject to a proportionality standard. CCS may also consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct but it will still be necessary for the dominant undertaking to show that its conduct is proportionate to the benefits claimed.

12. Section 54 prohibits mergers, which have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods and services (what is commonly known as the SLC test).

13. The determination of whether a merger exists under the Act is based on qualitative rather than quantitative criteria, focusing on the concept of control. These criteria include considerations of both law and fact. A merger may therefore occur on a legal or a de facto basis.

14. In applying the SLC test, CCS will evaluate the prospects of competition in the future, with and without the merger. As a guide, competition concerns are unlikely to arise in a merger situation unless:

- (i) the merged entity will have a market share of 40% or more; or
- (ii) the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% or more.

15. The implementation of the merger control regime followed an extensive review of international best practices leading to the adoption of a voluntary notification regime for mergers and anticipated mergers. Powers were also given to CCS to issue interim directions to merger parties to prevent action which could prejudice CCS' ability to consider the merger situation further and/or impose appropriate remedies and power to accept commitments to address competition concerns so that mergers can be cleared quickly.

D. Description of the scope of application of the legislation, indicating:

- (1) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;
- (2) Whether it applies to all practices, acts or behaviour having effects on the country in question, irrespective of where they occur; and
- (3) Whether it is dependent on the existence of an agreement, or on such agreement being put into effect.

16. Unless excluded or exempted, the Act applies to all goods and services in markets in Singapore. As the Act is intended to apply only to market players, activities carried on by, agreements entered into or any conduct on the part of the government, any statutory body or any person acting on their behalf in relation to the said activity, agreement or conduct are excluded.

17. The section 34 prohibition does not apply to an agreement which contributes to:
- (a) (a) improving production or distribution; or
 - (b) (b) promoting technical or economic progress, but which does not —
 - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
 - (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

18. In appropriate circumstances, if CCS opines that a particular category of agreements contributes to —
- (c) (a) improving production or distribution; or
 - (d) (b) promoting technical or economic progress, but does not —
 - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
 - (ii) afford the undertakings concerned the possibility of eliminating

competition in respect of a substantial part of the goods or services in question,

- (iii) CCS may recommend to the Minister to make a block exemption order to exclude such agreements from the section 34 prohibition.

19. The section 34 prohibition against anticompetitive agreements does not apply to a vertical agreement. Under the Act, a “vertical agreement” is defined to mean an agreement entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers.

20. The Act provides for exclusions from the section 34 and section 47 prohibitions in the Third Schedule to the Act. These include sectors such as the telecommunications, energy, media and armed security services industries which have specific competition frameworks. Certain regulated activities such as the supply of ordinary letter and postcard services, piped potable water, wastewater management, scheduled bus services, rail services, and cargo terminal operations are also excluded.

21. A merger is excluded from the prohibitions under section 54 of the Act if the economic efficiencies arising or that may arise from the merger outweighs the adverse effects due to the substantial lessening of competition in the relevant market in Singapore.

22. Notwithstanding that an agreement referred to in section 34 has been made outside Singapore, or if a party abusing its dominant position is outside Singapore, or if the merger or anticipated merger is effected outside Singapore, or if any of the parties to the agreement, or the merger or anticipated merger are outside Singapore, so long as section 34, 47 and 54 of the Act are infringed, the same provisions under the Act will still apply.

23. In response to the question of whether the section 34 prohibition is dependent on the existence of an agreement or if it requires the said agreement to be put into effect before liability is attracted, the position under the Act is that the section 34 prohibition applies once parties enter into an agreement which have the object or effect of preventing, distorting or reducing competition within Singapore; hence, the agreement need not be implemented.

E. Description of the enforcement machinery (administrative and/or judicial), indicating any notification and registration agreements as well as the principal powers or body(-ies)

24. CCS enforces the Act and is responsible for taking action against anti-competitive agreements, abuse of dominant position and mergers which substantially lessen competition. It also advocates competition by working with government agencies, the

business community and consumer groups to promote pro-competition policies and conduct. Ultimately, it aims to raise greater awareness of the importance of competition amongst businesses and the general public.

25. In administering and enforcing the Act, CCS has available a range of tools and mechanisms which includes the following:

- i) Notification for guidance or decisions;
- ii) Leniency programmes; and,
- iii) Investigation and enforcement powers

26. There is no statutory requirement to notify agreements, conduct, mergers or anticipated mergers to CCS. It is for undertakings to ensure that their agreements, conduct or mergers are lawful. However, undertakings may notify their agreements or conduct to CCS for guidance or a decision (with fees payable to CCS) if they have concerns as to whether they are infringing the Act. While notification provides undertakings to an agreement with immunity from financial penalties for infringements of the section 34 prohibition occurring between the point of notification to such date as may be specified by CCS following its determination, this does not apply to conduct under the section 47 prohibition. Undertakings may also notify their mergers or anticipated mergers for a decision if they have concerns as to whether their merger infringes, or their anticipated merger if carried into effect will infringe, the section 54 prohibition.

27. To enforce the section 34 prohibition and combat cartel activities, CCS has in place a leniency programme for cartel members to reveal information about the cartel. Depending on the circumstances, CCS has discretion to grant full immunity from financial penalties or to reduce financial penalties payable by the infringing parties. At the time this paper was written, the CCS was inviting public feedback on proposed changes to enhance the leniency programme.

28. The Act gives CCS, where there are reasonable grounds for suspecting an infringement, investigation powers, including:

- (i) Power to require the production of documents and information - CCS can, by written notice, require any person to produce any relevant documents or information; and
- (ii) Entry of premises with or without a warrant - CCS can enter any premises to require the production of documents without a warrant after giving advance notice in writing. If the premises are occupied by an undertaking under investigation, no notice need be given. An application can also be made to a District Court for a warrant for CCS to enter and search the premises.

29. The Act sets out a number of criminal offences which may be committed where a person refuses to provide information, destroys or falsifies documents, provides false or misleading information or obstructs an officer of CCS. Such persons may be prosecuted in Court and be subject to a fine or to imprisonment or both.

30. CCS may, where it finds that any of the anti-competitive prohibitions has been infringed, give such directions as it considers appropriate to bring the infringement to an end. Directions may in particular require the person concerned to modify the agreement or conduct, or to terminate the agreement or cease the conduct. In some circumstances, the directions appropriate to bring an infringement to an end may include directions requiring an undertaking to make structural changes to its business.

31. CCS may impose a financial penalty for an infringement of any prohibition under the Act provided that infringement has been committed intentionally or negligently. The amount of penalty imposed may be up to 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years. When setting the amount of any penalty, CCS will take into account the factors such as:

- (i) the seriousness of the infringement;
- (ii) the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement;
- (iii) the duration of the infringement; and
- (iv) any further aggravating or mitigating factors.

32. An appeal against the decision of CCS (including a direction/imposition of a financial penalty) can be made to the Competition Appeal Board (“CAB”), an independent specialist tribunal comprising lawyers, economists, accountants and representatives from the banking and business sectors. Such an appeal must be brought within the specified time period. However, except in the case of an appeal against the imposition, or the amount, of a financial penalty, the appeal does not suspend the effect of the decision to which the appeal relates.

33. The CAB has wide powers in determining appeals and may:

- (i) confirm or set aside all or part of the decision;
- (ii) remit the matter to CCS;
- (iii) impose or revoke, or vary (either increase or decrease) the amount of a penalty;
- (iv) give such directions, or take other steps as CCS itself could have given or taken; or
- (v) make any other decision which CCS itself could have made.

34. A further appeal from a decision can be made to the High Court and Court of Appeal either on a point of law arising from a decision of the CAB or from any decision of the CAB as to the amount of a financial penalty.

35. Parties suffering loss or damage directly arising from an infringement of any of the prohibitions under the Act (and upon determination of any appeal) are able to commence a civil action against the infringing undertaking seeking relief. There is a 2 year limit for the taking of such private actions from the time that CCS made the decision or from the determination of the appeal, whichever is the later.

F. Description of any parallel or supplementary legislation, including treaties or undertakings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices

36. As highlighted above, there are specific competition frameworks for the telecommunications, energy, media and armed security services industries. Activities such as the supply of ordinary letter and postcard services, piped potable water, wastewater management, scheduled bus services, rail services, cargo terminal operations and clearing house operations are also subject to regulation by other government agencies..

37. Singapore has also entered into free trade agreements (“FTAs”) with other countries. The following FTAs which Singapore entered into contain chapters on competition/restrictive business practices:

- (i) Peru-Singapore Free Trade Agreement;
- (ii) Singapore-Australia Free Trade Agreement (Safta);
- (iii) Korea-Singapore Free Trade Agreement (KSFTA);
- (iv) Japan-Singapore Free Trade Agreement;
- (v) New Zealand-Singapore Free Trade Agreement;
- (vi) Panama-Singapore Free Trade Agreement;
- (vii) United States-Singapore Free Trade Agreement;
- (viii) The Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation (“the EFTA States”)-Singapore Free Trade Agreement;
- (ix) Chile, Brunei, New Zealand and Singapore (“Trans-Pacific”) Free Trade Agreement.

[For more information and corresponding legal text, please refer to the links found on the “International Enterprise Singapore” website: www.iesingapore.gov.sg]. Where applicable, dispute resolution provisions are provided in the respective treaties.

38. Apart from issuing decisions, CCS has also issued guidance pursuant to various applications for guidance filed by various parties.

G. Description of the major decisions taken by administrative and/or judicial bodies, and the specific issues covered

39. CCS issued its first infringement decision under the Act on 9 Jan 2008. It found that six pest control companies had infringed section 34 of the Act. CCS established that the infringing companies had bid-rigged by concluding anti-competitive agreements to assist each other in winning tenders for termite control services. Essentially, one company would request the others to submit bids higher than its own bid. Competing bids from the other companies were not independently priced and customers did not receive competitive proposals. Financial penalties totalling S\$262,759.66 (amounting to

approximately US\$190,000) were levied on the six companies by CCS. There was no appeal.

40. Further, CCS has issued a number of Guidances and Decisions, notably the decisions in the Qantas and British Airways Restated Joint Services Agreement issued on 13 February 2007 and the Qantas and Orangestar Cooperation Agreement issued on 5 March 2007.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof

41. Legislation (including subsidiary legislation) (Statutes available on website: statutes.agc.gov.sg)

- (i) Competition Act (Cap. 50B) (as amended by the Competition (Amendment) Act 2005 and the Competition (Amendment) Act 2007)
- (ii) Competition (Block Exemption For Liner Shipping Agreements) Order Cap/SI No. : Cap. 50b, Order 1
- (iii) Competition Regulations Cap/SI No. : Cap. 50b, Regulation 1
- (iv) Competition (Composition Of Offences) Regulations Cap/SI No. : Cap. 50b, Regulation 2
- (v) Competition (Fees) Regulations Cap/SI No. : Cap. 50b, Regulation 3
- (vi) Competition (Transitional Provisions For Section 34 Prohibition) Regulations Cap/SI No. : Cap. 50b, Regulation 4
- (vii) Competition (Appeals) Regulations Cap/SI No. : Cap. 50b, Regulation 5
- (viii) Competition (Appealable Decisions) Regulations Cap/SI No. : Cap. 50b, Regulation 6
- (ix) Competition Act (Commencement) Notification 2004 Cap/SI No. : S707/2004
- (x) Competition Act (Commencement) Notification 2005 Cap/SI No. : S559/2005
- (xi) Competition Act (Commencement) (No. 2) Notification 2005 Cap/SI No. : S864/2005
- (xii) Competition (Financial Penalties) Order 2007 Cap/SI No. : S372/2007
- (xiii) Competition (Exclusion Of Air Shuttle Service Agreement) Order 2007 Cap/SI No. : S497/2007
- (xiv) Competition Regulations 2007 Cap/SI No. : S348/2007
- (xv) Competition (Notification) Regulations 2007 Cap/SI No. : S349/2007
- (xvi) Competition (Fees) Regulations 2007 Cap/SI No. : S358/2007

42. CCS' Decisions (Available on CCS website: www.ccs.gov.sg)

- a) Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore (CCS 600/008/06) (9 Jan 08)
 - b) Notification for Decision by Qantas Airways and British Airways of their Restated Joint Services Agreement (CCS 400/002/06) (13 Feb 2007)
 - c) Notification for Decision by Qantas Airways and OrangeStar Investment Holdings of their Cooperation Agreement (CCS 400/003/06) (5 Mar 2007)
43. Merger Cases (Available on CCS website: www.ccs.gov.sg)

Notifying Date	Notified Mergers or Anticipated Mergers	Status
30 May 2008	Proposed Merger between Air Liquide Electronics U.S. LP and Chemical Management Division of Edwards Vacuum Inc.	Cleared on 8 July 2008
23 May 2008	Proposed Merger between Wacker Chemie AG, Wacker Polymer Systems GmbH & Co. KG and Air Products Polymers Holdings, L.P. (n.k.a. Wacker Polymers Holdings, L.P.)	Cleared on 2 July 2008
21 February 2008	Proposed Merger between Chartered Semiconductor Manufacturing Ltd and Hitachi Semiconductor Singapore Pte Ltd	Cleared on 28 March 2008
30 October 2007	<u>Proposed Merger between Dubai Drydocks World LLC and Labroy Marine Ltd</u>	Cleared on 6 December 2007
8 October 2007	Proposed Merger between Thomson Corporation and Reuters Group PLC	Cleared on 23 May 2008
28 September 2007	Proposed Merger between Kraft Foods Global, Inc. and Groupe Danone S.A.	Cleared on 12 November 2007
4 September 2007	Proposed Merger between Flextronics International Ltd and Soletron Corporation	Cleared on 2 October 2007
29 August 2007	Joint Venture between Intel Coporation, STMicroelectronics N.V., and Francisco Partners LLP	Cleared on 2 October 2007

COMPETITION ACT

PART I PRELIMINARY

Short title

1. This Act may be cited as the Competition Act.

Interpretation

2. —(1) In this Act, unless the context otherwise requires —

"anticipated merger" means an arrangement that is in progress or contemplation and that, if carried into effect, will result in the occurrence of a merger referred to in section 54 (2);

"block exemption" has the meaning assigned to it in section 36 (5);

"block exemption order" has the meaning assigned to it in section 36 (3);

"Board" means the Competition Appeal Board established under section 72;

"Chairman" means the Chairman of the Commission and includes any temporary Chairman of the Commission;

"Chief Executive" means the Chief Executive of the Commission appointed under section 10 and includes any person acting in that capacity;

"Commission" means the Competition Commission of Singapore established under section 3;

"Deputy Chairman" means the Deputy Chairman of the Commission and includes any temporary Deputy Chairman of the Commission;

"document" includes information recorded in any form;

"goods" includes —

- (a) buildings and other structures;
- (b) ships, aircraft and hovercraft;
- (c) gas and electricity; and
- (d) choses in action;

"information" includes estimates and forecasts;

"inspector" means an inspector appointed by the Commission to conduct any investigation under section 62;

"investigating officer" has the meaning assigned to it in section 64 (1);

"member" means a member of the Commission;

"party involved in a merger" means a person or an undertaking specified in section 54 (2) and includes the merged entity;

"party to an anticipated merger" means a person or an undertaking which would be a person or an undertaking specified in section 54 (2) if the anticipated merger were carried into effect;

"person" includes any undertaking;

"premises" does not include domestic premises unless —

- (a) they are used in connection with the affairs of an undertaking; or
- (b) documents relating to the affairs of an undertaking are kept there,
- (c) but includes any vehicle;

"public interest consideration" means national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe;

"section 34 prohibition" means the prohibition referred to in section 34 (1);

"section 47 prohibition" means the prohibition referred to in section 47 (1);

"section 54 prohibition" means the prohibition referred to in section 54 (1);

"service" means a service of any description whether industrial, trade, professional or otherwise;

"undertaking" means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services.

- (2) The fact that to a limited extent the section 34 prohibition does not apply to an agreement, because of an exclusion provided by or under this Act, does not require those provisions of the agreement to which the exclusion relates to be disregarded when considering whether the agreement infringes the prohibition for other reasons.
- (3) For the purposes of this Act, the power to require information, in relation to information recorded otherwise than in a legible form, includes the power to require a copy of it in a legible form.
- (4) Any power conferred on any person by this Act to require information includes the power to require any document which he believes may contain that information.

[Canada Competition, ss. 2 (1) and 91; UK Competition 1998, s. 59 (1), (2) to (4); UK Enterprise 2002, s. 232 (2)]

PART II COMPETITION COMMISSION OF SINGAPORE

Division 1 — Establishment, incorporation and constitution of Commission

Establishment and incorporation of Competition Commission of Singapore

3. There is hereby established a body to be known as the Competition Commission of Singapore which shall be a body corporate with perpetual succession and shall, by that name, be capable of —

- (a) suing and being sued;
- (b) acquiring, owning, holding and developing or disposing of property, both movable and immovable; and
- (c) doing and suffering such other acts or things as bodies corporate may lawfully do and suffer.

Common seal

4. (1) The Commission shall have a common seal and such seal may from time to time be broken, changed, altered or made anew as the Commission thinks fit.
- (2) All deeds and other documents requiring the seal of the Commission shall be sealed with the common seal of the Commission.
- (3) All courts, judges and persons acting judicially shall take judicial notice of the common seal of the Commission affixed to any document and shall presume that it was duly affixed.

Constitution of Commission

5. (1) The Commission shall consist of the following members:
- (a) (a) a Chairman; and
 - (b) (b) such other members, not being less than 2 or more than 16, as the Minister may from time to time determine.
- (2) The First Schedule shall have effect with respect to the Commission, its members and proceedings.

Division 2 — Functions, duties and powers of Commission

Functions and duties of Commission

6. (1) Subject to the provisions of this Act, the functions and duties of the Commission shall be —
- (a) to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore;
 - (b) to eliminate or control practices having adverse effect on competition in Singapore;
 - (c) to promote and sustain competition in markets in Singapore;
 - (d) to promote a strong competitive culture and environment throughout the economy in Singapore;
 - (e) to act internationally as the national body representative of Singapore in respect of competition matters;
 - (f) to advise the Government or other public authority on national needs and policies in respect of competition matters generally; and
 - (g) to perform such other functions and discharge such other duties as may be

conferred on the Commission by or under any other written law.

- (2) In performing the functions and discharging the duties imposed on it by subsection (1), the Commission shall have regard to —
 - (a) the differences in the nature of various markets in Singapore;
 - (b) the economic, industrial and commercial needs of Singapore; and
 - (c) maintaining the efficient functioning of the markets in Singapore.
- (3) The Commission may undertake such other functions and duties as the Minister may assign to the Commission and in so doing, the Commission shall be deemed to be fulfilling the purposes of this Act, and the provisions of this Act shall apply to the Commission in respect of such functions and duties.
- (4) Nothing in this section shall be construed as imposing on the Commission, directly or indirectly, any form of duty or liability enforceable by proceedings before any court to which it would not otherwise be subject.

Powers of Commission

7. (1) Subject to the provisions of this Act, the Commission may carry on such activities as appear to the Commission to be advantageous, necessary or convenient for it to carry on for or in connection with the performance of its functions and the discharge of its duties under this Act or any other written law and, in particular, the Commission may exercise any of the powers specified in the Second Schedule.
- (2) This section shall not be construed as limiting any power of the Commission conferred by or under any other written law.
- (3) The Commission shall furnish the Minister information with respect to its property and activities in such manner and at such times as the Minister may require.

Directions by Minister

8. The Minister may give such general directions, not inconsistent with the provisions of this Act, relating to the policy the Commission is to observe in the exercise of its powers, the performance of its functions and the discharge of its duties as the Minister considers necessary, and the Commission shall give effect to any such directions.

Appointment of committees and delegation of powers

9. (1) The Commission may, in its discretion, appoint from among its own members or persons who are not members such number of committees as it thinks fit consisting of members or other persons or members and other persons for purposes which, in the opinion of the Commission, would be better regulated and managed by means of such committees.
- (2) The Commission may, subject to such conditions or restrictions as it thinks fit, delegate to any such committee or the Chairman, all or any of the powers, functions and duties vested in the Commission by this Act or any other written

law, except the powers to make regulations, prescribe or levy dues and rates and borrow money and the power of delegation conferred by this subsection.

- (3) The Commission may, subject to such conditions or restrictions as it thinks fit, delegate to any employee of the Commission or any person all or any of the powers, functions and duties vested in the Commission by this Act or any other written law, except the powers to make regulations, prescribe or levy dues and rates and borrow money and the power of delegation conferred by this subsection; and any power, function or duty so delegated may be exercised, performed or discharged by the employee or person in the name and on behalf of the Commission.
- (4) The Commission may continue to exercise a power conferred upon it, perform a function or discharge a duty under this Act or any other written law, notwithstanding the delegation of the power, function or duty under this section.

Division 3 — Provisions relating to staff

Appointment of Chief Executive and other employees, etc.

10. (1) The Commission shall, with the approval of the Minister, appoint a Chief Executive on such terms and conditions as the Commission may determine.
- (2) The Chief Executive shall —
 - (a) be known by such designation as the Commission may determine;
 - (b) be responsible to the Commission for the proper administration and management of the functions and affairs of the Commission in accordance with the policy laid down by the Commission; and
 - (c) not be removed from office without the consent of the Minister.
- (3) The Minister shall consult the Public Service Commission before granting his approval under subsection (1) or before giving his consent under subsection (2) (c).
- (4) If the Chief Executive is temporarily absent from Singapore or temporarily incapacitated by reason of illness or for any other reason temporarily unable to discharge his duties, another person may be appointed by the Commission to act in the place of the Chief Executive during any such period of absence from duty.
- (5) The Commission may, from time to time, appoint and employ on such terms and conditions as the Commission may determine such officers, employees, consultants and agents as may be necessary for the effective performance of its functions and discharge of its duties.

Division 4 — Financial provisions

Financial year

11. The financial year of the Commission shall begin on 1st April of each year and end on 31st March of the succeeding year, except that the first financial year of the Commission shall begin on 1st January 2005 and end on 31st March of the succeeding year.

Annual estimates

12. (1) The Commission shall, in every financial year, prepare or cause to be prepared and shall adopt annual estimates of income and expenditure of the Commission for the ensuing financial year.
- (2) Supplementary estimates may be adopted by the Commission at any of its meetings.
- (3) A copy of all annual estimates and supplementary estimates shall, upon their adoption by the Commission, be sent immediately to the Minister.
- (4) The Minister may approve or disallow any item or portion of any item shown in the estimates, and shall return the estimates as amended by him to the Commission, and the Commission shall be bound thereby.
- (5) Notwithstanding any provision of this section, the Commission may transfer all or any part of moneys assigned to one item of expenditure to any item under the same head of expenditure in any estimates approved by the Minister.

Moneys recovered or collected by Commission

13. (1) All moneys recovered or charges or composition sums collected under this Act, other than financial penalties, shall be paid into and form part of the moneys of the Commission.
- (2) All financial penalties collected under this Act shall be paid into the Consolidated Fund.

Grants-in-aid

14. For the purpose of enabling the Commission to perform its functions and discharge its duties under this Act, the Minister may, from time to time, make grants-in-aid to the Commission of such sums of money, as the Minister may determine, out of moneys to be provided by Parliament.

Power to borrow

15. (1) For the performance of its functions or discharge of its duties under this Act or any other written law, the Commission may, from time to time, raise loans from the Government or, with the approval of the Minister, raise loans within or outside Singapore from such source as the Minister may direct by —
 - (a) mortgage, overdraft or other means, with or without security;
 - (b) charge, whether legal or equitable, on any property vested in the Commission or on any other revenue receivable by the Commission under this Act or any other written law; or
 - (c) the creation and issue of debentures, bonds or any other instrument as the Minister may approve.
- (2) For the purposes of this section, the power to raise loans shall include the power to make any financial agreement whereby credit facilities are granted to the Commission for the purchase of goods, materials or things.

Issue of shares, etc.

16. As a consequence of the vesting of any property, rights or liabilities of the Government in the Commission under this Act, or of any capital injection or other investment by the Government in the Commission in accordance with any written law, the Commission shall issue such shares or other securities to the Minister for Finance as that Minister may, from time to time, direct.

Bank account

- 17.** (1) The Commission shall open and maintain an account with such bank as the Commission thinks fit.
- (2) Every such account shall be operated by such person as may, from time to time, be authorised in that behalf by the Commission.

Application of moneys

18. The moneys of the Commission shall be applied only in payment or discharge of the expenses, obligations and liabilities of the Commission and in making any payment that the Commission is authorised or required to make.

Investment

- 19.** The Commission may, subject to the general or special direction of the Minister.
- (a) invest its moneys in such manner as it thinks fit; and
- (b) engage in any financial activity or participate in any financial arrangement for the purpose of managing or hedging against any financial risk that arises or is likely to arise from such investment.

Accounts

- 20.** The Commission shall keep proper accounts and records of its transactions and affairs and shall do all things necessary to ensure that —
- (a) all payments out of its moneys are correctly made and properly authorised; and
- (b) adequate control is maintained over the assets of, or in the custody of, the Commission and over the expenditure incurred by the Commission.

Audit of accounts

- 21.** (1) The accounts of the Commission shall be audited by the Auditor-General or such other auditor as may be appointed annually by the Minister in consultation with the Auditor-General (referred to in this Act as the auditor).
- (2) A person shall not be qualified for appointment as an auditor under subsection (1) unless he is a public accountant who is registered or deemed to be registered under the Accountants Act (Cap. 2).
- (3) The Commission shall, as soon as practicable after the close of each financial year, prepare and submit the financial statements in respect of that year to the auditor who shall audit and report on them.

- (4) The auditor shall in his report state —
 - (a) whether the financial statements show fairly the financial transactions and the state of affairs of the Commission;
 - (b) whether proper accounting and other records have been kept, including records of all assets of the Commission whether purchased, donated or otherwise;
 - (c) whether the receipts, expenditure and investment of moneys and the acquisition and disposal of assets by the Commission during the financial year were in accordance with the provisions of this Act; and
 - (d) such other matters arising from the audit as he considers necessary.
- (5) The auditor shall, as soon as practicable after the accounts have been submitted for audit, send a report of his audit to the Commission.
- (6) The auditor shall submit such periodical and special reports to the Minister and to the Commission as may appear to him to be necessary or as the Minister or the Commission may require.

Powers of auditor

- 22. (1) The auditor or any person authorised by him shall be entitled at all reasonable times to full and free access to all accounting and other records relating, directly or indirectly, to the financial transactions of the Commission.
- (2) The auditor or any person authorised by him may make copies of, or take extracts from, any such accounting or other records.
- (3) The auditor or any person authorised by him may require any person to furnish him with such information in the possession of that person or to which that person has access as the auditor or any duly authorised person considers necessary for the performance of his functions under this Act.
- (4) Any officer of the Commission who —
 - (a) refuses or fails, without any reasonable cause, to allow the auditor or any person authorised by the auditor access to any accounting and other records of the Commission in his custody or power;
 - (b) refuses or fails, without any reasonable cause, to give any information possessed by him as and when required by the auditor or person authorised by the auditor; or
 - (c) hinders, obstructs or delays the auditor or any person authorised by the auditor in the performance of his functions, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1,000 and, in the case of a continuing offence, to a further fine not exceeding \$100 for every day or part thereof during which the offence continues after conviction.

Presentation of financial statements and auditor's report to Parliament

- 23. (1) The Commission shall, as soon as its accounts and financial statements have been audited in accordance with the provisions of this Act, send to the Minister a copy of the audited financial statements, signed by the Chairman, together with a copy of the auditor's report.
- (2) Where the Auditor-General is not the auditor of the Commission, a copy of the

audited financial statements and any report made by the auditor shall be forwarded to the Auditor-General at the same time they are submitted to the Commission.

- (3) The Minister shall, as soon as practicable, cause a copy of the audited financial statements and of the auditor's report referred to in subsection (1) to be presented to Parliament.

Division 5 — Transfer of property, assets, liabilities and employees

Transfer to Commission of property, assets and liabilities

24. (1) As from 1st January 2005, such movable and immovable property vested in the Government as may be determined by the Minister for Finance and used or managed by the Market Analysis Division of the Ministry of Trade and Industry (referred to in this Division as the transferred Division) and all assets, interests, rights, privileges, liabilities and obligations of the Government relating to the transferred Division shall be transferred to and shall vest in the Commission without further assurance, act or deed.
- (2) If any question arises as to whether any particular property, asset, interest, right, privilege, liability or obligation has been transferred to or vested in the Commission under subsection (1), a certificate under the hand of the Minister for Finance shall be conclusive evidence that the property, asset, interest, right, privilege, liability or obligation was or was not so transferred or vested.
- (3) Any immovable property to be transferred to and vested in the Commission under subsection (1) shall be held by the Commission upon such tenure and subject to such terms and conditions as the President may determine.
- (4) Every agreement relating to any of the transferred properties to which the Government was a party immediately before 1st January 2005, whether or not of such nature that the rights and liabilities thereunder could be assigned, shall have effect as from that date as if —
 - (a) the Commission had been a party to such an agreement; and
 - (b) for any reference to the Government there was substituted in respect of anything to be done on or after 1st January 2005 a reference to the Commission.

Transfer of employees

25. (1) As from 1st January 2005, such persons or categories of persons as the Minister may determine who, immediately before that date, were employed by the Government and posted to the transferred Division shall be transferred to the service of the Commission on terms no less favourable than those enjoyed by them immediately prior to their transfer.
- (2) If any question arises as to whether any person or any category of persons has been transferred to the service of the Commission under subsection (1), a certificate under the hand of the Minister shall be conclusive evidence that the person or category of persons was or was not so transferred.
- (3) Until such time as terms and conditions of service are drawn up by the Commission, the scheme and terms and conditions of service in the Government shall continue to apply to every person transferred to the service of the Commission under subsection (1) as if he were still in the service of the

Government.

Service rights, etc., of transferred employees to be preserved

26. (1) The terms and conditions to be drawn up by the Commission shall take into account the terms and conditions of service (including salaries and accrued rights to leave) enjoyed by the persons transferred to the service of the Commission under section 25 while in the employment of the Government.
- (2) Any term or condition relating to the length of service with the Commission shall recognise the length of service of the persons so transferred while in the employment of the Government to be service with the Commission.
- (3) Nothing in the terms and conditions of service to be drawn up by the Commission shall adversely affect the conditions that would have been applicable to persons transferred to the service of the Commission as regards any pension, gratuity or allowance payable under the Pensions Act (Cap. 225).
- (4) Where a person has been transferred to the service of the Commission under section 25, the Government shall be liable to pay to the Commission such portion of any pension, gratuity or allowance payable to the person on his retirement as the same shall bear to the proportion which the aggregate amount of his pensionable emoluments during his service with the Government bears to the aggregate amount of his pensionable emoluments during his service under both the Government and the Commission.
- (5) Where any person in the service of the Commission, whose case does not fall within the scope of any pension or other schemes established under this section, retires or dies in the service of the Commission or is discharged from such service, the Commission may grant to him or to such other person wholly or partly dependent on him, as the Commission thinks fit, such allowance or gratuity as the Commission may determine.

No benefits in respect of abolition or reorganisation of office

27. Notwithstanding the provisions of the Pensions Act, no person who is transferred to the service of the Commission under section 25 shall be entitled to claim any benefit under that Act on the ground that he has been retired from the public service on account of abolition or reorganisation of office in consequence of the establishment and incorporation of the Commission.

Existing contracts

28. All deeds, contracts, schemes, bonds, agreements, instruments and arrangements subsisting immediately before 1st January 2005 to which the Government is a party and relating to the transferred Division or to any person transferred to the service of the Commission under section 25 shall continue in force on and after that date and shall be enforceable by or against the Commission as if the Commission had been named therein or had been a party thereto instead of the Government.

Continuation and completion of disciplinary proceedings and other legal proceedings

29. (1) Where, on 1st January 2005, any disciplinary proceedings were pending against

any employee of the Government transferred to the service of the Commission, the proceedings shall be carried on and completed by the Commission.

- (2) Where, on 1st January 2005, any matter was in the course of being heard or investigated or had been heard or investigated by a committee acting under due authority but no order, ruling or direction had been made thereon, the committee shall complete the hearing or investigation and shall make such order, ruling or direction as it could have made under the authority vested in it before that date.
- (3) Any order, ruling or direction made by a committee under this section shall be treated as an order, a ruling or a direction of the Commission and have the same force or effect as if it had been made by the Commission pursuant to the authority vested in the Commission under this Act.
- (4) Any proceedings or cause of action pending or existing immediately before 1st January 2005 by or against the Government, or any person acting on its behalf, in relation to —
 - (a) the transferred Division;
 - (b) any portion of the property, assets, interests, rights, privileges, liabilities and obligations transferred to the Commission under section 24; or
 - (c) any employee transferred to the service of the Commission under section 25, may be continued, completed and enforced by or against the Commission.

Misconduct or neglect of duty by employee before transfer

30. The Commission may reprimand, reduce in rank, retire, dismiss or punish in some other manner a person who had, whilst he was in the employment of the Government, been guilty of any misconduct or neglect of duty which would have rendered him liable to be reprimanded, reduced in rank, retired, dismissed or punished in some other manner if he had continued to be in the employment of the Government, and if this Act had not been enacted.

Division 6 — General

Annual report

- 31.** (1) The Commission shall, as soon as practicable after the end of each financial year, cause to be prepared and transmitted to the Minister a report dealing generally with the activities of the Commission during the preceding financial year and containing such information relating to the proceedings and policy of the Commission as the Minister may, from time to time, direct.
- (2) The Minister shall, as soon as practicable, cause a copy of every such report to be presented to Parliament.

Symbol or representation of Commission

- 32.** (1) The Commission shall have the exclusive right to the use of such symbol or representation as the Commission may select or devise and thereafter display or exhibit such symbol or representation in connection with its activities or affairs.
- (2) Any person who uses a symbol or representation identical with that of the Commission, or which so resembles the Commission's symbol or

representation as to deceive or cause confusion, or to be likely to deceive or to cause confusion, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 6 months or to both and, in the case of a continuing offence, to a further fine not exceeding \$250 for every day or part thereof during which the offence continues after conviction.

PART III COMPETITION

Division 1 — General

Application of Part

- 33.** (1) Notwithstanding that —
- (a) an agreement referred to in section 34 has been entered into outside Singapore;
 - (b) any party to such agreement is outside Singapore;
 - (c) any undertaking abusing the dominant position referred to in section 47 is outside Singapore;
 - (d) an anticipated merger will be carried into effect outside Singapore;
 - (e) a merger referred to in section 54 has taken place outside Singapore;
 - (f) any party to an anticipated merger or any party involved in a merger is outside Singapore; or
 - (g) any other matter, practice or action arising out of such agreement, such dominant position, an anticipated merger or a merger is outside Singapore, this Part shall apply to such party, agreement, abuse of dominant position, anticipated merger or merger if —
 - (i) such agreement infringes or has infringed the section 34 prohibition;
 - (ii) such abuse infringes or has infringed the section 47 prohibition;
 - (iii) such anticipated merger, if carried into effect, will infringe the section 54 prohibition; or
 - (iv) such merger infringes or has infringed the section 54 prohibition,
 - (v) as the case may be.
- (2) In so far as this Part applies to an industry or a sector of industry that is subject to the regulation and control of another regulatory authority —
- (a) the exercise of powers by that other regulatory authority shall not be construed as derogating from the exercise of powers by the Commission; and
 - (b) the exercise of powers by the Commission shall not be construed as derogating from the exercise of powers by that other regulatory authority.
- (3) The Minister may make regulations for the purpose of co-ordinating the exercise of powers by the Commission under this Part and the exercise of powers by any other regulatory authority referred to in subsection (2), and may,

- in particular, make regulations to provide for the procedure to be followed —
- (a) in determining in a particular case or category of cases whether the Commission should exercise its powers under this Part or the other regulatory authority should exercise its powers; and
 - (b) where the Commission and the other regulatory authority may exercise their respective powers concurrently or conjunctively.
- (4) Nothing in this Part shall apply to any activity carried on by, any agreement entered into or any conduct on the part of —
- (a) the Government;
 - (b) any statutory body; or
 - (c) any person acting on behalf of the Government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.
- (5) Notwithstanding subsection (4), this Part shall apply to —
- (a) such statutory body or person acting on behalf of such statutory body; or
 - (b) such activity carried on, agreement entered into or conduct engaged in, by a statutory body or person acting on behalf of the statutory body in relation to such activity, agreement or conduct, as the Minister may, by order published in the *Gazette*, prescribe.
- (6) In this section, “statutory body” means a body corporate established by or under any written law.

[India Competition 2002, s. 32]

Division 2 — Agreements, etc., preventing, restricting or distorting competition

Agreements, etc., preventing, restricting or distorting competition

- 34.** (1) Subject to section 35, agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempt in accordance with the provisions of this Part.
- (2) For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they —
- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (3) Any provision of any agreement or any decision which is prohibited by subsection (1) shall be void on or after 1st January 2006 to the extent that it

infringes that subsection.

- (4) Unless the context otherwise requires, a provision of this Act which is expressed to apply to, or in relation to, an agreement shall be read as applying, with the necessary modifications, equally to, or in relation to, a decision by an association of undertakings or a concerted practice.
- (5) Subsection (1) shall apply to agreements, decisions and concerted practices implemented before, on or after 1st January 2006.
[UK Competition 1998, s. 2 (1), (2), (4), (5) and (6)]

Excluded agreements

35. The section 34 prohibition shall not apply to such matter as may be specified in the Third Schedule.

[UK Competition 1998, s. 3 (1)]

Block exemptions

- 36.** (1) If agreements which fall within a particular category of agreements are, in the opinion of the Commission, likely to be agreements referred to in section 41, the Commission may recommend that the Minister make an order specifying that category for the purposes of this section.
- (2) The Minister may make an order giving effect to such a recommendation —
 - (a) in the form in which the recommendation is made; or
 - (b) subject to such modifications as he considers appropriate.
 - (3) An order made under this section is referred to in this Part as a block exemption order.
 - (4) An agreement which falls within a category specified in a block exemption order shall be exempt from the section 34 prohibition.
 - (5) An exemption under this section is referred to in this Part as a block exemption.
[UK Competition 1998, s. 6]

Block exemption orders

- 37.** (1) A block exemption order may impose conditions or obligations subject to which a block exemption shall have effect.
- (2) A block exemption order may provide —
 - (a) that breach of a condition imposed by the order shall have the effect of cancelling the block exemption in respect of an agreement as from such date as the Commission may specify;
 - (b) that if there is a failure to comply with an obligation imposed by the order, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement as from such date as the Commission may specify; and
 - (c) that if the Commission considers that a particular agreement is not one to which section 41 applies, it may cancel the block exemption in respect of that agreement as from such date as the Commission may specify.
 - (3) A block exemption order may provide for a block exemption to have effect from a date earlier than that on which the order is made.

- (4) A block exemption order may provide that the order shall cease to have effect at the end of a specified period.
 - (5) In this section, "specified" means specified in a block exemption order.
- [UK Competition 1998, ss. 6 and 8 (6)]*

Opposition to block exemptions

- 38.** (1) A block exemption order may provide that a party to an agreement which does not qualify for the block exemption created by the order, but satisfies specified criteria, may notify the Commission of the agreement for the purposes of subsection (2).
- (2) An agreement which is notified under any provision included in a block exemption order by virtue of subsection (1) shall be treated, as from the end of the notice period, as falling within a category specified in a block exemption order unless the Commission —
- (a) is opposed to it being so treated; and
 - (b) gives notice in writing to the party concerned of its opposition before the end of that period.
- (3) If the Commission gives notice of its opposition under subsection (2), the notification under subsection (1) shall be treated as a notification under section 44.
- (4) In this section —
- "notice period" means such period as may be specified with a view to giving the Commission sufficient time to consider whether to oppose under subsection (2);
- "specified" means specified in a block exemption order.
- [UK Competition 1998, s. 7]*

Procedure for block exemptions

- 39.** (1) Before making a recommendation under section 36 (1), the Commission shall —
- (a) publish details of its proposed recommendation in such a way as the Commission thinks most suitable for bringing it to the attention of those likely to be affected; and
 - (b) consider any representations made to the Commission regarding its proposed recommendation.
- (2) If the Minister proposes to give effect to such a recommendation subject to modifications, he shall inform the Commission of the proposed modifications and take into account any comments made by the Commission.
- [UK Competition 1998, s. 8 (1) and (2)]*

Variation and revocation of block exemption orders

- 40.** (1) If, in the opinion of the Commission, it is appropriate to vary or revoke a block exemption order, the Commission may make a recommendation to that effect to

the Minister.

- (2) Section 39 shall apply to any proposed recommendation under subsection (1).
- (3) Where there has been no recommendation under subsection (1), the Minister shall, before exercising his power to vary or revoke a block exemption order —
 - (a) inform the Commission of the proposed variation or revocation; and
 - (b) take into account any comments made by the Commission.

[UK Competition 1998, s. 8 (3) to (5)]

Criteria for block exemptions

- 41.** Section 36 shall apply to any agreement which contributes to —
- (a) improving production or distribution; or
 - (b) promoting technical or economic progress, but which does not —
 - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
 - (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

[UK Competition 1998, s. 9]

Requests for Commission to examine agreements

- 42.** (1) Sections 43 and 44 provide for an agreement to be examined by the Commission on the application of a party to the agreement who thinks that it may infringe the section 34 prohibition.
- (2) The Minister may make regulations to provide —
- (a) for the procedure to be followed —
 - (i) by any person making an application under subsection (1); and
 - (ii) by the Commission, in considering such an application; and
 - (b) as to the application of sections 43 to 46 and the procedure referred to in paragraph (a), with such modifications (if any) as may be prescribed, in cases where the Commission —
 - (i) has given a direction withdrawing an exclusion; or
 - (ii) is considering whether to give such a direction.

[UK Competition 1998, s. 12]

Notification for guidance

- 43.** (1) A party to an agreement who applies for the agreement to be examined under this section shall —
- (a) notify the Commission of the agreement; and
 - (b) apply to it for guidance.
- (2) On an application under this section, the Commission may give the applicant guidance as to whether or not, in its view, the agreement is likely to infringe the section 34 prohibition.
- (3) If the Commission considers that the agreement is likely to infringe the section 34 prohibition if it is not exempt, its guidance may indicate whether the

- agreement is likely to be exempt from the prohibition under a block exemption.
- (4) If an agreement to which the section 34 prohibition applies has been notified to the Commission under this section, no penalty shall be imposed under this Part in respect of any infringement of the prohibition by the agreement which occurs during the period —
 - (a) beginning with the date on which the notification was given; and
 - (b) ending with such date as may be specified in a notice in writing given to the applicant by the Commission when the application has been determined.
 - (5) The date specified in a notice under subsection (4) (b) shall not be earlier than the date on which the notice is given.

[UK Competition 1998, s. 13]

Notification for decision

44. (1) A party to an agreement who applies for the agreement to be examined under this section shall —
 - (a) notify the Commission of the agreement; and
 - (b) apply to it for a decision.
- (2) On an application under this section, the Commission may make a decision as to —
 - (a) whether the section 34 prohibition has been infringed; and
 - (b) if it has not been infringed, whether that is because of the effect of an exclusion or because the agreement is exempt from the prohibition.
- (3) If an agreement to which the section 34 prohibition applies has been notified to the Commission under this section, no penalty shall be imposed under this Part in respect of any infringement of the prohibition by the agreement which occurs during the period —
 - (a) beginning with the date on which the notification was given; and
 - (b) ending with such date as may be specified in a notice in writing given to the applicant by the Commission when the application has been determined.
- (4) The date specified in a notice under subsection (3) (b) shall not be earlier than the date on which the notice is given.

[UK Competition 1998, s. 14]

Effect of guidance

45. (1) This section shall apply to an agreement if the Commission has determined an application under section 43 by giving guidance that —
 - (a) the agreement is unlikely to infringe the section 34 prohibition, regardless of whether or not it is exempt; or
 - (b) the agreement is likely to be exempt under a block exemption.
- (2) The Commission shall take no further action in relation to the section 34 prohibition with respect to an agreement to which this section applies, unless —

- (a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its guidance;
 - (b) it has reasonable grounds for suspecting that the information on which it based its guidance was incomplete, false or misleading in a material particular;
 - (c) one of the parties to the agreement applies to it for a decision under section 44 with respect to the agreement; or
 - (d) a complaint about the agreement has been made to it by a person who is not a party to the agreement.
- (3) No penalty may be imposed under this Part in respect of any infringement of the section 34 prohibition by an agreement to which this section applies.
- (4) The Commission may remove the immunity given by subsection (3) if —
- (a) it takes action under this Part with respect to the agreement in one of the circumstances mentioned in subsection (2);
 - (b) it considers that it is likely that the agreement will infringe the section 34 prohibition; and
 - (c) it gives notice in writing to the party on whose application the guidance was given that it is removing the immunity as from the date specified in its notice.
- (5) If the Commission has reasonable grounds for suspecting that information —
- (a) on which it based its guidance; and
 - (b) which was provided to it by a party to the agreement, was incomplete, false or misleading in a material particular, the date specified in a notice under subsection (4) (c) may be earlier than the date on which the notice is given.

[UK Competition 1998, s. 15]

Effect of decision that section 34 prohibition has not been infringed

- 46.** (1) This section shall apply to an agreement if the Commission has determined an application under section 44 by making a decision that the agreement has not infringed the section 34 prohibition.
- (2) The Commission shall take no further action in relation to the section 34 prohibition with respect to the agreement unless —
- (a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its decision; or
 - (b) it has reasonable grounds for suspecting that the information on which it based its decision was incomplete, false or misleading in a material particular.
- (3) No penalty may be imposed under this Part in respect of any infringement of the section 34 prohibition by an agreement to which this section applies.
- (4) The Commission may remove the immunity given by subsection (3) if —
- (a) it takes action under this Part with respect to the agreement in one of the circumstances mentioned in subsection (2);
 - (b) it considers that it is likely that the agreement will infringe the section 34

prohibition; and

- (c) it gives notice in writing to the party on whose application the decision was made that it is removing the immunity as from the date specified in its notice.
- (5) If the Commission has reasonable grounds for suspecting that information —
- (a) on which it based its decision; and
 - (b) which was provided to it by a party to the agreement, was incomplete, false or misleading in a material particular, the date specified in a notice under subsection (4) (c) may be earlier than the date on which the notice is given.

[UK Competition 1998, s. 16]

Division 3 — Abuse of dominant position

Abuse of dominant position

- 47.** (1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.
- (2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in —
- (a) predatory behaviour towards competitors;
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
- (3) In this section, “dominant position” means a dominant position within Singapore or elsewhere.

[UK Competition 1998, s. 18]

Excluded cases

48. The section 47 prohibition shall not apply to such matter as may be specified in the Third Schedule.

[UK Competition 1998, s. 19 (1)]

Requests for Commission to consider conduct

- 49.** (1) Sections 50 and 51 provide for conduct of a person to be considered by the Commission on the application of that person who thinks the conduct may infringe the section 47 prohibition.
- (2) The Minister may make regulations to provide for the procedure to be followed —
- (a) by any person making an application under subsection (1); and

(b) by the Commission, in considering such an application.

[UK Competition 1998, s. 20]

Notification for guidance

- 50.** (1) A person who applies for conduct to be considered under this section shall —
- (a) notify the Commission of the conduct; and
 - (b) apply to it for guidance.
- (2) On an application under this section, the Commission may give the applicant guidance as to whether or not, in its view, the conduct is likely to infringe the section 47 prohibition.

[UK Competition 1998, s. 21]

Notification for decision

- 51.** (1) A person who applies for conduct to be considered under this section shall —
- (a) notify the Commission of the conduct; and
 - (b) apply to it for a decision.
- (2) On an application under this section, the Commission may make a decision as to —
- (a) whether the section 47 prohibition has been infringed; and
 - (b) if it has not been infringed, whether that is because of the effect of an exclusion.

[UK Competition 1998, s. 22]

Effect of guidance

- 52.** (1) This section shall apply to conduct if the Commission has determined an application under section 50 by giving guidance that the conduct is unlikely to infringe the section 47 prohibition.
- (2) The Commission shall take no further action in relation to the section 47 prohibition with respect to the conduct to which this section applies, unless —
- (a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its guidance;
 - (b) it has reasonable grounds for suspecting that the information on which it based its guidance was incomplete, false or misleading in a material particular; or
 - (c) a complaint about the conduct has been made to it.
- (3) No penalty may be imposed under this Part in respect of any infringement of the section 47 prohibition by conduct to which this section applies.
- (4) The Commission may remove the immunity given by subsection (3) if —
- (a) it takes action under this Part with respect to the conduct in one of the circumstances mentioned in subsection (2);
 - (b) it considers that it is likely that the conduct will infringe the section 47 prohibition; and

- (c) it gives notice in writing to the undertaking on whose application the guidance was given that it is removing the immunity as from the date specified in its notice.
- (5) If the Commission has reasonable grounds for suspecting that information —
 - (a) on which it based its guidance; and
 - (b) which was provided to it by an undertaking engaging in the conduct, was incomplete, false or misleading in a material particular, the date specified in a notice under subsection (4) (c) may be earlier than the date on which the notice is given.

[UK Competition 1998, s. 23]

Effect of decision that section 47 prohibition has not been infringed

- 53.** (1) This section shall apply to conduct if the Commission has determined an application under section 51 by making a decision that the conduct has not infringed the section 47 prohibition.
- (2) The Commission shall take no further action in relation to the section 47 prohibition with respect to the conduct unless —
- (a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its decision; or
 - (b) it has reasonable grounds for suspecting that the information on which it based its decision was incomplete, false or misleading in a material particular.
- (3) No penalty may be imposed under this Part in respect of any infringement of the section 47 prohibition by conduct to which this section applies.
- (4) The Commission may remove the immunity given by subsection (3) if —
- (a) it takes action under this Part with respect to the conduct in one of the circumstances mentioned in subsection (2);
 - (b) it considers that it is likely that the conduct will infringe the section 47 prohibition; and
 - (c) it gives notice in writing to the undertaking on whose application the decision was made that it is removing the immunity as from the date specified in its notice.
- (5) If the Commission has reasonable grounds for suspecting that information —
- (a) on which it based its decision; and
 - (b) which was provided to it by an undertaking engaging in the conduct, was incomplete, false or misleading in a material particular, the date specified in a notice under subsection (4) (c) may be earlier than the date on which the notice is given.

[UK Competition 1998, s. 24]

Division 4 — Mergers

Mergers

- 54.** (1) Subject to section 55, mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services are prohibited.

- (2) For the purposes of this Part, a merger occurs if —
 - (a) 2 or more undertakings, previously independent of one another, merge;
 - (b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
 - (c) the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.
- (3) For the purposes of this Part, control, in relation to an undertaking, shall be regarded as existing if, by reason of rights, contracts or any other means, or any combination of rights, contracts or other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by —
 - (a) ownership of, or the right to use all or part of, the assets of an undertaking; or
 - (b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.
- (4) For the purposes of this Part, control is acquired by any person or other undertaking if he or it —
 - (a) becomes a holder of the rights or contracts, or entitled to use the other means, referred to in subsection (3); or
 - (b) although not becoming such a holder or entitled to use those other means, acquires the power to exercise the rights derived therefrom.
- (5) The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger falling within subsection (2) (b).
- (6) In determining whether influence of the kind referred to in subsection (3) is capable of being exercised, regard shall be had to all the circumstances of the matter and not solely to the legal effect of any instrument, deed, transfer, assignment or other act done or made.
- (7) For the purposes of this Part, a merger shall not be deemed to occur if —
 - (a) the person acquiring control is a receiver or liquidator acting as such or is an underwriter acting as such;
 - (b) all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;
 - (c) control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or
 - (d) control is acquired by an undertaking referred to in subsection (8) in the circumstances specified in subsection (9).
- (8) The undertaking referred to in subsection (7) (d) is an undertaking the normal

activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others.

- (9) The circumstances referred to in subsection (7) (d) are that —
- (a) the control concerned is constituted by the undertaking's holding, on a temporary basis, securities acquired in another undertaking; and
 - (b) any exercise by the undertaking of voting rights in respect of those securities, whilst that control subsists —
 - (i) is for the purpose of arranging for the disposal, within the specified period, of all or part of the other undertaking or its assets or securities; and
 - (ii) is not for the purpose of determining the manner in which any activity of the other undertaking, being an activity that could affect competition in markets for goods or services in Singapore, is carried on.
- (10) In subsection (9), “specified period” means —
- (a) the period of 12 months from the date on which control of the other undertaking was acquired; or
 - (b) if in a particular case the undertaking shows that it is not reasonably possible to effect the disposal concerned within the period referred to in paragraph (a), within such longer period as the Commission determines and specifies with respect to that case.

Excluded mergers

55. The section 54 prohibition shall not apply to any merger specified in the Fourth Schedule.

Requests for Commission to consider anticipated mergers and mergers

- 56.** (1) Section 57 provides for an anticipated merger to be considered by the Commission on the application of a party to that anticipated merger who thinks the anticipated merger, if carried into effect, may infringe the section 54 prohibition.
- (2) Section 58 provides for a merger to be considered by the Commission on the application of a party involved in that merger who thinks the merger may infringe the section 54 prohibition.
- (3) The Minister may by regulations provide —
- (a) that only such anticipated mergers as are prescribed may be notified to the Commission under section 57; and
 - (b) for the procedure to be followed —
 - (i) by any party making an application under section 57 or 58; and
 - (ii) by the Commission, in considering such an application.

Notification of anticipated merger

57. (1) A party to an anticipated merger of the relevant type which applies for the anticipated merger to be considered under this section shall —
- (a) notify the Commission of the anticipated merger; and
 - (b) apply to it for a decision.
- (2) Subject to subsections (3) and (5) and sections 60A and 60B, on an application under this section, the Commission may make a decision as to —
- (a) whether the section 54 prohibition will be infringed by the anticipated merger, if carried into effect; and
 - (b) if it will not be infringed, whether it is —
 - (i) because of the effect of an exclusion which will apply if the anticipated merger is carried into effect;
 - (ii) because the anticipated merger, if carried into effect, is exempted from the application of the prohibition under subsection (3); or
 - (iii) because a commitment has been accepted pursuant to section 60A.
- (3) Where the Commission proposes to make a decision that the section 54 prohibition will be infringed by an anticipated merger, if carried into effect, the Commission shall give written notice to the party who applied for a decision on the anticipated merger and the party may, within 14 days of the date of the notice, apply to the Minister for the anticipated merger, if carried into effect, to be exempted from the section 54 prohibition on the ground of any public interest consideration.
- (4) The decision of the Minister made under subsection (3) shall be final.
- (5) Where the Minister exempts an anticipated merger under subsection (3), the Commission may make a decision under subsection (2) (b) (ii).
- (6) The Minister may revoke the exemption of an anticipated merger granted under subsection (3) if he has reasonable grounds for suspecting that the information on which he based his decision was incomplete, false or misleading in a material particular.
- (7) Subject to subsection (8), where the Commission makes a decision that an anticipated merger, if carried into effect, will not infringe the section 54 prohibition, the Commission may, if it thinks fit, state that the decision shall be valid only for the period it specifies therein.
- (8) Before the expiry of the period referred to in subsection (7), if any, an application may be made by all parties to the anticipated merger who applied to the Commission for a decision on the anticipated merger under this section for that period to be extended.
- (9) Where an application for an anticipated merger to be considered has been made to the Commission in accordance with subsection (1) and the anticipated merger is carried into effect before the Commission makes a decision under subsection (2) in respect thereof, the application relating to the anticipated merger —
- (a) may be treated by the Commission as if it were an application for the resulting merger to be considered made in accordance with section 58; and
 - (b) the Commission may make a decision under section 58 in respect of the resulting merger.
- (10) For the purpose of subsection (9), the Commission may make a decision under

section 58 (2) (b) (ii) (read with section 58 (5)) in respect of the merger referred to in subsection (9), notwithstanding the exemption was granted by the Minister under subsection (3) in respect of the anticipated merger.

- (11) Notwithstanding subsection (9), the Commission may refuse to make any decision in respect of a merger referred to therein and require any party involved in the merger to apply to the Commission for the merger to be considered under section 58 (1).
- (12) In this section, “an anticipated merger of the relevant type” means an anticipated merger of the type prescribed by regulations made under section 56 (3) (a).

Notification of merger

- 58.** (1) A party involved in a merger which applies for the merger to be considered under this section shall —
- (a) notify the Commission of the merger; and
 - (b) apply to it for a decision.
- (2) Subject to subsections (3) and (5) and sections 60A and 60B, on an application under this section, the Commission may make a decision as to —
- (a) whether the section 54 prohibition has been infringed; and
 - (b) if it has not been infringed, whether that is —
 - (i) because of the effect of an exclusion;
 - (ii) because the merger is exempted from the prohibition under subsection (3); or
 - (iii) because a commitment has been accepted pursuant to section 60A.
- (3) Where the Commission proposes to make a decision that the section 54 prohibition has been infringed, the Commission shall give written notice to —
- (a) the party who applied for a decision on the merger; or
 - (b) in a case where section 57 (9) applies, the party who applied for a decision on the anticipated merger (which was carried into effect) or, where that party no longer exists, the merged entity, and the party or merged entity so notified by the Commission may, within 14 days of the date of the notice, apply to the Minister for the merger to be exempted from the section 54 prohibition on the ground of any public interest consideration.
- (4) The decision of the Minister made under subsection (3) shall be final.
- (5) Where the Minister exempts a merger under subsection (3), the Commission may make a decision under subsection (2) (b) (ii).
- (6) The Minister may revoke the exemption of a merger granted under subsection (3) if he has reasonable grounds for suspecting that the information on which he based his decision was incomplete, false or misleading in a material particular.
- (7) A reference in any provision of this Act to an application or a notification under section 58 shall include a reference to an application or a notification under section 57 that the Commission treats as an application or a notification under section 58 pursuant to section 57 (9).

Interim measures in relation to notifications of anticipated mergers and mergers

- 58A.**(1) If, in respect of an application under section 57 or 58, the Commission has reasonable grounds for suspecting that —
- (a) the section 54 prohibition will be infringed by an anticipated merger, if carried into effect; or
 - (b) the section 54 prohibition has been infringed by a merger, but has not completed its consideration of the matter, and the Commission considers that it is necessary for it to act under this section —
 - (i) for the purpose of preventing any action that may prejudice —
 - (A) the consideration of the anticipated merger or merger; or
 - (B) the giving of any direction under section 69; or
 - (ii) as a matter of urgency for the purpose —
 - (A) of preventing serious, irreparable damage to a particular person or category of persons; or
 - (B) of protecting the public interest, the Commission may give such directions as it considers appropriate for that purpose.
- (2) Before giving a direction under this section, the Commission shall —
- (a) give written notice to the person to whom it proposes to give the direction; and
 - (b) give that person an opportunity to make representations.
- (3) A notice under subsection (2) shall indicate the nature of the direction which the Commission is proposing to give and its reasons for wishing to give it.
- (4) A direction given under this section shall have effect while subsection (1) applies, but may be replaced if the circumstances permit by a direction under section 69.
- (5) Sections 69 (2) (ba) (i) and (c) (i) and 85 shall also apply to directions given under this section.

Effect of decision that anticipated merger, if carried into effect, will not infringe section 54 prohibition

- 59.** (1) This section shall apply to an anticipated merger in respect of which the Commission has determined an application under section 57 by making a decision that the anticipated merger, if carried into effect, will not infringe the section 54 prohibition.
- (2) The Commission shall take no further action in relation to the section 54 prohibition with respect to the anticipated merger (including where the anticipated merger is carried into effect, or if the Commission's decision is valid for a specified period, where the anticipated merger is carried into effect within that period) unless —
- (a) it has reasonable grounds for suspecting that any information on which it based its decision (which may include information on the basis of which it accepted a commitment) was incomplete, false or misleading in a material particular; or
 - (b) it has reasonable grounds for suspecting that a party who provided a commitment has failed to adhere to one or more of the terms of the

commitment.

- (3) Action that may be taken in respect of the circumstances referred to in subsection (2) may include the revocation of the decision that the anticipated merger, if carried into effect, will not infringe the section 54 prohibition.
- (4) No penalty may be imposed under this Part in respect of any infringement of the section 54 prohibition by the anticipated merger to which this section applies, if carried into effect or, where the Commission's decision is valid for a specified period, if carried into effect within that period.
- (5) The Commission may remove the immunity given by subsection (4) if —
 - (a) it takes action under this Part with respect to one of the circumstances referred to in subsection (2);
 - (b) it considers that it is likely that the anticipated merger, if carried into effect, or the resulting merger will infringe the section 54 prohibition; and
 - (c) it gives notice in writing to the party on whose application the decision was made that it is removing the immunity as from the date specified in its notice.
- (6) If the Commission has reasonable grounds for suspecting that —
 - (a) any information on which it based its decision (which may include information on the basis of which it accepted a commitment), and which was provided to it by a party to the anticipated merger, was incomplete, false or misleading in a material particular; or
 - (b) a party who provided a commitment has failed to adhere to one or more of the terms of the commitment, the date specified in a notice under subsection (5) (c) may be earlier than the date on which the notice is given.
- (7) Where —
 - (a) the Commission has made a decision that an anticipated merger, if carried into effect, will not infringe the section 54 prohibition; and
 - (b) the merger resulting from a purported carrying into effect of the anticipated merger is materially different from the anticipated merger, nothing in this section shall prevent the Commission from taking any action in relation to the section 54 prohibition in respect of the merger.

Effect of decision that merger has not infringed section 54 prohibition

- 60.** (1) This section shall apply to a merger if the Commission has determined an application under section 58 by making a decision that the merger has not infringed the section 54 prohibition.
- (2) The Commission shall take no further action in relation to the section 54 prohibition with respect to the merger unless —
- (a) it has reasonable grounds for suspecting that any information on which it based its decision (which may include information on the basis of which it accepted a commitment) was incomplete, false or misleading in a material particular; or
 - (b) it has reasonable grounds for suspecting that a party who provided a commitment has failed to adhere to one or more of the terms of the

commitment.

- (3) Action that may be taken in respect of the circumstances referred to in subsection (2) may include the revocation of the decision that the merger has not infringed the section 54 prohibition.
- (4) No penalty may be imposed under this Part in respect of any infringement of the section 54 prohibition by a merger to which this section applies.
- (5) The Commission may remove the immunity given by subsection (4) if —
 - (a) it takes action under this Part with respect to the merger in one of the circumstances mentioned in subsection (2);
 - (b) it considers that it is likely that the merger will infringe the section 54 prohibition; and
 - (c) it gives notice in writing to —
 - (i) the party on whose application the decision was made; or
 - (ii) in a case where section 57(9) applies, the party who applied for a decision on the anticipated merger (which was carried into effect) or, where that party no longer exists, the merged entity, that it is removing the immunity as from the date specified in its notice.
- (6) If the Commission has reasonable grounds for suspecting that —
 - (a) any information on which it based its decision (which may include information on the basis of which it accepted a commitment), and which was provided to it by a party involved in the merger, was incomplete, false or misleading in a material particular; or
 - (b) a party who provided a commitment has failed to adhere to one or more of the terms of the commitment, the date specified in a notice under subsection (5) (c) may be earlier than the date on which the notice is given.

Division 4A — Commitments

Commitments

- 60A.**(1) The Commission may, at any time before making a decision pursuant to an application under section 57 or 58 or an investigation under section 62 (1) (c) or (d) as to whether —
- (a) the section 54 prohibition will be infringed by an anticipated merger, if carried into effect; or
 - (b) the section 54 prohibition has been infringed by a merger, accept from such person as it thinks appropriate, a commitment to take or refrain from taking such action as it considers appropriate for the purpose of remedying, mitigating or preventing the substantial lessening of competition or any adverse effect which —
 - (i) may be expected to result from the anticipated merger, if carried into effect; or
 - (ii) has resulted or may be expected to result from the merger.
- (2) A commitment shall come into force on the date specified by the Commission when it is accepted.

- (3) The Commission may, at any time when a commitment is in force, accept —
 - (a) a variation of the commitment; or
 - (b) another commitment in substitution, for the purpose referred to in subsection (1).
- (4) A commitment may be released by the Commission where it has reasonable grounds for believing that the commitment is no longer necessary or appropriate for the purpose referred to in subsection (1).
- (5) Before accepting, varying, substituting or releasing a commitment, the Commission shall, except in exceptional circumstances, consult with such person as it thinks appropriate.

Effect of commitments

- 60B.**(1) Where the Commission has accepted a commitment under section 60A, and subject to subsection (2), the Commission shall make a decision that —
- (a) the section 54 prohibition will not be infringed by an anticipated merger, if carried into effect; or
 - (b) the section 54 prohibition has not been infringed by a merger, as the case may be.
- (2) Nothing in subsection (1) shall prevent the Commission from revoking the decision already made, commencing or continuing any investigation, or making a decision or giving a direction, where —
 - (a) it has reasonable grounds for suspecting that any information on the basis of which it accepted a commitment was incomplete, false or misleading in a material particular; or
 - (b) it has reasonable grounds for suspecting that a party who provided a commitment has failed to adhere to one or more of the terms of the commitment.
 - (3) If the Commission revokes a decision referred to in subsection (1), the commitment shall be treated, unless otherwise stated, as released from the date of that revocation.
 - (4) The Commission may review the effectiveness of commitments it has accepted under section 60A in such circumstances as it considers appropriate.

Division 5 — Enforcement

Guidelines on enforcement of Part

- 61.** (1) The Commission may, from time to time and with a view to enabling any person to order his affairs in compliance with the provisions of this Part, cause to be published in the *Gazette* guidelines indicating the manner in which the Commission will interpret, and give effect to, the provisions of this Part.
- (2) For the purpose of preparing any guidelines under subsection (1), the Commission may consult with such persons as it thinks appropriate.
 - (3) Where the guidelines would apply to an industry or a sector of industry that is subject to the regulation and control of another regulatory authority, the Commission shall, in preparing those guidelines, consult with that regulatory authority.

(4) Guidelines published under this section shall not be binding on the Commission.

[UK Competition 1998, s. 52 (6)]

Power to require documents or information

- 61A.**(1) Where the Commission —
- (a) has reasonable grounds for suspecting that any feature, or combination of features, of a market in Singapore for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in Singapore; or
 - (b) in considering an application for decision filed pursuant to section 44, 51, 57 or 58, has reasonable grounds for suspecting that —
 - (i) the section 34 prohibition has been infringed by any agreement;
 - (ii) the section 47 prohibition has been infringed by any conduct;
 - (iii) the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or
 - (iv) the section 54 prohibition has been infringed by any merger, the Commission may, by notice in writing to any person, require the person to produce to the Commission a specified document, or to provide the Commission with specified information, which the Commission considers relates to any matter relevant to such purposes.
- (2) A notice under subsection (1) shall indicate —
- (a) the purpose for which the specified document or specified information is required by the Commission; and
 - (b) the nature of the offences created by sections 75 to 78.
- (3) The Commission may specify in the notice —
- (a) the time and place at which any document is to be produced or any information is to be provided; and
 - (b) the manner and form in which it is to be produced or provided.
- (4) The power under this section to require a person to produce a document includes the power —
- (a) if the document is produced —
 - (i) to take copies of it or extracts from it; and
 - (ii) to require such person, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document; or
 - (b) if the document is not produced, to require such person to state, to the best of his knowledge and belief, where it is.
- (5) For the purposes of subsection (1) (a), any reference to a feature of a market in Singapore for goods or services shall be construed as a reference to —
- (a) the structure of the market concerned or any aspect of that structure;
 - (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
 - (c) any conduct relating to the market concerned of customers of any person

who supplies or acquires goods or services, and, in this subsection, “conduct” includes any failure to act (whether or not intentional) and any other unintentional conduct.

- (6) In subsections (1) and (2), “specified” means —
 - (a) specified or described in the notice; or
 - (b) falling within a category which is specified or described in the notice.

Power to investigate

- 62. (1) The Commission may conduct an investigation if there are reasonable grounds for suspecting that —
 - (a) the section 34 prohibition has been infringed by any agreement;
 - (b) the section 47 prohibition has been infringed by any conduct;
 - (c) the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or
 - (d) the section 54 prohibition has been infringed by any merger.
- (2) For the purpose of subsection (1), the Commission may appoint an inspector to conduct the investigation.

[UK Competition 1998, s. 25]

Power when conducting investigation

- 63. (1) For the purposes of an investigation under section 62, the Commission or the inspector may, by notice in writing to any person, require that person to produce to the Commission or the inspector a specified document, or to provide the Commission or the inspector with specified information, which the Commission or the inspector considers relates to any matter relevant to the investigation.
- (2) A notice under subsection (1) shall indicate —
 - (a) the subject matter and purpose of the investigation; and
 - (b) the nature of the offences created by sections 75 to 78.
- (3) The Commission or the inspector may also specify in the notice —
 - (a) the time and place at which any document is to be produced or any information is to be provided; and
 - (b) the manner and form in which it is to be produced or provided.
- (4) The power under this section to require a person to produce a document includes the power —
 - (a) if the document is produced —
 - (i) to take copies of it or extracts from it; and
 - (ii) to require such person, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document; or
 - (b) if the document is not produced, to require such person to state, to the best of his knowledge and belief, where it is.

- (5) In subsection (1), “specified” means —
 - (a) specified, or described, in the notice; or
 - (b) falling within a category which is specified, or described, in the notice.

[UK Competition 1998, s. 26]

Power to enter premises without warrant

- 64.** (1) In connection with an investigation under section 62 —
- (a) any officer of the Commission who is authorised by the Commission to do so (an investigating officer) and such other officers or persons as the Commission has authorised in writing to accompany the investigating officer (authorised person); and
 - (b) any inspector and such other person as the inspector may require, may enter any premises.
- (2) No investigating officer or inspector, and no authorised person or person required by the inspector respectively, shall enter any premises in the exercise of the powers under this section unless the investigating officer or the inspector, as the case may be, has given the occupier of the premises a written notice which —
- (a) gives at least 2 working days’ notice of the intended entry;
 - (b) indicates the subject matter and purpose of the investigation; and
 - (c) indicates the nature of the offences created by sections 75 to 78.
- (3) Subsection (2) shall not apply —
- (a) if the investigating officer or inspector has reasonable grounds for suspecting that the premises are, or have been, occupied by an undertaking which is being investigated in relation to —
 - (i) an agreement referred to in section 34;
 - (ii) conduct referred to in section 47; or
 - (iii) an anticipated merger, or a merger referred to in section 54; or
 - (b) if the investigating officer or inspector has taken all such steps as are reasonably practicable to give notice but has not been able to do so.
- (4) Where subsection (3) applies, the power of entry conferred by subsection (1) shall be exercised —
- (a) in the case of an investigating officer and any authorised person, upon production of —
 - (i) evidence of the investigating officer’s authorisation and the authorisation of every authorised person accompanying him; and
 - (ii) a document containing the information referred to in subsection (2) (b) and (c); and
 - (b) in the case of an inspector and any person required by him, upon production of —
 - (i) evidence of the inspector’s appointment; and
 - (ii) a document containing the information referred to in subsection (2)

(b) and (c).

- (5) An investigating officer, an authorised person, an inspector or a person required by the inspector entering any premises under this section may —
- (a) take with him such equipment as appears to him to be necessary;
 - (b) require any person on the premises —
 - (i) to produce any document which he considers relates to any matter relevant to the investigation; and
 - (ii) if the document is produced, to provide an explanation of it;
 - (c) require any person to state, to the best of his knowledge and belief, where any such document is to be found;
 - (d) take copies of, or extracts from, any document which is produced;
 - (e) require any information which is stored in any electronic form and is accessible from the premises and which he considers relates to any matter relevant to the investigation, to be produced in a form —
 - (i) in which it can be taken away; and
 - (ii) in which it is visible and legible; and
 - (iii) take any step which appears to be necessary for the purpose of preserving or preventing interference with any document which he considers relates to any matter relevant to the investigation.

[40/2005]

[UK Competition 1998, s. 27]

Power to enter premises under warrant

- 65.** (1) The Commission or any inspector may apply to a court for a warrant and the court may issue such a warrant if it is satisfied that —
- (a) there are reasonable grounds for suspecting that there are on any premises documents —
 - (i) the production of which has been required under section 63 or 64; and
 - (ii) which have not been produced as required;
 - (b) there are reasonable grounds for suspecting that —
 - (i) there are on any premises documents which the Commission or the inspector has power under section 63 to require to be produced; and
 - (ii) if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed; or
 - (c) an investigating officer, an authorised person, an inspector or a person required by the inspector has attempted to enter the premises in the exercise of his powers under section 64 but has been unable to do so and that there are reasonable grounds for suspecting that there are on the premises documents the production of which could have been required under that section.
- (2) A warrant under this section shall authorise a named officer, and —

- (a) in the case of an investigation conducted by the Commission, such other officers or persons as the Commission has authorised in writing to accompany the named officer; and
 - (b) in the case of an investigation conducted by an inspector, such other persons as the inspector may require, to do all or any of the following:
 - (i) to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose;
 - (ii) to search any person on those premises if there are reasonable grounds for believing that that person has in his possession any document, equipment or article which has a bearing on the investigation;
 - (iii) to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the application under subsection (1) was granted (the relevant kind);
 - (iv) to take possession of any document appearing to be of the relevant kind if — (A) such action appears to be necessary for preserving the document or preventing interference with it; or (B) it is not reasonably practicable to take copies of the document on the premises;
 - (v) to take any other step which appears to be necessary for the purpose mentioned in paragraph (iv) (A);
 - (vi) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found;
 - (vii) to require any information which is stored in any electronic form and is accessible from the premises and which he considers relates to any matter relevant to the investigation, to be produced in a form — (A) in which it can be taken away; and (B) in which it is visible and legible; and
 - (viii) to remove from those premises for examination any equipment or article which relates to any matter relevant to the investigation.
- (3) If, in the case of a warrant under subsection (1) (b), the court is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation concerned, the warrant shall also authorise the actions mentioned in subsection (2) to be taken in relation to any such document.
 - (4) Where possession of any document is taken under subsection (2) (iv) or (3), the named officer may, at the request of the person from whom possession of the document was taken, provide such person with a copy of the document.
 - (5) A named officer may allow any equipment or article which has a bearing on an investigation and which may be removed from any premises for examination under subsection (2) (viii) to be retained on those premises subject to such conditions as the named officer may require.
 - (6) Any person who fails to comply with any condition imposed under subsection (5) shall be guilty of an offence.
 - (7) A warrant issued under this section shall indicate —
 - (a) the subject matter and purpose of the investigation; and

- (b) the nature of the offences created by sections 75 to 78, and shall continue in force until the end of the period of one month beginning from the day on which it is issued.
- (8) The powers conferred by this section shall not be exercised except upon production of a warrant issued under this section.
- (9) Any person entering premises by virtue of a warrant under this section may take with him such equipment as appears to him to be necessary.
- (10) If there is no one at the premises when the named officer proposes to execute such a warrant, he shall, before executing it —
 - (a) take such steps as are reasonable in all the circumstances to inform the occupier of the intended entry; and
 - (b) if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed.
- (11) If the named officer is unable to inform the occupier of the intended entry, he shall, when executing the warrant, leave a copy of it in a prominent place on the premises.
- (12) On leaving any premises which he has entered by virtue of a warrant under this section, the named officer shall, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them.
- (13) Any document of which possession is taken under subsection (2) (iv) may be retained for a period of 3 months.
- (14) In this section —
 - "named officer" means —
 - (a) an officer of the Commission named in the warrant; or
 - (b) the inspector named in the warrant, as the case may be;
 - "occupier" , in relation to any premises, means a person whom the named officer reasonably believes is the occupier of those premises.

[UK Competition 1998, ss. 28 (1) to (5) and (7) and 29]

Self-incrimination and savings for professional legal advisers

- 66. (1) A person is not excused from disclosing any information or document to the Commission or, as the case may be, to an investigating officer, such officer or person as the Commission has authorised in writing to accompany the investigating officer, an inspector or a person required by the inspector, under a requirement made of him under any provision of this Act on the ground that the disclosure of the information or document might tend to incriminate him.
- (2) Where a person claims, before making a statement disclosing information that he is required to under any provision of this Act to the Commission or, as the case may be, to an investigating officer, such officer or person as the Commission has authorised in writing to accompany the investigating officer, an inspector or a person required by the inspector, that the statement might tend to incriminate him, that statement —
 - (a) shall not be admissible in evidence against him in criminal proceedings other than proceedings under Part V; but
 - (b) shall, for the avoidance of doubt, be admissible in evidence in civil proceedings, including proceedings under this Act.
- (3) Nothing in this Part shall —
 - (a) compel a professional legal adviser to disclose or produce a privileged

communication, or a document or other material containing a privileged communication, made by or to him in that capacity; or

- (b) authorise the taking of any such document or other material which is in his possession.
- (4) A professional legal adviser who refuses to disclose the information or produce the document or other material referred to in subsection (3) shall nevertheless be obliged to give the name and address (if he knows them) of the person to whom, or by or on behalf of whom, that privileged communication was made.

[40/2005]

[SFA 2002 Ed., s. 153]

Interim measures

- 67.** (1) If the Commission —
- (a) has reasonable grounds for suspecting that the section 34 prohibition or the section 47 prohibition has been infringed but has not completed its investigations into the matter; and
 - (b) considers that it is necessary for it to act under this section as a matter of urgency for the purpose —
 - (i) of preventing serious, irreparable damage to a particular person or category of persons; or
 - (ii) of protecting the public interest, the Commission may give such directions as it considers appropriate for that purpose.
- (1A) If the Commission has reasonable grounds for suspecting that the section 54 prohibition —
- (a) will be infringed by an anticipated merger, if carried into effect; or
 - (b) has been infringed by a merger, but has not completed its investigations into the matter, and considers that it is necessary for it to act under this section — (i) for the purpose of preventing any action that may prejudice — (A) the investigations; or (B) the giving of any direction under section 69; or (ii) as a matter of urgency for the purpose — (A) of preventing serious, irreparable damage to a particular person or category of persons; or (B) of protecting the public interest, the Commission may give such directions as it considers appropriate for that purpose.
- (2) Before giving a direction under this section, the Commission shall —
 - (a) give written notice to the person to whom it proposes to give the direction; and
 - (b) give that person an opportunity to make representations.
 - (3) A notice under subsection (2) shall indicate the nature of the direction which the Commission is proposing to give and its reasons for wishing to give it.
 - (4) A direction given under this section shall have effect while subsection (1) or (1A), as the case may be, applies, but may be replaced if the circumstances permit by a direction under section 69.
 - (5) In the case of a suspected infringement of the section 34 prohibition, sections 69 (2) (a) and 85 shall also apply to directions given under this section.
 - (6) In the case of a suspected infringement of the section 47 prohibition, sections 69 (2) (b) and 85 shall also apply to directions given under this section.
 - (7) In the case of a suspected infringement of the section 54 prohibition by an anticipated merger, if carried into effect, or a merger, sections 69 (2) (ba) (i)

and (c) (i) and 85 shall also apply to directions given under this section.
[UK Competition 1998, s. 35]

Decision of Commission upon completion of investigation

- 68.** (1) Where —
- (a) after considering the statements made, or documents or articles produced, in the course of an investigation conducted by it under this Part; or
 - (b) in the case of an investigation conducted by an inspector, after considering the report of the inspector, the Commission proposes to make a decision that the section 34 prohibition has been infringed by any agreement, the section 47 prohibition has been infringed by any conduct, the section 54 prohibition will be infringed by any anticipated merger, if carried into effect, or the section 54 prohibition has been infringed by any merger, the Commission shall —
 - (i) give written notice to the person likely to be affected by such decision; and
 - (ii) give such person an opportunity to make representations to the Commission.
- (2) Subject to subsections (3) and (5), upon considering any representation made to the Commission under subsection (1) (ii), the Commission may, as it thinks fit, make a decision that —
- (a) the section 34 prohibition has been infringed by any agreement;
 - (b) the section 47 prohibition has been infringed by any conduct;
 - (c) the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or
 - (d) the section 54 prohibition has been infringed by any merger.
- (3) Where —
- (a) in relation to an anticipated merger, the Commission proposes to make a decision that the section 54 prohibition will be infringed by the anticipated merger, if carried into effect; or
 - (b) in relation to a merger, the Commission proposes to make a decision that the section 54 prohibition has been infringed by the merger, and the Commission has given written notice under subsection (1) (i) to the parties to the anticipated merger or the parties involved in the merger, as the case may be, any such party may, within 14 days of the date of the notice, apply to the Minister for the anticipated merger, if carried into effect, or the merger to be exempted from the section 54 prohibition on the ground of any public interest consideration.
- (4) The decision of the Minister under subsection (3) shall be final.
- (5) Where the Minister exempts an anticipated merger or a merger under subsection (3), the Commission may make a decision that —
- (a) the section 54 prohibition will not be infringed by the anticipated merger, if carried into effect; or
 - (b) the section 54 prohibition has not been infringed by the merger.
- (6) The Minister may revoke the exemption of an anticipated merger or a merger granted under subsection (3) if he has reasonable grounds for suspecting that the information on which he based his decision was incomplete, false or misleading in a material particular.

Enforcement of decision of Commission

- 69.** (1) Where the Commission has made a decision that —
- (a) any agreement has infringed the section 34 prohibition;
 - (b) any conduct has infringed the section 47 prohibition;
 - (c) any anticipated merger, if carried into effect, will infringe the section 54 prohibition; or
 - (d) any merger has infringed the section 54 prohibition, the Commission may give to such person as it thinks appropriate such directions as it considers appropriate to bring the infringement or the circumstances referred to in paragraph (c) to an end and, where necessary, requiring that person to take such action as is specified in the direction to remedy, mitigate or eliminate any adverse effects of such infringement or circumstances and to prevent the recurrence of such infringement or circumstances.
- (2) A direction referred to in subsection (1) may, in particular, include provisions —
- (a) where the decision is that any agreement has infringed the section 34 prohibition, requiring parties to the agreement to modify or terminate the agreement;
 - (b) where the decision is that any conduct has infringed the section 47 prohibition, requiring the person concerned to modify or cease the conduct;
 - (ba) where the decision is that any anticipated merger, if carried into effect, will infringe the section 54 prohibition —
 - (i) prohibiting the anticipated merger from being carried into effect;
 - (ii) requiring any parties to any agreement that is directly related and necessary to the implementation of the merger (which would result from the anticipated merger being carried into effect) to modify or terminate the agreement, notwithstanding the agreement is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 45 or 46, as the case may be, that the agreement is unlikely to infringe, or has not infringed, the section 34 prohibition; and
 - (iii) requiring any person concerned with any conduct that is directly related and necessary to the implementation of the merger (which would result from the anticipated merger being carried into effect) to modify or cease that conduct, notwithstanding the conduct is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 52 or 53, as the case may be, that the conduct is unlikely to infringe, or has not infringed, the section 47 prohibition;
 - (c) where the decision is that any merger has infringed the section 54 prohibition —
 - (i) requiring the merger to be dissolved or modified in such manner as the Commission may direct;
 - (ii) requiring any parties to any agreement that is directly related and

necessary to the implementation of the merger to modify or terminate the agreement, notwithstanding that the agreement is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 45 or 46, as the case may be, that the agreement is unlikely to infringe, or has not infringed, the section 34 prohibition; and

- (iii) requiring any person concerned with any conduct that is directly related and necessary to the implementation of the merger to modify or cease that conduct, notwithstanding that the conduct is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 52 or 53, as the case may be, that the conduct is unlikely to infringe, or has not infringed, the section 47 prohibition;
 - (d) where the decision is that any agreement has infringed the section 34 prohibition, any conduct has infringed the section 47 prohibition or any merger has infringed the section 54 prohibition, to pay to the Commission such financial penalty in respect of the infringement as the Commission may determine; and
 - (e) in any case, requiring any party to an agreement that has infringed the section 34 prohibition, any person whose conduct has infringed the section 47 prohibition, any party to an anticipated merger which, if carried into effect, will infringe the section 54 prohibition or any party involved in a merger that has infringed the section 54 prohibition —
 - (i) to enter such legally enforceable agreements as may be specified by the Commission and designed to prevent or lessen the anti-competitive effects which have arisen;
 - (ii) to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the Commission; and
 - (iii) to provide a performance bond, guarantee or other form of security on such terms and conditions as the Commission may determine.
- (3) For the purpose of subsection (2) (d), the Commission may impose a financial penalty only if it is satisfied that the infringement has been committed intentionally or negligently.
- (4) No financial penalty fixed by the Commission under this section may exceed 10% or such other percentage of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of 3 years, as the Minister may, by order published in the *Gazette*, prescribe.
- (5) The Commission shall, in any direction requiring the payment of a financial penalty, specify the date before which the financial penalty is to be paid, being a date not earlier than the end of the period within which an appeal against the direction may be brought under section 71.
- [*Canada Competition, s. 92 (1) (e) (i) and (ii); UK Competition 1998, ss. 32, 33 and 36 (1), (2), (3), (6), (7) and (8)*].

Notification

70. The Commission shall, within 14 days of its making any decision or direction

under this Part, notify any person affected by such decision or direction.
[Gas 2002 Ed., s. 79]

PART IV
APPEALS
Division 1 — General

Appealable decisions

- 71.** (1) Any party to an agreement in respect of which the Commission has made a decision, any person in respect of whose conduct the Commission has made a decision, any party to an anticipated merger in respect of which the Commission has made a decision or any party involved in a merger in respect of which the Commission has made a decision, may appeal within the prescribed period to the Board against, or with respect to, that decision.
- (1A) Any person, other than a person referred to in subsection (1), to whom the Commission has given a direction under section 58A, 67 or 69 may appeal within the prescribed period to the Board against, or with respect to, that direction.
- [40/2005]
- (2) Except in the case of an appeal against the imposition, or the amount, of a financial penalty, the making of an appeal under this section shall not suspend the effect of the decision to which the appeal relates.
- (3) In subsection (1), “decision” means a decision of the Commission as to —
- (a) whether the section 34 prohibition has been infringed by any agreement;
 - (b) whether the section 47 prohibition has been infringed by any conduct;
 - (c) whether the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or
 - (d) whether the section 54 prohibition has been infringed by any merger, and includes a direction given under section 58A, 67 or 69 (including the imposition of any financial penalty under section 69 or as to the amount of any such financial penalty) and such other decision as the Minister may by regulations prescribe.

[UK Competition 1998, s. 46]

Division 2 — Competition Appeal Board

Competition Appeal Board

- 72.** (1) For the purpose of hearing any appeal referred to in section 71 (1), there shall be a Competition Appeal Board consisting of not more than 30 members appointed, from time to time, by the Minister on the basis of their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment.
- (2) Members of the Board shall hold office for such period as may be determined by the Minister and shall be eligible for re-appointment.
- (3) The Minister may at any time remove any member of the Board from office without assigning any reason.
- (4) A member of the Board may resign his office by notice in writing to the Minister.
- (5) The Minister shall appoint to be Chairman of the Board a person who is

- qualified to be a Judge of the Supreme Court.
- (6) The Chairman of the Board shall, when present, preside at every meeting of the Board, and in his absence such member of the Board as may be chosen by the members present shall preside.
 - (7) The Minister may appoint a secretary to the Board and such other officers and employees of the Board as may be necessary.
 - (8) All the powers, functions and duties of the Board may be exercised, performed and discharged by any committee of the Board consisting of not less than 3 members of the Board, one of whom may be the Chairman of the Board.
 - (9) Any act, finding or decision of any such committee shall be deemed to be the act, finding or decision of the Board.
 - (10) The secretary shall, from time to time, summon such members of the Board as may be nominated by the Chairman of the Board, to constitute a committee of the Board for the purposes of giving effect to the provisions of this Part, and it shall be the duty of such members to attend at the times and places specified in the summons.
 - (11) Subject to subsection (12), where the Chairman of the Board is nominated under subsection (10) as a member of a committee, he shall preside at every meeting of the committee, and where the Chairman is not nominated as a member of a committee, the Chairman shall determine which member of the committee shall preside at every meeting of that committee.
 - (12) Where the Chairman of the Board or the member determined by the Chairman under subsection (11) (as the case may be) is absent at any committee meeting, such member of the committee as may be chosen by the members present shall preside.
 - (13) All matters coming before the Board or a committee of the Board at any sitting thereof shall be decided by a majority of votes of those members present and, in the event of an equality of votes, the Chairman of the Board or any other member presiding shall have a second or casting vote.
 - (14) Members of the Board may receive such remuneration and such travelling and subsistence allowances as the Minister may determine.
 - (15) The Minister may make regulations —
 - (a) prescribing the period within which appeals may be made;
 - (b) prescribing the manner in which appeals shall be made to the Board;
 - (c) prescribing the procedure to be adopted by the Board in hearing appeals and the records to be kept by the Board;
 - (d) prescribing the places where and the times at which appeals shall be heard by the Board;
 - (e) prescribing the fees to be paid in respect of any appeal under this Part;
 - (f) prescribing the award of costs of or incidental to any proceedings before the Board or the award of expenses, including any allowances payable to persons in connection with their attendance before the Board; and
 - (g) generally for the better carrying out of the provisions of this Part.

[Income Tax 2004 Ed., s. 78]

Powers and decisions of Board

73. (1) The Board shall, by notice to the Commission and the appellant, specify the date on and the place at which the appeal shall be heard.
- (2) The Board shall have all the powers and duties of the Commission that are

- necessary to perform its functions and discharge its duties under this Act.
- (3) The Board shall have the powers, rights and privileges vested in a District Court on the hearing of an action, including —
 - (a) the enforcement of the attendance of witnesses and their examination on oath or otherwise;
 - (b) the compelling of the production of documents; and
 - (c) the award of such costs or expenses as may be prescribed under section 72 (15).
 - (4) A summons signed by such member of the Board as may be authorised by the Board shall be equivalent to any formal procedure capable of being issued in an action for enforcing the attendance of witnesses and compelling the production of documents.
 - (5) Where any person being duly summoned to attend before the Board does not so attend, that person shall be guilty of an offence.
 - (6) A witness before the Board shall be entitled to the same immunities and privileges as if he were a witness before a District Court.
 - 7) All appeals under this section shall be determined, having regard to the nature and complexity of the appeal, as soon as reasonably practicable.
 - (8) The Board may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may —
 - (a) remit the matter to the Commission;
 - (b) impose or revoke, or vary the amount of, a financial penalty;
 - (c) give such direction, or take such other step, as the Commission could itself have given or taken; or
 - (d) make any other decision which the Commission could itself have made.
 - (9) Any decision of the Board on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Commission.
 - (10) If the Board confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.
 - (11) The Board shall notify the appellant of its decision in respect of his appeal and the reasons for its decision.

[Gas 2002 Ed., s. 85 (1) to (7) and (10); UK Competition 1998, Sch. 8 Part I, Para. 3 (2) to (4)]

Appeals to High Court and Court of Appeal

- 74.** (1) An appeal against, or with respect to, a decision of the Board made under section 73 shall lie to the High Court —
 - (a) on a point of law arising from a decision of the Board; or
 - (b) from any decision of the Board as to the amount of a financial penalty.
- (2) An appeal under this section may be made only at the instance of a person who was a party to the proceedings in which the decision of the Board was made.
- (3) The High Court shall hear and determine any such appeal and may —
 - (a) confirm, modify or reverse the decision of the Board; and
 - (b) make such further or other order on such appeal, whether as to costs or otherwise, as the Court may think fit.
- (4) There shall be such further right of appeal from decisions of the High Court under this section as exists in the case of decisions made by that Court in the exercise of its original civil jurisdiction.

[Income Tax 2004 Ed., s. 81 (4) to (5); UK Competition 1998, s. 49 (1)]

PART V OFFENCES

Refusal to provide information, etc.

- 75.** (1) Any person who fails to comply with a requirement imposed on him under section 61A, 63, 64 or 65 shall be guilty of an offence.
- (2) If a person is charged with an offence under subsection (1) in respect of a requirement to produce a document, it shall be a defence for him to prove that —
- (a) the document was not in his possession or under his control; and
 - (b) it was not reasonably practicable for him to comply with the requirement.
- (3) If a person is charged with an offence under subsection (1) in respect of a requirement —
- (a) to provide information;
 - (b) to provide an explanation of a document; or
 - (c) to state where a document is to be found, it shall be a defence for him to prove that he had a reasonable excuse for failing to comply with the requirement.
- (4) Failure to comply with a requirement imposed under section 61A, 63 or 64 shall not be an offence if the person imposing the requirement has failed to act in accordance with that section.
- [UK Competition 1998, s. 42 (1) to (4)]*

Destroying or falsifying documents

- 76.** Any person who, having been required to produce a document under section 61A, 63, 64 or 65 —
- (a) intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it; or
 - (b) causes or permits its destruction, disposal, falsification or concealment, shall be guilty of an offence.
- [UK Competition 1998, s. 43 (1)]*

False or misleading information

- 77.** (1) Any person who provides information to the Commission, an investigating officer or an inspector or any person authorised, appointed or employed to assist the Commission, investigating officer or inspector, in connection with any function or duty of the Commission, investigating officer or inspector under this Act shall be guilty of an offence if —
- (a) the information is false or misleading in a material particular; and
 - (b) the knows that it is false or misleading in a material particular or is reckless as to whether it is.
- (2) A person who —
- (a) provides an information to another person, knowing the information to be false or misleading in a material particular; or
 - (b) recklessly provides any information to another person which is false or misleading in a material particular, knowing that the information is to be

used for the purpose of providing information to the Commission, an investigating officer or an inspector or any person authorised, appointed or employed to assist the Commission, investigating officer or inspector, in connection with any function or duty of the Commission, investigating officer or inspector under this Act, shall be guilty of an offence.

[UK Competition 1998, s. 44 (1) and (2)]

Obstruction of officer of Commission, etc.

78. Any person who refuses to give access to, or assaults, hinders or delays any member, officer, employee or agent of the Commission authorised to act for or assist the Commission, or any inspector or person assisting an inspector, in the discharge of his duties under this Act shall be guilty of an offence.

No costs or damages or other relief arising from seizure to be recoverable unless seizure without reasonable or probable cause

79. No person shall, in any proceedings before any court in respect of any equipment, article or document seized in the exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of the proceedings or to any damages or other relief other than an order for the return of the equipment, article or document or the payment of their value unless the seizure was made without reasonable or probable cause.

Powers of enforcement

80. (1) In addition to the powers conferred on him by this Act or any other written law, an officer or employee of the Commission may, in relation to any offence under this Act, on declaration of his office and production to the person against whom he is acting such identification card as the Chief Executive may direct to be carried by officers or employees of the Commission —
- (a) require any person whom he reasonably believes to have committed that offence to furnish evidence of the person's identity;
 - (b) require any person to furnish any information or produce any document or copy thereof in the possession of that person, and may, without fee or reward, inspect, make copies or extracts from such document; and
 - (c) require, by order in writing, the attendance before the officer or employee of any person being within the limits of Singapore who, from the information given or otherwise obtained by the officer or employee, appears to be acquainted with the circumstances of the case.
- (2) Any person who —
- (a) wilfully mis-states or without lawful excuse refuses to give any information or produce any document or copy thereof required of him by an officer or employee of the Commission under subsection (1); or
 - (b) fails to comply with a lawful demand of an officer or employee of the Commission in the discharge of his duties by such officer or employee under this Act, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months or to both.

Offences by bodies corporate, etc.

- 81.** (1) Where an offence under this Act committed by a body corporate is proved —
- (a) to have been committed with the consent or connivance of an officer; or
 - (b) to be attributable to any neglect on his part, the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- (2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
- (3) Where an offence under this Act committed by a partnership is proved —
- (a) to have been committed with the consent or connivance of a partner; or
 - (b) to be attributable to any neglect on his part, the partner as well as the partnership shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- (4) Where an offence under this Act committed by an unincorporated association (other than a partnership) is proved —
- (a) to have been committed with the consent or connivance of an officer of the unincorporated association or a member of its governing body; or
 - (b) to be attributable to any neglect on his part, the officer or member as well as the unincorporated association shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- (5) In this section —
- "officer" —
 - (a) in relation to a body corporate, means any director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body corporate and includes any person purporting to act in any such capacity; or
 - (b) in relation to an unincorporated association (other than a partnership), means the president, the secretary, or any member of the committee of the unincorporated association, or any person holding a position analogous to that of president, secretary or member of a committee and includes any person purporting to act in any such capacity;
 - "partner" includes a person purporting to act as a partner.
- (6) The Commission may, with the approval of the Minister, make regulations to provide for the application of any provision of this section, with such modifications as may be appropriate, to any body corporate or unincorporated association formed or recognised under the law of a territory outside Singapore.

Jurisdiction of court

- 82.** Notwithstanding any provision to the contrary in the Criminal Procedure Code (Cap. 68), a District Court shall have jurisdiction to try any offence under this Act and shall have power to impose the full penalty or punishment in respect of the offence.

General penalty

- 83.** Any person who is guilty of an offence under this Act for which no penalty is

expressly provided shall be liable on conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 12 months or to both.

Composition of offences

- 84.** (1) Any offence under —
- (a) this Act; or
 - (b) any subsidiary legislation made under this Act, may be compounded under this section if the offence is prescribed as a compoundable offence.
- (2) For the purpose of subsection (1), the Commission may, with the approval of the Minister, make regulations —
- (a) to prescribe the offences under this Act or any subsidiary legislation made thereunder as offences that may be compounded under this section;
 - (b) to designate the person who may compound such offences; and
 - (c) to specify the maximum sum for which such offence may be compounded, except that the maximum sum so specified shall not exceed —
 - (i) one half of the amount of the maximum fine that is prescribed for the offence; or
 - (ii) \$5,000, whichever is the lower.
- (3) The person designated under subsection (2) (b) may compound any offence prescribed under subsection (2) (a) by collecting from a person who is reasonably suspected of having committed the offence a sum of money not exceeding the maximum sum that is specified under subsection (2) (c) in respect of that offence.

PART VI MISCELLANEOUS

Enforcement of directions of Commission and commitments in District Court

- 85.** (1) For the purposes of enforcement of any direction made by the Commission under section 58A, 67 or 69, or any commitment accepted by the Commission under section 60A and which it has not released, the Commission may apply for the direction or commitment to be registered in a District Court in accordance with the Rules of Court and the District Court shall register the direction or commitment in accordance with the Rules of Court.
- (2) From the date of registration of any direction or commitment under subsection (1), the direction or commitment shall be of the same force and effect, and all proceedings may be taken on the direction or commitment, for the purposes of enforcement as if it had been an order originally obtained in the District Court which shall have power to enforce it accordingly.
- (3) A District Court shall have jurisdiction to enforce any direction or commitment in accordance with subsection (2) regardless of the monetary amount involved and may, for the purpose of enforcing such direction or commitment, make any order —
- (a) to secure compliance with the direction or commitment; or
 - (b) to require any person to do any thing to remedy, mitigate or eliminate any effects arising from —

- (i) any thing done which ought not, under the direction or commitment, to have been done; or
 - (ii) any thing not done which ought, under the direction or commitment, to have been done, which would not have occurred had the direction or commitment been complied with.
- (4) Nothing in this section shall be interpreted as conferring upon the District Court any power to order the winding up of a company.

Rights of private action

- 86.** (1) Any person who suffers loss or damage directly as a result of an infringement of the section 34 prohibition, the section 47 prohibition or the section 54 prohibition shall have a right of action for relief in civil proceedings in a court under this section against any undertaking which is or which has at the material time been a party to such infringement.
- (2) No action to which subsection (1) applies may be brought —
- (a) until after a decision referred to in subsection (3) has established that the section 34 prohibition, the section 47 prohibition or the section 54 prohibition has been infringed; and
 - (b) during the period referred to in subsection (4).
- (3) The decisions which may be relied upon for the purposes of an action under this section are —
- (a) the decision by the Commission under section 68;
 - (b) the decision of the Board under section 73 (on an appeal from the decision of the Commission under section 71);
 - (c) the decision of the High Court under section 74 (on an appeal from the decision of the Board under that section); and
 - (d) the decision of the Court of Appeal under section 74 (on an appeal from the decision of the High Court under that section).
- (4) The periods during which an action may not be brought under this section are —
- (a) in the case of a decision of the Commission, the period during which an appeal may be made to the Board under section 71 (1);
 - (b) in the case of a decision of the Commission which is the subject of an appeal to the Board as referred to in paragraph (a), the period following the decision of the Board during which a further appeal may be made under section 74 to the High Court; and
 - (c) in the case of a decision of the High Court which is the subject of a further appeal to the Court of Appeal, the period during which an appeal may be made under section 74 to the Court of Appeal.
- (5) Where any appeal referred to in paragraph (a), (b) or (c) of subsection (4) is made, the period specified in that paragraph includes the period before the appeal is determined.
- (6) No action to which subsection (1) applies may be brought after the end of 2 years after the relevant period specified in subsection (4).
- (7) In determining a claim under this section, the court shall accept as final and conclusive any decision referred to in subsection (3) which establishes that the prohibition in question has been infringed.
- (8) The court may grant to the plaintiff in an action under subsection (1) all or any

of the following reliefs:

- (a) relief by way of injunction or declaration;
 - (b) damages; and
 - (c) such other relief as the court thinks fit.
- (9) Nothing in this section shall be construed as conferring on any party to an agreement which infringes the section 34 prohibition a right of action for relief. *[Ireland Competition 1991, s. 6 (1) and (3); UK Competition 1998, s. 47A (1), (5) to (7) and (9)]*

Co-operation between Commission and other regulatory authorities on competition matters

- 87.** (1) The Commission may enter into any agreement with any regulatory authority for the purposes of —
- (a) facilitating co-operation between the Commission and the regulatory authority in the performance of their respective functions in so far as they relate to issues of competition between undertakings;
 - (b) avoiding duplication of activities by the Commission and the regulatory authority, being activities involving the determination of the effects on competition of any act done, or proposed to be done; and
 - (c) ensuring, as far as practicable, consistency between decisions made or other steps taken by the Commission and the regulatory authority in so far as any part of those decisions or steps consists of or relates to a determination of any issue of competition between undertakings.
- (2) An agreement that is entered into under subsection (1) is referred to in this section as a co-operation agreement.
- (3) A co-operation agreement may include —
- (a) a provision enabling each party to furnish to another party information in its possession if the information is required by that other party for the purpose of the performance by it of any of its functions;
 - (b) a provision enabling each party to forbear to perform any of its functions in relation to a matter in circumstances where it is satisfied that another party is performing functions in relation to that matter; and
 - (c) a provision requiring each party to consult with any other party before performing any function in circumstances where the respective exercise by each party of the function concerned involves the determination of issues of competition between undertakings that are identical to one another or fall within the same category of such an issue, being a category specified in the agreement.
- (4) In this section —
- "issue of competition between undertakings" includes an issue of competition between undertakings that arises generally in the sector of activity in relation to which the Commission or the regulatory authority may exercise powers and such an issue that falls, or could fall, to be the subject of the exercise by the Commission or the regulatory authority of powers in particular circumstances; "party" means a party to a co-operation agreement and a reference to another party (whether that expression or the expression "other party" is used) shall, where there are 2 or more other parties to the agreement, be construed as a reference to one or more of those other parties or each of them, as appropriate. *[Ireland Competition 2002, s. 34 (1), (3) and (12)]*

Co-operation between Commission and foreign competition bodies

- 88.** (1) The Commission may, with the approval of the Minister, enter into arrangements with any foreign competition body whereby each party to the arrangements may —
- (a) furnish to the other party information in its possession if the information is required by that other party for the purpose of performance by it of any of its functions; and
 - (b) provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.
- (2) The Commission shall not furnish any information to a foreign competition body pursuant to such arrangements unless it requires of, and obtains from, that body an undertaking in writing by it that it will comply with terms specified in that requirement, including terms that correspond to the provisions of any other written law concerning the disclosure of that information by the Commission.
- (3) The Commission may give an undertaking to a foreign competition body that it will comply with terms specified in a requirement made of the Commission by the body to give such an undertaking where —
- (a) those terms correspond to the provisions of any law in force in the country or territory in which the body is established, being provisions which concern the disclosure by the body of the information referred to in paragraph (b); and
 - (b) compliance with the requirement is a condition imposed by the body for furnishing information in its possession to the Commission pursuant to the arrangements referred to in subsection (1).
- (4) In this section, “foreign competition body” means a person in whom there are vested functions under the law of another country or territory with respect to the enforcement or the administration of provisions of law of that country or territory concerning competition between undertakings (whether in a particular sector of the economy of that country or territory or throughout that economy generally).

[Ireland Competition 2002, s. 46]

Preservation of secrecy

- 89.** (1) Subject to subsection (5), every specified person shall preserve, and aid in the preserving of, secrecy with regard to —
- (a) all matters relating to the business, commercial or official affairs of any person;
 - (b) all matters that have been identified as confidential under subsection (3); and
 - (c) all matters relating to the identity of persons furnishing information to the Commission, that may come to his knowledge in the performance of his functions and discharge of his duties under this Act and shall not communicate any such matter to any person, except in so far as such communication —
 - (i) is necessary for the performance of any such function or discharge of any such duty; or
 - (ii) is lawfully required by any court or the Board, or lawfully required

or permitted under this Act or any other written law.

- (2) Any person who fails to comply with subsection (1) shall be guilty of an offence.
- (3) Any person, when furnishing any information to the Commission, may identify information that he claims to be confidential information.
- (4) Every claim made under subsection (3) shall be supported by a written statement giving reasons why the information is confidential.
- (5) Notwithstanding subsection (1), the Commission may disclose any information relating to any matter referred to in subsection (1) in any of the following circumstances:
 - (a) where the consent of the person to whom the information relates has been obtained; or
 - (b) for the purposes of —
 - (i) a prosecution under this Act;
 - (ii) subject to subsection (6), enabling the Commission to give effect to any provision of this Act;
 - (iii) enabling the Commission, an investigating officer or an inspector to investigate a suspected offence under this Act or to enforce a provision thereof; or
 - (iv) complying with such provision of an agreement between Singapore and a country or territory outside Singapore (referred to in this section as a foreign country) as may be prescribed, where the conditions specified in subsection (7) are satisfied.
- (6) If the Commission is considering whether to disclose any information under subsection (5) (b) (ii), the Commission shall have regard to —
 - (a) the need for excluding, so far as is practicable, information the disclosure of which would in its opinion be contrary to the public interest;
 - (b) the need for excluding, so far as is practicable —
 - (i) commercial information the disclosure of which would, or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates; or
 - (ii) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interest; and
 - (c) the extent to which the disclosure is necessary for the purposes for which the Commission is proposing to make the disclosure.
- (7) The conditions referred to in subsection (5) (b) (iv) are —
 - (a) the information or documents requested by the foreign country are available to the Commission;
 - (b) unless the Government otherwise allows, the foreign country undertakes to keep the information given confidential at all times; and
 - (c) the disclosure of the information is not likely to be contrary to the public interest.
- (8) In this section, “specified person” means a person who is or has been —
 - (a) a member, an officer, an employee or an agent of the Commission;
 - (b) a member of a committee of the Commission or any person authorised, appointed or employed to assist the Commission;

- (c) an inspector or a person authorised, appointed or employed to assist an inspector; or
- (d) a member of the Board or any person authorised, appointed or employed to assist the Board.

[Imports and Exports 1996 Ed., s. 31 (1), (5) and (6); UK Competition 1998, s. 56]

Protection from personal liability

- 90.** No action, suit or other legal proceedings shall lie personally against —
- (a) the Commission;
 - (b) any member, officer, employee or an agent of the Commission;
 - (c) any member of the Board or any person authorised, appointed or employed to assist the Board;
 - (d) any person who is on secondment or attachment to the Commission;
 - (e) any person authorised, appointed, employed or directed by the Commission to exercise the Commission's powers, perform the Commission's functions or discharge the Commission's duties or to assist the Commission in the exercise of its powers, the performance of its functions or the discharge of its duties under this Act or any other written law; or
 - (f) any inspector or any person authorised, appointed or employed to assist him in connection with any function or duty of the inspector under this Act, for anything done (including any statement made) or omitted to be done in good faith in the course of or in connection with —
 - (i) the exercise or purported exercise of any power under this Act or any other written law;
 - (ii) the performance or purported performance of any function or the discharge or purported discharge of any duty under this Act or any other written law; or
 - (iii) the compliance or purported compliance with this Act or any other written law.

Public servants

- 91.** All members, officers and employees of the Commission, all inspectors and all members of the Board shall be deemed to be public servants for the purposes of the Penal Code (Cap. 224).

Proceedings conducted by officers of Commission

- 91A.**(1) Proceedings in respect of an offence under this Act may be conducted by an officer of the Commission who is authorised in writing in that behalf by the Chief Executive.
- (2) Notwithstanding the provisions of any written law, a legal officer of the Commission who has been admitted as an advocate and solicitor under the Legal Profession Act (Cap. 161) may —
- (a) appear in any civil proceedings involving the Commission in the

- performance of its functions or duties under any written law; and
- (b) make and do all acts and applications in respect of the civil proceedings on behalf of the Commission.

[40/2005]

[ACRA 2005 Ed., s. 33]

Amendment of Third and Fourth Schedules

- 92.** The Minister may at any time, by order published in the *Gazette*, amend the Third and Fourth Schedules.

Regulations

- 93.** (1) The Commission may, with the approval of the Minister, make regulations for any purpose for which regulations are required to be made under this Act and generally for carrying out the purposes and provisions of this Act.
- (2) Without prejudice to the generality of subsection (1), the Commission may, with the approval of the Minister, make regulations for or with respect to all or any of the following matters:
- (a) the manner of appointment, conduct and discipline and the terms and conditions of service of the employees of the Commission;
 - (b) the establishment of funds for the payment of gratuities and other benefits to employees of the Commission;
 - (c) the form and manner in which a notification under section 38 (1) is to be made;
 - (d) the form and manner in which complaints that the section 34 prohibition has been infringed by any agreement, the section 47 prohibition has been infringed by any conduct, the section 54 prohibition will be infringed by any anticipated merger, if carried into effect, or the section 54 prohibition has been infringed by any merger, are to be submitted to the Commission;
 - (da) the acceptance of commitments, and the variation, substitution or release of commitments, including the parties that may apply for the variation, substitution or release of commitments and the form and manner in which applications for the variation, substitution or release of any commitment are to be submitted to the Commission;
 - (e) the form and manner in which notices of decisions and directions of the Commission are to be given, and the persons to whom such notices are to be given;
 - (f) the fees to be charged in respect of anything done or any services rendered by the Commission under or by virtue of this Act, including the calculation of the amount of fees by reference to matters including —
 - (i) the turnover of all or any party to an agreement (determined in such manner as may be prescribed);
 - (ii) the turnover of any person whose conduct the Commission is to consider (determined in such manner as may be prescribed);
 - (iii) the turnover of all or any party to an anticipated merger (determined in such manner as may be prescribed); and
 - (iv) the turnover of all or any party involved in a merger (determined in such manner as may be prescribed); and

- (g) anything which may be prescribed or is required to be prescribed under this Act.

[UK Competition 1998, s. 53 (2) (a)]

Transitional provisions

- 94.** The Minister may make regulations to provide for —
- (a) the repeal or amendment of any written law which appears to him to be unnecessary having regard to the provisions of this Act or to be inconsistent with any provision of this Act; and
 - (b) such transitional, savings and other consequential, incidental and supplemental provisions as he considers necessary or expedient, including providing —
 - (i) for any transitional period (whether granted upon an application or otherwise), and any extension or early termination thereof;
 - (ii) for different transitional periods to apply — (A) to different provisions of this Act; or (B) to different activities, agreements or conduct or different categories of activity, agreement or conduct, to which such provisions relate; and
 - (iii) that any provision of this Act shall not apply, or shall apply in a modified form, for the purpose of or in connection with the transitional period, whether generally or in relation to any specific activity, agreement or conduct or category of activity, agreement or conduct.

FIRST SCHEDULE
Section 5 (2)
CONSTITUTION AND PROCEEDINGS OF COMMISSION

Appointment of Chairman and members

1. (1) The Chairman and other members of the Commission shall be appointed by the Minister.
- (2) The Minister may appoint the Chief Executive as a member.
- (3) The persons to be appointed under this paragraph shall be chosen for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment.

Appointment of Deputy Chairman

2. (1) The Minister may, in his discretion, appoint any member of the Commission to be the Deputy Chairman of the Commission.
- (2) The Deputy Chairman so appointed may, subject to such direction as may be given by the Chairman, exercise all or any of the powers exercisable by the Chairman under this Act.
- (3) If for any reason the Chairman is unable to act or the office of the Chairman is vacant, the Deputy Chairman may exercise all or any of the powers conferred, or discharge all or any of the duties imposed, on the Chairman under this Act.

Tenure of office of members of Commission

3. A member of the Commission shall hold office on such conditions and for such term of not less than 3 years and not more than 5 years as the Minister may determine, and shall be eligible for re-appointment.

Temporary Chairman, Deputy Chairman or member

4. The Minister may appoint any person to be a temporary Chairman, Deputy Chairman or member during the temporary incapacity from illness or otherwise, or during the temporary absence from Singapore, of the Chairman, Deputy Chairman or any member, as the case may be.

Revocation of appointment

5. The Minister may, at any time, revoke the appointment of the Chairman, Deputy Chairman or any member if he considers such revocation necessary in the interest of the effective and economical performance of the functions of the Commission under this Act or in the public interest.

Resignation

6. A member may resign from his office at any time by giving not less than one month's notice to the Minister.

Chairman may delegate function

7. The Chairman may, in writing, authorise any member of the Commission to exercise any power or perform any function conferred on the Chairman under this Act.

Vacation of office

8. The seat of a member shall become vacant —
 - (a) on his death;
 - (b) if he fails to attend 3 consecutive meetings of the Commission without sufficient cause (the sufficiency thereof to be decided by the Commission);
 - (c) if he becomes in any manner disqualified from membership of the Commission;
 - (d) if he resigns from his office; or
 - (e) if his appointment is revoked.

Filling of vacancies

9. If a vacancy occurs in the membership of the Commission, the Minister may, subject to paragraph 1, appoint any person to fill the vacancy, and the person so appointed shall hold office for the remainder of the term for which the vacating member was appointed.

Disqualification from membership

10. No person shall be appointed or shall continue to hold office as a member if he —
 - (a) is an undischarged bankrupt or has made any arrangement with his creditors;
 - (b) has been sentenced to imprisonment for a term exceeding 6 months and has not received a free pardon;
 - (c) is incapacitated by physical or mental illness; or
 - (d) is otherwise unable or unfit to discharge the functions of a member.

Disclosure of interest by members

11. (1) A member who is in any way, directly or indirectly, interested in a transaction or project of the Commission shall disclose the nature of his interest at the first meeting of the Commission at which he is present after the relevant facts have come to his knowledge.
 - (2) A disclosure under sub-paragraph (1) shall be recorded in the minutes of the meeting of the Commission and, after the disclosure, that member —
 - (a) shall not take part in any deliberation or decision of the Commission with respect to that transaction or project; and
 - (b) shall be disregarded for the purpose of constituting a quorum of the Commission for such deliberation or decision.
 - (3) For the purposes of this paragraph, a member whose spouse, parent, step-parent, son, adopted son, step-son, daughter, adopted daughter, step-daughter,

brother, half-brother, step-brother, sister, half-sister or step-sister has an interest in the transaction or project referred to in sub-paragraph (1) shall be deemed to be interested in such transaction or project.

Sealing of documents

12. (1) All deeds and other documents requiring the seal of the Commission shall be sealed with the common seal of the Commission in the presence of any 2 officers of the Commission duly authorised by the Commission to act in that behalf and shall be signed by those officers.
- (2) Such signing shall be sufficient evidence that the common seal of the Commission has been duly and properly affixed and that the seal is the lawful common seal of the Commission.
- (3) The Commission may by resolution or otherwise appoint an officer or employee of the Commission or any other agent, either generally or in a particular case, to execute or sign on behalf of the Commission any agreement or other instrument not under seal in relation to any matter coming within the powers of the Commission.
- (4) Section 12 of the Registration of Deeds Act (Cap. 269) shall not apply to any instrument purporting to have been executed under sub-paragraph (1).

Salaries, fees and allowances payable to members of Commission

13. There shall be paid to the members of the Commission, out of the funds of the Commission, such salaries, fees and allowances as the Minister may from time to time determine.

Quorum

14. (1) At every meeting of the Commission, one half of the number of members shall constitute a quorum.
- (2) The Chairman, or in his absence the Deputy Chairman, shall preside at meetings of the Commission, and if both the Chairman and Deputy Chairman are absent from any meeting or part thereof, such member as the members present may elect shall preside at that meeting or part thereof.
- (3) A decision at a meeting of the Commission shall be adopted by a simple majority of the members present and voting except that, in the case of an equality of votes, the Chairman or any other member presiding shall have a casting vote in addition to his original vote.
- (4) Where not less than 4 members of the Commission request the Chairman by notice in writing signed by them to convene a meeting of the Commission for any purpose specified in the notice, the Chairman shall, within 7 days from the receipt of the notice, convene a meeting for that purpose.

Vacancies

15. The Commission may act notwithstanding any vacancy in its membership.

Procedure at meetings

16. (1) The Chairman or any other officer authorised by him shall, subject to such standing orders as may be made by the Commission under sub-paragraph (2), summon all meetings of the Commission for the despatch of business.
- (2) Subject to the provisions of this Act, the Commission may make standing orders to regulate its own procedure generally and, in particular, regarding the holding of meetings, the notice to be given of such meetings, the proceedings thereat, the keeping of minutes, the custody, production and inspection of such minutes, and the opening, keeping, closing and auditing of accounts.

Validity of act or proceeding

17. No act or proceeding of the Commission shall be questioned on the ground —
- (a) of any vacancy in, or defect in the constitution of, the Commission;
 - (b) of any defect in the appointment of any person acting as the Chairman or as a member;
 - (c) of any omission, defect or irregularity in the procedure of the Commission not affecting the merits of the case; or
 - (d) that any member has contravened paragraph 11.

SECOND SCHEDULE

Section 7 (1)

POWERS OF COMMISSION

1. To conduct such investigations as may be necessary for enforcing this Act.
2. To require any person to furnish such returns and information as may be necessary for implementing the provisions of this Act.
3. To issue or make arrangements for approving codes of practice relating to competition and to give approval to or withdraw approval from such codes of practice.
4. To publish educational materials or carry out other educational activities relating to competition; or to support (financially or otherwise) the carrying out by others of such activities or the provision by others of information or advice.
5. To carry out research and studies and to conduct seminars, workshops and symposia relating to competition, or to support (financially or otherwise) the carrying out by others of such activities.
6. With the approval of the Minister, to form or participate in the formation of any company, partnership or joint venture as a shareholder or partner or in any capacity.
7. To enter into such contracts as may be necessary or expedient for the purpose of performing its functions or discharging its duties.
8. To become a member or an affiliate of any international body, the functions, objects or duties of which are similar to those of the Commission.
9. To acquire and hold property, both movable and immovable, and to sell, lease, mortgage or otherwise dispose of the property.

10. To grant loans to officers or employees of the Commission for such purposes specifically approved by the Commission as are likely to increase the efficiency of the officers or employees.
11. To grant or guarantee loans to any officer or employee of the Commission for the purchase of a house, land or a flat or for the renovation of a house or a flat for the use or occupation of the officer or employee and his family (if any).
12. To make provision for gratuities, pensions, allowances or other benefits for employees or former employees of the Commission or its predecessors.
13. To make provision for the specialised training of any employee of the Commission and, in that connection, to offer scholarships to intending trainees or otherwise pay for the cost of the training and all expenditure incidental thereto.
14. To offer bursaries and scholarships for study at any school or institution of higher learning to members of the public and officers or employees of the Commission and members of their families.
15. To do anything incidental to any of its functions under this Act or any other written law.

THIRD SCHEDULE
Sections 35, 48 and 92 and paragraph 2 of Fourth Schedule
EXCLUSIONS FROM SECTION 34 PROHIBITION AND SECTION 47
PROHIBITION

Services of general economic interest, etc.

1. Neither the section 34 prohibition nor the section 47 prohibition shall apply to any undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.

Compliance with legal requirements

2. (1) The section 34 prohibition shall not apply to an agreement to the extent to which it is made in order to comply with a legal requirement.
- (2) The section 47 prohibition shall not apply to conduct to the extent to which it is engaged in order to comply with a legal requirement.
- (3) In this paragraph, “legal requirement” means any requirement imposed by or under any written law.

Avoidance of conflict with international obligations

3. (1) If the Minister is satisfied that, in order to avoid a conflict between the provisions of Part III and an international obligation of Singapore, it would be appropriate for the section 34 prohibition not to apply to —
 - (a) a particular agreement; or
 - (b) any agreement of a particular description, he may by order exclude the

agreement, or agreements of that description, from the section 34 prohibition.

- (2) An order under sub-paragraph (1) may make provision for the exclusion of the agreement or agreements to which the order applies, or of such of them as may be specified, only in specified circumstances.
- (3) An order under sub-paragraph (1) may also provide that the section 34 prohibition is to be deemed never to have applied in relation to the agreement or agreements, or in relation to such of them as may be specified.
- (4) If the Minister is satisfied that, in order to avoid a conflict between the provisions of Part III and an international obligation of Singapore, it would be appropriate for the section 47 prohibition not to apply in particular circumstances, he may by order provide for it not to apply in such circumstances as may be specified.
- (5) An order under sub-paragraph (4) may provide that the section 47 prohibition is to be deemed never to have applied in relation to specified conduct.
- (6) An international arrangement relating to civil aviation and designated by an order made by the Minister is to be treated as an international obligation for the purposes of this paragraph.
- (7) In this paragraph, “specified” means specified in the order.

Public policy

4. (1) If the Minister is satisfied that there are exceptional and compelling reasons of public policy why the section 34 prohibition ought not to apply to —
 - (a) a particular agreement; or
 - (b) any agreement of a particular description, he may by order exclude the agreement, or agreements of that description, from the section 34 prohibition.
- (2) An order under sub-paragraph (1) may make provision for the exclusion of the agreement or agreements to which the order applies, or of such of them as may be specified, only in specified circumstances.
- (3) An order under sub-paragraph (1) may also provide that the section 34 prohibition is to be deemed never to have applied in relation to the agreement or agreements, or in relation to such of them as may be specified.
- (4) If the Minister is satisfied that there are exceptional and compelling reasons of public policy why the section 47 prohibition ought not to apply in particular circumstances, he may by order provide for it not to apply in such circumstances as may be specified.
- (5) An order under sub-paragraph (4) may provide that the section 47 prohibition is to be deemed never to have applied in relation to specified conduct.
- (6) In this paragraph, “specified” means specified in the order.

Goods and services regulated by other competition law

5. The section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct which relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter.

Specified activities

6. (1) The section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct which relates to any specified activity.
- (2) In this paragraph, “specified activity” means —
- (a) the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act (Cap. 237A);
 - (b) the supply of piped potable water;
 - (c) the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
 - (d) the supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Cap. 259B);
 - (e) the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Cap. 263A); and
 - (f) cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap. 170A).

Clearing houses

7. The section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct which relates to —
- (a) the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations (Cap. 19, Rg 1); or
 - (b) any activity of the Singapore Clearing Houses Association in relation to its activities regarding the Automated Clearing House.

Vertical agreements

8. (1) The section 34 prohibition shall not apply to any vertical agreement, other than such vertical agreement as the Minister may by order specify.
- (2) In this paragraph, “vertical agreement” means any agreement entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers.
- [UK Competition 1998, Sch. 3 Paras. 4, 5, 6 and 7]*

Agreements with net economic benefit

9. The section 34 prohibition shall not apply to any agreement which contributes to —
- (a) improving production or distribution; or
 - (b) promoting technical or economic progress, but which does not —
 - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

- (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Provisions directly related and necessary to implementation of mergers

- 10. The section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct that is directly related and necessary to the implementation of a merger.

Mergers

- 11. (1) The section 34 prohibition shall not apply to any agreement (either on its own or when taken together with another agreement) to the extent that it results, or if carried out would result, in a merger.
- (2) The section 47 prohibition shall not apply to any conduct (either on its own or when taken together with other conduct) to the extent that it results in a merger.
[S870/2005]

FOURTH SCHEDULE

Sections 55 and 92

EXCLUSIONS FROM SECTION 54 PROHIBITION

- 1. The section 54 prohibition shall not apply to any merger —
 - (a) approved by any Minister or regulatory authority (other than the Commission) pursuant to any requirement for such approval imposed by any written law;
 - (b) approved by the Monetary Authority of Singapore established under section 3 of the Monetary Authority of Singapore Act (Cap. 186) pursuant to any requirement for such approval imposed under any written law; or
 - (c) under the jurisdiction of any regulatory authority (other than the Commission) under any written law relating to competition, or code of practice relating to competition issued under any written law.
- 2. The section 54 prohibition shall not apply to any merger involving any undertaking relating to any specified activity as defined in paragraph 6 (2) of the Third Schedule.
- 3. The section 54 prohibition shall not apply to any merger if the economic efficiencies arising or that may arise from the merger outweigh the adverse effects due to the substantial lessening of competition in the relevant market in Singapore.

LEGISLATION HISTORY

1. Act 46 of 2004 — Competition Act 2004

Date of First Reading	:	21 September 2004 (Bill No. 44/2004 published on 22 September 2004)
Date of Second and Third Readings	:	19 October 2004
Date of commencement	:	1 January 2005 (Parts I and II and First and Second Schedules) 1 September 2005 (Part IV) 1 January 2006 (Parts III (except Division 4), V and VI and Third Schedule)

2. Act 40 of 2005 — Competition (Amendment) Act 2005

Date of First Reading	:	17 October 2005 (Bill No. 32/2005 published on 18 October 2005)
Date of Second and Third Readings	:	21 November 2005
Date of commencement	:	1 January 2006

SOUTH AFRICA

COMMENTARY BY THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA ON THE SOUTH AFRICAN COMPETITION ACT

1 Background

South Africa's history with competition law and policy dates back to 1955 with the enactment of the Regulation of Monopolistic Conditions Act, No 24 of 1955 (the 1955 Act). The Mouton Commission of 1977, however, revealed little progress with this law as the economy was still characterized by high levels of concentration. Consequently, the Maintenance and Promotion of Competition Act, No. 96 of 1979 (the 1979 Act) repealed the 1955 Act and established a Competition Board. Disappointingly, the 1979 law was still not robust enough to deal with these structural changes to the economy. In 1986, the 1979 Act was amended to give the Board more powers to deal with structural issues. Despite the amendments, however, the Board was berated for its timidity to act decisively to combat market dominance by large firms¹.

It became imperative therefore, with the attainment of democracy, that the regulatory framework governing the economy should be reformed. The structural imbalances of the economy had long been a source of concern for the African National Congress (ANC). It was thus no wonder that competition policy was contained in the ANC's 1992 Policy Guidelines for a Democratic South Africa and sought to introduce "anti-monopoly, anti-trust and merger policies in accordance with international norms and practices, to curb monopolies and continued domination of the economy by a minority within the white minority, and to promote greater efficiency in the private sector". This ideology later found way into the democratic government's economic policy blueprints – both the Reconstruction and Development Programme (RDP) and the Growth, Employment and Redistribution (GEAR) policy. Consequently, a task team was instituted in 1998 to formulate a new competition policy framework for the country. With all the flaws in the previous legislation, policymakers had to ensure that the new law was robust enough to tackle the structural problems of the economy going forward and be able to deal with anticompetitive conduct as well.

2 Objectives of the Act

The South African Competition Act, No 89 (the Competition Act) was then promulgated in 1998 and entered into force in 1999, thereby repealing the 1979 Act². As expected, the new Act establishes three independent institutions and contains more substantive provisions to deal with merger control and anticompetitive conduct.

Not only that, the new Act had to deal with both economic efficiency issues and social equity considerations, objectives that are sometimes contradictory. Section 2 of the Act states its purpose as being

“to promote and maintain competition in the Republic in order to:

¹ Browne CH. 2000. Big business and the wealth of South Africa. Policy issues in the transition from apartheid. Centre for International Politics, University of Pennsylvania, Department of Political Science. Working Paper Series No. 00-01.

² Department of Trade and Industry. 1997. Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development

- a) promote the efficiency, adaptability and development of the economy;
- b) provide consumers with competitive prices and product choice;
- c) promote employment and advance the social and economic welfare of South Africans;
- d) expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
- e) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- f) promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”

The Competition Act applies to all economic activity within, or having an effect within, the Republic. In other words, any activity of an economic nature is bound by the Act, with the exception of collective bargaining agreements as defined by the Constitution and the Labour Relations Act and concerted conduct aimed at achieving non-commercial and socio-economic objectives. Furthermore, conduct that takes place outside the borders of South Africa may still run afoul of the Competition Act if the effects thereof are felt within country. This relates to conduct such as export cartels that may be based in other countries but whose activities impact the South African economy.

3 Institutions

The Competition Act provides for the creation of independent institutions, the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (the Appeal Court). The Commission has investigative and decision-making powers with respect to small and intermediate mergers, as well as exemption applications, but only makes recommendations to the Tribunal on large mergers and restrictive practices complaints. The Commission also performs a prosecutorial function before the Tribunal. Parties may appeal the Commission’s rulings on small and intermediate mergers and exemption applications to the Tribunal. The Tribunal performs an adjudicative function. It makes decisions on large mergers and adjudicates on complaints referred to it by the Commission. The Tribunal also hears appeals of the Commission's decisions. The decisions of the Tribunal may then be appealed to the Appeal Court, which has the status of a High Court. The Appeal Court is presided over by at least three judges of the High Court. The Appeal Court may review any decision of the Tribunal or consider an appeal arising from the Tribunal in respect of any of its final decisions, other than a consent order or any of its interim or interlocutory decisions.

Broadly speaking, the Competition Act deals with merger review on the one hand and restrictive business practices on the other.

4 Merger control

In terms of section 12 and 13 of the Competition Act, companies are compelled to notify the Commission of any merger that falls within the stipulated thresholds. Mergers are divided into small, intermediate and large, based on the Gazetted financial thresholds.

A party to a small merger is not required to notify the Commission unless required to do so by the Commission in terms of section 12 (3). The Act provides that mergers must be evaluated in terms of the substantial lessening of competition (SLC) test. It also lists other factors that must be taken into consideration by the Commission and Tribunal when evaluating or assessing a merger. These include the level of actual or potential competition, the ease of entry into the market, the level and trends of concentration, the degree of countervailing power, whether the business of a party to the merger is likely to fail, etc. From the period since inception up to April 2005, the Commission received a total of 1,764 merger notifications. Of all mergers finalized during that period, only 16 transactions were prohibited.³

5 Restrictive practices

The Competition Act provides for the prohibition of restrictive horizontal and vertical practices as well as abuse of dominance conduct. Section 4 (1)(a) of the Act contains a *rule of reason* provision that prohibits an agreement between, or concerted practice by firms or a decision by an association of firms if it is between parties in a horizontal relationship and if

“it has the effect of substantially preventing, or lessening competition in market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.”

The Commission or Tribunal has to weigh up the anticompetitive effects against the pro-competitive or other efficiency gains.

By contrast, in terms of section 4 (1)(b) an agreement described above that involves price fixing, collusive tendering or market allocation is prohibited *per se*. It requires no defence or justification by the offender.

In terms of section 5, an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs the effect. *Per se* prohibitions relating to vertical restrictive practices include minimum resale price maintenance.

Section 8 of the Act contains abuse of dominance prohibitions. Examples include:

- Price discrimination
- Predatory pricing
- Inducing a supplier/customer not to deal
- Refusing to supply
- Charging an excessive price to the detriment of consumers
- Refusing to give a competitor access to an essential facility
- Engaging in an exclusionary act - Efficiency and pro-competitive gains defence.

³ See Competition Commission Annual Reports.

6 Exemptions

The Act provides for the exemption of certain prohibited practices aimed at promoting exports, promoting SMEs and businesses owned by historically disadvantaged persons, stopping decline in an industry or promoting the economic stability of a designated industry.

7 Conclusion

The 2003 OECD peer review process of the South African competition regime highlighted the high level of sophistication of the competition authorities in dealing with merger cases characterized by complex structural issues. It was noted, however, that more attention should be paid to non-merger matters and advocacy. In addition, there is a need to "improve the depth and strengthen the capacity of the professional staff."

Areas for improvement that were noted in the report are being addressed. The shortage of personnel is being addressed while the skills base and professionalism of our staff are constantly enhanced through training. The Commission has also stepped up its advocacy role and has been working with both parastatals and Government departments to help unravel anti-competitive practices, some of which flow from Government policies.

REPUBLIC OF SOUTH AFRICA

competition Act

(Date of commencement of sections 1-3, 6,11,19-43,78,79 & 84 on 30 November 1998.
The remaining sections of the Act commenced on 1 September 1999)

**as amended by
Competition Amendment Act, No 35 of 1999**

(Date of commencement 1 September 1999)
Competition Amendment Act, No. 15 of 2000
(Date of commencement 1 September 2000)
Competition Second Amendment Act, No. 39 of 2000
(Date of commencement 1 February 2001)

Act

To provide for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court; and for related matters.

PREAMBLE

The people of South Africa recognise :

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

This paragraph was amended to its present form by section 22 of The Competition Second Amendment Act, 2000

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.

IN ORDER TO -

provide all South Africans equal opportunity to participate fairly in the national economy;
achieve a more effective and efficient economy in South Africa;

provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;

create greater capability and an environment for South Africans to compete effectively in international markets;

restrain particular trade practices which undermine a competitive economy;

regulate the transfer of economic ownership in keeping with the public interest;

establish independent institutions to monitor economic competition; and

give effect to the international law obligations of the Republic.

Be it therefore enacted by the Parliament of the Republic of South Africa, as follows :

CHAPTER 1

DEFINITIONS, INTERPRETATION, PURPOSE AND APPLICATION OF ACT

Definitions and interpretation

In this Act -

‘acquiring firm’ means a firm –

- a) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;
- b) that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or
- c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b);

Paragraph (i) was added by section 1 (a) of The Competition Second Amendment Act, 2000

- i. ‘**agreement**’, when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable;

Paragraph (ii) was amended to its present form by section 1 (b) of The Competition Second Amendment Act, 2000.

- ii. ‘**civil court**’ means a High Court or Magistrates Court, as referred to in sections 166(c) and (d) of the Constitution;
- iii. ‘**complainant**’ means a person who has submitted a complaint in terms of section 49B(2)(b);

Paragraph (iv) was added by section 1 (c) of The Competition Second Amendment Act, 2000.

- iv. ‘**confidential information**’ means trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others;
- v. ‘**concerted practice**’ means co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement;
- vi. ‘**Constitution**’ means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);
- vii. ‘**essential facility**’ means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers;
- viii. ‘**excessive price**’ means a price for a good or service which –
 - (aa) bears no reasonable relation to the economic value of that good or service; and

- (bb) is higher than the value referred to in subparagraph (aa);
- (i) **‘exclusionary act’** means an act that impedes or prevents a *firm* entering into, or expanding within, a market;
- (ii) **‘firm’** includes a person, partnership or a trust;
- (iii) **‘goods or services’**, when used with respect to particular *goods or services*, includes any other *goods or services* that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints;
- (iv) **‘horizontal relationship’** means a relationship between competitors;
- the former definition of interest was deleted section 1 (d) of The Competition Second Amendment Act, 2000*
- (v) **‘market power’** means the power of a *firm* to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers;
- (vi) **‘member’s interest’** has the meaning set out in the Close Corporations Act, 1984 (Act No. 69 of 1984);
- Paragraph (xv) was added by section 1 (e) of The Competition Second Amendment Act, 2000*
- (vii) **‘Minister’** means the *Minister* of Trade and Industry;
- (viii) **‘organ of state’** has the meaning set out in section 239 of the *Constitution*;
- (ix) **‘party to a merger’** means an *acquiring firm* or a *target firm*;
- Paragraph (xviii) was added by section 1 (f) of The Competition Second Amendment Act, 2000*
- (x) **‘premises’** includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container;
- (xi) **‘prescribed’** means *prescribed by regulation*;
- Paragraph (xx) was amended to its present form by section 1 (g) of The Competition Second Amendment Act, 2000*
- (xii) **‘primary acquiring firm’** means any *firm* contemplated in paragraph (a) of the definition of *acquiring firm*;
- Paragraph (xxi) was added by section 1 (h) of The Competition Second Amendment Act, 2000*
- (xiii) **‘primary target firm’** means any *firm* contemplated in paragraph (a) or (b) of the definition of *target firm*;
- Paragraph (xxii) was added by section 1 (h) of The Competition Second Amendment Act, 2000*
- (xiv) **‘private dwelling’** means any part of a structure that is occupied as a residence, or any part of a structure or outdoor living area that is accessory to, and used wholly for the purposes of, a residence;
- (xv) **‘prohibited practice’** means a practice prohibited in terms of Chapter 2;
- (xvi) **‘public regulation’** means any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a *regulatory authority* or pursuant to any statutory authority;
- (xvii) **‘registered trade union’** means a trade union registered in terms of section 96 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

Paragraph (xxvi) was added by section 1 (i) of The Competition Second Amendment Act, 2000

- (xviii) **‘regulation’** means a regulation made under this Act;
- (xix) **‘regulatory authority’** means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry;
- (xx) **‘respondent’** means a *firm* against whom a complaint of a *prohibited practice* has been initiated in terms of *this Act*;
- (xxi) **‘restrictive horizontal practice’** means any practice listed in section 4;
- (xxii) **‘restrictive vertical practice’** means any practice listed in section 5;
- (xxiii) **‘small business’** has the meaning set out in the National *Small business Act*, 1996 (Act No. 102 of 1996);
- (xxiv) **‘target firm’** means a *firm* –
- a) the whole or part of whose business would be directly or indirectly controlled by an acquiring firm as a result of a transaction in any circumstances set out in section 12;
 - b) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm; or
 - c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b);

Paragraph (xxxiii) was added by section 1 (j) of The Competition Second Amendment Act, 2000

- i. ‘this Act’ includes the regulations and Schedules;
 - ii. ‘vertical relationship’ means the relationship between a firm and its suppliers, its customers, or both.
- (1A) When a particular number of business days is provided for performing an act, the number of days must be calculated by –
- (a) excluding the first day, any public holiday, Saturday and Sunday; and
 - (b) including the last day.
- Subsection (1A) was added by section 1 (k) of The Competition Second Amendment Act, 2000
- (2) This Act must be interpreted –
- (a) in a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2; and
 - (b) in compliance with the international law obligations of the Republic.
- (3) Any person interpreting or applying this Act may consider appropriate foreign and international law.

1. Purpose of Act

The purpose of *this Act* is to promote and maintain competition in the Republic in order –

- 1) to promote the efficiency, adaptability and development of the economy;
- 2) to provide consumers with competitive prices and product choices;
- 3) to promote employment and advance the social and economic welfare of South Africans;

- 4) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- 5) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- 6) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

1. Application of Act

(i) This Act applies to all economic activity within, or having an effect within, the Republic, except –

1. collective bargaining within the meaning of section 23 of the *Constitution*, and the Labour Relations Act, 1995 (Act No. 66 of 1995);
2. a collective *agreement*, as defined in section 213 of the Labour Relations Act, 1995; and
3. . . .

Paragraph (c) was deleted by section 2 (a) of The Competition Second Amendment Act, 2000.

4. . . .

Paragraph (d) was deleted by section 2 (a) of The Competition Second Amendment Act, 2000.

5. concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

(1A)(a) In so far as *this Act* applies to an industry, or sector of an industry, that is subject to the jurisdiction of another *regulatory authority*, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of *this Act*, *this Act* must be construed as establishing concurrent jurisdiction in respect of that conduct.

- (b) The manner in which the concurrent jurisdiction is exercised in terms of *this Act* and any other *public regulation*, must be managed, to the extent possible, in accordance with any applicable *agreement* concluded in terms of sections 21(1)(h) and 82(1) and (2).

Subsection (1A) was added by section 2 (b) of The Competition Second Amendment Act, 2000

(ii) For all purposes of *this Act*, a person is a historically disadvantaged person if that person -

6. is one of a category of individuals who, before the *Constitution* of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;
7. is an association, a majority of whose members are individuals referred to in paragraph (a);
8. is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members' *interest* and are able to control a majority of its votes; or
9. is a juristic person or association, and persons referred to in paragraph

(a), (b) or (c) own and control a majority of its issued share capital or members' *interest* and are able to control a majority of its votes.

CHAPTER 2 PROHIBITED PRACTICES

PART A RESTRICTIVE PRACTICES

1) Restrictive horizontal practices prohibited

(iii) An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of *firms*, is prohibited if it is between parties in a *horizontal relationship* and if –

10. it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the *agreement, concerted practice, or decision* can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

11. it involves any of the following *restrictive horizontal practices* :

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*; or

(iii) collusive tendering.

Subsection (1) was amended to its present form by section 3(a) and (b) of The Competition Second Amendment Act, 2000.

(iv) An *agreement* to engage in a *restrictive horizontal practice* referred to in subsection (1)(b) is presumed to exist between two or more *firms* if –

12. any one of those *firms* owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and

13. any combination of those *firms* engages in that *restrictive horizontal practice*.

Subsection (2) was amended to its present form by section 3(c) of The Competition Second Amendment Act, 2000.

(v) A presumption contemplated in subsection (2) may be rebutted if a *firm, director or shareholder* concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market.

(vi) For purposes of subsections (2) and (3), “director” means –

14. a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973);

15. a member of a close corporation, as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);

16. a trustee of a trust ; or

17. a person holding an equivalent position in a *firm*.

Subsection (4) was amended to its present form by section 3(d) of The Competition Second Amendment Act, 2000.

(vii) The provisions of subsection (1) do not apply to an *agreement* between, or *concerted practice* engaged in by, –

18. a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or

19. the constituent *firms* within a single economic entity similar in structure to those referred to in paragraph (a).

(2) Restrictive vertical practices prohibited

(viii) An *agreement* between parties in a *vertical relationship* is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the *agreement* can prove that any technological, efficiency or other pro-competitive, gain resulting from that *agreement* outweighs that effect.

(ix) The practice of minimum resale price maintenance is prohibited.

(x) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a *good or service* provided –

20. the supplier or producer makes it clear to the reseller that the recommendation is not binding; and

21. if the product has its price stated on it, the words “recommended price” appear next to the stated price.

PART B ABUSE OF A DOMINANT POSITION

(3) **Restricted application of Part**

Section 6 was amended to its present form by section 4 of The Competition Second Amendment Act, 2000.

- (xi) The *Minister*, in consultation with the Competition Commission, must determine –
 - 22. a threshold of annual turnover, or assets, in the Republic, either in general or in relation to specific industries, below which this Part does not apply to a *firm*; and
 - 23. a method for the calculation of annual turnover or assets to be applied in relation to that threshold.
- (xii) The *Minister* may make a new determination in terms of subsection (1) in consultation with the Competition Commission.
- (xiii) Before making a determination contemplated in this section, the *Minister*, in consultation with the Competition Commission, must publish in the Gazette a notice –
 - 24. setting out the proposed threshold and method of calculation for purposes of this section; and
 - 25. inviting written submissions on that proposal.
- (xiv) Within six months after publishing a notice in terms of subsection (3), the *Minister*, in consultation with the Competition Commission, must publish in the Gazette a notice –
 - 26. Setting out the threshold and method of calculation for purposes of this section; and
 - 27. the effective date of that threshold.

(4) **Dominant firms**

A *firm* is dominant in a market if –

- 28. it has at least 45% of that market;
- 29. it has at least 35%, but less than 45%, of that market, unless it can show that it does not have *market power*; or
- 30. it has less than 35% of that market, but has *market power*.

(5) **Abuse of dominance prohibited**

It is prohibited for a dominant firm to -

- 31. charge an *excessive price* to the detriment of consumers;
- 32. refuse to give a competitor access to an *essential facility* when it is economically feasible to do so;
- 33. engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
- 34. engage in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –

1. requiring or inducing a supplier or customer to not deal with a competitor;
2. refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
3. selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
4. selling *goods or services* below their marginal or average variable cost; or
5. buying-up a scarce supply of intermediate goods or resources required by a competitor.

(6) Price discrimination by dominant firm prohibited

(xv) An action by a dominant *firm*, as the seller of *goods or services* is prohibited price discrimination, if –

35. it is likely to have the effect of substantially preventing or lessening competition;
36. it relates to the sale, in equivalent transactions, of *goods or services* of like grade and quality to different purchasers; and
37. it involves discriminating between those purchasers in terms of –
 1. the price charged for the *goods or services*;
 2. any discount, allowance, rebate or credit given or allowed in relation to the supply of *goods or services*;
 3. the provision of services in respect of the *goods or services*; or
 4. payment for services provided in respect of the *goods or services*.

(xvi) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection is not prohibited price discrimination if the dominant *firm* establishes that the differential treatment –

38. makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, *goods or services* are supplied to different purchasers;
39. is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
40. is in response to changing conditions affecting the market for the *goods or services* concerned, including –
 1. any action in response to the actual or imminent deterioration of perishable goods;

2. any action in response to the obsolescence of goods;
3. a sale pursuant to a liquidation or sequestration procedure; or
4. a sale in good faith in discontinuance of business in the *goods or services* concerned.

PART C
EXEMPTIONS from application of chapter

(7) Exemption

Section 10 was amended to its present form by section 5 of The Competition Second Amendment Act, 2000.

- (xvii) A *firm* may apply to the Competition Commission to exempt from the application of this Chapter. -
41. an *agreement* or practice, if that *agreement* or practice meets the requirements of subsection (3); or
 42. or category of *agreements* or practices, if that category of *agreements* or practices meets the requirements of subsection (3).
- (xviii) Upon receiving an application in terms of subsection (1), the Competition Commission must –
43. grant a conditional or unconditional exemption for a specified term, if the *agreement* or practice concerned, or category of *agreements* or practices concerned, meets the requirements of subsection (3); or
 44. refuse to grant an exemption, if -
 1. the *agreement* or practice concerned, or category of *agreements* or practices concerned, does not meet the requirements of subsection (3); or
 2. the *agreement* or practice, or category of *agreements* or practices does not constitute a *prohibited practice* in terms of this Chapter.
- (xix) The Competition Commission may grant an exemption in terms of subsection (2)(a) only if –
45. any restriction imposed on the *firms* concerned by the *agreement* or practice concerned, or category of either *agreements* or practices concerned, is required to attain an objective mentioned in paragraph (b); and
 46. the *agreement* or practice concerned, or category of *agreements* or practices concerned, contributes to any of the following objectives:
 1. maintenance or promotion of exports;
 2. promotion of the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive;
 3. change in productive capacity necessary to stop decline in an industry; or
 4. the economic stability of any industry designated by the *Minister*, after consulting the Minister responsible for that industry.

(xx) A *firm* may apply to the Competition Commission to exempt from the application of this Chapter an *agreement* or practice, or category of *agreements* or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of the Performers' Protection Act, 1967 (Act No. 11 of 1967), the Plant Breeder's Rights Act, 1976 (Act No. 15 of 1976), the Patents Act, 1978 (Act No. 57 of 1978), the Copyright Act, 1978 (Act No. 98 of 1978), the Trade Marks Act, 1993 (Act No. 194 of 1993) and the Designs Act, 1993 (Act No. 195 of 1993).

(4A) Upon receiving an application in terms of subsection (4), the Competition Commission may grant an exemption for a specified term.

(xxi) The Competition Commission may revoke an exemption granted in terms of subsection (2)(a) or subsection (4A) if –

47. the exemption was granted on the basis of false or incorrect information;
48. a condition for the exemption is not fulfilled; or
49. the reason for granting the exemption no longer exists.

(xxii) Before granting an exemption in terms of subsection (2) or (4A), or revoking an exemption in terms of subsection (5), the Competition Commission –

50. must give notice in the *Gazette* of the application for an exemption, or of its intention to revoke that exemption;
51. must allow interested parties 20 business days from the date of that notice to make written representations as to why the exemption should not be granted or revoked; and
52. may conduct an investigation into the *agreement* or practice concerned, or category of *agreements* or practices concerned.

(xxiii) The Competition Commission, by notice in the *Gazette*, must give notice of any exemption granted, refused or revoked in terms of this section.

(xxiv) The *firm* concerned, or any other person with a substantial financial interest affected by a decision of the Competition Commission in terms of subsection (2), (4A) or (5), may appeal that decision to the Competition Tribunal in the *prescribed* manner.

(xxv) At any time after refusing to grant an exemption in terms of subsection (2)(b)(ii), the Competition Commission –

53. may withdraw its notice of refusal to grant the exemption, in the *prescribed* manner; and
54. if it does withdraw its notice of refusal, must reconsider the application for exemption.

CHAPTER 3 MERGER CONTROL

Chapter 3 was amended to its present form by section 6 of The Competition Second Amendment Act, 2000.

(8) **Thresholds and categories of mergers**

(xxvi) The *Minister*, in consultation with the Competition Commission, must determine—

55. A lower and a higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets, in the Republic, in general or in relation to specific industries, for purposes of determining categories of mergers contemplated in subsection (5); and

56. a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds.

(xxvii) The *Minister* may make a new determination in terms of subsection (1) in consultation with the Competition Commission.

(xxviii) Before making a determination contemplated in this section, the *Minister*, in consultation with the Competition Commission, must publish in the *Gazette* a notice—

57. setting out the proposed threshold and method of calculation for purposes of this section; and

58. inviting written submissions on that proposal.

(xxix) Within six months after publishing a notice in terms of subsection (3), the *Minister*, in consultation with the Competition Commission, must publish in the *Gazette* a notice—

59. setting out the new threshold and method of calculation for purposes of this section; and

60. the effective date of that threshold.

(xxx) For purposes of this Chapter—

61. “**a small merger**” means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection (1)(a);

62. “**an intermediate merger**” means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection (1)(a); and

63. “**a large merger**” means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1)(a).

(9) **Merger defined**

(xxxi) (a) For purposes of *this Act*, a merger occurs when one or more *firms* *directly or indirectly* acquire or establish direct or indirect control over the whole or part of the business of another *firm*.

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through -

(i) purchase or lease of the shares, an interest or assets of the other *firm* in question; or

(ii) amalgamation or other combination with the other *firm* in question.

(xxxii) A person controls a *firm* if that person—

64. beneficially owns more than one half of the issued share capital of the *firm*;
65. is entitled to vote a majority of the votes that may be cast at a general meeting of the *firm*, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
66. is able to appoint or to veto the appointment of a majority of the directors of the *firm*;
67. is a holding company, and the *firm* is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);
68. in the case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
69. in the case of a close corporation, owns the majority of members' *interest* or controls directly or has the right to control the majority of members' votes in the close corporation; or
70. has the ability to materially influence the policy of the *firm* in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

12A. Consideration of Mergers

- (1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and—
 - (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine—
 - (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
 - (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or
 - (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).
- (2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the *firms* in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including—

- (a) the actual and potential level of import competition in the market;
 - (b) the ease of entry into the market, including tariff and regulatory barriers;
 - (c) the level and trends of concentration, and history of collusion, in the market;
 - (d) the degree of countervailing power in the market;
 - (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
 - (f) the nature and extent of vertical integration in the market;
 - (g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
 - (h) whether the merger will result in the removal of an effective competitor.
- (xxxiii) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—
- 71. a particular industrial sector or region;
 - 72. employment;
 - 73. the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive; and
 - 74. the ability of national industries to compete in international markets.

(10) Small merger notification and implementation

- (xxxiv) A party to a small merger—
- 75. is not required to notify the Competition Commission of that merger unless the Commission requires it to do so in terms of subsection (3); and
 - 76. may implement that merger without approval, unless required to notify the Competition Commission in terms of subsection (3).
- (xxxv) A party to a small merger may voluntarily notify the Competition Commission of that merger at any time.
- (xxxvi) Within 6 months after a small merger is implemented, the Competition Commission may require the parties to that merger to notify the Commission of that merger in the *prescribed* manner and form if, in the opinion of the Commission, having regard to the provisions of section 12A, the merger—
- 77. may substantially prevent or lessen competition; or
 - 78. cannot be justified on public interest grounds.
- (xxxvii) A *party to a merger* contemplated in subsection (3) may take no further steps to implement that merger until the merger has been approved or conditionally approved.
- (xxxviii) Within 20 business days after all parties to a small merger have fulfilled all their notification requirements in the *prescribed* manner and form, the Competition Commission —
- 79. may extend the period in which it has to consider the proposed merger

by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger; or

80. after having considered the merger in terms of section 12A, must issue a certificate in the *prescribed* form —

- (i) approving the merger;
- (ii) approving the merger subject to any conditions;
- (iii) prohibiting implementation of the merger, if it has not been implemented; or
- (iv) declaring the merger to be prohibited.

(xxxix) If, upon the expiry of the 20 business day period provided for in subsection (5), the Competition Commission has not issued any of the certificates referred to in that subsection or, upon the expiry of an extension period contemplated in subsection (5)(a), the Commission has not issued a certificate referred to in subsection (5)(b), the merger must be regarded as having been approved, subject to section 15.

(xl) The Competition Commission must—

81. publish a notice of the decision in the *Gazette*; and

82. issue written reasons for the decision if-

- (i) it prohibits or conditionally approves the merger; or
- (ii) requested to do so by a party to the merger.

13A. Notification and implementation of other mergers

(1) A party to an intermediate or a large merger must notify the Competition Commission of that merger in the *prescribed* manner and form.

(2) In the case of an intermediate or a large merger, the *primary acquiring firm* and the *primary target firm* must each provide a copy of the notice contemplated in subsection (1) to -

- (a) any *registered trade union* that represents a substantial number of its employees; or
- (b) the employees concerned or representatives of the employees concerned, if there are no such *registered trade unions*.

(3) The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16 (2) or the Competition Appeal Court in terms of section 17.

13B. Merger investigations

(1) The Competition Commission may direct an inspector to investigate any merger, and may designate one or more persons to assist the inspector.

(2) The Competition Commission may require any *party to a merger* to provide additional information in respect of the merger.

(3) Any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant

information in respect of that merger.

(11) Competition Commission intermediate merger proceedings

(xli) Within 20 business days after all parties to an intermediate merger have fulfilled all their notification requirements in the *prescribed* manner and form, the Competition Commission —

83. may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger; or

84. after having considered the merger in terms of section 12A, must issue a certificate in the *prescribed* form —

(i) approving the merger;

(ii) approving the merger subject to any conditions; or

(iii) prohibiting implementation of the merger.

(xlii) If, upon the expiry of the 20 business day period provided for in subsection (1), the Competition Commission has not issued any of the certificates referred to in that subsection or, upon the expiry of an extension period contemplated in subsection (1)(a), the Commission has not issued a certificate referred to in subsection (1)(b), the merger must be regarded as having been approved, subject to section 15.

(xliii) The Competition Commission must—

85. publish a notice of the decision in the *Gazette*; and

86. issue written reasons for the decision if

(i) it prohibits or conditionally approves the merger; or

(ii) requested to do so by a party to the merger.

14A. Competition Commission large merger proceedings

(1) After receiving notice of a large merger, the Competition Commission -

(b) must refer the notice to the Competition Tribunal and to the *Minister*; and

(c) within 40 business days after all parties to a large merger have fulfilled all their *prescribed* notification requirements, must forward to the Competition Tribunal and the *Minister* a written recommendation, with reasons, whether or not implementation of the merger should be—

(i) approved;

(ii) approved subject to any conditions; or

(iii) prohibited.

(2) The Competition Tribunal may extend the period for making a recommendation in respect of a particular merger upon an application by the Competition Commission, but the Tribunal may not grant an extension of more than 15 business days at a time.

(3) If, upon the expiry of the period contemplated in subsection (1), or an

extended time contemplated in subsection (2), the Competition Commission has neither applied for an extension or a further extension as the case may be, nor forwarded a recommendation to the Competition Tribunal, any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission.

- (4) Upon receipt of an application by a party contemplated in subsection (3), the Tribunal must set a date for proceedings in respect of that merger.

(12) Revocation of merger approval

(xlv) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if—

87. the decision was based on incorrect information for which a party to the merger is responsible;
88. the approval was obtained by deceit; or
89. a *firm* concerned has breached an obligation attached to the decision.

(xlv) If the Competition Commission revokes a decision to approve a merger under subsection (1), it may prohibit that merger even though any time limit set out in this Chapter may have elapsed.

(13) Competition Tribunal merger proceedings

(xlvi) If the Competition Commission approves -

90. a small or intermediate merger subject to any conditions, or prohibits such merger, any party to the merger, by written notice and in the *prescribed* form, may request the Competition Tribunal to consider the conditions or prohibited merger; or
91. an intermediate merger, or approves such merger subject to any conditions, a person who, in terms of section 13A (2), is required to be given notice of the merger, by written notice and in the *prescribed* form, may request the Competition Tribunal to consider the approval or conditional approval, provided the person had been a participant in the proceedings of the Competition Commission.

(xlvii) Upon receiving a referral of a large merger and recommendation from the Competition Commission in terms of section 14A(1), or a request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A, and the recommendation or request, as the case may be, and within the *prescribed* time -

92. approve the merger;
93. approve the merger subject to any conditions; or
94. prohibit implementation of the merger.

(xlviii) Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger and section 15, read with the changes required by the context, applies to a revocation in terms of this subsection.

(xlix) The Competition Tribunal must—

95. publish a notice of the decision made in terms of subsection (2) or (3) in

the *Gazette*; and

96. issue written reasons for any such decision.

(14) Competition Appeal Court merger proceedings

(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by—

97. any party to the merger; or

98. a person who, in terms of section 13A(2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal.

(li) The Competition Appeal Court may—

99. set aside the decision of the Competition Tribunal;

100. amend the decision by ordering or removing restrictions, or by including or deleting conditions; or

101. confirm the decision.

(lii) If the Competition Appeal Court sets aside a decision of the Competition Tribunal, the Court must—

102. approve the merger;

103. approve the merger subject to any conditions; or

104. prohibit implementation of the merger.

(15) Intervention in merger proceedings

(liii) In order to make representations on any public interest ground referred to in section 12A(3), the *Minister* may participate as a party in any intermediate or large merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the *prescribed* manner.

(liv) Despite anything to the contrary in *this Act*, the Competition Commission may not make a decision in terms of section 13(5)(b) or 14(1)(b), and the Competition Tribunal may not make an order in terms of section 16(2), if the—

105. merger constitutes—

(i) an acquisition of shares for which permission is required in terms of section 37 of the Banks Act, 1990 (Act No. 94 of 1990); or

(ii) a transaction for which consent is required in terms of section 54 of the Banks Act, 1990 (Act No. 94 of 1990); and

106. the Minister of Finance has, in the *prescribed* manner, issued a notice to the Commissioner specifying the names of the parties to the merger and certifying that—

(i) the merger is a merger contemplated in paragraph (a)(i) or (ii); and

(ii) it is in the public interest that the merger is subject to the jurisdiction of the Banks Act, 1990 (Act No. 94 of 1990) only.

(lv) Sections 13(6) and 14(2) do not apply to a merger in respect of which the

Minister of Finance has issued a certificate contemplated in subsection (2).

CHAPTER 4 COMPETITION COMMISSION, TRIBUNAL, AND COURT

PART A - THE COMPETITION COMMISSION

(16) Establishment and Constitution of Competition Commission

(lvi) There is hereby established a body to be known as the Competition Commission, which -

107. has jurisdiction throughout the Republic;

108. is a juristic person; and

109. must exercise its functions in accordance with *this Act*.

(lvii) The Competition Commission consists of the Commissioner, and one or more Deputy Commissioners, appointed by the *Minister* in terms of *this Act*.

Subsection (2) was amended to its present form by section 7 of The Competition Second Amendment Act, 2000.

(17) Independence of Competition Commission

(lviii) The Competition Commission –

110. is independent and subject only to the *Constitution* and the law; and

111. must be impartial and must perform its functions without fear, favour, or prejudice.

(lix) The Commissioner, each Deputy Commissioner and each member of the staff of the Competition Commission, must not –

112. engage in any activity that may undermine the integrity of the Commission;

113. participate in any investigation, hearing or decision concerning a matter in respect of which that person has a direct financial interest or any similar personal interest;

114. make private use of, or profit from, any *confidential information* obtained as a result of performing that person's official functions in the Commission; or

115. divulge any information referred to in paragraph 2(c) to any third party, except as required as part of that person's official functions within the Commission.

(lx) Each *organ of state* must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties.

(18) Functions of Competition Commission

(lxi) The Competition Commission is responsible to –

116. implement measures to increase market transparency;

117. implement measures to develop public awareness of the provisions of *this Act*;

118. investigate and evaluate alleged contravention's of Chapter 2;

- 119. grant or refuse applications for exemption in terms of Chapter 2;
- 120. authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3;
- 121. negotiate and conclude consent orders in terms of section 63;
- 122. refer matters to the Competition Tribunal, and appear before the Tribunal, as required by *this Act*;
- 123. negotiate *agreements* with any *regulatory authority* to co-ordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of *this Act*;
- 124. participate in the proceedings of any *regulatory authority*;
- 125. advise, and receive advice from, any *regulatory authority*;
- 126. over time, review legislation and *public regulations*, and report to the *Minister* concerning any provision that permits uncompetitive behaviour; and
- 127. deal with any other matter referred to it by the Tribunal.

(lxii) In addition to the functions listed in subsection (1), the Competition Commission may –

- 128. report to the *Minister* on any matter relating to the application of *this Act*;
- 129. enquire into and report to the *Minister* on any matter concerning the purposes of *this Act*; and
- 130. perform any other function assigned to it in terms of this or any other Act.

(lxiii) The *Minister* must table in the National Assembly any report submitted in terms of subsection (1)(k), and any report submitted in terms of subsection (2) if that report deals with a substantial matter relating to the purposes of *this Act* –

- 131. within 10 business days after receiving that report from the Competition Commission; or
- 132. if Parliament is not then sitting, within 10 business days after the commencement of the next sitting.

Subsection (3) was amended to its present form by section 8(a) of The Competition Second Amendment Act, 2000.

(lxiv) The *Minister*, in consultation with the Commissioner, and by notice in the *Gazette*, may *prescribe regulations* for matters relating to the functions of the Commission, including –

- 133. forms;
- 134. time periods;
- 135. information required;
- 136. additional definitions;

- 137. filing fees;
- 138. access to *confidential information*;
- 139. manner and form of participation in Commission procedures; and
- 140. procedures.

Subsection (4) was amended to its present form by section 8 (b) of The Competition Second Amendment Act, 2000.

(19) Appointment of Commissioner

(lxv) The *Minister* must appoint a person with suitable qualifications and experience in economics, law, commerce, industry or public affairs to be the Commissioner for a term of five years.

(lxvi) The *Minister* may re-appoint a person as Commissioner at the expiry of that person's term of office.

(lxvii) The Commissioner is the Chief Executive Officer of the Competition Commission, is responsible for the general administration of the Commission and for carrying out any functions assigned to it in terms of *this Act*, and must –

- 141. perform the functions that are conferred on the Commissioner by or in terms of *this Act*;

- 142. manage and direct the activities of the Commission; and

- 143. supervise the Commission's staff.

(lxviii) The *Minister* must, in consultation with the Minister of Finance, determine the Commissioner's remuneration, allowances, benefits, and other terms and conditions of employment.

(lxix) The Commissioner, on one month written notice addressed to the *Minister*, may resign as Commissioner.

(lxx) The *Minister* –

- 144. must remove the Commissioner from office if that person becomes subject to any of the disqualification's referred to in section 28(3)(a) – (d); and

- 145. other than as provided in paragraph (a), may remove the Commissioner from office only for –

- (lxxi) serious misconduct;

- (lxxii) permanent incapacity; or

- (lxxiii) engaging in any activity that may undermine the integrity of the Competition Commission.

(20) Appointment of Deputy Commissioner

(lxxiv) The *Minister* must appoint at least one person, and may appoint other persons, with suitable qualifications and experience in economics, law, commerce, industry or public affairs as Deputy Commissioner to assist the Commissioner in carrying out the functions of the Competition Commission.

(lxxv) The *Minister* must designate a Deputy Commissioner to perform the functions of the Commissioner whenever –

146. the Commissioner is unable for any reason to perform the functions of the Commissioner; or

147. the office of Commissioner is vacant.

(21) Appointment of inspectors

(lxxvi) The Commissioner may appoint any person in the service of the Competition Commission, or any other suitable person, as an inspector.

(lxxvii) The *Minister* may, in consultation with the Minister of Finance, determine the remuneration paid to a person who is appointed in terms of subsection (1), but who is not in the full-time service of the Competition Commission.

(lxxviii) An inspector must be provided with a certificate of appointment signed by the Commissioner stating that the person has been appointed as an inspector in terms of *this Act*.

(lxxix) When an inspector performs any function in terms of *this Act*, the inspector must –

148. be in possession of a certificate of appointment issued to that inspector in terms of subsection (3); and

149. show that certificate to any person who –

(lxxx) is affected by the exercise of the functions of the inspector; and

(lxxxii) requests to see the certificate.

2000. *Subsection (4) was amended to its present form by section 9 of The Competition Second Amendment Act,*

(22) Staff of Competition Commission

(lxxxii) The Commissioner may –

150. appoint staff, or contract with other persons, to assist the Competition Commission in carrying out its functions; and

151. in consultation with the *Minister* and Minister of Finance, determine the remuneration, allowances, benefits, and other terms and conditions of appointment of each member of the staff.

Part B - The Competition Tribunal

(23) Establishment and Constitution of Competition Tribunal

(lxxxiii) There is hereby established a body to be known as the Competition Tribunal, which

152. has jurisdiction throughout the Republic;

153. is a juristic person;

154. is a Tribunal of record; and

155. must exercise its functions in accordance with *this Act*.

(lxxxiv) The Competition Tribunal consists of a Chairperson and not less than three, but not more than ten, other women or men appointed by the President, on a full or part-time basis, on the recommendation of the *Minister*, from among persons nominated by the *Minister* either on the *Minister's* initiative or

in response to a public call for nominations.

Subsection (2) was amended to its present form by section 10 of The Competition Second Amendment Act, 2000.

(lxxxv) The President must -

156. appoint the Chairperson and other members of the Competition Tribunal on the date that *this Act* comes into operation; and

157. appoint a person to fill any vacancy on the Tribunal.

(lxxxvi) Section 20, read with the changes required by the context, applies to the Competition Tribunal.

(24) Functions of Competition Tribunal

(lxxxvii) The Competition Tribunal may -

158. adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in *this Act*;

159. adjudicate on any other matter that may, in terms of *this Act*, be considered by it, and make any order provided for in *this Act*;

160. hear appeals from, or review any decision of, the Competition Commission that may, in terms of *this Act*, be referred to it; and

161. make any ruling or order necessary or incidental to the performance of its functions in terms of *this Act*.

(lxxxviii) Section 21(4), read with the changes required by the context, applies to the Competition Tribunal, and the reference in that section to the Commissioner must be construed as a reference to the Chairperson of the Tribunal.

Section 27 was amended to its present form by section 11 of The Competition Second Amendment Act, 2000.

(25) Qualifications of members of Competition Tribunal

(lxxxix) The Chairperson and other members of the Competition Tribunal, viewed collectively must -

162. represent a broad cross-section of the population of the Republic; and

163. comprise sufficient persons with legal training and experience to satisfy the requirements of section 31(2)(a).

(xc) Each member of the Competition Tribunal must -

164. be a citizen of South Africa, who is ordinarily resident in South Africa;

165. have suitable qualifications and experience in economics, law, commerce, industry or public affairs; and

166. be committed to the purposes and principles enunciated in section 2.

(xci) A person may not be a member of the Competition Tribunal if that person -

167. is an office-bearer of any party, movement, organisation or body of a partisan political nature;

168. is an unrehabilitated insolvent;

169. is subject to an order of a competent court holding that person to be mentally unfit or disordered; or

170. has been convicted of an offence committed after the *Constitution* of the Republic of South Africa, 1993 (Act No. 200 of 1993), took effect, and sentenced to imprisonment without the option of a fine.

(26) Term of office of members of Competition Tribunal

(xcii) Subject to subsection (2), the Chairperson and each other member of the Competition Tribunal serves for a term of five years.

(xciii) The President may re-appoint a member of the Competition Tribunal at the expiry of that member's term of office, but no person may be appointed to the office of the Chairperson of the Tribunal for more than two consecutive terms.

(xciv) The Chairperson, on one month written notice addressed to the *Minister*, may –

171. resign from the Competition Tribunal; or

172. resign as Chairperson, but remain as a member of the Tribunal.

(xcv) A member of the Competition Tribunal other than the Chairperson may resign by giving at least one month's written notice to the *Minister*.

(xcvi) The President, on the recommendation of the *Minister*, –

173. must remove the Chairperson or any other member of the Competition Tribunal from office if that person becomes subject to any of the disqualification's referred to in section 28(3); and

174. other than as provided in subsection (a), may remove the Chairperson or a member from office only for –

(i) serious misconduct;

(ii) permanent incapacity; or

(iii) engaging in any activity that may undermine the integrity of the Tribunal.

(27) Deputy Chairperson of Competition Tribunal

(xcvii) The President must, on the recommendation of the *Minister*, designate a member of the Competition Tribunal as Deputy Chairperson of the Tribunal.

(xcviii) The Deputy Chairperson performs the functions of Chairperson whenever –

175. the office of Chairperson is vacant; or

176. the Chairperson is for any other reason temporarily unable to perform the functions of Chairperson.

(28) Competition Tribunal proceedings

(xcix) The Chairperson is responsible to manage the caseload of the Competition Tribunal, and must assign each matter referred to the Tribunal to a panel composed of any three members of the Tribunal.

(c) When assigning a matter in terms of subsection (1), the Chairperson must –

177. ensure that at least one member of the panel is a person who has legal training and experience; and

178. designate a member of the panel to preside over the panel's proceedings.
- (ci) If, because of withdrawal from a hearing in terms of section 32, resignation, illness or death, a member of the panel is unable to complete the proceedings in a matter assigned to that panel, the Chairperson must –
179. direct that the hearing of that matter proceed before any remaining member of the panel subject to the requirements of subsection (2)(a); or
180. terminate the proceedings before that panel and constitute another panel, which may include any member of the original panel, and direct that panel to conduct a new hearing.
- (cii) The decision of a panel on a matter referred to it must be in writing and include reasons for that decision.
- (ciii) If the Competition Tribunal may extend or reduce a *prescribed* period in terms of *this Act*, the Chairperson of the Tribunal or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order –
181. extending or reducing that period; or
182. condoning late performance of an act that is subject to that period.

Subsection (5) was added by section 12 of The Competition Second Amendment Act, 2000.

- (civ) A decision of the Chairperson or other person contemplated in subsection (5), or of a majority of the members of a panel in any other matter, is the decision of the Tribunal.

Subsection (6), formerly (5), was amended to its present form by section 12 of The Competition Second Amendment Act, 2000.

(29) Conflicts and disclosure of interest by members of Competition Tribunal

- (cv) A member of the Tribunal may not represent any person before a panel of the Tribunal.
- (cvi) If, during a hearing, it appears to a member of the Competition Tribunal that a matter concerns a financial or other interest of that member contemplated in section 20(2)(b), the member must –
183. immediately and fully disclose the fact and nature of that interest to the Chairperson and to the presiding member at that hearing; and
184. withdraw from any further involvement in that hearing.

(30) Acting by member of Competition Tribunal after expiry of term of office

If, on the expiry of the term of office of a member of the Competition Tribunal, that member is still considering a matter before the Tribunal, that member may continue to act as a member in respect of that matter only.

(31) Remuneration and benefits of members of Competition Tribunal

- (cvii) The *Minister*, in consultation with the Minister of Finance, may determine the remuneration, allowances, and other benefits of the Chairperson, Deputy Chairperson and other members of the Competition Tribunal.
- (cviii) The *Minister* may not during the term of office of a member of the Competition Tribunal, reduce the member's salary, allowances or benefits.

(cix) The *Minister* may determine any other conditions of appointment not provided for in this section.

(32) Staff of Competition Tribunal

The Chairperson may-

185. appoint staff, or contract with other persons, to assist the Competition Tribunal in carrying out its functions; and

186. in consultation with the *Minister* and the Minister of Finance, determine the remuneration, allowances, benefits, and other terms and conditions of appointment of a member of the staff.

Part C - The Competition Appeal Court

(33) Establishment and Constitution of Competition Appeal Court

(cx) There is hereby established a court to be known as the Competition Appeal Court, which -

187. is a court contemplated in section 166(e) of the *Constitution* with a status similar to that of a High Court;

188. has jurisdiction throughout the Republic; and

189. is a court of record.

(cxi) The Competition Appeal Court consists of at least three judges, appointed by the President on the advice of the Judicial Services Commission, each of whom must be a judge of the High Court.

Subsection (2) was amended to its present form by section 1 of The Competition Amendment Act, 2000.

(cxii) The President must designate one of the judges of the Competition Appeal Court to be Judge President of the Court.

Subsection (3) was added by section 1 (b) of The Competition Amendment Act, 2000.

(cxiii) The Minister of Justice, after consulting the Judge President of the Competition Appeal Court, may second any number of judges of the High Court to serve as acting judges of the Competition Appeal Court.

Subsection (4) was added by section 1 (b) of The Competition Amendment Act, 2000.

(cxiv) When the office of Judge President of the Competition Appeal Court is vacant, or when the Judge President is temporarily unable to perform the functions of that office for any reason, the senior judge of the Court must perform the functions of Judge President.

Subsection (5) was added by section 1 (b) of The Competition Amendment Act, 2000.

(34) Functions of Competition Appeal Court

(cxv) The Competition Appeal Court may -

190. review any decision of the Competition Tribunal; or

191. consider an appeal arising from the Competition Tribunal in respect of -

(cxvi) any of its final decisions, other than a consent order made in terms of section 63; or

(cxvii) any of its interim or interlocutory decisions that may, in terms of *this Act*, be taken on appeal.

(cxviii) The Competition Appeal Court may give any judgement or make any order, including an order to –

192. confirm, amend or set aside a decision or order of the Competition Tribunal; or

193. remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.

Section 37 was amended to its present form by section 2 of The Competition Amendment Act, 2000.

(35) Business of Competition Appeal Court

(cxix) The Judge President of the Competition Appeal Court –

194. is responsible to supervise and direct the work of the Court;

195. must preside at proceedings of the Court or designate another judge of the Competition Appeal Court to preside at particular proceedings of the Court; and

Paragraph (b) was amended to its present form by section 3(a) of The Competition Amendment Act, 2000.

196. by notice in the *Gazette*, may make rules for the proceedings of the Court.

(cxx) Subject to subsection (2A), the Judge President must assign each matter before the Court to a bench composed of three judges of the Court.

Subsection (2) was amended to its present form by section 3(b) of The Competition Amendment Act, 2000.

(2A) The Judge President, or any other judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider an -

197. appeal against a decision of an interlocutory nature, as *prescribed* by the rules of the Competition Appeal Court;

198. application concerning the determination or use of *confidential information*;

199. application for leave to appeal, as *prescribed* by the rules of the Competition Appeal Court;

200. application to suspend the operation and execution of an order that is the subject of a review or appeal; or

201. application for procedural directions.

Subsection (2A) was added by section 3(c) of The Competition Amendment Act, 2000.

(cxxi) The decision of a judge sitting alone in terms of subsection (2A), or of a majority of the bench hearing a particular matter, is the decision of the Competition Appeal Court.

Subsection (3) was amended to its present form by section 3(d) of The Competition Amendment Act, 2000.

(cxxii) If a judge, or any of the judges hearing a matter assigned in terms of subsection (2) is unable to complete the proceedings in that matter, the Judge President must -

202. direct that the hearing of that matter proceed before the remaining judge or judges to whom it was assigned; or

203. terminate the proceedings before that bench and constitute another bench, which may include a judge to whom the matter was originally

assigned, and direct that bench to hear the matter afresh.

Subsection (4) was amended to its present form by section 3(e) of The Competition Amendment Act, 2000.

(cxxiii) A decision of the Competition Appeal Court must be in writing and include reasons for that decision.

(36) Term of office

(cxxiv) The Judge President and any other judge of the Competition Appeal Court is appointed for a fixed term determined by the President at the time of appointment and holds office until -

204. the expiry of the term;

205. the date the judge ceases to be a judge of the High Court; or

206. the judge resigns from the Court by giving written notice to the President.

(cxxv) Section 33, read with the changes required by the context, applies to the Judge President and other judges of the Competition Appeal Court.

(cxxvi) The tenure of office, the remuneration, and the terms and conditions of service applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989), are not affected by the appointment and concurrent tenure of office of that judge who is appointed as a judge of the Competition Appeal Court.

Section 39 was amended to its present form by section 4 of The Competition Amendment Act, 2000.

Part D - Administrative Matters Concerning the Competition Commission and the Competition Tribunal

(37) Finances

(cxxvii) The Competition Commission is financed from –

207. money that is appropriated by Parliament for the Commission;

208. fees payable to the Commission in terms of *this Act*;

209. income derived by the Commission from its investment and deposit of surplus money in terms of subsection (6); and

210. money received from any other source.

(cxxviii) The financial year of the Competition Commission is the period from 1 April in any year to 31 March in the following year, except that the first financial year of the Commission begins on the date that *this Act* comes into operation, and ends on 31 March next following that date.

(cxxix) Each year, at a time determined by the *Minister*, the Commissioner must submit to the *Minister* a statement of the Competition Commission's estimated income and expenditure, and requested appropriation from Parliament, in respect of the next ensuing financial year.

(cxxx) The Competition Commission must open and maintain an account in the name of the Commission with a registered bank, or other registered financial institution, in the Republic, and –

211. any money received by the Commission must be deposited to that account; and

212. every payment on behalf of the Commission must be made from that account.
- (cxxxix) Cheques drawn on the account of the Competition Commission must be signed on its behalf by two persons authorised for that purpose by resolution of the Commission.
- (cxxxixii) The Competition Commission may invest or deposit money of the Commission that is not immediately required for contingencies or to meet current expenditures –
213. on a call or short-term fixed deposit with any registered bank or financial institution in the Republic; or
214. in an investment account with the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).
- (cxxxixiii) The Commissioner is the accounting authority of the Competition Commission for the purposes of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

Subsection (7) was amended to its present form by section 13 (a) of The Competition Second Amendment Act, 2000.

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Subsection (8) was deleted by section 13 (b) of The Competition Second Amendment Act, 2000.

- (cxxxixiv) Within six months after the end of each financial year, the Commissioner must prepare financial statements in accordance with established accounting practice, principles and procedures, comprising –
215. a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Competition Commission during the preceding financial year; and
216. a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.
- (cxxxixv) The Auditor General must audit the Competition Commission's financial records each year.

(38) Annual Report

- (cxxxixvi) Within six months after the end of the Competition Commission's financial year, the Commissioner must prepare and submit to the *Minister* an annual report in the *prescribed* form, including –
217. the audited financial statements prepared in terms of section 40(9);
218. the auditor's report, prepared in terms of section 40(10);
219. a report of activities undertaken in terms of its functions set out in *this Act*;
220. a statement of the progress achieved during the preceding year towards realization of the purposes of *this Act*; and
221. any other information that the *Minister*, by notice in the *Gazette*, determines.
- (cxxxixvii) The *Minister* must table in the National Assembly each annual report submitted in terms of subsection (1) –
222. within 10 business days after receiving that report from the Competition Commission; or

223. if Parliament is not then sitting, within 10 business days after the commencement of the next sitting.

Subsection (2) was amended to its present form by section 14 of The Competition Second Amendment Act, 2000.

(39) Rules applicable to Competition Tribunal

Sections 40 and 41, each read with the changes required by the context, applies to the Competition Tribunal, except that a reference in either section to the Commissioner must be read as referring to the Chairperson of the Tribunal.

(40) Liability

(cxxxviii) The State Liability Act, 1957 (Act No. 20 of 1957), read with the changes required by the context, applies to the Competition Commission and to the Competition Tribunal, but a reference in that Act to “the *Minister* of the Department concerned” must be interpreted as referring to the Commissioner, or to the Chairperson, as the case may be.

(cxxxix) No Competition Tribunal member, Competition Appeal Court member, Commissioner, staff person, or contractor is liable for any report, finding, point of view or recommendation that is given in good faith and is submitted to Parliament, or made known, under the *Constitution* or *this Act*.

CHAPTER 5

INVESTIGATION AND ADJUDICATION PROCEDURES

Chapter 5 was amended to its present form by section 15 of The Competition Second Amendment Act, 2000

Part A - Confidential information

(41) Right of informants to claim confidentiality

(cxl) (a) A person, when submitting information to the Competition Commission or the Competition Tribunal, may identify information that the person claims to be *confidential information*.

(b) Any claim contemplated in paragraph (a) must be supported by a written statement in the prescribed form, explaining why the information is confidential.

(cxli) The Competition Commission is bound by that a claim contemplated in subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is *confidential information*.

(cxlii) The Competition Tribunal may—

224. determine whether or not the information is confidential; and

225. if it finds that the information is confidential, make any appropriate order concerning access to that information.

(42) Disclosure of information

(cxliii) A person who seeks access to information that is subject to a claim that it is *confidential information* may apply to the Competition Tribunal in the

prescribed manner and form, and the Competition Tribunal may—

226. determine whether or not the information is *confidential information*;
and
 227. if it finds that the information is confidential, make any appropriate order concerning access to that *confidential information*.
- (cxliv) Within 10 business days after an order of the Competition Tribunal is made in terms of section 44(3), a party concerned may appeal against that decision to the Competition Appeal Court, subject to its rules.
- (cxlv) From the time information comes into the possession of the Competition Commission or Competition Tribunal until a final determination has been made concerning it, the Commission and Tribunal must treat as confidential, any information that—
228. the Competition Tribunal has determined is *confidential information*; or
 229. is the subject of a claim in terms of this section.
- (cxlvi) Once a final determination has been made concerning any information, it is confidential only to the extent that it has been accepted to be *confidential information* by the Competition Tribunal or the Competition Appeal Court.

45A. Restricted use of information

- (1) (a) When making any decision in terms of *this Act*, the Competition Commission, subject to paragraph (b), may take *confidential information* into account in making its decision.

(b) If the Commission's reasons for the decision would reveal any confidential information, the Commission must provide a copy of the proposed reasons to the party concerned at least 10 business days before publishing those reasons.
- (2) A party may apply to the Competition Tribunal within the period contemplated in subsection (1)(b) after receiving a copy of the proposed reasons, subject to its rules, for an appropriate order to protect the confidentiality of the relevant information.
- (3) A party concerned may appeal against a decision of the Competition Tribunal in terms of subsection (2) to the Competition Appeal Court, subject to its rules.
- (4) If a party applies to the Competition Tribunal in terms of subsection (2), the Competition Commission may not publish the proposed reasons until the Tribunal or the Competition Appeal Court, as the case may be, has made an order regarding the matter.

Part B - Powers of Search and Summons

(43) Authority to enter and search under warrant

- (cxlvii) A judge of the High Court, a regional magistrate, or a magistrate may issue a warrant to enter and search any *premises* that are within the jurisdiction of that judge or magistrate, if, from information on oath or

affirmation, there are reasonable grounds to believe that –

230. a *prohibited practice* has taken place, is taking place or is likely to take place on or in those *premises*; or

231. anything connected with an investigation in terms of *this Act* is in the possession of, or under the control of, a person who is on or in those *premises*.

(cxlviii) A warrant to enter and search may be issued at any time and must specifically –

232. identify the *premises* that may be entered and searched; and

233. authorise an inspector or a police officer to enter and search the *premises* and to do anything listed in section 48.

(cxliv) A warrant to enter and search is valid until one of the following events occurs:

234. the warrant is executed;

235. the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

236. the purpose for issuing it has lapsed; or

237. the expiry of one month after the date it was issued.

(cl) A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.

(cli) A person authorised by warrant issued in terms of subsection (2) may enter and search *premises* named in that warrant.

(clii) Immediately before commencing with the execution of a warrant, a person executing that warrant must either-

238. if the owner, or person in control, of the *premises* to be searched is present-

(i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and

(ii) hand a copy of the warrant to that person or to the person named in it; or

239. if none of those persons is present, affix a copy of the warrant to the *premises* in a prominent and visible place.

(44) Authority to enter and search without warrant

(cliii) An inspector who is not authorised by a warrant in terms of section 46(2) may enter and search *premises* other than a *private dwelling*.

(cliv) Immediately before entering and searching in terms of this section, the inspector conducting the search must provide identification to the owner or person in control of the *premises* and explain to that person the authority by which the search is being conducted, and must -

- 240. get permission from that person to enter and search the *premises*; or
- 241. believe on reasonable grounds that a warrant would be issued under section 46 if applied for, and that the delay that would ensue by first obtaining a warrant would defeat the object or purpose of the entry and search.

(clv) An entry and search without a warrant may be carried out only during the day, unless doing it at night is justifiable and necessary in the circumstances.

(45) Powers to enter and search

(clvi) A person who is authorised under section 46 or 47 to enter and search *premises* may –

- 242. enter upon or into those *premises*;
- 243. search those *premises*;
- 244. search any person on those *premises* if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
- 245. examine any article or document that is on or in those *premises* that has a bearing on the investigation;
- 246. request information about any article or document from the owner of, or person in control of, the *premises* or from any person who has control of the article or document, or from any other person who may have the information;
- 247. take extracts from, or make copies of, any book or document that is on or in the *premises* that has a bearing on the investigation;
- 248. use any computer system on the *premises*, or require assistance of any person on the *premises* to use that computer system, to –
 - (i) search any data contained in or available to that computer system;
 - (ii) reproduce any record from that data; and
 - (iii) seize any output from that computer for examination and copying; and
- 249. attach and, if necessary, remove from the *premises* for examination and safekeeping, anything that has a bearing on the investigation.

(clvii) Section 49A(3) applies to an answer given or statement made to an inspector in terms of this section.

(clviii) An inspector authorised to conduct an entry and search in terms of section 46 or 47 may be accompanied and assisted by a police officer.

(46) Conduct of entry and search

(clix) A person who enters and searches any *premises* under section 48 must conduct the entry and search with strict regard for decency and order, and with regard for each person’s right to dignity, freedom, security and privacy.

(clx) During any search under section 48(1)(c), only a female inspector or police officer may search a female person, and only a male inspector or police officer

may search a male person.

(clxi) A person who enters and searches *premises* under section 48 must, before questioning anyone -

250. advise that person of the right to be assisted at the time by an advocate or attorney; and

251. allow that person to exercise that right.

(clxii) A person who removes anything from *premises* being searched must-

252. issue a receipt for it to the owner of, or person in control of, the *premises*; and

253. return it as soon as practicable after achieving the purpose for which it was removed.

(clxiii) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.

(clxiv) If the owner or person in control of an article or document refuses in terms of subsection (5) to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged.

(clxv) A police officer who is authorised to enter and search *premises* under section 46, or who is assisting an inspector who is authorised to enter and search *premises* under section 46 or 47, may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the *premises*.

(clxvi) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.

(clxvii) The Competition Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the *premises* was present.

49A. Summons

(1) At any time during an investigation in terms of *this Act*, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject—

254. to appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or

255. at a time and place specified in the summons, to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book,

document or other object specified in the summons.

- (2) A person questioned by an inspector conducting an investigation, or by the Commissioner or other person in terms of subsection (1), must answer each question truthfully and to the best of that person's ability, but the person is not obliged to answer any question if the answer is self-incriminating.
- (3) No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged.

Part C - Complaint Procedures

49B. Initiating a complaint

- (1) The Commissioner may initiate a complaint against an alleged prohibited practice.
- (2) Any person may –
 - (a) submit information concerning an alleged *prohibited practice* to the Competition Commission, in any manner or form; or
 - (b) submit a complaint against an alleged *prohibited practice* to the Competition Commission in the *prescribed* form.
- (3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.
- (4) At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector.

49C. Interim relief

- (1) At any time, whether or not a hearing has commenced into an alleged *prohibited practice*, the *complainant* may apply to the Competition Tribunal for an interim order in respect of the alleged practice.
- (2) The Competition Tribunal -
 - (a) must give the *respondent* a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and
 - (b) may grant an interim order if it is reasonable and just to do so, having regard to the following factors:
 - (i) The evidence relating to the alleged *prohibited practice*;
 - (ii) the need to prevent serious or irreparable damage to the applicant; and
 - (iii) the balance of convenience.
- (3) In any proceedings in terms of this section, the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict.
- (4) An interim order in terms of this section may not extend beyond the earlier of the -
 - (a) conclusion of a hearing into the alleged *prohibited practice*; or
 - (b) date that is six months after the date of issue of the interim order.
- (5) If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months.
- (6) Any party to an application may apply to the Competition Appeal Court to review a decision of the Competition Tribunal in terms of this section.
- (7) The applicant may appeal to the Competition Appeal Court against a refusal by the Competition Tribunal to grant an interim order in terms of this section.
- (8) The *respondent* may appeal to the Competition Appeal Court in terms of this section against an order of the Competition Tribunal that has a final or irreversible effect.

49D. Consent Orders

- (1) If, during, on or after completion of the investigation of a complaint, the Competition Commission and the *respondent* agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b).
- (2) After hearing a motion for a consent order, the Competition Tribunal must —
 - (a) make the order as agreed to and proposed by the Competition

Commission and the *respondent*;

(b) indicate any changes that must be made in the draft order before it will make the order; or

(c) refuse to make the order.

(3) With the consent of a *complainant*, a consent order may include an award of damages to the *complainant*.

(4) A consent order does not preclude a *complainant* from applying for—

(a) a declaration in terms of section 58(1)(a)(v) or (vi); or

(b) an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the *complainant*.

(47) Outcome of complaint

(clxviii) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.

(clxix) Within one year after a complaint was submitted to it, the Commissioner must -

256. subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a *prohibited practice* has been established; or

257. in any other case, issue a notice of non-referral to the *complainant* in the *prescribed* form.

(clxx) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it –

258. may -

(i) refer all the particulars of the complaint as submitted by the *complainant*;

(ii) refer only some of the particulars of the complaint as submitted by the *complainant*; or

(iii) add particulars to the complaint as submitted by the *complainant*; and

259. must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint not referred to the Competition Tribunal.

(clxxi) In a particular case -

260. the Competition Commission and the *complainant* may agree to extend the period allowed in subsection (2); or

261. on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

(clxxii) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in

subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.

(48) Referral to Competition Tribunal

(clxxiii) If the Competition Commission issues a notice of non-referral in response to a complaint, the *complainant* may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.

(clxxiv) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50(1), or by a *complainant* in terms of subsection (1), must be in the *prescribed* form.

(clxxv) The Chairperson of the Competition Tribunal must, by notice in the *Gazette*, publish each referral made to the Tribunal.

(clxxvi) The notice published in terms of subsection (3) must include -

262. the name of the *respondent*; and

263. the nature of the conduct that is the subject of the referral.

Part D - Tribunal Hearings and Orders

(49) Hearings before Competition Tribunal

(clxxvii) The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of *this Act*.

(clxxviii) Subject to subsections (3) and (4), the Competition Tribunal -

264. must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and

265. may conduct its hearings informally or in an inquisitorial manner.

(2A) Despite subsection (2)(a), the Chairperson of the Tribunal may order that a matter be heard -

(a) in chambers, if no oral evidence will be heard, or that oral submissions be made at the hearing; or

(b) by telephone or video conference, if it is the interests of justice and expediency to do so.

(clxxix) Despite subsection (2), the Tribunal member presiding at a hearing may exclude members of the public, or specific persons or categories of persons, from attending the proceedings-

266. if evidence to be presented is *confidential information*, but only to the extent that the information cannot otherwise be protected;

267. if the proper conduct of the hearing requires it; or

268. for any other reason that would be justifiable in civil proceedings in a High Court.

(clxxx) At the conclusion of a hearing, the Competition Tribunal must make any order permitted in terms of *this Act*, and must issue written reasons for its decision.

(clxxxix) The Competition Tribunal must provide the participants and other

members of the public reasonable access to the record of each hearing, subject to any ruling to protect *confidential information* made in terms of subsection (3)(a).

(50) Right to participate in hearing

(clxxxii) The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

269. If the hearing is in terms of Part C—

- (i) the Commissioner, or any person appointed by the Commissioner;
- (ii) the *complainant*, if -
 - (aa) the *complainant* referred the complaint to the Competition Tribunal; or
 - (bb) in the opinion of the presiding member of the Competition Tribunal, the *complainant's* interest is not adequately represented by another participant, and then only to the extent required for the *complainant's* interest to be adequately represented;
- (iii) the respondent; and
- (iv) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the complainant's interest to be adequately represented;

270. If the hearing is in terms of section 10 or Schedule 1—

- (i) the applicant for an exemption;
- (ii) the Competition Commission;
- (iii) the appellant, if the appellant is not the applicant for an exemption;
- (iv) an interested person contemplated in section 10(8) who submitted a representation to the Competition Commission, unless, in the opinion of the presiding member of the Competition Tribunal, that person's interest is adequately represented by another participant, but only to the extent required for the person's interest to be adequately represented; and
- (v) the *Minister* or member of the Executive Council if consulted in terms of Schedule 1;

271. if the hearing is in terms of Chapter 3—

- (i) any party to the merger;
- (ii) the Competition Commission;
- (iii) any person who was entitled to receive a notice in terms of section 13A (2) and who indicated to the Commission an

- intention to participate, in the *prescribed* form;
- (iv) the *Minister*, if the *Minister* has indicated an intention to participate; and
- (v) any other person whom the Competition Tribunal recognised as a participant; and

272. if the hearing is in terms of Part A—

- (i) the person who owns the information that is the subject of the hearing;
- (ii) any person who sought disclosure of any information that is the subject of the hearing;
- (iii) the Competition Commission; and
- (iv) any other person whom the Tribunal recognised as a participant.

(51) Powers of member presiding at hearing

The member of the Competition Tribunal presiding at a hearing may-

- 273. direct or summon any person to appear at any specified time and place;
- 274. question any person under oath or affirmation;
- 275. summon or order any person-
 - (i) to produce any book, document or item necessary for the purposes of the hearing; or
 - (ii) to perform any other act in relation to *this Act*;
- 276. give directions prohibiting or restricting the publication of any evidence given to the Competition Tribunal;
- 277. accept oral submissions from any participant; and
- 278. accept any other information that is submitted by a participant.

(52) Rules of procedure

(clxxxiii) Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2).

(clxxxiv) The Tribunal may condone any technical irregularities arising in any of its proceedings.

(clxxxv) The Tribunal may—

- 279. accept as evidence any relevant oral testimony, document or other thing, whether or not—
 - (i) it is given or proven under oath or affirmation; or
 - (ii) would be admissible as evidence in court; but
- 280. refuse to accept any oral testimony, document or other thing that is unduly repetitious.

(53) Witnesses

- (clxxxvi) Every person giving evidence at a hearing of the Competition Tribunal must answer any relevant question.
- (clxxxvii) The law regarding a witness' privilege in a criminal case in a court of law applies equally to a person who provides information during a hearing.
- (clxxxviii) The Competition Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.
- (clxxxix) Section 49A(3) applies to evidence given by a witness in terms of this section.

(54) Costs

- (cxc) Subject to subsection (2), and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs.
- (cxci) If the Competition Tribunal –
281. has not made a finding against a *respondent*, the Tribunal member presiding at a hearing may award costs to the *respondent*, and against a *complainant* who referred the complaint in terms of section 51(1); or
 282. has made a finding against a *respondent*, the Tribunal member presiding at a hearing may award costs against the *respondent*, and to a *complainant* who referred the complaint in terms of section 51(1).

(55) Orders of Competition Tribunal

- (cxcii) In addition to its other powers in terms of *this Act*, the Competition Tribunal may -
283. make an appropriate order in relation to a *prohibited practice*, including -
 - (i) interdicting any prohibited practice;
 - (ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
 - (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;
 - (iv) ordering divestiture, subject to section 60;
 - (v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65;
 - (vi) declaring the whole or any part of an agreement to be void;
 - (vii) ordering access to an essential facility on terms reasonably required;
 284. *confirm* a consent *agreement* in terms of section 49D as an order of the Tribunal; or
 285. subject to sections 13(6) and 14(2), condone, on good cause shown, any non-compliance of -
 - (i) the Competition Commission or Competition Tribunal rules; or

- (ii) a time limit set out in *this Act*.
 - (cxciii) At any time, the Competition Tribunal may adjourn a hearing for a reasonable period of time, if there is reason to believe that the hearing relates to a *prohibited practice* that might qualify for exemption in terms of section 10.
 - (cxciv) Despite any other provision of *this Act*, if the Competition Tribunal adjourns a hearing in terms of subsection (2), the *respondent* may apply for an exemption during that adjournment.
- (56) Administrative penalties**
- (cxcv) The Competition Tribunal may impose an administrative penalty only -
 - 286. for a *prohibited practice* in terms of section 4(1)(b), 5(2) or 8(a), (b) or (d);
 - 287. for a *prohibited practice* in terms of section 4(1)(a), 5(1), 8(c) or 9(1), if the conduct is substantially a repeat by the same *firm* of conduct previously found by the Competition Tribunal to be a *prohibited practice*;
 - 288. for contravention of, or failure to comply with, an interim or final order of the Competition Tribunal or the Competition Appeal Court; or
 - 289. if the parties to a merger have -
 - (i) failed to give notice of the merger as required by Chapter 3;
 - (ii) proceeded to implement the merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;
 - (iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16; or
 - (iv) proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by *this Act*.
 - (cxcvi) An administrative penalty imposed in terms of subsection (1) may not exceed 10% of the *firm's* annual turnover in the Republic and its exports from the Republic during the *firm's* preceding financial year.
 - (cxcvii) When determining an appropriate penalty, the Competition Tribunal must consider the following factors:
 - 290. the nature, duration, gravity and extent of the contravention;
 - 291. any loss or damage suffered as a result of the contravention;
 - 292. the behaviour of the *respondent*;
 - 293. the market circumstances in which the contravention took place;
 - 294. the level of profit derived from the contravention;
 - 295. the degree to which the *respondent* has co-operated with the Competition Commission and the Competition Tribunal; and

296. whether the *respondent* has previously been found in contravention of *this Act*.

(cxcviii) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the *Constitution*.

(57) Divestiture

(cxcix) If a merger is implemented in contravention of Chapter 3, the Competition Tribunal may -

297. order a party to the merger to sell any shares, *interest* or other assets it has acquired pursuant to the merger; or

298. declare void any provision of an *agreement* to which the merger was subject.

(cc) The Competition Tribunal, in addition to or in lieu of making an order under section 58, may make an order directing any *firm*, or any other person to sell any shares, *interest* or assets of the *firm* if -

299. it has contravened section 8, and

300. the *prohibited practice* -

(i) cannot adequately be remedied in terms of another provision of *this Act*; or

(ii) is substantially a repeat by that *firm* of conduct previously found by the Tribunal to be a *prohibited practice*.

(ccii) An order made by the Competition Tribunal in terms of subsection (2) is of no force or effect unless confirmed by the Competition Appeal Court.

(ccii) An order made in terms of subsection (1) or (2) may set a time for compliance, and any other terms that the Competition Tribunal considers appropriate, having regard to the commercial interests of the party concerned.

Part E - Appeals and reviews to Competition Appeal Court

(58) Appeals

(cciii) A person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter.

(cciv) The Competition Appeal Court may make an order for the payment of costs against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness.

(59) Appellate jurisdiction

(ccv) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:

301. Interpretation and application of Chapters 2, 3 and 5, other than—

(i) a question or matter referred to in subsection (2); or

- (ii) a review of a certificate issued by the Minister of Finance in terms of section 18(2); and
- 302. the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2).
- (ccvi) In addition to any other jurisdiction granted in *this Act* to the Competition Appeal Court, the Court has jurisdiction over—
 - 303. the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of *this Act*;
 - 304. any constitutional matter arising in terms of *this Act*;
 - 305. the question whether a matter falls within the exclusive jurisdiction granted under subsection (1).
- (ccvii) The jurisdiction of the Competition Appeal Court—
 - 306. is final over a matter within its exclusive jurisdiction in terms of subsection (1); and
 - 307. is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2).
- (ccviii) An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the Supreme Court of Appeal, or Constitutional Court, subject to section 63 and their respective rules.
- (ccix) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a *prohibited practice*.
- (60) Leave to appeal**
- (ccx) The right to an appeal in terms of section 62(4)—
 - 308. is subject to any law that—
 - (i) specifically limits the right of appeal set out in that section; or
 - (ii) specifically grants, limits or excludes any right of appeal;
 - 309. is not limited by monetary value of the matter in dispute; and
 - 310. exists even if the matter in dispute is incapable of being valued in money.
- (ccxi) An appeal in terms of section 62(4) may be brought to the Supreme Court of Appeal, or, if it concerns a Constitutional matter, to the Constitutional Court, only—
 - 311. with leave of the Competition Appeal Court; or
 - 312. if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be.
- (ccxii) A court granting leave to appeal in terms of this section may attach any appropriate conditions, including a condition that the applicant provide

security for the costs of the appeal.

- (ccxiii) If the Competition Appeal Court, when refusing leave to appeal, made an order of costs against the applicant, the Supreme Court of Appeal or the Constitutional Court may vary that order on granting leave to appeal.
- (ccxiv) An application to the Competition Appeal Court for leave to appeal must be made in the manner and form required by the Competition Appeal Court Rules.
- (ccxv) An application to the Constitutional Court for leave to appeal must be made in the manner and form required by its Rules.
- (ccxvi) Section 21(1A) to (3)(e) of the Supreme Court Act, 1959 (Act No. 59 of 1959), read with the changes required by the context, applies to an application to the Supreme Court of Appeal for leave to appeal under *this Act*.
- (ccxvii) A person applying to the Supreme Court of Appeal for leave to appeal under *this Act* must give notice of the application to the registrar of the Competition Appeal Court.

CHAPTER 6

ENFORCEMENT

Chapter 6 was amended to its present form by section 15 of The Competition Second Amendment Act, 2000

(61) Status and enforcement of orders

- (ccxviii) Any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court.
- (ccxix) The Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Competition Tribunal.
- (ccxx) Proceedings under subsection (2) may not be initiated more than three years after the imposition of the administrative penalty.

(62) Civil actions and jurisdiction

- (ccxxi) Nothing in *this Act* renders void a provision of an *agreement* that, in terms of *this Act*, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.
- (ccxxii) If, in any action in a *civil court*, a party raises an issue concerning conduct that is prohibited in terms of *this Act*, that court must not consider that issue on its merits, and -
 - 313. if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or
 - 314. otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that -
 - (i) the issue has not been raised in a frivolous or vexatious manner;

and

- (ii) the resolution of that issue is required to determine the final outcome of the action.

(ccxxiii) . . .

Subsection (3) was deleted section 15 of The Competition Second Amendment Act, 2000

(ccxxiv) . . .

Subsection (4) was deleted section 15 of The Competition Second Amendment Act, 2000

(ccxxv) . . .

Subsection (5) was deleted section 15 of The Competition Second Amendment Act, 2000

(ccxxvi) A person who has suffered loss or damage as a result of a *prohibited practice*-

315. may not commence an action in a *civil court* for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

316. if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the *prescribed* form -

- (i) certifying that the conduct constituting the basis for the action has been found to be a *prohibited practice* in terms of *this Act*;
- (ii) stating the date of the Tribunal or Competition Appeal Court finding; and
- (iii) setting out the section of *this Act* in terms of which the Tribunal or the Competition Appeal Court made its finding.

(ccxxvii) A certificate referred to in subsection (6)(b) is conclusive proof of its contents, and is binding on a *civil court*.

(ccxxviii) An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a *civil court* with respect to the same matter.

(ccxxix) A person's right to bring a claim for damages arising out of a *prohibited practice* comes into existence -

317. on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or

318. in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.

(ccxxx) For the purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of *this Act* will commence on the date of issue of the certificate referred to in subsection (6).

(63) Variation of order

(ccxxxi) The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may

vary or rescind its decision or order -

319. erroneously sought or granted in the absence of a party affected by it;

320. in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or

321. made or granted as a result of a mistake common to all of the parties to the proceeding.

(64) Limitations of bringing action

(ccxxxii) A complaint in respect of a *prohibited practice* may not be initiated more than three years after the practice has ceased.

(ccxxxiii) A complaint may not be referred to the Competition Tribunal against any *firm* that has been a *respondent* in completed proceedings before the Tribunal under the same or another section of *this Act* relating substantially to the same conduct.

(65) Standard of proof

In any proceedings in terms of *this Act*, other than proceedings in terms of section 49C or criminal proceedings, the standard of proof is on a balance of probabilities.

CHAPTER 7

OFFENCES

(66) Breach of confidence

(ccxxxiv) It is an offence to disclose any *confidential information* concerning the affairs of any person or *firm* obtained –

322. in carrying out any function in terms of *this Act*; or

323. as a result of initiating a complaint, or participating in any proceedings in terms of *this Act*.

(ccxxxv) Subsection (1) does not apply to information disclosed -

324. for the purpose of the proper administration or enforcement of *this Act*;

325. for the purpose of the administration of justice; or

326. at the request of an inspector, Commissioner, Deputy Commissioner or Competition Tribunal member entitled to receive the information.

(67) Hindering administration of Act

It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by *this Act*.

(68) Failure to attend when summoned

A person commits an offence who, having been summoned in terms of section 49A, or directed or summoned to attend a hearing –

327. fails without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or

328. attends as required, but -

- (i) refuses to be sworn in or to make an affirmation; or
- (ii) fails to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person.

Section 71 was amended to its present form by section 16 of The Competition Second Amendment Act, 2000

(69) Failure to answer fully or truthfully

A person commits an offence who, having been sworn in or having made an affirmation -

- 329. subject to section 49A(3) or 56, fails to answer any question fully and to the best of that person's ability; or
- 330. gives false evidence, knowing or believing it to be false.

Section 72 was amended to its present form by section 17 of The Competition Second Amendment Act, 2000

(70) Failure to comply with Act

(ccxxxvi) A person commits an offence who contravenes or fails to comply with an interim or final order of the Competition Tribunal or the Competition Appeal Court.

Subsection (2) was amended to its present form by section 18 of The Competition Second Amendment Act, 2000

(ccxxxvii) A person commits an offence who -

- 331. does anything calculated to improperly influence the Competition Tribunal or Competition Commission concerning any matter connected with an investigation;
- 332. anticipates any findings of the Tribunal or Commission concerning an investigation in a way that is calculated to influence the proceedings or findings;
- 333. does anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law;
- 334. knowingly provides false information to the Commission;
- 335. defames the Tribunal or the Competition Appeal Court, or a member of either of them, in their respective official capacities;
- 336. wilfully interrupts the proceedings or misbehaves in the place where a hearing is being conducted;
- 337. acts contrary to a warrant to enter and search;
- 338. without authority, but claiming to have authority in terms of section 46 or 47 -
 - (i) enters or searches *premises*; or
 - (ii) attaches or removes an article or document.

(71) Penalties

(ccxxxviii) Any person convicted of an offence in terms of *this Act*, is liable -

- 339. in the case of a contravention of section 73(1), to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or

340. in any other case, to a fine not exceeding R2 000-00 or to imprisonment for a period not exceeding six months, or to both a fine and imprisonment.

(72) Magistrate's Court jurisdiction to impose penalties

Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in *this Act*.

(73) Repealed

Section 76 was repealed by section 19 of The Competition Second Amendment Act, 2000

(74) Proof of facts

(ccxxxix) In any criminal proceedings in terms of *this Act* -

341. if it is alleged that a person at a *firm* is or was an employee, that person must be presumed to be an employee at that *firm*, unless the contrary is proved;

342. if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item must be presumed to have made the statement, entry, record or information, unless the contrary is proved; and

343. an order certified by the Chairperson of the Competition Tribunal or Judge President of the Competition Appeal Court, is conclusive proof of the contents of the order of the Competition Tribunal or the Competition Appeal Court, as the case may be.

(ccxli) A statement, entry or record, or information, in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it.

CHAPTER 8

GENERAL PROVISIONS

(75) Regulations

The Minister, by notice in the Gazette, may make regulations that are required to give effect to the purposes of this Act.

(76) Guidelines

(ccxli) The Competition Commission may prepare guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of *this Act*.

(ccxlii) A guideline prepared in terms of subsection (1) -

344. must be published in the *Gazette*; but

345. is not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of *this Act*.

(77) Official seal

The President, by proclamation in the *Gazette*, may prescribe an official seal for each of the Competition Commission, Competition Tribunal and the Competition Appeal Court.

(78) Act binds State

This Act binds the State.

(79) Relationships with other agencies

(ccxliii) A *regulatory authority* which, in terms of any *public regulation*, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector—

346. must negotiate agreements with the Competition Commission, as anticipated in section 21(1)(h); and

347. in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement.

(ccxliv) Subsection (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission.

(ccxlv) In addition to the matters contemplated in section 21(1)(h), an agreement in terms of subsection (1) must -

348. identify and establish procedures for the management of areas of concurrent jurisdiction;

349. promote co-operation between the *regulatory authority* and the Competition Commission;

350. provide for the exchange of information and the protection of *confidential information*; and

351. be published in the *Gazette*.

Subsections (1), (2) and (3) were added by section 20 of The Competition Second Amendment Act, 2000

(ccxlvi) The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of *this Act*, to exchange information with a similar foreign agency.

(80) Transitional arrangements and repeal of laws

(ccxlvii) Subject to Schedule 3, the laws specified in Schedule 2, and all proclamations, *regulations* or notices promulgated or published in terms of those laws, are repealed.

(ccxlviii) The repeal of those laws specified in Schedule 2 does not affect any transitional arrangements made in Schedule 3.

(81) Short Title and commencement of Act

(ccxlix) *This Act* is called the Competition Act and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

(ccl) The President may set different dates for different provisions of *this Act* to come into operation.

(ccli) Unless the context otherwise indicates, a reference in a section of *this Act* to a time when *this Act* comes into operation must be construed as a reference to the time when that section comes into operation.

SCHEDULE 1

EXEMPTION OF PROFESSIONAL RULES

PART A

Part A was amended to its present form by section 21 of The Competition Second Amendment Act, 2000

- (1) A professional association whose rules contain a restriction that has the effect of substantially preventing or lessening competition in a market may apply in the *prescribed* manner to the Competition Commission for an exemption in terms of item 2.
- (2) The Competition Commission may exempt all or part of the rules of a professional association from the provisions of Part A of Chapter 2 of *this Act* for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of substantially preventing or lessening competition in a market is reasonably required to maintain—
 352. professional standards; or
 353. the ordinary function of the profession.
- (3) Upon receiving an application in terms of item 1, the Competition Commission must—
 - (a) publish a notice of the application in the *Gazette*;
 - (b) allow interested parties 20 business days from the date of that notice to make representations concerning the application; and
 - (c) consult the responsible Minister, or member of the Executive Council concerning the application.
- (ccli) After considering the application and any submissions or other information received in relation to the application, and consulting with the responsible Minister or member of the Executive Council, the Commission must—
 - (a) either grant an exemption or reject the application by issuing a notice in the *prescribed* form to the applicant;
 - (b) give written reasons for its decision; and
 - (c) publish a notice of that decision in the *Gazette*.
- (cclii) The Competition Commission, in the *prescribed* manner, may revoke an exemption granted under item 4 on good cause shown, at any time after it has—
 - (a) given notice in the *Gazette* of its intention to revoke the exemption;
 - (b) allowed interested parties 20 business days from the date of that notice to make representations concerning the exemption; and
 - (c) consulted the responsible Minister, or member of the Executive Council.
- (ccliii) A professional rule is exempt, or its exemption revoked, only as of the date on which notice of the exemption or revocation, as the case may be, is

published in the *Gazette*.

(cclv) The Competition Commission must maintain for public inspection a record of all professional rules that have received exemption, or for which exemption has been revoked.

(cclvi) A professional association, or any other person with a substantial interest affected by a decision of the Competition Commission in terms of item 4 may appeal against that decision to the Competition Tribunal in the *prescribed* manner and form.

(cclvii) In this Schedule—

'professional association' means an association referred to in Part B of this Schedule;

'professional rules' means rules regulating a professional association that are binding on its members;

'rules' includes public regulations, codes of practice and statements of principle.

PART B

For the purpose of *this Act*, a professional association is –

354. for each of the following professions, a governing body of that profession registered in terms of an Act mentioned below the name of that profession; or

355. any other association, if the Competition Commission is satisfied that it represents the interests of members of a profession referred to in paragraph (a):

Accountants and Auditors

Public Accountants and Auditors Act, 1991 (Act No. 80 of 1991).

Architects

Architects Act, 1970 (Act No. 35 of 1970).

Engineering

Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990)

Estate Agents

Estate Agents Act, 1976 (Act No. 112 of 1976)

Attorneys and Advocates

Attorneys Act, 1979 (Act No. 53 of 1979)

Admission of Advocates Act, 1964 (Act No. 74 of 1964)

Natural sciences

Natural Scientific Professions Act, 1993 (Act No. 106 of 1993)

Quantity Surveyors

Quantity Surveyors Act, 1970 (Act No. 36 of 1970)

Surveyors

Professional and Technical Surveyors Act, 1984 (Act No. 40 of 1984)

Town and Regional Planners

Town and Regional Planners Act, 1984 (Act No. 19 of 1984)

Valuers

Valuers Act, 1982 (Act No. 23 of 1982)

Medical

Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974)

Nursing Act, 1978 (Act No. 50 of 1978)

Dental Technicians Act, 1979 (Act No. 19 of 1979)

Pharmacy Act, 1974 (Act No. 53 of 1974)

Veterinary and Para-veterinary Professional Act, 1982 (Act No. 19 of 1982)

Chiropractors Homeopaths and Allied Health Service Professions Act, 1982 (Act No. 63 of 1982)

Miscellaneous

Any other *professional association* to whom the provisions of this Schedule have been declared applicable by the *Minister* by notice in the *Gazette*.

SCHEDULE 2

REPEAL OF LAWS (SECTION 83)

NO AND YEAR OF LAW	SHORT TITLE	EXTENT OF REPEAL
Act No. 96 of 1979	Maintenance and Promotion of Competition Act, 1979	The whole
Act No. 58 of 1980	Maintenance and Promotion of Competition Amendment Act, 1980	The whole
Act No. 62 of 1983	Maintenance and Promotion of Competition Amendment Act, 1983	The whole
Act No. 12 of 1985	Maintenance and Promotion of Competition Amendment Act, 1985	The whole
Act No. 5 of 1986	Maintenance and Promotion of Competition Amendment Act, 1986	The whole
Act No. 96 of 1987	Maintenance and Promotion of Competition Amendment Act, 1987	The whole
Act No. 88 of 1990	Maintenance and Promotion of Competition Amendment Act, 1990	The whole

SCHEDULE 3

Transitional Arrangements

Schedule 3 was amended to its present form by section 1 of The Competition Amendment Act, 1999

- (1) A ruling issued in terms of section 6(2)(a) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), or notice issued in terms of section 14(1)(c) of that Act, in relation to an “acquisition” as defined in that Act, must be regarded for purposes of *this Act*, depending on the context, to be either -
 - (a) a conditional approval of a merger as if it had been granted after *this Act* came into operation, by the Competition Commission in terms of section 14(1)(b)(ii) or by the Competition Tribunal in terms of section 15(2)(b); or
 - (b) a prohibition of a merger as if it had been prohibited after *this Act* came into operation, by the Competition Commission in terms of section 14(1)(b)(iii) or by the Competition Tribunal in terms of section 15(2)(c).
- (2) An arrangement entered into in terms of section 11(1) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as having been *confirmed* as a consent order in terms of section 63 of *this Act* and is valid for a period of 12 months from the date on which *this Act* comes into operation.
- (3) An exemption granted in terms of Section 14(5) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as having been granted in terms of section 10 of *this Act* and is valid for a period of 12 months from the date on which *this Act* comes into operation.
- (3A) A notice issued by the *Minister* in terms of section 14(1)(c) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), in relation to a "restrictive practice" or a "monopoly situation" as defined in that Act, must be regarded as an order in terms of section 60(1)(a) of *this Act* and is valid for a period of 12 months from the date on which *this Act* comes into operation.
- (4) Any reference in any other statute to –
 - (a) the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to *this Act*;
 - (b) a “restrictive practice” or “monopoly situation” as defined in terms of section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to a “*prohibited practice*” in terms of *this Act*;
356. an “acquisition” as defined in terms of section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to a “merger” in terms of *this Act*;
- (d) The “Competition Board” as established in terms of section 3 of the

Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to the Competition Commission.

- (e) The Chairperson of the Competition Board contemplated in section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to either the Competition Commissioner contemplated in section 22 of *this Act*, or the chairperson of the Competition Tribunal contemplated in section 26 of *this Act*, as determined by the *Minister*.

(4A) Any transaction that takes place between the date on which this Act is published and the date on which this Act comes into operation, and which would constitute an intermediate or large merger if it had taken place after this Act came into operation, is regarded for a period of 12 months after the date on which this Act comes into operation as a merger in contravention of Chapter 3 and is subject to the provisions of section 62 (1), unless -

- (a) the transaction has been approved by the Competition Board in terms of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979); or
- (b) the transaction has been notified in terms of item 4B.

(4B) Any party to a transaction contemplated in item 4A may, within three months after the date on which this Act comes into operation, notify the Competition Commission of the transaction in terms of section 13 as if it were an intermediate or large merger.

(4C) The provisions of Chapter 3, with the changes required by the context, apply to a transaction that is notified under item 4B.

(4D) After this Act comes into operation, any appeal pending before a special court contemplated in section 15 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as an appeal to the Competition Appeal Court contemplated in section 36 of this Act in the manner prescribed.

(4E) Subject to items 1 to 3A, the Competition Appeal Court may, after hearing any appeal contemplated in item 4D, make any decision that the special court could have made in terms of section 15 (10) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), and the provisions of this Act otherwise apply to that decision, as if it were a decision of the Competition Appeal Court in terms of this Act.

(4F) (1) Notwithstanding sections 6 and 11, the first determinations of thresholds made by the Minister in terms of those sections must be made before the date on which this Act comes into operation.

(2) Notwithstanding sections 6 (2) and 11 (2), the first determinations contemplated in subsection (1) take effect on the date on which this Act comes into operation.

(5) When this Act comes into operation an officer or employee appointed in terms of the Public Service Act, 1994, to serve the Competition Board established by the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), continues to be an officer or employee under the Public Service Act, subject to the direction of the Department of Trade and Industry.

(6) If an officer or an employee referred to in item 5 is appointed as an officer or employee of the Competition Commission, the accumulated value of that persons contributions to any pension fund, together with the accumulated value of the contributions made to that fund by the person's employer, may be transferred to a pension fund established for the benefit of the staff of the Commission.

APPENDIX

(eXPLANATORY NOTE: Extracts from the transitional provisions of the Competition Amendment Act No. 15 of 2000 and the Competition Second Amendment Act No. 39 of 2000 are repeated below for easy reference.)

Competition Amendment Act , No. 15 of 2000

Competition Appeal Court

(cclviii) The Competition Amendment Act, 2000 provides:

" Anyone serving as Judge President or as a judge of the Competition Appeal Court immediately before this Act comes into operation continues to serve in that office after this Act comes into operation, subject to section 39 of the principal Act."

(cclix) Competition Second Amendment Act, No. 39 of 2000

Transitional Provisions

(1) In this section—

357. "**principal Act**" means the Competition Act, 1998 (Act No. 89 of 1998), as it existed immediately before the commencement of *this Act*; and

358. "**principal Act as amended**" means the principal Act as amended by *this Act*.

(2) Despite section 6(3) and (4), and section 11(3) and (4), of the principal Act as amended, the Minister of Trade and Industry may at the commencement of *this Act* publish in the *Gazette* a notice determining a new threshold and method of calculation under each of those sections, respectively.

(3) A determination in terms of subsection (2) takes effect on the date of commencement of *this Act*, and if it is a determination under—

(a) section 6 of the principal Act as amended, applies to any proceedings that were pending before the Competition Commission, Competition Tribunal or Competition Appeal Court immediately before the date of commencement of *this Act*; or

(b) section 11 of the principal Act as amended, applies to any proceedings that were pending before the Competition Commission immediately before the date of commencement of *this Act*.

(cclx) A recommendation made by the Competition Commission in terms of section 14(3) of the principal Act must be regarded as having been a decision made under section 14 (1)(b) of the principal Act as amended, if—

(a) as a result of subsection (3)(b), the merger is classified as an intermediate merger; and

(b) the Competition Tribunal had not made an order in respect of the merger at the date of commencement of *this Act*.

(cclxi) Any proceedings that were pending before the Competition Commission, Competition Tribunal or Competition Appeal Court before the date of commencement of *this Act* must be preceded with in terms of the principal Act as amended, except to the extent that a *regulation* under section 21(4) or

27(2) of the principal Act as amended, or a rule of the Competition Appeal Court, provides otherwise.

(cclxii) For greater clarity, section 18(2) and (3) of the principal Act as amended applies to a merger that was pending before the Competition Commission or the Competition Tribunal immediately before the date of commencement of *this Act*.

SWITZERLAND

COMMENTARY BY THE GOVERNMENT OF SWITZERLAND ON THE COMPETITION LEGISLATION OF SWITZERLAND

A. Description of the reasons for the introduction of the legislation

The reasons for the latest revision of Swiss competition law (Federal Act on Cartels and other Restraints of Competition of 1995, Cartel Act) in 2003 were twofold:

First of all, lack of competition had been identified as one of the main reasons for the high prices of many products and services on the Swiss market.

Secondly, international developments had made it clear that despite the fact that reforms had been introduced to improve the competitive environment since the early 1990s, the scope and pace of reform had been too timid to tackle the competitive problems encountered. Although the possibility existed to impose fines on firms that infringed the law, this instrument could only be used if the offence was repeated by the same parties. Other than having a shaming effect, a first breach of competition law in Switzerland was effectively 'free', unlike in most other OECD countries. This legal barrier, which for constitutional reasons turned out to be particularly frustrating in the well-known global "vitamin case", also helped to trigger further reform efforts in Switzerland. While the cartel members were sanctioned with record fines in the USA and in the EU, Switzerland's Competition Commission (Comco) was only able to issue a decision confirming that the vitamin cartel had infringed competition law, despite the fact that the leading cartel member was a Swiss firm established in Switzerland-. As a result, the Federal Council initiated a partial revision of the 1995 Cartel Act in early 2000.

One of the main objectives of the revision therefore concerned the introduction of direct sanctions in the form of fines ranging to up to 10% of turnover generated in Switzerland in the previous three business years for the most damaging types of anti-competitive behaviour, i.e. hard core cartels and abuse of a dominant position. This was accompanied by several other measures all intended to improve the preventive effect of the law and to bring Swiss competition law more in line with the EU framework. In addition to direct sanctions, the main reforms also included the introduction of:

- Leniency, authorising reduction or exemption from fines in exchange for co-operation with a cartel investigation;
- Presumption of illegality for vertical agreements on prices and territories;
- New investigation procedures, in particular dawn raids;
- Clearer application of the law to both public and private enterprises.

The revised competition law was adopted in 2003 with full application commencing in April 2005 following a transition period. Two existing ordinances on merger controls and emoluments were also amended following revision of the Act.

Other pieces of legislation completing Switzerland's competition policy are the 1986 Unfair Competition Act, the 1995 Internal Market Act instituting the principle of mutual recognition⁴⁶ for goods and services in Switzerland, and the 1985 Price Supervision Act. The Internal Market Act has recently been revised to make it more effective against restraints of competition that still remain on Switzerland's domestic market.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation

Foundations of competition law

Swiss competition law is derived from Article 96 of the Federal Constitution which provides for freedom of trade and commerce and empowers the legislature to remedy any economically or socially harmful effects of cartels or similar groupings and hence to combat private restraints of competition.

There have been four phases of competition legislation: first, the period before the first revision of the Cartel Act in 1985; second, the phase between the revision of 1985 and the 1995 Act on Cartels and Other Restraints of Competition (1995 Cartel Act); third, the implementation of the 1995 Cartel Act, from 1 July 1996 to 31 March 2004; and finally, the phase marked by the revision of the law in 2003 and the entry into force of the new law on 1 April 2004 (2003 Cartel Act).

The period before 1985

Performing its constitutional duty, the federal legislature passed its first Cartel Act in 1962. This period was marked by a philosophy of freedom of contract under which companies could not be prevented from concluding agreements not to compete. A firm not participating in the cartel should at least have the possibility of competing with the cartel members. The law therefore prohibited boycotts. The Cartel Commission used a rule of balancing positive and negative effects of the conduct at issue. The Cartel Commission had no decision-making powers however, instead proposing measures by which the Federal Department of Economic Affairs to remedy challenged practices.

The phase after 1985 and before the 1995 Cartel Act

The revised Cartel Act was passed in 1985. The 1985 law, like the first, principally covered cartels and dealt only to a lesser extent with abuses by powerful firms on the market. The new law introduced a distinction between the suppression of effective competition, which it prohibited, and obstacles to competition, which it assessed along

⁴⁶ In fact, this principle is similar to the "Cassis de Dijon" principle which has been widely accepted in the European Union since the 1970s. When the German company Rewe wanted to start selling the French liquor, Cassis de Dijon, in their stores, German authorities objected. The potion did not have the prescribed 25 per cent alcohol, which was mandatory for fruit liquor in Germany. Rewe went on to sue the German authorities successfully before the European Court of Justice, arguing that this boiled down to an import prohibition. The European Court recognised Rewe's claim, so that since 1979 every EU-country is obliged to give free access to products from another EU country. The "Cassis de Dijon" principle applies to all sectors that have not yet been harmonised by EU law. Among the Swiss cantons, similar "inter-cantonal" import restrictions persisted. As a remedy, the "Cassis de Dijon" principle was introduced in Switzerland's internal market.

the lines that are now included in Art. 5.2 of the Cartel Act.⁴⁷ Towards the end of the 1980s, this revision led to the decision by the minister of economic affairs to prohibit cartel agreements in the banking sector (notably with regard to brokerage). However, the Cartel Commission's lack of powers, coupled with the shortcomings of the investigation procedures instituted by the law, made it all the more difficult to enforce competition law effectively in Switzerland. Consequently, in 1992 the Federal Department of Economic Affairs asked a working group to draft a new competition law, resulting in a draft law on cartels and other restraints of competition which was passed on 6 October 1995.

Implementation of the 1995 Cartel Act

The Cartel Act was passed at the same time as the Internal Market Act and the Technical Barriers to Trade Act as part of a programme to revitalise the Swiss economy launched in 1992 after voters and the cantons rejected membership of the European Economic Area.

The Ordinance of 17 June 1996 on the control of mergers of enterprises was adopted at the same time as the Cartel Act, supplementing the Act's provisions regarding business concentrations. An ordinance on emoluments within the framework of the Cartel Act was adopted in February 1998.

When the Act was revised in 1995, the substantive provisions for assessing restraints of competition drew extensively from EU competition law. Although the Cartel Act is based on the principle of regulating abuse and EU competition law is based on the principle of prohibition, the revision brought the two bodies of law significantly closer together. Swiss competition law thus became closer to that of many other OECD countries. In particular, the law clarified the distinction between the 'suppression of effective competition' and 'obstacles to competition' by explicitly providing for a presumption (which had been implicit in the 1985 law) that agreements on price, quantities and geographic division of markets could not, as matter of principle, be justified by claims of economic efficiency.

One significant feature of the 1995 Cartel Act was to give Comco the power to issue decisions prohibiting unlawful restraints of competition. Its decisions could be challenged before an appeal tribunal, before going to a federal court. The merger control provisions of the 1995 Cartel Act also gave Comco the power to issue binding decisions.

C. Description of the practices, acts or behaviour subject to control, indicating for each;

- a) The type of control -for example- outright prohibition, prohibition in principle or examination on a case-by-case basis

⁴⁷ "An agreement is deemed to be justified on grounds of economic efficiency:

- a) when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- b) when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition."

In contrast to competition law in many other countries, Swiss cartel law is based on the prevention of abuse, not prohibition. One effect of this stance was to preclude certain stricter rules from the Cartel Act (direct sanctions were introduced only for certain types of anticompetitive behaviour). Another consequence relates to the burden of proof which, in a system based on preventing abuse, lies entirely with the competition authorities.

Unlawful agreements (Art 5 Cartel Act)⁴⁸

The term "agreements affecting competition" means binding or non-binding agreements and concerted practices between enterprises operating at the same or at different levels of the market, the purpose or effect of which is to restrain competition.

Agreements that significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful.

An agreement is deemed to be justified on grounds of economic efficiency:

- a) when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- a) when such agreement will not in any way allow the enterprises concerned to eliminate effective competition.

The conditions under which agreements affecting competition are as a general rule deemed to be justified on grounds of economic efficiency may be determined by way of ordinances or communications. The following in particular will be taken into consideration in this respect:

- a) co-operation agreements relating to research and development;
- b) specialisation and rationalisation agreements, including agreements concerning the use of schemes for calculating costs;
- c) agreements granting exclusive rights to deal in certain goods or services;
- d) agreements granting exclusive licences for intellectual property rights;
- e) agreements with the purpose of improving the competitiveness of small and medium sized enterprises, in so far as they have only a limited effect on the market.

Under the Cartel Act there is a presumption that certain horizontal agreements and, since the 2003 reform, certain vertical agreements are unlawful. For these types of horizontal and vertical agreement, the presumption brings Swiss law closer to laws based on the principle of prohibition. With regard to horizontal agreements, Article 5.3 of the Cartel Act states that agreements among actual or potential competitors are presumed to

⁴⁸ For the complete articles (Cartel Act art 5, 7, 9) see www.weko.admin.ch/publikationen/00213/index.html?lang=en

lead to the elimination of effective competition when they directly or indirectly fix prices or restrict the quantities of goods or services to be produced, bought or supplied or allocate markets geographically or according to trading partners.

The 2003 reform introduced a new presumption that certain types of vertical agreement are unlawful. Parliament expressly wanted the new measure to prevent vertical restrictions that cause high prices in Switzerland by compartmentalising the national market. Article 5.4 of the Cartel Act states that the elimination of effective competition is also presumed in the case of agreements between enterprises at different levels in the market regarding fixed or minimum prices as well as in the case of agreements in distribution contracts regarding the allocation of territories insofar as sales by other distributors into these territories are not permitted. If the presumption is upheld, the agreement is unlawful. However, even if the presumption of the elimination of competition is refuted, the agreement can still be deemed unlawful if it constitutes a significant restraint of competition and cannot be justified on grounds of economic efficiency. The conditions for assessing vertical agreements are laid down in two Comco communications.⁴⁹

Unlawful practices of enterprises having a dominant position (Art 7 Cartel Act)

Practices on the part of enterprises with a dominant market position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners.

The following in particular may constitute unlawful practices:

- a) refusal to deal (e.g. refusal to supply or buy goods).
- b) discrimination between trading partners with regard to prices or other conditions of trade.
- c) the imposition of unfair prices or other unfair conditions of trade.
- d) the under-cutting of prices or other conditions directed against a specific competitor.
- e) restrictions on production, outlets or technical development.
- f) the conclusion of contracts only on condition that partners agree to supply additional goods or services.

Notification of concentrations (art 9 Cartel Act)

Concentrations of enterprises have to be notified to the Comco before they are carried out. The following thresholds in the last accounting period prior to the concentration apply:

1. the enterprises concerned reported joint turnover of at least CHF 2 billion or turnover in Switzerland of at least CHF 500 million, and

⁴⁹ These and all the other communications issued by Comco are published at:
<http://www.weko.admin.ch/publikationen/00213/index.html?lang=en>

2. at least two of the enterprises concerned reported individual turnover in Switzerland of at least CHF 100 million.

Concentrations of enterprises subject to notification shall be investigated by the Competition Commission if a preliminary review (Article 32, para 1) reveals signs that they create or strengthen a dominant position.

The Competition Commission may prohibit the concentration or authorise it subject to conditions or obligations if it transpires from the investigation that the concentration:

1. creates or strengthens a dominant position liable to eliminate effective competition, and
2. does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position.

In all three cases (agreements affecting competition, practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority as well as prohibited concentrations of enterprises) an exceptional authorisation (Art. 8 and 11 Cartel Act) on the grounds of compelling public interests can be granted by the political instances (i.e. the Swiss government). The interests taken into account concern issues other than competition and the respective authorisation is granted only in highly exceptional cases. So far, such an authorisation has been requested only once and was rejected.

b) The extent to which the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, act or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example controls concerning misleading advertising.

Articles 5, 7 and 9 of the Cartel Act cover the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules.

The Cartel Act does not expressly touch upon consumer issues as such, the idea being that unhindered competition benefits consumers as well. More specifically, consumer protection is covered - among others - by the Unfair Competition Act⁵⁰ which protects fair competition and by the same token good faith in business dealings and fair business practices. However, it is not limited to consumer issues but protects all market players and their organisations from unfair business practices: competitors, clients at all levels of trade, in particular consumers, trade and business associations and consumer organisations. The Unfair Competition Act contains rules on clear, comparable and clearly stated prices, whether in a display window, shop or advertisement and promotes fair competition in general. The Unfair Competition Act therefore contains the basic rules for the correct publishing of prices and for the prevention of misleading price

⁵⁰ See <http://www.admin.ch/ch/f/rs/241/index.html>

comparisons. Detailed provisions are laid down in the Ordinance on the Notification of Prices.⁵¹

D. Description of the scope of application of the legislation, indicating:

a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;

Swiss competition law does not contain lists of sectoral exclusions. The only general exclusion mentioned in the Cartel Act concerns the effects on competition that result exclusively from laws governing intellectual property (article 3 para. 2 Cartel Act). According to Art. 3, para. 1 Cartel Act, the Act is not applicable to actions of enterprises in accordance with legal provisions that do not allow competition in a market for certain goods or services. This particularly concerns provisions which establish an official market or price system or provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights.

In these cases, the competition authorities have to clarify whether or not these provisions leave room for competition. The law is based on the assumption that an official market organisation only exists if it was actually the legislator's intention to exclude competition in a specific area. As long as room is left for competitive behaviour, competition law applies.

The following list contains sectors which are more or less affected by exclusions of competition law:

- Agriculture
- Pharmaceuticals
- Railway
- Telecommunications
- Postal services
- Banking and insurance
- Radio and TV broadcasting
- Health care
- Electricity
- Gas
- Electric and sanitary installations

The following case illustrates how competition authorities have interpreted the above mentioned article with regard to the electricity sector which has not yet been liberalised:

Electric installations - Watt-Migros/EEF

In 2000, Comco opened an investigation to clarify whether Entreprises Électriques

⁵¹ See http://www.admin.ch/ch/f/rs/c942_211.html

Fribourgeoises (EEF) abuses its dominant position while refusing the transmission of electricity by a third party (Watt) on the network owned by EEF.

EEF alleged that the Cartel Act is not applicable because EEF was entrusted by the canton of Fribourg with a legal mandate to supply power in this canton, which amounts to a public interest task. Furthermore, the electricity tariffs of EEF are subject to the approval of the said canton. They also argued that the transmission of electricity from third parties could jeopardise this task and endanger security of supply.

In a decision dated 17 June 2003, the Federal Supreme Court ruled that the monopoly on the operation and construction of the power grid does not imply a monopoly on the use of the network. Electricity prices are not regulated. The transmission of power from competitors through the power grid is neither detrimental to security of supply nor does it imply that EEF is per se an unprofitable business. If, under particular circumstances, the security of the energy supply were to be at risk, the government could intervene by excluding the application of competition law for political reasons (exceptional authorization according to art. 8 Cartel Act⁵²). There are therefore no legal provisions preventing the application of the Cartel Act. Consequently, the Federal Supreme Court stated that EEF was abusing its dominant position and ordered it to comply with the provisions contained in Art. 7 Cartel Act.

a) Whether it applies to all practices, acts or behaviour having effects on the country in question, irrespective of where they occur;

The Cartel Act applies to all concerted practices and agreements which have a direct, substantial and reasonably foreseeable effect within Swiss territory (the so-called “effects doctrine”). Therefore, agreements concluded abroad, or conduct that takes place outside Switzerland, but which has such effects in Switzerland, may fall under Swiss jurisdiction.

Cartel Act, Art 2 Para 2:

“The present law applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country.”

a) *Whether it is dependent of the existence of an agreement, or on such agreement being put into effect.*

In order to be applied properly, the ‘effects doctrine’ depends on the existence of co-operation agreements. The necessary enforcement tools (e.g. dawn raids, imposition of sanctions) cannot be used against firms situated in the territory of foreign countries as this would be a violation of international public law. So far, Switzerland has concluded only

⁵² Article 8: Exceptional authorisation on the grounds of compelling public interests

"Agreements affecting competition and practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests."

some agreements containing co-operation rules in the field of competition. These are briefly described below (F). In most cases, these agreements form part of existing free trade agreements and are therefore seen as complementary to trade liberalisation. A pure co-operation agreement between competition authorities does not yet exist.

E. Description of the enforcement machinery (administrative and / or judicial), indicating any notification and registration agreements, and principal powers of body (ies)

Competition policy institutions

The competition authorities consist of the Competition Commission (Comco) and its Secretariat. Comco is the decision-making body and the Secretariat is the investigative arm. Under Article 18 of the Cartel Act, Comco takes all decisions that are not expressly reserved for another authority. Comco has three chambers with competencies for services, manufactured goods and infrastructure respectively.

Comco also has powers to ensure that the Confederation, the cantons, the communes and other bodies performing public duties comply with the Internal Market Act. It can make recommendations to them concerning planned or existing legislative acts and conduct inquiries and forward the recommendations to the authorities concerned (Article 8 of the Internal Market Act).

The Federal Council institutes Comco and appoints the members of the presiding body (Article 18.1 of the Cartel Act). Comco has between eleven and fifteen members, the majority of whom are experts, that is, not representatives of a particular interest group (Article 18.2). Membership of Comco, including of the presiding body, is a non-occupational public service activity. Comco currently has fifteen members, seven of whom represent interest groups (SMEs, trade and industry, trade unions, retailers, small farmers and consumers).

The Comco Secretariat has a staff of about 60 whose conditions of service are governed by the law applicable to federal government employees. The Federal Council appoints the Secretariat's directors and the Commission appoints the remainder of the staff (Article 24). The Secretariat has three departments corresponding to Comco's three chambers.

Other authorities dealing with competition matters

Other authorities may have cause to intervene in competition matters. They include cantonal civil courts, appeal bodies such as the Federal Administrative Court, the Federal Supreme Court, the Federal Council, and bodies whose powers are determined by laws other than the Cartel Act and that have an influence on competition matters, such as the Office of the Price Supervisor, the Federal Communication Commission, and the Postal Services Regulatory Authority.

The Price Supervisor's task is to prevent increases in or the maintenance of abusive prices set by cartels and enterprises with market power. The Office of the Price Supervisor focuses mainly on prices administered by the government and set by powerful enterprises. Measures to eliminate or prevent abuse are taken with the consent of the interested parties, but firms or associations that fail to comply with recommendations

(decreed negotiated prices) may be fined up to CHF 100,000. When Comco and the Office of the Price Supervisor carry out parallel proceedings, proceedings under the Cartel Act take precedence over those under the Price Supervision Act except in the event of a decision to the contrary taken by common consent by the Competition Commission and the Price Supervisor (Article 3.3 of the Cartel Act). The Federal Council's appointment of the Price Supervisor depends to a considerable extent on political considerations. As a rule, the Price Supervisor is a member of parliament. He attends Comco meetings in an advisory capacity. The two authorities' powers rarely overlap as market regimes or government-set prices and special rights granted to enterprises performing public tasks are often exempt from direct application of the Cartel Act.

The Federal Office of Communications (Ofcom) deals with matters relating to telecommunications and broadcasting (radio and television). In these areas, Ofcom is both the regulator and the national authority. As an office of DETEC, the Federal Department of the Environment, Transport, Energy and Communications, Ofcom prepares the decisions of the Swiss government (Federal Council), DETEC and the Federal Communications Commission (ComCom). ComCom was created in September 1997 as the licensing authority for the liberalised telecommunications market. Under the Telecommunications Act of 30 April 1997, it has the following powers: a) to issue licences to telecommunications service operators (Article 4), universal service licences (Article 18) and licences to use radio communications frequencies (Article 22); b) to fix the conditions for interconnection at first instance when service providers are unable to reach agreement (Article 11); c) to approve the national frequency allocation plan (Article 25) and national numbering plans and to set terms and conditions for number portability and the free choice of service provider (Article 28); d) to decide measures in the event of an infringement of applicable legislation and, where appropriate, to withdraw the licence (Article 58). ComCom is an independent authority instituted by the Federal Council. It has seven members who must be independent experts. It is not subject to any guidelines from the Federal Council or DETEC, the Federal Department responsible for communication matters. It has its own secretariat. ComCom co-operates with Comco on matters relating to interconnection. Comco has been given an advisory role in this sphere. Only enterprises in a dominant position can be required to provide interconnection. Comco has to rule on the question of dominant position on ComCom's behalf (Article 11.3 of the Telecommunications Act).

As the Swiss postal service, Swiss Post, is owned by the Confederation, the Confederation found itself with a dual role when opening up the postal market to competition: namely that of owner and market regulator. The Federal Council therefore created PostReg, a postal regulatory authority. Its main tasks are defined under Article 41 of the Postal Ordinance, namely to monitor the quality of universal service provision and access to universal service, to review compliance with accounting principles and the prohibition on cross-subsidy, and to deal with complaints to the regulatory authority relating to universal service.

Competition law enforcement

Procedures

A distinction needs to be made between procedures relating to restraints of competition (agreements affecting competition and abuse of dominant position) and merger control procedures.

Restraints of competition

Restraint of competition procedures are carried out by means of preliminary reviews and investigations. The competition authorities are free to decide whether or not to initiate a procedure. The decision to initiate a procedure cannot be appealed. The Comco Secretariat is not obliged to give a complainant its reasons for not initiating a procedure. However, under Article 39 of the Cartel Act and Article 71 of the Administrative Procedure Act, complainants may request the supervisory authority to examine the grounds for the Secretariat's decision. The origin of the complainant (Swiss or foreign national) plays no role in the decision of whether or not to open a procedure. The Secretariat may conduct preliminary reviews on its own initiative, at the request of enterprises concerned or on the basis of information received from third parties (Article 26 of the Cartel Act). If there are signs of an unlawful restraint of competition (revealed by a preliminary investigation or from other sources), the Secretariat opens an investigation with the consent of a member of Comco's presiding body. It opens an investigation in all events if asked to do so by the Commission or by the Department (Article 27.1). Comco determines the order in which investigations that have been opened should be conducted (Article 27.2).

The Secretariat gives notice of the opening of an investigation in an official publication (Article 28.1). Should the Secretariat consider that a restraint of competition is unlawful, it may propose an amicable settlement to the enterprises involved concerning ways of removing the restraint (Article 29.1). However, such a settlement must be in writing and approved by Comco (Article 29.2).

On a proposal from the Secretariat, Comco takes its decision on measures to be taken (for example, prohibition of the behaviour in question) or on approval of the amicable settlement (Article 30.1). The participants in the investigation may provide their opinions on the Secretariat's proposal in writing. Comco may also conduct hearings and instruct the Secretariat to take additional steps for the requirements of the investigation (Article 30.2). Comco takes its decision on the basis of all these elements, either in plenary session or in a Chamber. Managers and staff members with an interest in the cases concerned attend Comco's decision-taking sessions.

Decisions on agreements affecting competition are mainly based on the following criteria: the elimination of effective competition, which is deemed to exist when there is no longer any internal or external competition (meaning internal or external to the agreement); material effects on competition, which are assessed according to qualitative criteria (the aims of the agreement) and quantitative criteria based on analysis of the current and potential competitive situation and the power of the partners involved.

Decisions concerning the abuse of dominant position are assessed mainly on the basis of the current and potential competitive situation and the power of the partners involved.

Merger control procedures

For concentrations of enterprises, transactions subject to notification are investigated (in detail) by Comco if a preliminary review reveals signs that they create or strengthen a dominant position (Article 10.1). The procedure is thus conducted in two phases: a preliminary review lasting no more than one month, and a detailed investigation lasting no more than four months.

During the review phase, the participating enterprises must refrain from carrying out the concentration for one month following notification unless, at their request, Comco has authorised them to do so for important reasons (Article 32.2). If an investigation is initiated, Comco decides at the outset whether the concentration may be carried out provisionally by way of exception or whether it should remain suspended.

The review and investigation consider the effects of the merger in principle on the markets for the products and on the geographical markets affected by it. Under Article 11.1.c of the merger control ordinance⁵³, a market is deemed to be affected by a merger if two or more of the enterprises involved jointly hold 20 per cent or more of the Swiss market or if one of the enterprises involved holds 30 per cent or more. In these markets the creation or strengthening of a dominant position capable of eliminating effective competition is considered in the light of three criteria: current competition, potential competition and the power of the partners involved.

New direct sanctions

Under the 2003 Cartel Act, the following infringements are liable to direct sanctions: participation in a hard-core cartel (Article 5.3), a category which covers enterprises that enter into agreement with direct competitors on prices or quantities of goods and services or allocate markets geographically; participation in a hard-core vertical cartel (Article 5.4), which covers distribution systems that set fixed or minimum prices and distribution contracts that allocate territories insofar as sales by other distributors are excluded; abuse of dominant position (Article 7).

Sanctions are administrative by nature and take the form of fines. Under Article 49.1, an enterprise that participates in an unlawful agreement within the meaning of Article 5.3 (horizontal hard-core cartel) or 5.4 (vertical hard-core cartel) or that behaves unlawfully within the meaning of Article 7 (abuse of dominant position) is required to pay an amount equal to up to 10 per cent of its aggregate turnover in Switzerland in the previous three business years. The Sanctions Ordinance of 12 March 2003 sets the criteria to be used for deciding the actual amount of the fine. Under Article 2.1 of the ordinance, the sanction is calculated in several stages.

First, a base amount (starting point) is determined. Depending on the severity and type of the violation, it may be up to 10% of turnover by the relevant enterprise on the relevant markets in Switzerland in the last three business years (Article 3 of the Sanctions Ordinance). Second, the base amount is adjusted according to the length of the violation. If the anticompetitive practice has lasted between one and five years, it is increased by up to 50%. If the anticompetitive practice has lasted longer than five years, it is increased by a supplement of up to 10 per cent per year (Article 4 of the Sanctions Ordinance). Third, any aggravating circumstances are taken into consideration on a case-by-case basis.

If there are aggravating circumstances, the amount calculated in the first two phases is increased further, particularly when an enterprise repeatedly breaches the Cartel Act, has achieved particularly high profits as a result, refuses to co-operate with the authorities or otherwise attempts to obstruct the investigation (Article 5.1 of the Sanctions Ordinance). In the case of horizontal and vertical agreements that eliminate effective competition, the amount calculated in the first two phases is further increased if the

⁵³ See <http://www.weko.admin.ch/publikationen/00213/index.html?lang=en>

enterprise instigated the restriction of competition, played a leading role or has instructed or carried out retaliatory measures against the other participants to the restriction of competition in order to implement the anticompetitive agreement (Article 5.2 of the Sanctions Ordinance).

If there are mitigating circumstances the amount calculated in the first two phases is reduced, in particular if the enterprise terminates the restraint of competition after the first involvement of the Comco Secretariat, and at the latest before the opening of a procedure (Article 6.1 of the Sanctions Ordinance). In the case of horizontal and vertical agreements that eliminate effective competition, the amount is reduced if the enterprise has played an exclusively passive role or has not carried out retaliatory measures that had been agreed in order to impose the agreement (Article 6.2 of the Sanctions Ordinance).

Article 7 of the Sanctions Ordinance states that the sanction may not in any case amount to more than 10 per cent of the enterprise's turnover generated in Switzerland in the previous three business years.

The law contains a mechanism for the exemption from or the reduction of direct sanctions which is mainly invoked when notification is voluntary (exemption from the sanction) and when a leniency programme applies (total or partial remittance of the sanction).

Any enterprise may voluntarily notify a possible restraint of competition due to a specific project, such as a research and development or distribution contract, before it takes effect (Article 49a.3a of the Cartel Act). Notification may enable the enterprise to avoid the risk of a direct sanction. The law contains a provision to prevent enterprises from abusing the system by notifying a blatant restraint of competition and deploying it immediately afterwards for benefit until the competition authority decides whether or not it is unlawful (Article 49a.3a of the Cartel Act).

Leniency programme

Under the leniency programme instituted by the 2003 Cartel Act, Comco may wholly or partially waive a direct sanction if an enterprise that is a member of a cartel assists in the discovery and removal of the cartel concerned (Article 49a.2 of the Cartel Act). The introduction of this whistle-blowing mechanism occasioned much debate in parliament as it was not considered to be consistent with Switzerland's judicial culture. The terms of the leniency programme are defined in Article 8 of the Sanctions Ordinance, which sets out the conditions under which an enterprise may be completely or partially exempted from sanctions.

The system for total exemption from sanctions was inspired by existing practice in other countries. At a time when the competition authority has no knowledge of the cartel, the enterprise must acknowledge its involvement and be the first to deliver information which enables the competition authority to open an investigation. If an investigation has already been opened, the enterprise must provide the necessary evidence to prove a violation. The other conditions are ongoing co-operation with the competition authorities and cessation of the unlawful behaviour at the latest at the time of self-notification, unless the competition authorities give others instructions in order not to compromise the investigation. However, if the enterprise was the instigator or leader of the cartel, a total exemption is not possible. A sanction may be reduced by up to 50 per cent if an

enterprise voluntarily provides information or documents and can be reduced by up to 80 per cent when an enterprise provides information or evidence unasked regarding further competition violations. A partial reduction is also possible when the competition authorities have already opened a procedure on their own initiative or when another member of the cartel has already qualified for a complete exemption.

Appeals

There are two legal channels for appeals against decisions taken by the competition authorities. An appeal may be lodged with the Federal Administrative Court, the first instance of appeal in administrative matters against decisions by Comco or the Secretariat and for the enforcement measures at Article 42.2 relating to proceedings initiated in respect of the treaty between Switzerland the EC regarding air traffic. It is competent in first instance (Article 44 of the Cartel Act).

The Federal Supreme Court is the highest court of appeal against decisions taken by the Federal Administrative Tribunal and cantonal civil courts.

In contrast to procedures relating to unlawful restraints of competition (agreements affecting competition and abuse of dominant position), third-party enterprises that are not participants in a merger are not treated as parties. Consequently, they do not have access to files and have no power of appeal.

When Comco issues a decision finding that a restraint of competition is unlawful, the interested parties may request an exceptional authorisation from the Federal Council on the grounds of compelling public interests (Articles 8, 11 and 31 of the Cartel Act). Such a request may also be submitted if appeals to the above-mentioned appeals authorities have failed. A request to the Federal Council is based on political considerations and is not therefore a legal remedy.⁵⁴

Disclosure policy

Article 48.1 of the Cartel Act states that the competition authorities may publish their decisions.

Article 48.2 states that the courts must provide a complete copy of any judgments they may render pursuant to the Cartel Act to the Secretariat without being asked to do so. The Secretariat collects such judgments and may publish them periodically.

Comco has a very open disclosure policy. Its decisions and those of other authorities with powers in competition matters (Federal Administrative Tribunal, Price Inspector, etc.) are published in a journal of competition law and policy (*Droit et Politique de la Concurrence*) which appears five times a year. Comco's activities and publications (communications, ordinances, etc.) are also published on its website (www.weko.ch).

Under Article 49.2, Comco draws up an annual report for the Federal Council.

Other means of enforcement

⁵⁴ See page 5.

The cantonal civil courts are the specific civil law authorities in competition matters. Since the 1995 Cartel Act took effect, the assessment criteria in civil and administrative law have been based on uniform substantive norms. In a civil action, a person whose access to or exercise of competition is hampered by an unlawful restraint of competition can ask the civil courts to order removal or cessation of the obstacle, award damages and reparations and return any illicitly earned profits (Article 12). If the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case is referred to Comco for an opinion (Article 15). Recourse has rarely been made to the civil courts in Switzerland to date, as firms apparently prefer to go directly to Comco, thus avoiding the cost of proceedings whose outcome is uncertain, although this is now changing.

Finally, the law also provides the possibility of imposing penal sanctions (fines). However, these provisions have so far never been applied in practice.

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices

Existing supplementary legislative acts such as the Internal Market Act, the Price Supervision Act and the Unfair Competition Act have already been described earlier on.⁵⁵

As the Cartel Act applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country (Article 2), this raises the issue of investigations into practices orchestrated by foreign enterprises and enforcement of the corresponding decisions. Switzerland has not concluded any co-operation agreements relating to competition. Co-operation between the Swiss competition authorities and foreign authorities is limited and carried out on a case-by-case basis. A distinction can be made between formal and informal co-operation.

Formal co-operation is based on:

- the free trade agreement of 22 July 1972 between the European Economic Community and Switzerland, Article 27.3 of which states that if an anticompetitive practice is incompatible with the proper functioning of the agreement within the meaning of Article 23.1, the contracting parties should supply the joint committee with all relevant information and provide it with all the assistance it requires in order to examine the case and, where appropriate, to eliminate the practice objected to.
- the bilateral agreement between the European Community and the Swiss Confederation on air transport, especially Articles 8, 9, 10 and 11 thereof. The agreement, which entered into force on 1 June 2002, provides that the entire Community *acquis* relating to air transport should apply to relations between Switzerland and the EU. Competition rules and merger control are applied by the EU institutions pursuant to the EU legislation set out in the annex to the agreement. Comco co-operates with the European Commission in enforcing decisions and taking procedural measures in Switzerland. Switzerland retains

⁵⁵ See pages 1, 6, 9.

exclusive competence with regard to state aid and Comco is the independent authority which monitors compliance with Swiss rules on state aid. Regular contacts take place between the Swiss and EU authorities with a view to ensuring that the air transport agreement is properly implemented;

- most of the free trade agreements concluded between the EFTA states (Iceland, Norway, Switzerland and Liechtenstein) and third countries contain a competition chapter with substantial provisions as well as rules on co-operation;
- two OECD recommendations:
 - the 1995 Recommendation of the Council concerning Co-operation between Member States on Anticompetitive Practices affecting International Trade;
 - the 1998 Recommendation of the Council concerning Effective Action against Hard Core Cartels.

Informal co-operation allows for certain contacts with foreign competition authorities without involving the exchange of confidential information.

Where merger procedures are involved Comco, with the agreement of the enterprises concerned, cooperates with the other competition authorities dealing with the same transaction.

G. Description of the major decisions taken by administrative and/or judicial bodies, and the specific issued covers:

- Unlawful agreements:

Credit cards:

Comco concluded the investigation in the field of credit cards and approved in a formal decision the amicable settlement signed by the institutions involved. The subject matter of the investigation was a charge agreed between the issuers of credit cards (including UBS AG, Credit Swiss, Cornèr Banca SA and Viseca Card Services SA) and the providers of acceptance agreements (the acquirers, currently comprising Telekurs Multipay AG and Aduno SA) for domestic payment transactions (known as the domestic multilateral interchange fee; DMIF) in the two Visa and MasterCard credit card systems. This multilaterally agreed charge is levied as a percentage of the related transaction price (price for the purchase of a product or of a service) and paid by the acquirer to the issuer.

The decision includes in particular the limitation of the DMIF at the effective cost of the network, the abrogation of the “non discrimination clause” (NDR) and the obligation of the acquirers to communicate on request with the tradesmen the value of the DMIF applicable to their sector. The issuers are committed to reducing within three years, the current DMIF to a maximum amount fixed in the decision corresponding to the effective costs of the network. When this period expires, the effective costs of the network will be recalculated and the maximum amount will be adapted. The Comco limited its approval to four years.

www.weko.admin.ch/publikationen/00188/JB-2005-E.pdf?lang=en

Price fixing in the book market:

In 2005, Comco examined for the second time the question of price fixing in the book market in Switzerland. Comco had confirmed the illegality of the single price for books for the first time in September 1999. On appeal, the Federal Supreme Court referred the matter back to Comco for it to examine whether the restriction affecting competition caused by the standard book price could be justified on grounds of economic efficiency. At the time Comco examined whether it led to greater choice, a greater variety of products or to an improvement in sales due to an increase in the number of points of sale and better customer service. It confirmed that the positive effects claimed for the single book price could not be proven and cannot justify the restraint of competition, which must be considered unlawful in this case. The question of knowing whether a system of this type is desirable on the grounds of cultural policy cannot be considered by Comco, by virtue of the Cartels Act.

www.weko.admin.ch/publikationen/00212/rpw2005-2-130705-ohneschriften-2.pdf?lang=fr p.269 et seq.

- Abuse of a dominant position:

Feldschösschen/Coca-Cola:

The contractual agreement between Feldschösschen and Coca-Cola in which Feldschösschen supports the sale of Coca-Cola's products is acceptable from the point of view of competition law because there are other channels of distribution. On the other hand, Comco noted that there were unlawful agreements restraining trade in the relationship between Feldschösschen and the operators of hotels and restaurants.

- Concentrations of enterprises:

Tamedia/BZ-20 Minuten:

For the first time in a procedure regarding enterprise concentrations, Comco took the decision to forbid this merger because it would have created a dominant position capable of removing effective competition from the market with regards to readership and advertising in the Bern area.

Source: DPC 2004/2, p. 529 available in German

www.weko.admin.ch/publikationen/00212/RPW20042.pdf?lang=fr

- Dawn raids

Air Cargo:

Comco opened an investigation against several airline companies concerning agreements in the air cargo sector. Comco initiated the procedure with dawn raids at various company premises. Acting on information received, Comco knew of the existence of agreements between air cargo carriers relating to different surcharges on air cargo transport. These agreements deal with surcharges on fuel, security, customs and war risk. The investigation will have to demonstrate the existence of such

agreements and their consequences in Switzerland. Based on the air transport agreement with the European Union, Comco is conducting this investigation in cooperation with the European Commission and third countries.

www.weko.admin.ch/publikationen/pressemitteilungen/00243/160206-PC-Luftfracht-F.pdf?lang=fr.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof

Sources of legislation:

- *Federal Act on Cartels and Other Restraints of Competition (Cartel Act)*

Homepage address: www.weko.admin.ch/publikationen/00213/index.html?lang=en

Languages: German, French, Italian, English

- *Federal Act of 6 October 1995 on the Internal Market*

Homepage: www.weko.admin.ch/publikationen/00213/index.html?lang=fr

Languages: German, French, Italian

- *Federal Act of 19 December 1986 on Unfair Competition*
<http://www.admin.ch/ch/f/rs/c241.html>
- *Federal Act of 20 December 1986 on Price Supervision*
http://www.admin.ch/ch/f/rs/c942_20.html
- *Federal Act of 30 April 1997 on Telecommunications*
http://www.admin.ch/ch/f/rs/784_10/index.html
- Ordinance on the Control of Mergers of Enterprises of 17 June 1996

Homepage address:

- Ordinance on Sanctions for Unlawful Restrictions of Competition (Sanctions Ordinance) of 12 March 2004 which included the Leniency application.

Homepage address: www.weko.admin.ch/publikationen/00213/index.html?lang=en

- Ordinance on the Prescription of Fees

Homepage address: www.weko.admin.ch/publikationen/00213/index.html?lang=fr

Principal decisions:

- "Law and policy of competition" (casebook)

Homepage address: www.weko.admin.ch/publikationen/00212/index.html?lang=fr

Languages: German, French, Italian

- Administrative Procedure Act

Homepage address: www.admin.ch/ch/f/rs/rs.html

Explanatory publications:

Homepage address: www.weko.admin.ch/publikationen/00213/index.html?lang=en

- Notice Regarding the Competition Law Treatment of Vertical Agreements
- Notice Regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade
- Remarks on the Ordinance on Fines

Homepage address: www.weko.admin.ch/publikationen/00213/index.html?lang=fr

- Remarks on the Notice Regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade
- Notice Regarding Small- and Middle-Sized Undertakings
- Notice Regarding the Ratification and Sponsoring of Sporting Goods
- Notice Regarding the Use of Aids of Calculation
- Remarks on the Progress of House Searches

Press publications:

Homepage address:

www.weko.admin.ch/publikationen/pressemitteilungen/index.html?lang=en

Federal Act on Cartels and Other Restraints of Competition (Cartel Act; LCart)

The text of the Federal Act on Cartels and Other Restraints of Competition is available at the Internet website:

http://www.kpmg.ch/docs/20060613_Federal_Act_on_Cartels_and_other_restraints_of_Compensation_e.pdf

THAILAND

COMMENTARY BY THE GOVERNMENT OF THAILAND ON THE COMPETITION LAW OF THAILAND

A. Development of Thailand Competition Law

The development of competition law in Thailand began with the enactment of the Price Fixing and Anti-Monopoly Act of 1979. The 1979 Act consists of two parts. The price fixing part and the anti-monopoly part. The anti-monopoly part of 1979 Act is aimed at promoting fair competition. It empowers the Central Committee to look after business structures that may create monopoly and conduct restrictive business practices. But since it created problems for enforcement, the Department of Internal Trade, who is in charged of the said Act, made the adjustment of the Act by separating it into 2 Acts: The Price of Goods and Services Act and the Competition Act. The Competition Act which came into effect on April 30, 1999 is emphasized on business conduct control.

B. Objective of the Act

The objective of the Business Competition Act of 1999 is to promote fair and free trade. Its principle is mainly to look after business practices.

C. Anti-Competitive Behaviors under the Act

Under the Act, the anti-competitive behaviours have been defined and divided into three main categories: the abuse of market domination, merger and other anti-competitive conducts.

(I) The Abuse of Market Domination

Its objective is to prohibit a business operator with market domination from advantageously utilizing his/her position or creating barrier to entry for other business operators. "A Business Operator with Market Domination" means one or more business operators in the market of any goods or services who have the market share and sales volume above the level that prescribed by the Competition Commission. The prohibited acts are as follows.

- 1) unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services;
- 2) unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving, or providing services or obtaining credits from other business operators;
- 3) suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than market demand;

- 4) intervening in the operation of business of other persons without justifiable reasons.

(II) The merger part of the Act is adopted to prevent merger that may lead to monopoly or unfair competition. The Act defined mergers which result in the amount of market share, sales volume, capital stocks or assets in excess of those specified by the Competition Commission may proceed the competition Commission grants approval.

(III) Prohibit a business operator from conspiring, colluding or collaborating with another business operator, which result in creating monopoly, reducing competition or restricting competition in any of the following manners.

- 1) fixing selling price of goods or services as a single price or as agreed or restricting the sale volume of goods or services;
- 2) fixing buying price of goods or services as a single price or as agreed or restricting the purchase volume of goods or services;
- 3) entering into an agreement with a view to having market domination or market control;
- 4) fixing an agreement or condition in a collusive manner in order to enable one party to win a bid or a tender for goods or services or in order to prevent one party from participating in a bid or a tender for goods or services;
- 5) fixing geographical areas in which each business operator may distribute or restrict the distribution of goods or services, or fixing customers to whom each business operator may sell goods or provide services to the exclusion of other business operators from competing in the distribution of such goods or services;
- 6) fixing geographical areas in which each business operator may purchase goods or services or fixing persons from whom business operators may purchase goods or services;
- 7) fixing the quantity of goods or services in which each business operator may produce, purchase, distribute or provide with a view to restricting the quantity to be lower than the market demand;
- 8) reducing the quality of goods or services to a level lower than that in the previous production, distribution or provision, whether the distribution is made at the same or at a higher price;
- 9) appointing or entrusting any person as a sole distributor or provider of the same goods or services or the same kind of goods or services;
- 10) fixing conditions or practice with regard to the purchase or distribution of goods or the provision of services in order to achieve the uniform or agreed practice.

In the case where it is commercially necessary that's any act under Section 27(5-10) be undertaken, the business operator shall seek prior approval from the Competition Commission.

(IV) The Act also deals with agreements between domestic and overseas business operators performing an activity which will restrict the freedom or opportunity of a person residing in the Kingdom from purchasing goods or services for his/her own use directly from business operators outside the Kingdom.

(V) In order to prevent any other behaviors, which may not be covered by the above provisions, the Act also prohibit a business operator from performing any act which are not free and fair competition and which results in destroying, impairing, obstructing or impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing the cessation of business.

It can be seen that business practices controlled by the Business Competition Act of 1999 cover the practices, acts or behaviors in Section D, paragraph 3 and 4 of the Set of Principles and Rules.

D. Scope of application of the legislation

The 1999 Act does not apply to the act of central, provincial and local administration; state enterprises under the law on budgetary procedure; group of farmers, co-operatives or co-operative societies recognized by law that their businesses are operated for the benefit of the farmers; and businesses prescribed under the Ministerial Regulation.

The Competition Act, however, applies to the acts or behaviors that are committed in the Kingdom of Thailand as well as those that are committed outside the Kingdom but have effect in the Kingdom.

Generally speaking, the Competition Act was enacted without the dependent upon the existence of any agreement.

E. Enforcement Body

(I) The Competition Commission consists of the Minister of Commerce as Chairman, the Permanent-Secretary of the Ministry of Commerce as Vice-Chairman, the Director-General of the Department of Internal Trade as Member and Secretary, and the Permanent-Secretary of the Ministry of Finance, and no more than twelve other qualified persons as Members shall be responsible for the enforcement of the Act.

In addition, these qualified persons appointed as members must not be political officials, holders of political positions, executive members or holders of positions with the responsibilities in the administration of political parties. They shall hold office for a term of two years and not more than two consecutive terms in case they are re-appointed. The Commission shall have the powers and duties to consider complaints, to prescribe rules for dominant position, to consider an application for permission to merge business, or initiate the joint reduction or restriction of competition to give orders for suspension, cessation, correction, or variation of activities by business operators.

(II) Specialized sub-committee consists of not less than four and not more than six persons qualified in the matter concerned and having knowledge and experience in various fields such as law, science, engineering, pharmacology, agriculture, economics, commerce, accountancy, or business administration appointed by the Commission and a representative of the Department of Internal Trade as a member and secretary. The sub-committee shall have powers and duties to consider and give opinions about the conduct

indicative of market domination, a merger of business, the reduction or restriction of competition; to consider and give opinion about the permission to merge business or initiate the reduction or restriction of competition; and the consider and give opinion in other matters as entrusted by the Commission.

(III) Inquiry sub-committee consists of one person possessing knowledge and experience in criminal case who is appointed from police officials or public prosecutors, not more than four persons possessing knowledge and experience in economics, law, commerce, agriculture, or accountancy, and a representative of the Department of Internal Trade as a member and secretary. The sub-committees shall have powers and duties to conduct an investigation and inquiry in connection with the commission of the offences under this law.

(IV) Appellate committee consists of not more than seven qualified persons with knowledge and experience in law economics, business administration or public administration appointed by the Council of Ministers and officials from the Department of Internal Trade acts as secretary and assistant secretaries appointed by the Director General of the Department. The committee shall have powers and duties to consider and decided on the appeal against an order of the Commission and to issue an order suspending the execution of the order of the Commission requiring the business operator to suspend, cease, rectify or vary such act as market domination, merge of business or joint reduction or restriction of competition.

(V) Steps for implementing the Competition Act are as follows:

- 1) The office of the Competition Commission shall monitor the movement and oversee the conduct of business operator (which is done by the competent official or complaints of any business operators or consumers) and if an offence which is prohibited under the Act is found, it will be reported to the Commission.
- 2) The Commission will submit the matter to an inquiry sub-committee to find the facts and related evidence. The Commission may also submit the matter to the specialized sub-committee to consider and give opinions to the Commission.
- 3) The inquiry and the specialized sub-committees may submit opinions to the Commission to have a prosecution or non-prosecution order. Concurrently, the Commission may order business operators to suspend or cease such act.
- 4) In case of the Commission's prosecution order, the office of the Competition Commission will submit such opinions to the public prosecutor together with words of investigation for further proceedings.

(VI) Application for Permission and Considering of the Application

- 1) Considering the permission of mergers or jointly reducing or restricting of competition, the business operator shall provide adequate reasons for the act both in questions of fact and in questions of law;
- 2) Business operator and related person shall have opportunities to provide explanation and related evidence;

3) Business operator may reject the Competition Commission's consideration.

E. There is no parallel or supplementary legislation including treaties or understanding with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices.

G. There were 2 complaints recently that the Commission has made decision as follows:

I. Tying of Whisky and Beer

The Commission resolutions are the tying sale between Whisky and Beer occurred in subagent and wholesale level. The unreasonably fixing compulsory conditions requiring its customers to restrict purchase of Beer by a business operator having market domination violated Article 25(2) of the Trade Competition Act. Since the criteria for market dominance has not yet been approved by the Cabinet, Article 25(2) could not apply in this case. Therefore, the Commission ordered the Secretariat:

- To inform subagents that the tying sales of Beer was an inappropriate behavior and violate Article 25(2) of the Act so Beer Chang should cease that behavior.
- To monitor the movement of Whisky and Beer producers in particular and report to the Commission periodically.

II. Cable Television Monopoly

The Commission resolutions are as follows

- Business operation of the UBC group (Cable Television Company) is considered as a single unit so it did not violate Article 27(1) of the Competition Act. The reason is IBC(original) held 98% of UBC (original) and it has the same management team. This is not considered as concerted agreement which may violate Article 27(1) of the Trade Competition Act.
- The UBC Group is the sole business operator in Cable Television business and gain 100% market share which is considered as dominance. Raising prices of service packages by the UBC Group did not violate Article 25(1) since the company faced the financial problems due to Baht depreciation and company loss even if after the merge.
- Since the adjustment of service package and monthly fee is under the approval of the Mass Communication Organization of Thailand (MCOT) which is the Concession Grantor, MCOT should monitor the company's prices of service packages and the number of packages in order to provide more alternatives to consumers.
- The Committee ordered the Department of Internal Trade as a Secretariat to study the contract between the UBC Group and MCOT whether the operation of the UBC group is a State-own enterprise.

H. Bibliography citing sources of legislation and principal decisions as well as public dissemination

The Competition Act in Thailand is under Civil Law System. Thus, the commission decision will be based on the principles and objectives of the Act together with the facts which is case by case.

With regard to public dissemination, the government adopted manual and guidelines of the Act available to public and businessmen for its effective enforcement.

Legal Division
Department of Internal Trade

March, 2001

THAILAND
Tentative Translation
COMPETITION ACT,
B.E. 2542 (1999)

Bhumibol Adulyadej, Rex.,

Given on the 22nd Day of March B.E. 2542;

Being the 54th Year of the Present Reign.

His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:

Whereas it is expedient to have a law on competition by revising the rules relating to anti-monopoly provided in the law on price fixing and anti-monopoly;

Whereas it is aware that this Act contains certain provisions in relation to the restriction of rights and liberties of persons, in respect of which section 29, in conjunction with section 31, section 35, section 36, section 45, section 48 and section 50 of the Constitution of the Kingdom of Thailand so permit by virtue of the provisions law;

Be it, therefore, enacted by the King, by and with the advice and consent of the National Assembly, as follows:

Section 1. This Act is called the "Competition Act, B.E. 2542 (1999) "

Section 2. This Act shall come into force after thirty days as from the date of its publication in the Government Gazette.**

Section 3. In this Act:

"business" means an undertaking in agriculture, industry, commerce, finance, insurance, and services and shall include other undertakings prescribed by Ministerial Regulations;

"finance" means commercial banking under the law on commercial banking, finance and credit foncier businesses under the law on operation of finance, securities and credit foncier businesses, and securities business under the law on securities and securities exchange;

"business operator" means a distributor, producer for distribution orderer or importer into the Kingdom for distribution or purchaser for production or redistribution of goods or a service provider in the course of business;

**Published in Government Gazette, Vol. 116, Part 22b, dated 31st March 1999.

"goods" means an article capable of utilisation or consumption, including a document of title to an article;

"service" means the procurement of work by way of commission, the granting of any right or the giving of permission to use or to have benefits in any property or any undertaking in return for monetary remuneration or other benefit but shall not include the hire of service;

"price" means a price of goods and shall also include remuneration for the performance of a service;

"business operator with market domination" means one or more business operators in the market of any goods or service who have the market share and sales volume above that prescribed by the Commission with the approval of the Council of Ministers and published in the Government Gazette, having regard to the market competition;

"Commission" means the Competition Commission;

"member" means a member of the Competition Commission;

"Secretary-General" means the Secretary-General of the Competition Commission;

"competent official" means a Government official appointed by the Minister to perform activities under this Act;

"Minister" means the Minister having charge and control of the execution of this Act.

Section 4. This Act shall not apply to the act of:

- (1) Central administration, provincial administration or local administration;
- (2) State enterprises under the law on budgetary procedure;
- (3) Farmers' groups, co-operatives or co-operative societies recognised by law and having as their object the operation of businesses for the benefit of the occupation of farmers;
- (4) businesses prescribed by the Ministerial Regulation, which may provide for exemption from the application of this Act in whole or only in respect of any particular provision thereof.

Section 5. The Minister of Commerce shall have charge and control of the execution of this Act, provided that in respect of financial undertakings, the Minister of Commerce and the Minister of Finance shall jointly have charge and control, and shall have the power to appoint competent officials, issue Ministerial Regulations for the execution of this Act and issue Notifications hereunder.

Such Ministerial Regulations and Notifications shall come into force upon their publication in the Government Gazette.

CHAPTER 1
COMPETITION COMMISSION

Section 6. There shall be the Competition Commission consisting of the Minister of Commerce as Chairman, Permanent-Secretary for the Ministry of Commerce as Vice-Chairman, Permanent-Secretary for the Ministry of Finance and not less than eight, but not more than twelve, qualified persons with knowledge and experience in law, economics, commerce, business administration or public administration appointed by the Council of Ministers, provided that at least one-half of whom must be appointed from qualified members in the private sector, as members and the Secretary-General shall be a member and secretary.

The appointment of the qualified persons under paragraph one shall be in accordance with the rules and procedure prescribed in the Ministerial Regulation.

Section 7. A qualified person appointed as member must not be a political official, holder of a political position, executive member or holder of a position with the responsibility in the administration of a political party.

Section 8. The Commission shall have the powers and duties as follows:

- (1) to make recommendations to the Minister with regard to the issuance of Ministerial Regulations under this Act;
- (2) to issue Notifications prescribing market share and sales volume of any business by reference to which a business operator is deemed to have market domination;
- (3) to consider complaints under section 18 (5);
- (4) to prescribe rules concerning, the collection and the taking of goods as samples for the purposes of examination or analysis under section 19 (3);
- (5) to issue Notifications prescribing the market share, sales volume, amount of capital, number of shares, or amount of assets under section 26 paragraph two;
- (6) to give orders under section 30 and section 31 for the suspension, cessation, correction or variation of activities by business operators;
- (7) to issue Notifications prescribing the form, rules, procedure and conditions for the application for permission to merge businesses or initiate the joint reduction or restriction of competition under section 35;
- (8) to consider an application for permission to merge businesses or initiate the joint reduction or restriction of competition submitted under section 35;
- (9) to invite any particular person to give facts, explanations, advice or opinions;
- (10) to monitor and accelerate an inquiry sub-committee's conduct of an inquiry of offences under this Act.
- (11) to prescribe rules for the performance of work of the competent officials for the purpose of the execution of this Act;

(12) to perform other acts provided by the law to be the powers and duties of the Commission;

(13) to consider taking criminal proceedings as requested in the complaint lodged by the injured person under section 55.

Section 9. The qualified member under section 6 shall hold office for a term of two years.

At the expiration of the term under paragraph one, if a new qualified member is not yet appointed, the qualified member who vacates office at the expiration of the term shall continue to hold office for the purpose of the performance of work until a newly appointed qualified member takes office.

The qualified member who vacates office at the expiration of the term may be re-appointed but may not serve for more than two consecutive terms.

Section 10. The provisions of section 75, section 76, section 77, section 78, section 79, section 80, section 81, section 82 and 83 of the Administrative Procedure Act, B.E. 2539 (1996) shall apply to the appointment of a qualified member, the vacation of office of a qualified member and a meeting of qualified members *mutatis mutandis*, and a qualified member shall also vacate office upon being under the prohibitions under section 7.

Section 11. The Commission may appoint a sub-committee to consider and make recommendations on any matter or perform any act as entrusted and prepare a report thereon for submission to the Commission.

Section 12. The Commission shall appoint one or more specialised sub-committees consisting of, for each sub-committee, not less than four and not more than six persons qualified in the matter concerned and having knowledge and experience in various fields such as law, science, engineering, pharmacology, agriculture, economics, commerce, accountancy, or business administration as members, with the representative of the Department of Internal Trade as a member and secretary.

The specialised sub-committee shall elect one member as Chairman.

Section 13. The specialised sub-committee has the duty to consider and give opinions to the Commission on the following matters, as entrusted by the Commission:

- (1) the matter concerning the conduct indicative of market domination, a merger of businesses, the reduction or restriction of competition under section 25, section 26, section 27, section 28 and section 29;
- (2) the consideration of an application for permission to merge businesses or initiate the reduction or restriction of competition under section 37;
- (3) other matters to be considered at the request of the Commission and other acts to be performed as entrusted by the Commission.

For the purpose of this Act, a specialised sub-committee may submit opinions or recommendations to the Commission with regard to the execution of this Act.

In carrying out the acts under paragraph one, the specialised sub- committee shall have the power to issue a written summons requiring the persons concerned to give statements or furnish documents or any other evidence for supplementing its consideration.

Section 14. The Commission shall appoint one or more inquiry sub-committees consisting of, for each sub-committee, one person possessing knowledge and experience in criminal cases who is appointed from police officials, public prosecutors and, in addition, not more than four persons possessing knowledge and experience in economics, law, commerce, agriculture, or accountancy, as members, with the representative of the Department of Internal Trade as a member and secretary.

The inquiry sub-committee shall have the power and duty to conduct an investigation and inquiry in connection with the commission of offences under this Act and, upon completion thereof, submit opinions to the Commission for further consideration.

The inquiry sub-committee shall elect one member as Chairman.

Section 15. In the performance of the duties under this Act, a member of the Commission and a member of an inquiry sub-committee under section 14 shall have the same powers and duties as an inquiry official under the Criminal Procedure Code.

Section 16. In the case where the Commission submits to the public prosecutor the opinion for prosecution, an objection to the public prosecutor's non-prosecution order under the Criminal Procedure Code shall be the power to be exercised by the Chairman of the Commission in place of the Commissioner-General of the Royal Thai Police Force or the *Changwad* Governor as the case may be.

Section 17. The provisions of section 9 and section 10 shall apply *mutatis mutandis* to the sub-committee, specialised sub-committee and inquiry sub-committee.

CHAPTER II OFFICE OF THE COMPETITION COMMISSION

Section 18. There shall be established the Office of the Competition Commission in the Department of Internal Trade, Ministry of Commerce, with the Director-General of the Department of Internal Trade as the Secretary-General, who shall be the superior official responsible for the official affairs of the Office, with the powers and duties as follows:

- (1) to carry out administrative tasks of the Commission, the Appellate Committee and sub-committees appointed by the Commission;
- (2) to prescribe regulations for the purpose of the work performance of the Office of the Competition Commission;
- (3) to monitor the movement and oversee the conduct of business operators and report the same to the Commission;
- (4) to conduct studies, analyses and research in relation to goods, services, and business conduct and make recommendations and give opinions to the Commission on the prevention of market domination, merger of businesses and

reduction and restriction of competition in the operation of businesses;

- (5) to receive complaints by which it is alleged by any person that violation of this Act has occurred and to carry out its preliminary consideration for submission to the Commission, in accordance with the regulations prescribed and published in the Government Gazette by the Commission;
- (6) to co-ordinate with Government agencies or agencies concerned, for the purpose of the performance of duties under this Act;
- (7) to perform the acts in, the implementation of Notifications, regulations and resolutions of the Commission and perform such acts as entrusted by the Commission, the Appellate Committee or the sub-committee appointed by the Commission

Section 19. In the execution of this Act, the competent official shall have the following powers;

- (1) to issue a written summons requiring any person to give statements, facts or written explanations or furnish accounts, records, documents or any evidence for examination or supplementing his consideration,
- (2) to enter the place of business, place of production, place of distribution, place of purchase, warehouse or place of service of the business operator or of any person or other place reasonably suspected to have therein a violation of the provisions of this Act, for the purpose of examining the conformity with this Act or for searching and seizing evidence or property which may be confiscated under this Act or arresting the offender under this Act without a warrant of search in the following cases:
 - (a) where a flagrant offence is evidently being committed in the place;
 - (b) where a person having committed a flagrant offence has, while being pursued, taken refuge, or there are serious grounds for suspecting that such person is concealing, in the place;
 - (c) where there are reasonable grounds for suspecting that the evidence or property which may be confiscated under this Act is found in the place and there are reasonable grounds to believe that by reason of delay in obtaining a warrant of search the evidence or property is likely to be removed, concealed, destroyed or transformed from its original state;
 - (d) where the person to be arrested is the owner of the place and there is a warrant for such arrest or such arrest may be made without a warrant;

Provided that, for these purposes, the competent official has the power to inquire into facts or summon accounts, records, documents or other evidence from the business operator or from the person concerned or order such persons who are in such place to perform necessary acts;

- (3) to collect or take goods, in a reasonable quantity, as samples for an examination or analysis without payment of the prices of such goods, in accordance with the

rules prescribed by the Commission in the Government Gazette;

- (4) to attach documents, accounts, records or evidence for the purpose of examination and taking legal proceedings under this Act.

Section 20. In the performance of duties of the competent official, a person concerned shall render reasonable assistance.

Section 21. In the performance of duties, the competent official shall produce an identification card to the persons concerned.

The identification card shall be in accordance with the form prescribed by the Minister in the Government Gazette.

Section 22. The competent official shall procure service of the written summons under section 13 paragraph 3, section 19 (1) or section 44 (3) by directing it at the domicile or the place of business of the person named in the summons between sunrise and sunset or during working hours of such person or may send it by registered post requiring acknowledgement of receipt thereof.

In the case where the competent official serves the summons under paragraph one but the person named in the summons refuses to accept it without reasonable cause, the competent official shall request the administrative or police official to accompany the competent official for the purpose of leaving the summon on the spot. If the competent official does not meet the person named in the summons at his or her domicile or place of business, the summons may be served on any *sui juris* person who is living or working in that dwelling-place or place of business. If nobody is met or nobody agrees to accept the summons on behalf of the person named therein, such summons shall be posted in a conspicuous place at the domicile or the place of business in the presence of the administrative or police official who accompanies as witness.

When the competent official has carried out the act under paragraph one or paragraph two, it shall be deemed that the person named in the summons has received it. In the case of the posting of the summons, it shall be deemed that such summons is received upon the lapse of five days as from the date of its posting. If the service is made by a registered post requiring acknowledgement of its receipt, it shall be deemed that the summons is received upon the lapse of five days as from the date of its receipt.

Section 23. In the execution of this Act, members, members of the Appellate Committee or of the sub-committee, Secretary-General, and competent officials shall be the officials under the Penal Code.

Section 24. For the purpose of arresting offenders under this Act, the competent official shall have the same powers as the administrative or police officer under the Criminal Procedure Code.

An arrest of the offender may be made without a warrant of arrest when a flagrant offence is evidently being committed or when there is any other circumstance under which the Criminal Procedure Code permits administrative or police official to make an arrest without a warrant of arrest.

**CHAPTER III
ANTI-MONOPOLY**

Section 25. A business operator having market domination shall not act in any of the following manners:

- (1) unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services;
- (2) unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;
- (3) suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand;
- (4) intervening in the operation of business of other persons without justifiable reasons.

Section 26. A business operator shall not carry out a business merger which may result in monopoly or unfair competition as prescribed and published in the Government Gazette by the Commission unless the Commission's permission is obtained.

The publication by the Commission under paragraph one shall specify the minimum amount or number of market share, sale volume, capital, shares or assets in respect of which the merger of business is governed thereby.

The merger of business under paragraph one shall include:

- (1) a merger made by a producer with another producer, by a distributor with another distributor, by a producer with a distributor, or by a service provider with another service provider, which has the effect of maintaining the status of one business and terminating the status of the other business or creating a new business;
- (2) a purchase of the whole or part of assets of another business with a view to controlling business administration policies, administration and management;
- (3) a purchase of the whole or part of shares of another business with a view to controlling business administration policies, administration and management.

The application by a business operator for the permission under paragraph one shall be submitted to the Commission under section 35.

Section 27. Any business operator shall not enter into an agreement with another business operator to do any act amounting to monopoly, reduction of competition or

restriction of competition in the market of any particular goods or any particular service in any of the following manners:

- (1) fixing selling prices of goods or services as a single price or as agreed or restricting the sale volume of goods or services;
- (2) fixing buying prices of goods or services as a single price or as agreed or restricting the purchase volume of goods or services;
- (3) entering into an agreement with a view to having market domination or market control;
- (4) fixing an agreement or condition in a collusive manner in order to enable one party to win a bid or a tender for the goods or services or in order to prevent one party from participating in a bid or a tender for the goods or services;
- (5) fixing geographical areas in which each business operator may distribute or restrict the distribution of goods or services, or fixing customers to whom each business operator may sell goods or provide services to the exclusion of other business operators from competing in the distribution of such goods or services;
- (6) fixing geographical areas in which each business operator may purchase goods or services or fixing persons from whom business operators may purchase goods or services;
- (7) fixing the quantity of goods or services in which each business operator may produce, distribute, or provide with a view to restricting the quantity to be lower than the market demand;
- (8) reducing the quality of goods or services to a level lower than that in the previous production, distribution or provision, whether the distribution is made at the same or at a higher price;
- (9) appointing or entrusting any person as a sole distributor or provider of the same goods or services or the same kind of goods or services;
- (10) fixing conditions or practice with regard to the purchase or distribution of goods or the provision of services in order to achieve the uniform or agreed practice.

In the case where it is commercially necessary that the acts under (5), (6), (7), (8), (9) or (10) be undertaken within a particular period of time, the business operator shall submit an application for permission to the Commission under section 35.

Section 28. A business operator who has business relation with business operators outside the Kingdom, whether it is on a contractual basis or through policies, partnership, shareholding or any other similar form, shall not carry out any act in order that a person residing in the Kingdom and intending to purchase goods or services for personal consumption will have restricted opportunities to purchase goods or services directly from business operators outside the Kingdom.

Section 29. A business operator shall not carry out any act which is not free and fair

competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.

Section 30. The Commission shall have the power to issue a written order requiring a business operator who has market domination, with the market share of more than seventy five percent, to suspend, cease or vary the market share. For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith.

Section 31. In the case where the Commission considers that a business operator violates section 25, section 26, section 27, section 28 or section 29, the Commission shall have the power to issue a written order requiring the business operator to suspend, cease, rectify or vary such act. For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith.

The business operator who receives the order under paragraph one and disagrees therewith shall have the right to appeal under section 46.

The business operator may not claim compensation from the Commission by reason that the Commission has issued the order under paragraph one.

Section 32. In the consideration of the case under section 31, the Commission must afford the business operator, members of the specialised sub- committee, members of the inquiry sub-committee or competent officials concerned reasonable opportunities to give explanations and present supporting evidence.

In issuing an order under section 31, the Commission must specify reasons for such order both in questions of fact and in questions of law, and signatures of the members considering the case shall be entered.

The notification of the order under paragraph two shall be carried out within seven days as from the date of the Commission's order, and section 22 shall apply *mutatis mutandis*.

Section 33. The person receiving the order under section 31 must comply with such order unless the Court or the Appellate Committee passes a judgment or issues an order suspending the execution thereof or revoking the order of the Commission.

Section 34. In the case where the Court passes a judgment that any business operator is guilty of an offence under section 25, section 26, section 27, section 28 or section 29, the Court shall issue an order requiring the business operator to suspend, cease, rectify or vary such act.

CHAPTER IV APPLICATION FOR PERMISSION AND CONSIDERATION OF THE APPLICATION

Section 35. Any business operator wishing to apply for permission to carry out the act under section 26 or section 27 (5), (6), (7), (8), (9) or (10) shall submit an application in accordance with the form, rules, procedure and conditions prescribed and published in the Government Gazette by the Commission.

The application must at least:

- (1) contain adequate reasons and specify necessity for the act;
- (2) specify the intended procedures therefor;
- (3) specify the duration therefor.

Section 36. The Commission shall complete the consideration of the application under section 35 within ninety days as from the date of its receipt; provided that the business operator, members of the specialised sub-committee or competent officials concerned must be afforded reasonable opportunities to give explanations and present supporting evidence.

In the case where the consideration cannot be completed within the time specified in paragraph one by reason of necessity, the Commission may grant an extension of time for not more than fifteen days, but the reasons and necessity for the extension shall also be recorded in the consideration and decision proceedings.

Section 37. When the Commission has made an inquiry and is of the opinion that the application under section 35 submitted by the business operator is reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy and has no effect on material and due interests of general consumers, the Commission shall issue a written order granting permission in favour of such business operator. But if the Commission issues an order rejecting permission, the order shall be notified in writing to the business operator without delay.

In granting permission under paragraph one, the Commission may fix the time or any condition for compliance by the business operator to whom permission is granted, and, if it is of the opinion that economic situations, facts or conduct relied on by the Commission in its consideration have changed, the Commission may amend, make addition to, or revoke such time or conditions at any time.

The business operator who receives the order of the Commission and disagrees with such order shall have the right to appeal under section 46.

Section 38. The Commission must specify reasons for the order granting or rejecting permission under section 37 both in questions of fact and in questions of law and the order shall contain signatures of the members considering the application, and the provisions of section 32 paragraph three shall apply *mutatis mutandis*.

Section 39. The business operator to whom permission is granted under section 37 must carry out the business within the scope, duration and conditions permitted by the Commission.

In the case where there is a violation of or failure to comply with paragraph one, the Commission shall have power to revoke the permission order under section 37 in whole or in part and may also fix the time within which compliance is required.

CHAPTER V
INITIATION OF AN ACTION FOR COMPENSATION

Section 40. The person suffering an injury in consequence of the violation of section 25, section 26, section 27, section 28 or section 29 may initiate an action for claiming compensation from the violator.

In initiating an action for claiming compensation under paragraph one, the Consumer Protection Commission or an association under the law on consumer protection has the power to initiate an action for claiming compensation on behalf of consumers or members of the association, as the case may be.

Section 41. If the action for claiming compensation under section 40 is not submitted to the Court within one year as from the date the person suffering the injury has or ought to have had the knowledge of the ground thereof, the right to submit the action to the Court shall lapse.

CHAPTER VI
THE APPEAL

Section 42. There shall be an Appellate Committee consisting of not more than seven qualified persons with knowledge and experience in law, economics, business administration or public administration appointed by the Council of Ministers as members.

The members of the Appellate Committee shall elect one member among themselves as Chairman.

The Director-General of the Department of Internal Trade shall appoint Government officials of the Department of Internal Trade to act as secretary and assistant secretaries.

Section 43. The person appointed as member of the Appellate Committee must not be under the prohibitions under section 7 and shall not be a member of the Commission.

Section 44. The Appellate Committee shall have the following powers and duties:

- (1) to prescribe the rules and procedure for the appeal under section 47 paragraph one;
- (2) to consider and decide on the appeal against an order of the Commission under section 31 or section 37;
- (3) to issue a written summons requiring the persons concerned to give statements or furnish documents or evidence for the purpose of the consideration of the appeal;
- (4) to issue an order suspending the execution of the order of the Commission under section 31 or section 37.

Section 45. A member of the Appellate Committee shall hold office for a term of four years.

In the initial period, at the expiration of two years, three members of the Appellate Committee shall vacate office by drawing lots and such vacation of office by drawing lots shall be deemed to be the vacation of office at the expiration of the term.

The provisions of section 9 paragraph three and section 10 shall apply to the Appellate Committee *mutatis mutandis*.

Section 46. The appeal against the order of the Commission under section 31 and section 37 shall be submitted to the Appellate Committee by the person receiving the order within thirty days as from the date of the knowledge of the Commission's order.

Section 47. The rules and procedure for the appeal shall be as prescribed and published in the Government Gazette by the Appellate Committee.

The Appellate Committee shall consider and decide on the appeal within ninety days as from the date of the receipt thereof and notify the decision in writing to the appellant, and the provisions of section 36 and section 38 shall apply *mutatis mutandis*.

The decision of the Appellate Committee shall be final.

When the Appellate Committee has decided upon the appeal, the Commission and business operators shall comply with such decision.

CHAPTER VII PENALTIES

Section 48. Any person who fails to comply with the written summons issued by the specialised sub-committee, competent official or the Appellate Committee under section 13 paragraph three, section 19 (1) or section 44 (3), as the case may be, shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding five thousand Baht or to both.

Section 49. Any person who obstructs the performance of duties by the competent official under section 19 (2), (3) or (4) or section 22 shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding twenty thousand Baht or to both.

Section 50. Any person who fails to render assistance to the competent official under section 20 shall be liable to imprisonment for a term not exceeding one month or to a fine not exceeding two thousand Baht or to both.

Section 51. Any person who violates section 25, section 26, section 27, section 28 or section 29 or fails to comply with section 39 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million Baht or to both, and, in the case of the repeated commission of the offence, shall be liable to the double penalty.

Section 52. Any person who fails to comply with the order of the Commission under section 30 or section 31 or with the decision of the Appellate Committee under section 47 shall be liable to imprisonment for a term of one to three years or to a fine of two to six million Baht, and to a daily fine not exceeding fifty thousand Baht throughout the occurrence of such violation.

Section 53. Any person who discloses information concerning the business or the operation of a business operator which, according to the ordinary course of dealing of the business operator, is the restrictive and confidential information and which such person has acquired or knew on account of the performance under this Act shall be liable to imprisonment for a term not exceeding one year, or to a fine not exceeding one hundred thousand Baht or to both, unless it is the disclosure in the performance of Government service or for the purpose of an inquiry or trial.

Any person who acquires or has the knowledge of any fact from the person under paragraph one and discloses such information in the manner likely to cause an injury to any person shall be liable to the same penalty.

Section 54. In the case where the person who commits an offence punishable under this Act is a juristic person, then, the managing director, the managing partner or the person responsible for the operation of the business of the juristic person in such matter shall also be liable to the penalty provided by the law for such offence unless it is proved that such act has been committed without his or her knowledge or consent or he or she has already taken reasonable action for preventing the commission of such offence from occurring

Section 55. The injured person in the offences under section 51 and section 54 may not institute a criminal action on his or her own motion but has the right to lodge a complaint with the Commission for consideration under this Act.

Section 56. All offences under this Act which are punishable by fine or imprisonment for a term not exceeding one year shall be under the power of the Commission to settle the cases. In exercising such power, the Commission may entrust a sub-committee, the Secretary-General or a competent official to act on its behalf.

When the offender has paid the fine in the fixed amount within the specified time, the case shall be deemed settled in accordance with the provisions of the Criminal Procedure Code.

Transitory Provision

Section 57. In the case where a business operator is under necessity and has carried out the acts specified in section 27 (5), (6), (7), (8), (9) or (10) on the day this Act comes into force, such person shall submit an application within ninety days as from the date of the entry into force of this Act, and when the application has been submitted, such business operator may continue to carry out the acts under section 27 (5), (6), (7), (8), (9) or (10) until the notification of the result of the consideration of the application is received

Countersigned by: Chuan Leekpai
Prime Minister

TURKEY

Commentary by the Government of Turkey on Turkish competition legislation

Law on the Protection of Competition No 4054 (Law No 4054) was enacted in 1994. Basic substantive provisions are Article 4 entitled “Agreements, Concerted Practices and Decisions Limiting Competition”, Article 5 entitled “Exemption” and Article 6 entitled “Abuse of Dominant Position” and Article 7 entitled “Mergers or Acquisitions”.

A. Description of the reasons for the introduction of the legislation

The reasons for its introduction are to comply with the provision in the Constitution of Turkey that is “*The state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets.*” and to comply with the commitments arising from its relations with the EC.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation

The objectives of the legislation can be found in Article 1 of Law No 4054 that is “*The purpose of this Act is to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end.*” The reasoning of Article 1 is “*The developments in today’s world have shown that competition in a market economy not only ensures effective utilization of the resources, but also causes a fall in the prices of the competing products and causes those undertakings which want to have a larger share in the market to increase the quality of their products and to use new technologies in production. This dynamism brought about by free competitive structure ensures a constant and balanced development in the economy of the country. On the other hand, the fall in the prices and the rise in the quality have a social benefit by protecting the whole society, that is, the consumers. For these reasons, the purpose of this act is for the State to ensure the protection of competition through the necessary legal arrangements.*”

C. Description of the practices, acts or behaviour subject to control

(D) *The type of control – for example, outright prohibition, prohibition in principle or examination on a case-by-case basis;*

Basically three types of economic activities are within the scope of Law No 4054. These are;

Agreements, Concerted Practices and Decisions Limiting Competition

Article 4 entitled “Agreements, Concerted Practices and Decisions Limiting Competition” prohibits agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services. Article 4 mentions such cases in a non-exhaustive list as follows:

- a) Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,
- b) Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,
- c) Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,
- d) Complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behaviour, or preventing potential new entrants to the market,
- e) Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,
- f) Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.

Article 56 provides that any agreements and decisions of associations of undertakings contrary to Article 4 are invalid.

Article 5 entitled “Exemption” provides conditions for exemption of agreements, concerted practices between undertakings, and decisions of associations of undertakings from the prohibition of the Article 4. The conditions for exemption are;

- a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,
- b) Benefitting the consumer from the above-mentioned,
- c) Not eliminating competition in a significant part of the relevant market,
- d) Not limiting competition more than what is compulsory for achieving the goals set out in (a) and (b).

The Competition Board has issued block exemption communiqués on vertical agreements, research and development agreements and vertical agreements and concerted practice in the motor vehicle sector.

Abuse of Dominant Position

Article 6 entitled “Abuse of Dominant Position” prohibits the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the

whole or a part of the country on their own or through agreements with others or through concerted practices. Article 6 provides a non-exhaustive list of abusive cases as follows;

- a) Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,
- b) Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,
- c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,
- d) Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,
- e) Restricting production, marketing or technical development to the prejudice of consumers.

Mergers or Acquisitions

Article 7 entitled “Mergers or Acquisitions” provides that merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited.

According to Communiqué No 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, where, as a result of a merger or an acquisition, total market share of the undertakings that carry out the merger or acquisition exceeds 25 % of the market in the relevant product market within the whole or a part of the territory, or even though it does not exceed this rate, their total turnover exceeds TL twenty-five trillion, it is compulsory for them to take the authorization of the Competition Board.

(b) The extent to which practices, acts or behaviours in section D, paragraphs 3 and 4, of the “Set of Principles and Rules” are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example controls concerning misleading advertising.

Generally speaking, the content of substantive clauses of Law No 4054 is generally compatible with the content in section D, paragraphs 3 and 4 of the “Set of Principles and Rules”. However, it should be kept in mind that Law No 4054 covers anti-competitive conduct provided that they affect markets for goods and services within the boundaries of the Republic of Turkey. As a result, while implementing Law No 4054, no special consideration is taken whether anti-competitive conduct has or likely to have “*adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries*”.

Law No 4054 does not deal with consumer protection in the sense that conduct such as misleading advertising is not considered within the scope of Law No 4054. Rather such practices are dealt under provisions of Commercial Code on unfair competition.

D. Description of the scope of application of the legislation, indicating:

(a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;

Law No 4054 applies to all anti-competitive transactions in markets for goods and services. Law No 4054 is not applicable to mergers and acquisitions involving banks total market shares of which do not exceed 20%.

(b) Whether it applies to all practices, acts or behaviour having effects on the country in questions, irrespective of where they occur;

Law No 4054 applies to all anti-competitive conduct affecting market for goods and services in Republic of Turkey.

(c) Whether it is dependent on the existence of an agreement, or on such agreement being put into effect.

Article 4 prohibits agreements the **object or effect or likely effect** of which is to prevent, distort or restrict competition. Therefore, the effect of the agreement is not necessary provided that the object is to prevent, distort or restrict competition.

E. Description of the enforcement machinery (administrative and/or judicial), indicating any notification and registration agreements, and principal powers of the body or bodies involved.

The Turkish Competition Authority (TCA) having a public legal personality, and an administrative and financial autonomy is established in order to ensure the formation and development of markets for goods and services in a free and sound competitive environment, to observe the implementation of Law No 4054, and to fulfil the duties assigned to it by Law No 4054.⁵⁶ The TCA, as an administrative organ, is independent in fulfilling its duties and no organ, authority and person may give commands and orders to influence the final decision of the TCA.⁵⁷

Decision making body of the TCA is the Competition Board and is composed of a total of 7 members, one being the Chairman and the other being the Deputy Chairman.⁵⁸ The term of office of the Chairman, Deputy Chairman and members of the Board is six years.⁵⁹ The member whose term has expired is eligible for re-election.⁶⁰ The offices of the Chairman and members of the Competition Board cannot be terminated due to any

⁵⁶ Article 20.1.

⁵⁷ Article 20.3.

⁵⁸ Article 22.1.

⁵⁹ Article 24.1.

⁶⁰ Ibid.

reason prior to the completion of their term.⁶¹ The Chairman of the Board is the highest ranking chief of the TCA, and is responsible for the overall management and representation of the TCA.⁶²

Principle powers of the Competition Board are, *inter alia*, as follows:⁶³

- To carry out, upon application or on its own initiative, examination, inquiry and investigation about the activities and legal transactions prohibited in Law No 4054; to take the necessary measures for terminating infringements upon establishing that the provisions provided in Law No 4054 are infringed, and to impose administrative fines on those responsible for them,
- To evaluate the requests of those concerned for exemption and negative clearance, and to grant an exemption and negative clearance certificate to the appropriate agreements,
- To constantly follow up the markets to which exemption decisions and negative clearance certificates are related, and to re-evaluate the applications of those concerned in case changes are established in these markets or in the positions of the parties,
- To permit mergers and acquisitions,
- To issue communiqués and make the necessary regulations as to the implementation of Law No 4054,
- To opine, directly or upon the request of the Ministry of Trade and Industry, concerning the amendments to be made to the legislation with regard to the competition law,
- To monitor legislations, practices, policies and measures of the other countries, concerning agreements and decisions limiting competition,
- To issue an annual report on its works, and the situation and developments in its fields of duty,

Basic instruments used to deal with anti-competitive conduct are preliminary inquiry and investigation.⁶⁴ In carrying out the duties assigned to the Competition Board, it may request any information from all public institutions and organizations, undertakings and associations of undertakings.⁶⁵ Officials of these authorities, undertakings and associations of undertakings are obliged to provide the requested information within the period to be determined by the Competition Board.⁶⁶ Moreover, the Competition Board may perform examinations at undertakings and associations of undertakings while carrying out its duties.⁶⁷ It is entitled to examine the books, any paperwork and documents of undertakings and associations of undertakings, and take their copies if

⁶¹ Article 24.2. Final sentence of Article 24.2 should be taken into account: “However, what terminate are the offices of the Chairman and members of the Board who are realized to have lost the qualifications required for their appointment or whose position is realized to be contrary to article 25 of this Act, by the decision of the Board, or whose offence with regard to the duty assigned by the Act is proven by a court decision.”

⁶² Article 29.2.

⁶³ See Article 27.

⁶⁴ See Section Four entitled “Procedure in Examinations and Inquiries of the Board”

⁶⁵ Article 14.1.

⁶⁶ Article 14.2.

⁶⁷ Article 15.1.

needed, request written or oral statement on particular issues, perform examinations on the spot with regard to any assets of undertakings.⁶⁸ Examination is performed by experts employed at the disposal of the Competition Board.⁶⁹ Those concerned are obliged with providing the copies of information, documents, books and other instruments requested.⁷⁰ Moreover, in case an on-the-spot inspection is hindered or likely to be hindered, the on-the-spot inspection is performed with the decision of a criminal magistrate.⁷¹

Provided that it is not less than 6,368 YTL, the Competition Board can impose fine up to ten percent of the annual gross revenue of natural and legal persons having the nature of punishable undertakings, and of associations of undertakings and/or the members of such associations.⁷² Fines are paid within three months as of the date of communicating the final decision of the Board to the one concerned.⁷³ Appealing against decisions of the Board does not cease the implementation of decisions, and the follow-up and collection of fines.⁷⁴

Appeal may be made to the Council of State, supreme administrative court, within due period against the final decisions, measure decisions, fines and periodic fines of the Competition Board, as of communicating the decision to the parties.⁷⁵

Compulsory notification of agreements, concerted practices and decisions falling under Article 4 to the Board was abolished as of 2005.

E. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices.

Telecommunication Authority (TA), founded in 2000 by Law No 4502, is the regulatory authority in telecommunication sector with administrative and financial autonomy and the Telecommunication Board is the decision making body of the TA. TA is independent while performing its duties. The TA is responsible for making and enforcing legal, economic and technical regulations in accordance with the principles and provisions set out in the legislation. The TA's main tasks are issuance of secondary legislation and licenses, setting tariffs where needed, and monitoring compliance in areas such as tariffs, interconnection and licensing.

As is the case in many jurisdictions, the Law No 4054 applies to all sectors of the economy. In this context, no specific exception was granted for any sector of the economy in Law No 4054. However, the only exception was granted for mergers not exceeding specified thresholds in banking sector within a different Act (Law No 4389).

⁶⁸ Article 15.1.a-b-c.

⁶⁹ Article 15.2.

⁷⁰ Article 15.3.

⁷¹ Ibid.

⁷² Article 16.2. Fines involved are redetermined each year in accordance with the provision of the Supplementary article 2 of the Turkish Penal Code, and are announced by the Communiqués of the Competition Board. For other fines, see Article 16 and 17.

⁷³ Article 55.2.

⁷⁴ Article 55.1.

⁷⁵ Ibid.

Therefore, Law No 4054 is applied in the telecommunications sector by Turkish Competition Authority (TCA) like it is in other sectors of the economy. In other words, Law No 4054 is a part of the regulatory framework for the telecommunications sector. It must be underlined that there is a specific provision in telecommunications legislation that requires the TCA to get the opinion of TA when enforcing Law No 4054 to the telecommunications sector. On the other hand, the TCA sends its opinion to the TA about new legislation in the consultation process.

Law No 4628 establishes an independent, administratively and financially autonomous public institution, namely the Energy Market Regulatory Authority (EMRA), for supervision and regulation. Article 8(b) of Law No 4628 explicitly recognises the merger control powers of the Competition Board in electricity market. Moreover, there are no provisions in Law No 4628 regarding infringements of competition and therefore Law No 4054 is applicable in electricity market as it is applicable in other markets. Article 4 of Law No 4628 requires EMRA to consider the opinions of the legal entities operating in the market and other relevant organizations and institutions when issuing regulations. In line with this provision, EMRA sought opinion of TCA regarding draft regulations various times. However, there is no formal protocol regarding cooperation between the TCA and EMRA.

Turkey signed free trade agreements with many countries and there are rules of competition concerning undertakings in these agreements. For instance, free trade agreement between Romania and Turkey provides that anti-competitive agreements, decisions and practices, abuse of a dominant position are not compatible with the proper functioning of the free trade agreement in so far as they may affect trade between Romania and Turkey.⁷⁶ Moreover, under certain circumstances, the parties may take appropriate measures after consultation within the Joint Committee⁷⁷ or after 30 working days following referral for such consultation if Turkey or Romania considers that a particular practice is incompatible with rules on anti-competitive agreements, practices and decisions and abuse of a dominant position.⁷⁸ Texts of free trade agreements are accessible at <http://www.dtm.gov.tr/ab/sta/bilesik.htm> .

Similarly, Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union provides competition rules prohibiting anti-competitive agreements, decisions and concerted practices; abuse of a dominant position in so far they may affect trade between EC and Turkey.⁷⁹ The Community or Turkey can take appropriate measures under certain circumstances after consultation within the Joint Customs Union Committee or after 45 working days following referral for such consultation in case a practice is compatible with these competition rules.⁸⁰ The Decision foresees exchange of information taking into account the limitations imposed by the requirements of professional and business secrecy.⁸¹ Moreover, the Decision foresees provisions regarding notification of anti-competitive activities carried out on the territory of one party and affecting interests of the other

⁷⁶ Article 24.1.

⁷⁷ The Joint Committee is responsible for the administration of this Agreement and shall ensure its proper implementation. See Article 35.1.

⁷⁸ Article 24.6.

⁷⁹ Article 32.

⁸⁰ Article 38.

⁸¹ Article 36.

party and request for appropriate enforcement action, the conduct by the party upon receiving such a notification, reservation of the discretion of the notified party whether to undertake enforcement action and recognition of capability of the notifying party to undertake enforcement action against such anticompetitive activities.⁸²

TCA signed memorandums of understanding with Romanian Competition Council and Fair Trade Commission of the Republic of Korea in 2005 in order to cooperate in the field of competition. However, the memorandums do not foresee exchange of confidential information.

G. The TCA has adopted the following secondary legislation in the last quarter of 2007:

- Communiqué on Block Exemption in Insurance Sector,
- Communiqué on Block Exemption for Technology Transfer Agreements,
- Guidelines on Market Definition,
- Guidelines on Subcontracting Agreements.

In addition to these secondary legislation, the TCA intends to submit its draft law to amend the Act no 4054 on the Protection of Competition (Competition Act) in the first quarter of 2008. The TCA expects that the amendments will make the enforcement of Competition Act more efficient and effective and it will help the TCA to allocate its resources mainly for more serious antitrust infringements. Those amendments will further align our law with that of the *EU acquis* as well.

⁸² Article 43.

ACT ON THE PROTECTION OF COMPETITION

Act No: 4054

Date of Adoption: 7/12/1994

Official Gazette of Its Publication: Date:13/12/1994 Number: 22140

Code of Its Publication: Series: 5 Volume: 34 Page:

SECTION I

Purpose, Scope, Definitions

Purpose

Article 1- The purpose of this Act is to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end.

Scope

Article 2- Agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the boundaries of the Republic of Turkey, and the abuse of dominance by the undertakings dominant in the market, and any kind of legal transactions and behaviour having the nature of mergers and acquisitions which shall decrease competition to a significant extent, and transactions related to the measures, establishments, regulations and supervisions aimed at the protection of competition fall under this Act.

Definitions

Article 3- In implementation of this Act, the terms express the following:

Ministry: The Ministry of Industry and Trade,

Competition: The contest between undertakings in markets for goods and services, which enables them to take economic decisions freely,

Dominant Position: The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers,

Undertaking: Natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole,

Association of Undertakings: Any kind of associations with or without a legal personality, which are formed by undertakings to accomplish particular goals,

Goods: Any kind of movable or immovable property which is the subject of trade,

Services: Physical, intellectual or combined activities carried out in return for a cost or interest,

Authority: Competition Authority,

Board: Competition Board.

SECTION II

CHAPTER ONE

Prohibited Activities

Agreements, Concerted Practices and Decisions Limiting Competition

Article 4- Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the

prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited.

Such cases are, in particular, as follows:

- a)** Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,
- b)** Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,
- c)** Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,
- d)** Complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behaviour, or preventing potential new entrants to the market,
- e)** Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,
- f)** Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.

In cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice.

Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

Exemption

Article 5- The Board, in case all the terms listed below exist, may decide **(Annulled: 02.07.2005-Article 5388/1)[1] (...)** to exempt agreements, concerted practices between undertakings, and decisions of associations of undertakings from the application of the provisions of article 4:

- a)** Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,
- b)** Benefitting the consumer from the above-mentioned,
- c)** Not eliminating competition in a significant part of the relevant market,
- d)** Not limiting competition more than what is compulsory for achieving the goals set out in subparagraphs (a) and (b).

(Amended: 02.07.2005-Article 5388/1)[2] *Exemption may be granted for a definite period, just as the granting of exemption may be subjected to the fulfillment of particular terms and/or particular obligations. Exemption decisions are valid as of the date of concluding an agreement or committing a concerted practice or taking a decision of an association of undertakings, or fulfilling a condition if it has been tied to a condition.*

In case the terms mentioned in the first paragraph are fulfilled, the Board may issue communiqués which ensure block exemptions for the types of agreements in specific subject-matters and which indicate their terms.

Abuse of Dominant Position

Article 6- The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited.

Abusive cases are, in particular, as follows:

- a)** Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,
- b)** Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,
- c)** Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,
- d)** Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,
- e)** Restricting production, marketing or technical development to the prejudice of consumers.

Mergers or Acquisitions

Article 7- Merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited.

The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid.

CHAPTER TWO

Powers of the Board

Negative Clearance

Article 8- Upon the application by the undertaking or associations of undertakings concerned, the Board may, on the basis of information in hand, grant a negative clearance certificate indicating that an agreement, decision, practice or merger and acquisition are not contrary to articles 4, 6 and 7 of this Act.

The Board may, after issuing such a certificate, revoke its opinion at any time, under the conditions set out in article 13. However, in this case, criminal sanction is not applied to the parties for the period until the change of opinion by the Board.

Termination of Infringement

Article 9- If the Board, upon informing, complaint or the request of the Ministry or on its own initiative, establishes that articles 4, 6 and 7 of this Act are infringed, it notifies the undertaking or associations of undertakings concerned of the decision encompassing those behaviour to be fulfilled or avoided so as to establish competition and maintain the situation before infringement, in accordance with the provisions mentioned in section Four of this Act.

Natural and legal persons who have a legitimate interest are entitled to file a complaint.

The Board, prior to taking a decision pursuant to the first paragraph, shall inform in writing the undertaking or associations of undertakings concerned of its opinions concerning how to terminate the infringement.

Where the occurrence of serious and irreparable damages is likely until the final decision, the Board may take interim measures which have a nature of maintaining the situation before the infringement and which shall not exceed the scope of the final decision.

(...)[3] Notification of Mergers and Acquisitions to the Board

Article 10- (Annulled paragraph one: 02.07.2005-5388/Article 2)[4]

As of the date the Board is notified of merger or acquisition agreements falling under article 7, the Board is, as a result of the preliminary examination to be performed by it within fifteen days, obliged to permit the merger or acquisition transaction, or if it decides to deal with this transaction under final examination, it is obliged to duly notify, with its preliminary objection letter, those concerned of the fact that the merger or acquisition transaction is suspended and cannot be put into practice until the final decision, together with other measures deemed necessary by it. In this case, the provisions of articles 40-59 of this Act shall be applicable.

Where the Board does not respond to or take any action for the application as to a merger or acquisition within due time, merger or acquisition agreements shall take effect and become legally valid after 30 days as of the date of the notification.

Failure to Notify Mergers and Acquisitions to the Board

Article 11- Where a merger and acquisition transaction whose notification to the Board is compulsory is not notified to the Board, the Board shall deal with the merger or acquisition under examination on its own initiative, when it is informed about the transaction anyway. As a result of the examination;

a) it allows the merger or acquisition in case it decides that the merger or acquisition does not fall under the first paragraph of article 7, but imposes fines on those concerned due to their failure to notify.

b) in case it decides that the merger or acquisition falls under the first paragraph of article 7, it decides that the merger or acquisition transaction be terminated, together with fines; all de facto situations committed contrary to the law be eliminated; any shares or assets seized be returned, if possible, to their former owners, whose terms and duration shall be determined by the Board, or if not possible, these be assigned and transferred to third parties; the acquiring persons may by no means participate in the management of undertakings acquired during the period until these are assigned to their former owners or third parties, and that other measures deemed necessary by it be taken.

Notification

Article 12- Notification fully and completely includes information required by the Notification Forms to be prepared by the Board. Either of the parties may submit the notification. The notifying party is obliged to inform the other party concerned of the situation. Relevant documents are enclosed with the notification, and the notification shall be considered to have been submitted on the date it is entered in the records of the Board.

Revocation of Exemption and Negative Clearance Decisions

Article 13- Exemption and negative clearance decisions may be revoked, or particular behaviour of the parties may be prohibited in the following cases:

- a) Change in any event constituting the basis of the decision,
- b) Failure to fulfil the terms or obligations resolved,

c) Having taken the decision on the basis of incorrect or incomplete information concerning the agreement in question.

Revocation decision shall be effective as of the date of the change in sub-paragraph (a), and the date of taking the exemption or negative clearance decision in other cases.

In case incorrectness and incompleteness mentioned in sub-paragraph (c) take place by the fraud or intent of the undertaking concerned, the decision shall be deemed not to have been taken at all.

Request for Information

Article 14- In carrying out the duties assigned to it by this Act, the Board may request any information it deems necessary from all public institutions and organizations, undertakings and associations of undertakings.

Officials of these authorities, undertakings and associations of undertakings are obliged to provide the requested information within the period to be determined by the Board.

On-the-Spot Inspection

Article 15- In carrying out the duties assigned to it by this Act, the Board may perform examinations at undertakings and associations of undertakings in cases it deems necessary. To this end, it is entitled to:

- a) Examine the books, any paperwork and documents of undertakings and associations of undertakings, and take their copies if needed,
- b) Request written or oral statement on particular issues,
- c) Perform examinations on the spot with regard to any assets of undertakings.

Examination is performed by experts employed at the disposal of the Board. While going for an examination, experts carry with them an authorization certificate showing the subject-matter and purpose of the examination, and that an administrative fine shall be imposed should incorrect information be provided.

(Supplementary paragraph: 01.08.2003-4971/Article 25): *Those concerned are obliged with providing the copies of information, documents, books and other instruments requested. In case an on-the-spot inspection is hindered or likely to be hindered, the on-the-spot inspection is performed with the decision of a criminal magistrate.*

CHAPTER THREE

Administrative Fines

Administrative Fine

Article 16- (Amended Article: 23.1.2008-5728/Article 472)[5] Among the cases that

- a) false or misleading information or document is provided in exemption and negative clearance applications and in authorization applications for mergers and acquisitions,
- b) mergers and acquisitions that are subject to authorization are realized without the authorization of the Board,

- c) in implementation of articles 14 and 15 of the Act, incomplete, false or misleading information or document is provided, or information or document is not provided within the determined duration or at all,
- d) on-the-spot inspection is hindered or complicated,

the Board shall impose on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations an administrative fine by one in thousand of annual gross revenues of undertakings and associations of undertakings or members of such associations which generate by the end of the financial year preceding the decision, which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board for those mentioned in sub-paragraphs (a), (b) and (c), and by five in thousand of their gross revenues to be calculated in the same manner for those mentioned in sub-paragraph (d). However, the penalty to be determined pursuant to this principle cannot be less than ten thousand Turkish Liras. Pursuant to sub-paragraph (b) of this paragraph, administrative fine is imposed to either of the parties in merger transactions and only to the acquirer in acquisition transactions.

The realization of on-the-spot inspection with a court decision shall not hinder the application of an administrative fine provided for in this Act in relation to the hindrance and complication of on-the-spot inspection.

To those who commit behaviour prohibited in articles 4, 6 and 7 of this Act, an administrative fine shall be imposed up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, which generate by the end of the financial year preceding the decision, which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board.

In case administrative fines mentioned in paragraph three are imposed on undertakings or associations of undertakings, an administrative fine up to five percent of the penalty imposed on the undertaking or association of undertakings shall be imposed on managers or employees of the association or association of undertakings who are determined to have a decisive influence in the infringement.

When deciding on an administrative fine pursuant to paragraph three, the Board shall take into consideration issues such as the repetition of infringement, its duration, market power of undertakings or associations of undertakings, their decisive influence in the realization of infringement, whether they comply with the commitments given, whether they assist with the examination, and the severity of damage that takes place or is likely to take place, within the context of article 17 paragraph two of the Faults Act dated 30/3/2005 and numbered 5326.

To those associations or associations of undertakings or their managers and employees making an active cooperation with the Authority for purposes of revealing contrariness to the Act, penalties mentioned in paragraphs three and four may not be imposed or reductions may be made in penalties to be imposed pursuant to such paragraphs taking into consideration the quality, efficiency and timing of cooperation and by means of demonstrating its grounds explicitly.

Issues taken into consideration in fixing administrative fines to be imposed pursuant to this article, terms for immunity from or reduction of fines in case of cooperation, and procedures and principles in relation to cooperation shall be determined by communiqués to be issued by the Board.

Relative Administrative Fine

Article 17- (Amended Article: 23.1.2008-5728/Article 473)6 Provided that penalties mentioned in article 16 paragraph one are reserved, the Board shall, for each day, impose on

undertakings and associations of undertakings an administrative fine by five in ten thousand of annual gross revenues of the relevant undertakings and associations of undertakings and/or members of such associations which generate by the end of the financial year preceding the decision, which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board in the event that

a) obligations introduced or commitments made by a final decision or interim measure decision are not complied with,

b) on-the-spot inspection is hindered or complicated,

c) in implementation of articles 14 and 15 of the Act, information or document requested is not provided within the duration determined.

Pursuant to paragraph one sub-paragraphs (a) and (c), administrative fines can be imposed from the completion of the duration determined for complying with the obligations in the decisions mentioned in these sub-paragraphs. The administrative fine related to the act in sub-paragraph (a) can be imposed from the day following the notice of this decision if any duration has not been determined in the decision where an obligation is introduced. And the administrative fine related to the acts in sub-paragraph (b) can be imposed from the day following the day when the act has been realized.

Nature and Application of Fines Imposed Pursuant to This Act

Article 18- (Annulled: 23.1.2008-5728/Article 578)7

Prescription in Fines and Periodic Fines

Article 19- (Annulled: 23.1.2008-5728/Article 578)8

SECTION THREE

Organization

Competition Authority

Article 20- The Competition Authority having a public legal personality, and an administrative and financial autonomy is established in order to ensure the formation and development of markets for goods and services in a free and sound competitive environment, to observe the implementation of this Act, and to fulfil the duties assigned to it by the Act.

The Ministry to which the Authority relates is the Ministry of Industry and Trade.

The Authority is independent in fulfilling its duties. No organ, authority and person may give commands and orders to influence the final decision of the Authority.

The central office of the Authority is based in Ankara.

Organization of the Competition Authority

Article 21- The organization of the Authority consists of the

a) Competition Board,

b) Presidency,

c) Service Units.

CHAPTER ONE

Competition Board

Organization of the Board

Article 22- (Amended Article: 02.07.2005-5388/Article 3)⁹ *The Competition Board is composed of a total of 7 members, one being the Chairman and the other being the Deputy Chairman.*

The Council of Ministers elects and appoints the members from among the two candidates apiece, to be nominated from inside or outside the following institutions for each vacant membership: two members from the Competition Board, one member from the Ministry of Industry and Trade, one member from the Ministry of State with which the Undersecretariat of State Planning Organization is affiliated, and one member apiece from the Supreme Court of Appeal, Council of State, and Turkish Union of Chambers and Commodity Exchanges.

The Council of Ministers shall commission one of the three candidates to be nominated by the Board as the President/Chairman. The Deputy President/Chairman is elected by the members of the Board.

Qualifications for Appointment

Article 23- The Chairman and members of the Board shall be appointed from among those who had a four-year higher education in law, economics, engineering, management or finance, either at home or abroad, possess a sufficient degree of professional knowledge and experience, and have worked in the public or private sector for at least 10 years, in line with their professions. Furthermore, it is compulsory that the members bear the qualifications mentioned in article 48 paragraph (A) sub-paragraphs 1, 4, 5, 6 and 7 of the Civil Servants Act No. 657.

Term of Office

Article 24- The term of office of the Chairman, Deputy Chairman and members of the Board is six years. The member whose term has expired is eligible for re-election. One third of the members of the Board is renewed every two years. During renewal, numbers and ratios in the provisions concerning the organization of the Board are taken into account. Should the Chairmanship and memberships are vacated before the expiration of the term of office, due to any reason other than renewal, election and appointment are carried out within one month for the vacated seats. The one appointed in such a case completes the term of the person he replaces.

The offices of the Chairman and members of the Board cannot be terminated due to any reason prior to the completion of their term. However, what terminate are the offices of the Chairman and members of the Board who are realized to have lost the qualifications required for their appointment or whose position is realized to be contrary to article 25 of this Act, by the decision of the Board, or whose offence with regard to the duty assigned by the Act is proven by a court decision.

Prohibitions

Article 25- The Chairman and members of the Board may not undertake any official or private mission, engage in commerce, be shareholders in partnerships, unless it is based on a special Act.

The Chairman and members of the Board are, prior to assuming office, obliged to dispose of all kinds of securities in their possession within the meaning of the capital market legislation, apart from securities issued by the Treasury in connection with borrowing, by means of selling or transferring them to persons other than their kin by blood up to the third degree and their kin by marriage up to the second degree. Those members who do not act in conformity with this provision within 30 days shall be deemed to have resigned from membership.

Positions in associations and foundations which aim at social assistance and education, and partnership in non-profit cooperatives fall outside this provision.

The members and staff of the Board may not disclose and use in their own or others' interests the confidential information as to the Authority, and trade secrets of undertakings and associations of undertakings that they learned during the implementation of this Act, even if they have left their office.

Oath

Article 26- Before the First Presidential Court of the Supreme Court of Appeal, the members of the Board take an oath that during their term of office, they shall carry out the tasks of the Board with full attention and honesty, and they shall not act or allow others to act contrary to the provisions of the Act.

The application made for the oath is deemed to be among the urgent business by the Supreme Court of Appeal. The Chairman and members of the Board may not assume office before taking an oath.

Duties and Powers of the Board

Article 27- The duties and powers of the Board are as follows:

- a)** To carry out, upon application or on its own initiative, examination, inquiry and investigation about the activities and legal transactions prohibited in this Act; to take the necessary measures for terminating infringements upon establishing that the provisions provided in this Act are infringed, and to impose administrative fines on those responsible for them,
- b)** To evaluate the requests of those concerned for exemption and negative clearance, and to grant an exemption and negative clearance certificate to the appropriate agreements,
- c)** To constantly follow up the markets to which exemption decisions and negative clearance certificates are related, and to re-evaluate the applications of those concerned in case changes are established in these markets or in the positions of the parties,
- d)** To permit mergers and acquisitions,
- e)** To elect the Deputy Chairman of the Board,
- f)** To issue communiqués and make the necessary regulations as to the implementation of this Act,
- g)** To opine, directly or upon the request of the Ministry, concerning the amendments to be made to the legislation with regard to the competition law,
- h)** To monitor legislations, practices, policies and measures of the other countries, concerning agreements and decisions limiting competition,
- i)** To determine and observe the implementation of the personnel policies of the Authority, to perform the appointment transactions of the personnel, to approve the annual budget, final account of revenues and expenses, and annual work schedules of the Authority, which are prepared by the Presidency, and to decide for transfers among the accounts in the budget if needed,
- j)** To determine the candidates to be nominated by the Authority for the vacated Board memberships,
- k)** To issue an annual report on its works, and the situation and developments in its fields of duty,
- l)** To negotiate and resolve the suggestions about purchases such as the procurement of movable and real property and fixtures, and about sales and leasings, and to make the necessary regulations therein,
- m)** To decide on any kind of transactions about credits, rights and obligations of the Authority concerning third parties,
- n)** To fulfil the other duties assigned by the Act.

Functioning Principles of the Board

Article 28- The Board is chaired and represented by the Chairman, and by the Deputy Chairman in cases of leave, sickness, traveling and in other cases where the Chairman is not present.

Meeting is chaired by the Chairman of the Board, or by the Deputy Chairman in his absence, and prior to the meeting, he determines the agenda to be resolved, and advises it to the members of the Board.

The members of the Board may not take part in negotiations and votings in events concerning themselves, and their kin by blood up to the third degree and their kin by marriage up to the second degree.

CHAPTER TWO

Presidency

Article 29- The Presidency is composed of the Chairman of the Board, the Deputy Chairman and the Vice-Chairmen of the Board.

The Chairman of the Board is the highest ranking chief of the Authority, and is responsible for the overall management and representation of the Authority.

This responsibility encompasses the duties and powers as to the regulation, supervision, evaluation of the works of the Authority within a general framework, and their announcement to the public when necessary.

Duties and Powers of the Presidency

Article 30- The duties and powers of the Presidency are as follows:

a) To ensure the organization and coordination at the highest level that the Competition Board which is the decisive body of the Authority and the service units work in harmony, efficiently, in a disciplined and orderly manner, and to solve the problems likely to occur between the service units of the Authority with respect to duties and powers,

b) To determine the agenda, date and time of the Board meetings, and to run the meetings,

c) To ensure the fulfilment of what is required by the Board decisions, and to monitor the implementation of these decisions,

d) To finalize and submit to the Board suggestions received from the service units,

e) To prepare and submit to the Board the annual budget, final account of revenues and expenses, and annual work reports of the Authority, and to ensure the implementation of the budget of the Authority, the collection of revenues and the carrying out of expenses,

f) To opine about decisions to be taken as to the competition policy, and the relevant legislation,

g) To arrange for and conduct the relations of the Authority with the Ministry and other organizations,

h) To represent the Authority in the presence of official and private organizations,

i) To ensure that final decisions of the Board, and communiqués and Regulations to be prepared by the Authority are published,

j) To determine the scope of duty and power of the personnel authorized to sign on behalf of the Chairman of the Board.

Vice-Presidents (Vice-Chairmen)

Article 31- Two Vice-Presidents may be commissioned for purposes of assisting the President in conducting the Presidential services. Vice-Presidents are obliged to fulfil duties and carry out

instructions given by the President, and to ensure harmony and cooperation between the levels of the organization and the service units concerned.

Service Units

Article 32- The service units of the Competition Authority are composed of the main service units organized as Department Head Offices, advisory units and auxiliary service units.

Supervision

Article 33- Accounts of the Authority are subject to the supervision of the State Audit Court.

CHAPTER THREE

Status of the Personnel of the Authority

Article 34- The essential and permanent duties required by the services of the Authority are conducted via the personnel employed on a contractual basis with an administrative service contract. Adequate number of expert professional staff and specialized non-career personnel may be employed at the disposal of the Authority.

The personnel of the Authority is subject to the Civil Servants Act No. 657, apart from the salary and financial rights. The Board is free in arranging the statuses of establishment and staff in compliance with the needs. The cancellation and creation of posts are carried out by the Board.

Those services calling for temporariness or a particular expertise are determined by the Presidency. Proxy or job contract provisions are applicable to personnel to be employed in such tasks. For those to be employed pursuant to this paragraph, salaries they receive from social security organizations shall not be cut off.

Foreign experts may also be employed pursuant to the principles of the Regulations which shall be prepared by the Presidency and which shall take effect upon the approval of the Board.

Appointment as Assistant Experts on Competition

Article 35- The following qualifications are sought for enabling appointment as assistant experts on competition:

- a)(Amended sub-paragraph: 02.07.2005-5388/Article 4)10** *To be a graduate of at least four-year higher education from faculties of law, economics, political sciences, management, economic and administrative sciences, or from management engineering or industrial engineering departments, or of higher education institutions abroad which are deemed equivalent to them,*
- b)(Amended sub-paragraph: 02.07.2005-5388/Article 4)11** *To succeed in the examination to be held jointly or separately for the branches listed in the sub-paragraph above,*
- c)** To succeed in the foreign language examination to be held in one of the English, French and German languages,
- d)** Not to be over thirty years of age as of the first day of January of the examination year.

Other necessary requirements are determined in the examination Regulations to be issued by the Board.

Experts on Competition

Article 36- Those appointed as assistant experts on competition pursuant to article 35 are awarded the title of "Expert on Competition" in case their expertise thesis which they shall

prepare or have already prepared concerning their topics is approved by the Board, provided that they have worked for at least three years and received a positive record.

Experts and assistant experts on competition bear the title and possess the power of professional staff.

Salary and Other Financial Rights

Article 37- Monthly salaries of the Chairman and members of the Board are determined by the Council of Ministers upon the proposal of the Ministry of Industry and Trade, provided that they do not exceed twice the salary of the highest ranking civil servant, including all payments. Those which are not subject to the income tax among the payments made to the highest ranking civil servant shall also not be subject to the income tax pursuant to this Act.

Salaries and other financial rights of the Authority personnel are determined by the Board upon the proposal of the Presidency, under the principles in the first paragraph with regard to salaries and making changes thereto.

Considering the Retirement and Service Periods

Article 38- The Chairman and members of the Board, and the other personnel are subject to the Pensioner's Fund Act. From among the persons who are subject to the Civil Servants Act No. 657, those appointed to the Chairmanship or memberships of the Board, and those employed in the Authority return to the position as a civil servant, and are appointed to an office compatible with their status, in case their term of office expires. In such a case, the periods they served in the Authority are considered in their services pursuant to the provisions of the Act they are subject to.

These provisions are also applicable to the Chairman and members, experts or the other personnel who come from universities, with reserving the necessary requirements for receiving academic titles.

With regard to retirement, the Chairman of the Board, the members of the Board and the Heads of Departments are considered to be at the same level with the Undersecretary of the Ministry, the Deputy Undersecretaries of the Ministry, and the General Managers of the Ministry respectively. The status of the other personnel as to retirement shall be indicated in the Regulations which shall be prepared by the Presidency and which shall be put into force upon the approval of the Board.

Revenues of the Authority

Article 39- Revenues of the Authority set up the budget of the Authority, and they are made up of the following items of revenues:

- a) The subsidy to be allocated in the budget of the Ministry,
- b) **(Annulled: 01.08.2003-4971/Article 25-B)12**
- c) **(Supplement: 17/9/2004-5234/Article 29)** *Payments to be made by four per ten thousand of the capitals of all partnerships to be newly established with the status of an incorporated and limited company, and that of the remaining portion in case of capital increase,13*
- d) Publication and other revenues.

Revenues belonging to the Authority are collected in an account to be opened in the Central Bank of the Republic of Turkey or a state bank. **(Annulled last sentence: 01.08.2003-4971/Article 25-B)14**

SECTION FOUR

Procedure in Examinations and Inquiries of the Board

Preliminary Inquiry

Article 40- On its own initiative or upon the applications filed with it, the Board decides to open a direct investigation, or to conduct a preliminary inquiry for determining whether or not it is necessary to open an investigation.

Should it be decided to conduct a preliminary inquiry, the Chairman of the Board assigns one or more of the experts among the professional staff as reporters.

The reporter who is entrusted with the task of conducting a preliminary inquiry notifies the Board in writing within 30 days of the information and any evidence obtained by him, and his comments about the issue.

Conclusion of Preliminary Inquiry

Article 41- Within 10 days following the submission of the preliminary inquiry report to the Board, the Board convenes in order to evaluate the information obtained and make a decision, and decides on whether or not to open an investigation.

Notification of Applicants

Article 42- In case the Board deems the claims put forward in applications for informing or complaint serious and sufficient, informers or complainants are notified in writing that the claims put forward have been deemed serious and that an inquiry has been initiated.

In cases where the Board either expressly rejects applications, or is deemed to have rejected them by means of failure to notify within due period, anyone who documents to have a direct or indirect interest may resort to jurisdiction against the rejection decision of the Board.

Commencement of Investigation by the Board

Article 43- (Amended first sentence: 02.07.2005-5388/Article 5)15 *If it is decided to perform an investigation, the Board designates the reporter or reporters who shall conduct the investigation under the supervision of the department head concerned.* The investigation is concluded within 6 months at the latest. In cases where it is deemed necessary, the Board may grant an additional period of 6 months only once.

The Board notifies the parties concerned of investigations initiated by it, within 15 days of issuing the decision for the initiation of investigation, and requests that the parties submit their first written pleas within 30 days. In order to enable the commencement of the first written reply period granted to the parties, it is required that the Board forwards to the parties concerned this notification letter, accompanied by adequate information as to the type and nature of the claims.

The decision of the Board to initiate an investigation is final.

Collecting Evidence and Informing the Parties

Article 44- A delegation acting on behalf of the Board and composed of **(Annulled phrase: 02.07.2005-5388/Article 5)16 (...)** reporters designated and commissioned by the Board may, during the investigation stage, exercise the powers to request information and carry out an on-the-spot inspection as provided in articles 14 and 15 of this Act respectively. Within this period determined, it may request from the parties and the other places concerned the forwarding of paperwork and the provision of any information which are deemed necessary by it. During the investigation stage of the Board, the person or persons claimed to have infringed this

Act may, at all times, submit to the Board any information and evidence likely to influence the decision.

Those parties which are notified of the initiation of an investigation against them may, until their request for enjoying the right to hearing, ask for a copy of any paperwork drawn up within the Authority in connection with themselves, and if possible, a copy of any evidence obtained.

The Board may not base its decisions on issues about which the parties have not been informed and granted the right to defense.

Notice and Reply

Article 45- The report prepared at the end of the investigation stage is notified to all members of the Board and the parties concerned.

Those determined to have infringed this Act are notified to submit their written pleas to the Board within 30 days. Those charged with conducting the investigation declare an additional written opinion within 15 days against the pleas to be submitted by the parties, and this is also notified to all members of the Board and the parties concerned. The parties may reply to such opinion within 30 days. In case the parties provide justifiable grounds, these periods may be extended only once and by one fold at the most.

The pleas of the parties not submitted within due period shall not be taken into account.

Hearing

Article 46- Hearing is held upon the parties' declaration of their will to enjoy the right to hearing in their petition of reply or defense. Furthermore, the Board may decide on its own initiative to hold a hearing.

Hearing is held within at least 30 days and at most 60 days from the end of the investigation stage. Invitations for the hearing are forwarded to the parties at least 30 days before the day of the hearing.

Principles Concerning the Hearing

Article 47- Hearings are held publicly. The Board may decide to hold the hearing in camera on grounds of protecting the general morals and trade secrets.

Hearings are chaired by the Chairman of the Board, or by the Deputy Chairman of the Board in his absence. The meeting is held with the participation of the Chairman of the Board or the Deputy Chairman, and at least **(Amended phrase: 02.07.2005-5388/Article 5)17** *four* members of the Board.

Hearings are completed in no longer than 5 consecutive sessions, and various meetings held within the same day are deemed as one session.

The parties are obliged to notify, 7 days before the hearing at the latest, the Board of the means of proof they shall utilize in the hearing. The parties may not utilize the means of proof not notified within due period.

During the hearing, the parties concerned may utilize any evidence and means of proof provided in the Part Two Chapter Eight of the Code of Civil Procedure. The parties claimed to have infringed this Act, or their representatives, and those who prove to the Board prior to the session that they have direct or indirect interests, or their representatives may participate in sessions.

Final Decision

Article 48- The decision is made on the same day after the hearing, or if not possible, within 15 days, together with its grounds.

In cases where a hearing is not requested by the parties, and the Board does not decide to hold a hearing on its own initiative, the final decision is made within 30 days following the end of the investigation stage, pursuant to the examination to be performed on the file.

In case the parties concerned fail to attend the hearing despite the decision to hold a hearing, the decision is made within one week following the date of the meeting determined, pursuant to the examination to be performed on the file.

Confidentiality of Meetings

Article 49- Decisions of the Board are taken as a result of confidential meetings and are communicated publicly. No member of the Board may cast an abstention vote. Except for the ones having an excuse, members who have been present at the hearing are obliged to participate in meetings.

Procedure in the Meeting

Article 50- The meeting is chaired by the Chairman of the Board, or in his absence, by the Deputy Chairman, and he determines matters to be resolved. After such matters are discussed freely, the Chairman collects the votes and casts his own vote finally.

Meeting and Decision Quorum

Article 51- In its final decisions, the Board convenes with the participation of at least a total of **(Amended phrase: 02.07.2005-5388/Article 5)18** *five* members including the Chairman or the Deputy Chairman, and it decides via the parallel votes of at least **(Amended phrase: 02.07.2005-5388/Article 5)19** *four* members.

Where the necessary quorum for the decision cannot be attained in the first meeting, the Chairman ensures that all members participate in the second meeting. However, if not possible, the decision is made via the absolute majority of the participants in the meeting. In this case, the quorum for the meeting may also not be less than the one mentioned in the first paragraph. In case of a tie vote in the second meeting, the vote of the side of the Chairman is deemed preponderant.

For decisions except the final decision, and particularly for decisions and transactions having the nature of measures and recommendations, it is required that at least one third of the members of the Board convenes and that the absolute majority of the participants in the meeting makes a decision.

Points Required in Decisions

Article 52- Decisions involve the following points:

- a)** Names and surnames of the members of the Board who made the decision,
- b)** Names and surnames of those who carried out the examination and inquiry,
- c)** Names, titles, residences and distinguishing characteristics of the parties,
- d)** Summary of the claims of the parties,
- e)** Summary of the examination and of the economic and legal issues discussed,
- f)** Opinion of the reporter,
- g)** Evaluation of all evidences and pleas submitted,
- h)** Grounds, and the legal basis of the decision,

- i) Conclusion,
- j) If any, writings about the dissenting votes.

Duties imposed on and rights granted to the parties with the decision made have to be written explicitly such that they do not pave the way for doubts and hesitations.

Taking the Decisions to Writing

Article 53- The decision is written by the Chairman of the Board or a member to be commissioned by him. Decisions are signed by the members participating in the meeting. Those members against the decision may take to writing dissenting votes individually or jointly. The original of the decision is kept in the archives of the Board. A copy of it is submitted to the parties in return for signature. Another copy is forwarded to the Publication Department of the Competition Authority for publication purposes.

(Annulled phrase: 01.08.2003-4971/Article 25)20 (...) Decisions of the Board are published **(Amended phrase: 17.09.2004-5234/Article 29)21** *on the internet page of the Authority* in such a way not to disclose the trade secrets of the parties.

Commencement Date of Periods

Article 54- In decisions of the Competition Board, periods commence as of the date the reasoned decision is communicated to the parties.

Appealing Against Decisions of the Board

Article 55- (Amended Article: 23.1.2008-5728/Article 474)22 Nullity suits against final decisions, measure decisions and administrative fine decisions of the Board shall be heard at the Council of State as the court of first instance.

Appealing against decisions of the Board shall not cease the implementation of decisions, and the follow up and collection of administrative fines.

SECTION FIVE

Private Law Consequences of Limiting Competition

Legal Nature of Agreements and Decisions Contrary to This Act

Article 56- Any agreements and decisions of associations of undertakings contrary to article 4 of this Act are invalid. The performance of acts arising out of such agreements and decisions may not be requested. In case a request is made for reclamation due to the invalidity of previous acts fulfilled, the return obligation of the parties is subject to articles 63 and 64 of the Code of Obligations.

The provision of article 65 of the Code of Obligations is not applicable to disputes arising out of this Act.

Right to Compensation

Article 57- Anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to this Act, or abuses his dominant position in a particular market for goods or services, is obliged to compensate for any damages of the injured. If the damage has resulted from the behaviour of more than one people, they are responsible for the damage jointly.

Compensation for the Damage

Article 58- Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited. Competing undertakings affected by the limitation of competition may request that all of their damages are compensated by the undertaking or undertakings which limited competition. In determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured, award compensation by three fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.

Burden of Proof

Article 59- Should the injured submit to the jurisdictional bodies proofs such as, particularly, the actual partitioning of markets, stability observed in the market price for quite a long time, the price increase within close intervals by the undertakings operating in the market, which give the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof is for the defendants that the undertakings are not engaged in concerted practice.

The existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence.

SECTION SIX

Final Provisions

Offences Committed on the Funds, Paperwork and Properties of the Authority

Article 60- (Amended Article: 23.1.2008-5728/Article 475)23 The funds, paperwork and any properties of the Authority have the force of state property. The Chairman and members of the Board, and its personnel who commit offences about their offices shall be deemed public officers in respect of responsibility for penalty. Those offences committed against the chairman and members of the Board and its personnel ex officio shall be deemed to have been committed against a public officer.

Against such persons, the provisions of the Act dated 2/12/1999 and numbered 4483 shall not be applicable due to offences committed by them in association with their offices.

Notice

Article 61- Notifications to be made to the parties concerned in accordance with this Act are performed pursuant to the provisions of the Notice Act No. 7201.

Regulations

Article 62- Apart from those mentioned in this Act, principles on the exercise of the powers by the Authority, its management and working principles, procedures and principles to be applied in the collection of its revenues, carrying out of its expenses and supervision of these transactions, principles of changes to be made to monthly salaries, principles as to employing foreign experts, regulations concerning the purchase and tender procedure of the movables and immovables to be purchased by the Authority, and provisions with regard to the accounting system of the

Authority are provided in the Regulations to be prepared by the Board and put into force via the resolution of the Council of Ministers.

Regulations to be issued pursuant to this Act shall be issued within one year from the date of publication of this Act.

Inapplicable Provisions²⁴

Article 63- The Authority is not subject to the General Accounting Act No. 1050, the State Tender Act No. 2886, the Allowances Act No. 6245, and to their annexes and amendments.

Revenues of the Authority are exempt from the Corporation Tax, and from the Inheritance and Transfer Tax due to donations and aids to be granted; interests to accrue in favor of the Authority due to any transactions to be performed are exempt from the Banking and Insurance Transactions Tax; revenues of the Authority and all transactions concerning these revenues are exempt from any kind of taxes, duties and charges in the purchase and sale of immovable goods; vehicles to be purchased for the Authority are exempt from the Vehicle Purchase Tax and Stamp Duty.

Temporary Article 1- The first appointment to the Competition Board is made pursuant to the principles of article 22. It is such that the provisions as to the candidates to be nominated by the Competition Board are not applicable.

In the first appointment, the Prime Minister and the Minister of Industry and Trade each nominate two candidates for membership, instead of the Board.

The members of the Board to be renewed by the end of the second and fourth years are determined by drawing names in the last meetings of the Board within such period. For the first term, the Chairman of the Board is appointed by the Council of Ministers from among the two candidates to be nominated by the Minister of Industry and Trade, and the Chairman and the Deputy Chairman of the Board complete their terms within six years without participating in the lot.

Temporary Article 2- The Competition Board to be appointed under the principles mentioned in the Temporary Article 1 announces that situation with a communiqué after the completion of the organization of the Competition Authority. Any agreements and decisions existing on the date of announcement are notified to the Board within 6 months from this date.

Temporary Article 3- Within one year from the date of entry into force of this Act, the Competition Board may appoint sufficient number of experts from public and private organizations to work in the Authority, without seeking the qualifications in articles 35 and 36 of the Act, provided that it is for once.

It is such that those to be appointed as experts are required to possess the qualifications listed in sub-paragraphs (a) and (c) of the first paragraph of article 35, have at least a five-year professional experience, and be under forty-one years of age. For those who shall be appointed as experts from public organizations, the requirement of having taken up their profession by a competitive and proficiency exam is sought as well.

Until the organization of the Competition Authority is completed, the personnel of the related Ministry may be temporarily commissioned in the fulfillment of the tasks of the Authority.

(Supplement: 02.07.2005-5388/Article 6) Temporary Article 4- *Election and appointment shall not be made for the memberships vacated until the number of Board members is reduced to seven.*

(Supplement: 01.07.2006-5538/Article 13) Temporary Article 5- *The Board can convene and take a decision with a maximum of seven members. In case the number of members of the Board is more than seven, the Chairman shall determine which member would be made not to participate in a meeting in turn.*

Entry Into Force

Article 64- Articles 16 and 17 of this Act concerning administrative fines shall enter into force one year after its publication, while the other articles on the date of its publication.

Execution

Article 65- The provisions of this Act shall be executed by the Council of Ministers.

[1] The phrase of "*upon the request of those concerned*", which was involved in the paragraph has been deleted from the text of the article.

[2] The Former Version of the Amended Paragraph: "Exemption decisions may be granted for a maximum of five years. Granting of exemption may be subjected to the fulfillment of particular terms and/or particular obligations. If the terms of exemption still continue when the exemption period granted by the Board has expired, the exemption decision may be renewed upon the application of the parties concerned."

[3] With article 2 of the Act dated 2/7/2005 and numbered 5388, the phrase of "Agreements" that was involved in between has been deleted from the title of the article.

[4] The Former Version of the Annulled Paragraph: "Those agreements, concerted practices and decisions falling under article 4 shall be notified to the Board within one month of their conclusion. Exemption provisions are not applicable to agreements not notified. In case exemption is granted to notifications not made on time, the exemption shall be valid as of the date of the notification."

[5] The Former Version of the Amended Article:

Fines

Article 16- The Board may impose on natural and legal persons having the nature of undertakings and on associations of undertakings and/or the members of such associations the following fines;

a) hundred million liras in case misleading or incorrect information is provided in applications for exemption, negative clearance and permission as to mergers or acquisitions, and in notifications and applications in relation to agreements concluded before the entry into force of this Act,

b) hundred million liras in case **(Supplementary phrase: 02.07.2005- 5388/Article 2)** *no information is provided at all*, incomplete, incorrect or misleading information is provided where there is a request for information by the decision of the Board, or an on-the-spot inspection,

c) fifty million liras in case **(Amended phrase: 02.07.2005-5388/ Article 2)** *merger or acquisition transactions subject to authorization are committed without the authorization of the Competition Board,*

d) sixty million liras in case the obligations in exemption decisions taken by the Board in accordance with article 5 paragraph three of this Act are not fulfilled.

Provided that it is not less than two hundred million liras for those proven, by the Board decision, to have committed behaviour prohibited in articles 4 and 6 of this Act, and for those who commit behaviour written in article 11 sub-paragraph (b) of this Act, fine is imposed up to ten percent of the annual gross revenue of natural and legal persons having the nature of undertakings to be imposed a penalty, and of associations of undertakings and/or the members of such associations, which generated by the end of the preceding financial year and which shall be determined by the Board.

In case undertakings and associations of undertakings having legal personality are subjected to fines mentioned in paragraph one, natural persons employed in managerial bodies of this legal personality are also fined personally up to ten percent of the fine imposed.

When deciding on fines, the Board shall take into account factors such as the existence of intent, the severity of fault, the market power of the undertaking or undertakings upon which a penalty is imposed, and the severity of potential damage.

Fines are not applicable to agreements and decisions notified within due time, for the period until the final decision by the Board, in case they do not expressly violate the provisions of this Act.

6 The Former Version of the Amended Article:

Periodic Fines

Article 17- The Board may impose on undertakings and associations of undertakings the following periodic fines per day, which shall commence from the date to be mentioned in the decision;

a) fifty million liras for failure to comply with the decision taken pursuant to article 9, concerning the termination of infringement, and other measures,

b) twenty-five million liras for failure to fulfil the decisions and measures of the Board provided for in article 11 sub-paragraph (b),

c) twenty-five million liras for performance of the behaviour prohibited pursuant to article 13 paragraph one,

d) twenty million liras for prevention of on-the-spot inspection by experts of the Board in accordance with article 15.

7 The Former Version of the Eliminated Article:

Any fines provided in this Act are of an administrative nature. Fines or periodic fines are separately applied to each party acting contrary to this Act.

In case a decision as to imposing a periodic fine is appealed, the periodic fine is not applicable as of the date of the appeal if a decision for the suspension of execution is issued about the periodic fine.

8 The Former Version of the Eliminated Article:

The power of the Board to impose fines and periodic fines is subject to the following periods of prescription:

a) three years for the infringement of provisions related to the application or notification of undertakings or associations of undertakings, provision of information, or on-the-spot inspection,

b) five years in other cases.

The period commences to run from the day of occurrence of the infringement. If continuous or repeated infringements are in question, it commences from the day the infringement ends or is repeated last.

Any action to be taken by the Board with regard to this infringement for purposes of examination or inquiry interrupts the prescription as of the notification of this action to one of the parties concerned.

That an appeal has been made against the decision interrupts the period of prescription.

9 The Former Version of the Amended Article: The Competition Board is composed of a total of 11 members, one being the Chairman and the other being the Deputy Chairman.

The Council of Ministers elects and appoints the members from among the two candidates apiece, to be nominated from inside or outside the following institutions for each vacant membership: four members from the Competition Board, two members from the Ministry of Industry and Trade, one member from the Ministry of State with which the Undersecretariat of State Planning Organization is affiliated, and one member apiece from the Supreme Court of Appeal, Council of State, Inter-University Board, and Turkish Union of Chambers and Commodity Exchanges.

It is compulsory that at least half of the candidates to be nominated by the Competition Board be elected from among the professional staff of the Competition Authority who have been awarded the title of expert.

The Council of Ministers shall commission one of the three candidates to be nominated by the Board as the Chairman. The Deputy Chairman is elected by the members of the Board from among themselves.

10 The Former Version of the Amended Sub-paragraph: "To be a graduate of economics and management departments of faculties of Law, Economics, Political Sciences, Management, Economic and Administrative Sciences, or industrial engineering or management engineering departments of faculties of Engineering, or higher education institutions abroad which are deemed equivalent to them,"

11 The Former Version of the Amended Sub-paragraph: "To succeed in the competitive examination to be held,"

12 The Former Version of the Eliminated Sub-paragraph: "Twenty-five percent of fines imposed by the Board pursuant to articles 16 and 17 of this Act,"

13 With article 29 of the Act dated 17/9/2004 and numbered 5234, sub-paragraph (c) has been added to this article, and the existing sub-paragraph (c) has been made to follow uninterruptedly as sub-paragraph (d).

14 The Former Version of the Eliminated Sentence: "Revenues mentioned in sub-paragraph (b) are deposited in the relevant account of the Authority during the deposit of the fine in the cashier's office of the Treasury after the fines become final."

15 The Former Version of the Amended Sentence: "If it is decided to perform an investigation, the Board also designates the member or members of the Board who shall conduct the investigation together with the reporter or reporters commissioned."

16 The phrase of "the member of the Board and" included in between has been deleted from the text of the article.

17 The phrase of "7" included in this paragraph has been amended, and it has been inserted in the text.

18 The phrase of "8" included in this paragraph has been amended, and it has been inserted in the text.

19 The phrase of "6" included in this paragraph has been amended, and it has been inserted in the text.

20 The phrase of "after finalization" included in this paragraph has been eliminated.

21 The phrase of "in the Official Gazette" included in this paragraph has been amended, and it has been inserted in the text.

22 The Former Version of the Amended Article:

Appeal may be made to the Council of State within due period against the final decisions, measure decisions, fines and periodic fines of the Board, as of communicating the decision to the parties. **(Amended sentence: 01.08.2003-4971/Article 25-D)[6]** *Appealing against decisions of the Board does not cease the implementation of decisions, and the follow-up and collection of fines.*

(Amended sentence: 01.08.2003-4971/Article 25-D)[6] *Fines are paid (Amended phrase: 17.09.2004-5234/Article 29-c)[6]* *within three months as of the date of communicating the final decision of the Board to the one concerned.* The enforcement of the decision of the Board imposing fines or periodic fines is subject to the provisions of the Act on the Procedure of Collection of Public Credits No. 6183.

23 The Former Version of the Amended Article:

The funds, paperwork and any properties of the Authority have the force of State Property. The Chairman and members of the Board, and its personnel who commit offences about their offices are punished in the same way like Civil servants. Those offences committed against the members and the personnel of the Board are deemed to have been committed against a Civil servant. Prosecutions in this respect are conducted pursuant to general provisions.

24 See article 81 of the Act dated 10/12/2003 and numbered 5018, and article 37 of the FY 2005 Budget Act dated 28/12/2004 and numbered 5277 with regard to the application of this article

UKRAINE

COMMENTARY BY THE GOVERNMENT OF UKRAINE ON THE ANTIMONOPOLY LEGISLATION OF UKRAINE

A. Description of the reasons of adopting the legislation

Transition of Ukraine from state planned economy to market economy created a need for adopting a number of legislative and other normative acts that are directed towards ensuring conditions for development and functioning of the mechanism of market economy, support to and protection of free fair competition with a view to ensuring efficient economy and social progress, protection of the interests of economic entities and consumers.

B. Description of the purposes of the legislation and changes in it from the moment of its adoption

The Law of Ukraine On Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities No. 2132-XII (hereinafter referred to as “Law No. 2132”) was adopted on 18 February 1992 to protect and stimulate competition. The preamble to the Law No. 2132 reads: “The present Law shall define the legal grounds for limitation and forestalling of monopolism, for prevention of unfair competition in entrepreneurial activities and for exercising state control over the observance of the antimonopoly legislation norms”. The Law No. 2132 provided for the establishment of the Antimonopoly Committee of Ukraine - the state body called to “ensure, according to its competence, state control over the observance of the antimonopoly legislation, protection of the interests of entrepreneurs and consumers against violations of the antimonopoly legislation”, defined its structure, competence and powers. Later on, the status of the Antimonopoly Committee of Ukraine (hereinafter referred to as “the Committee”), - its tasks, functions, powers, structure, principles of activities were defined by the Law of Ukraine On the Antimonopoly Committee of Ukraine of 26 November 1993 No. 3659-XII.

Concerning mechanisms, methods of and instruments for implementing the tasks provided for by Law No. 2132, those matters in the bulk of cases are regulated by other normative acts that have been adopted and are effective to develop provisions of this law.

On 7 June 1996, the Law of Ukraine On Protection Against Unfair Competition No. 236/96-BP (hereinafter referred to as “Law No. 236”) that defines the legal grounds for protecting economic entities and consumers against unfair competition was adopted. The law came into force on 1 January 1997 and replaced such norms of Law No. 2132 that concerned unfair competition.

Thus there are three legislative acts for the time being in Ukraine that constitute the basis for the antimonopoly legislation of Ukraine.

C. Description of practices, actions or behaviour that are objects of control

Law No. 2132 defines as violations of the antimonopoly legislation the following

actions:

- abuses of monopoly position;
- anticompetitive concerted actions;
- discrimination against economic entities that is practised by central and local bodies of executive power, by state bodies that regulate activities of natural monopolies and securities markets, by state bodies of privatization, by bodies of local self-government as well as by bodies of administrative and economic management and control being economic entities when they fulfil functions of management and control within such powers of the mentioned bodies that were delegated to them.

The definition of unfair competition and the responsibility for it are provided for by Law No. 236.

Abuse of monopoly position

Article 4 of Law No. 2132 defines as abuse of monopoly position the following:

1. imposition of such contract terms that create a disadvantage for contractors or imposition of such additional terms that have nothing in common with the subject of a contract, including imposition of a needless product on a contractor;
2. limitation or stoppage of production of products and their removal from circulation, which resulted or can result in creation or maintenance of deficit on the market or in setting monopoly prices;
3. partial or complete refusal to sell or purchase a product in the absence of alternative purchase or sales sources, which resulted or can result in creation of maintenance of deficits on the market or in setting monopoly prices;
4. other actions that resulted or can result in creation of barriers to entry into (withdrawal from) the market with respect to other economic entities;
5. setting of such discriminatory prices (tariffs, rates) for one's own products that restrict rights of particular consumers;
6. setting of monopoly high prices (tariffs, rates) for one's own products, which resulted or can result in violation of the rights of consumers;
7. setting of monopoly low prices (tariffs, rates) for one's own products, which resulted or can result in restriction of competition.

The actions mentioned in Points 1 and 5 are qualified as abuse of monopoly position irrespective of the consequences of performed actions.

The actions mentioned in Points 2, 3, 4, 6, 7 are qualified as abuse of monopoly position if there are the consequences provided for by the points.

The list of actions to be considered as abuses of monopoly position is made wider

due to the provisions of Point 4. For qualifying them, it is necessary, however, to have the consequences provided for by the same provision.

Only such economic entities that occupy monopoly position on the market of a particular product are subjects of a violation in the form of abuse of monopoly position.

Law No. 2132 defines that position of an economic entity whose share in the market of a particular product exceeds 35 per cent is considered to be a monopoly market position. Position of an economic entity whose share in the market of a particular product is less than 35 per cent may be defined as a monopoly one by a decision taken by the Antimonopoly Committee of Ukraine if that sort of position makes it possible for the economic entity to restrict competition on the market independently or jointly with other economic entities. The procedure of defining a monopoly position of an economic entity on the market is established by the relevant normative acts of the Committee and provides for the following sequence in defining market position:

- definition of the list of products with respect to which the market position is being defined;
- definition of consumers of those products;
- definition of the period within which the market position is being defined (as a rule, one year);
- definition of the product limits of the market (groups of interchangeable products);
- definition of the geographical limits of the market;
- definition of the list of economic entities (competitors) that supply the mentioned products to the relevant markets;
- definition of the list of economic entities whose share in the market of the mentioned products exceeds 35 per cent;
- definition of the fact that economic entities whose share in the market is less than 35 per cent have market power.

Monopoly position itself of an economic entity is not prohibited.

Fair competition (Points 2, 3, 4, 7) and the rights of participants of economic circulation including those of consumers (Points 1, 5, 6) are direct objects of a violation in the form of abuse of monopoly position. Depending upon the circumstances, violations can infringe on both objects at once.

The complete prohibition affects actions that are abuses of monopoly position and legal responsibility for committing them is provided for. In addition, if an economic entity abuses its monopoly position, the Committee may adopt a decision about compulsory split-up of the economic entity being a monopolist if that sort of split-up is possible.

Anticompetitive concerted actions

Article 5 of Law No. 2132 does not contain the list of actions to be anticompetitive concerted actions, at the same time it only provides for the consequences whose coming into existence makes it possible to consider any concerted actions (agreements) to be anticompetitive.

As the article provides for, anticompetitive concerted actions are considered to constitute such concerted actions (agreements) that resulted or can result in:

1. setting (maintenance) of monopoly prices (tariffs), rebates, extra charges (additional payments), increases in prices;
2. distribution of markets on the principle of territory, assortment of products, volume of product sale or product purchase, or according to the circle of consumers, or according to other indications, which resulted or can result in their monopolization;
3. removal of sellers, buyers, and other economic entities from the market or restriction of their access into it.

Coordination of actions, i.e. the existence of an agreement in any form between participants of that sort of actions, is a necessary sign of anticompetitive concerted actions. The actions can be committed in any form, namely in writing, orally, by silent consent, etc.

Monopolization or the possibility of monopolization of markets are additional necessary consequences to qualify such concerted actions that resulted or can result in distribution of markets on the principle of territory, assortment of products, volume of product sale or product purchase, or according to the circle of consumers.

Fair competition is a direct object of a violation in the form of abuse of monopoly position. The consumer rights (Point 1) may be an additional object of the violation.

Subjects of that sort of a violation can be the following:

1. economic entities;
2. central and local bodies of executive power, state bodies that regulate activities of natural monopolies and securities markets, state bodies of privatization, bodies of local self-government as well as bodies of administrative and economic management and control.

Actions that have the signs of anticompetitive concerted actions and are committed by the subjects in the meaning of Point 2 are considered not to be the violations provided for by Article 5 of Law No. 2132, but to be such discrimination against economic entities that is provided for by Article 6 of the same law.

The norm of Article 5 is a prohibitive one. The legislation provides for no exemptions from the article. Thus the complete prohibition affects anticompetitive concerted actions.

Discrimination against economic entities

Article 6 of Law No. 2132 defines the following actions to be discrimination against economic entities that are practised by bodies of state power, bodies of local self-government and bodies of administrative and economic management and control:

1. prohibition against the establishment of new enterprises or other organization forms of entrepreneurship in any sphere of activities;
2. putting restrictions on being engaged in some activities, which resulted or can result in restriction of competition;
3. putting restrictions on production of particular kinds of a product, which resulted or can result in restriction of competition;
4. compulsion of economic entities to join associations, concerns, interbranch, regional and other amalgamations of enterprises;
5. compulsion of economic entities to practice a priority conclusion of contracts;
6. compulsion of economic entities to provide a primary supply to a particular circle of consumers;
7. making decisions about centralized distribution of products, which resulted or can result in monopoly position on the market;
8. establishment of prohibition against sale of products from one region of the republic into another one;
9. giving particular economic entities such tax and other privileges that place them in a privileged position with respect to other economic entities, which resulted or can result in monopolization of the market of a particular product;
10. restriction of the rights of economic entities to purchase and sell products;
11. establishment of prohibitions or limitations with respect to particular economic entities or groups of economic entities.

The notion of violations in the form of discrimination of economic entities provides for, at once, two objects, namely fair competition to be based on equal rights of and opportunities for economic entities and the rights of participants of economic circulation, i.e. economic entities.

Limitation of the right or opportunity to be engaged in free, left to one's discretion, economic activities, violation of the principle of independence and equality of participants of economic circulation, artificial creation of advantages for certain economic entities, which in the end results in restriction or distortion of competition and restraint of competition, constitute the essence of the violations.

The actions mentioned in Points 1, 4, 5, 6, 8, 10, 11 are defined a priori as such actions that have negative impact on competition.

Perpetration of the actions mentioned in Points 2, 3, 7, 9 does not result obligatory in negative consequences for competition. That is why the actions mentioned in those points are defined to be discrimination of economic entities only if those actions result in the relevant consequences, namely restriction of competition or monopolization of the market.

Central and local bodies of executive power, state bodies that regulate activities of natural monopolies and securities markets, state bodies of privatization, bodies of local self-government as well as bodies of administrative and economic management and control being economic entities, when they fulfil functions of management and control within such powers of the mentioned bodies that were delegated to them, are subjects of the provided violations.

Conclusion of agreements between bodies of state power, bodies of local self-government, bodies of administrative and economic management and control, conclusion of agreements between those bodies and economic entities as well as their giving natural or legal persons powers to perform the actions provided for by Points 1-7 are also considered to be discrimination against economic entities.

Exemptions from the provisions of the article may be established by legislative acts of Ukraine for the purpose of ensuring national security, defence and public interests.

Responsibility for violations of the antimonopoly legislation in the form of discrimination is provided for with respect to legal persons being economic entities. The state bodies mentioned in article 6 and bodies of local self-government as legal persons do not bear the responsibility. In cases of that sort, the Committee or its bodies draw up statements of violations of the antimonopoly legislation and send them to the court of justice for its instituting administrative proceedings against guilty officials of the mentioned bodies.

Unfair competition

Legal grounds for protecting economic entities and consumers against unfair competition are defined by the Law of Ukraine On Protection Against Unfair Competition of 7 June 1996 No. 236/96-BP (hereinafter referred to as Law No. 236).

Law No. 236 defines unfair competition as any actions performed in the course of competition that contradict rules, trade and other fair customs in entrepreneurial activities. The law qualifies as unfair competition, in particular, the following:

1. Unlawful use of an economic entity's business reputation:
 - (a) unlawful use of others' trademarks, advertising material and packing;

The unauthorized use of others' Christian and company names, trademarks, logos, advertising material, packing, titles of books, works of art, periodicals, place-names of commodities' origin because of which there can be confusion with respect to activities of other economic entities having the priority right to use them is qualified as unlawful.

The use of a natural person's name in a company name is not qualified as unlawful if the person's name is somehow made distinct so as to rule out its confusion with activities of other economic entity.

(b) unlawful use of products made by other manufacturers;

Launching into circulation under one's name products belonging to a different manufacturer by changing or lifting that manufacturer's name without permission from an authorized person is the unlawful use of products made by other manufacturers.

(c) copying outward appearance of products;

Copying outward appearance of products or their parts is not qualified as unlawful if that sort of copying is caused exclusively by their functional use.

That norm does not affect products being protected as objects of intellectual property.

(d) comparative advertising;

Comparative advertising is not considered unlawful if information contained therein concerning products, work or services is corroborated by such factual data that are authentic, unbiased and useful for informing consumers.

2. Obstructing other economic entities' business in the course of competition and gaining unlawful advantage in competition:

(a) discrediting an economic entity;

(b) purchase and sale of products, fulfilling work and rendering services with compulsory assortment;

(c) instigation of boycott against an economic entity;

(d) instigating a supplier to discriminate against a buyer (customer);

(e) instigating an economic entity to abrogate a contract with its competitor;

(f) bribing an employee of a supplier;

Bribing an employee of a supplier is understood as giving or offering the employee - by a competitor of the buyer - material values in return for the employee's fulfilment on non-fulfilment of his duties that ensue from or in conjunction with the contract between the supplier and buyer, which resulted or could result in getting certain advantages over the buyer by the competitor of the buyer.

(g) bribing an employee of a buyer;

Bribing an employee of a buyer is a violation being analogous to bribing an employee of a supplier.

- (h) gaining unlawful advantage in competition;

Such getting advantage over other economic entity by means of violating the effective legislation that is reaffirmed by a decision made by a competent authority is gaining unlawful advantage in competition.

3. Unlawful collection, disclosure and use of commercial secrets:

- (a) unlawful collection of commercial secrets;
- (b) disclosure of commercial secrets;
- (c) instigating to disclose commercial secrets;

unlawful use of commercial secrets.

Fair competition is an object of violations in the form of unfair competition. Unlike abuses of monopoly position or performing anticompetitive concerted actions that restrict competition, the method of infringing on competition in the form of unfair competition does not restrict opportunities of other economic entities for competing and consists in “excessive” competition owing to the application of dishonest and unfair methods.

At the same time, rights of economic activities that are guaranteed by laws, including rights concerning objects of intellectual property (for example, rights for copying outward appearance of a product or rights for commercial information), can be an object of violations. In those cases the rights may be defended in legal form on the basis of the civil legislation. But this does not exclude the responsibility for violations of the antimonopoly legislation if actions of that sort are committed in order to gain advantages in competition.

Law No. 236, in comparison with Law No. 2132, comprises significantly a wider circle of subjects of violations. In particular, the sphere of application of Law No. 236 affects both natural and legal persons not being engaged in economic activities.

Control over economic concentration

Article 231 of Law No. 2132 establishes that it is necessary for economic entities to get preliminary consent of the Committee or its bodies to perform such types of concentration that are provided for by Article 23¹ and Resolution of the Cabinet of Ministers of Ukraine of 11 November 1994 No. 765 (with further amendments) that develops the provisions of Article 23¹. All types of concentration, upon which control is exercised, can be classified conventionally as the following two types:

- concentration resulted from merger of capital, including merger due to the establishment of a new organization and legal form of the enterprise or due to the replacement of that form of the enterprise;
- concentration resulted from getting the opportunity to have a decisive impact on economic activities of economic entities.

Both types of concentration are inseparable from each other and it is not possible to draw a clear-cut boundary between them, for example, during the establishment of an

amalgamation of enterprises whose body of management can have a decisive impact on economic activities of the participants or cannot have an impact of that sort (concern, association) or when an economic entity is joining an amalgamation of that sort.

In addition, if the same person is appointed to occupy such positions in two or more competing economic entities that enable him to have a decisive impact on their economic activities, this should be reported to the Committee within a month term.

The basic criteria that have been defined by Resolution of the Cabinet of Ministers of Ukraine of 11 November 1994 No. 765 (with further amendments) and in the presence of which control on the part of the Committee or its bodies over concentration is exercised are as follows:

- (a) monopoly position of any participant in concentration or exceeding 35 per cent of their joint market share - for establishment, merger, annexation, joining an amalgamation, liquidation (if the state share in the authorized capital stock exceeds 50 per cent) of economic entities as well as the situation when market share of the economic entity being established would obviously exceed 35 per cent;
- (b) the state of affairs when the total cost of assets or the total sales of products of participants in concentration according to the last business year exceed \$12,000,000 - for establishment and joining an amalgamation; \$6,000,000 - for, merger, annexation; \$600,000 - for liquidation (if the state share in the authorized capital stock exceeds 50 per cent);
- (c) monopoly position of any participant in concentration or the position when the cost of an integrated complex of property of an economic entity exceeds \$600,000 - for purchase, acquisition (by any means) for ownership, management, use, including lease, of the integrated complex of property of the economic entity;
- (d) attaining or exceeding 25, 50 per cent of votes in the high managing body of the relevant economic entity if the total cost of the purchase exceeds \$100,000 or if any participant in concentration occupies monopoly position - for purchase, acquisition (by any means) for owning or managing shares (stocks).

In addition, the mentioned resolution provides for coming to an agreement about constituent documents during the establishment of economic entities of the collective form of ownership as well as coming to an agreement about such amendments to the documents that strengthen coordination of actions on the market or lead, by other means, to worsening conditions of competition.

Control over economic concentration provides for that the Committee or its bodies should research future concentration, define consequences of that sort of concentration of markets and give their consent to or prohibit concentration.

The Committee will give its consent to concentration unless the concentration results in monopolization of markets or substantial restriction of competition.

The Committee, however, has the right to give its consent to such concentration that

results in monopolization of markets or substantial restriction of competition if positive effects obviously outweigh negative consequences caused by restriction of competition.

The antimonopoly legislation of Ukraine does not provide for exercising preliminary control over concerted actions of economic entities or over such agreements between them that are directed towards implementation of joint plans if actions of that sort are not associated with the establishment of organization and legal forms, merger of capital, the opportunity to have a decisive impact on economic activities.

Description of the sphere of application of the legislation

Law No. 2132 is applied to the relations in which economic entities take part (that is if rights or duties of economic entities are affected by the relation) if they result in restriction of competition, violation of the rights of consumers in the territory of Ukraine, irrespective of the place where the actions are committed.

Law No. 2132 does not affect relations that ensue from the rights concerning objects of intellectual property, with the exception of the cases provided for by the law itself.

The term “economic entity” denotes such a legal person, irrespective of its organization, legal and ownership forms, or such a natural person that is engaged in production, sale and purchase of products or in other economic activities; it also denotes any legal or natural person that exercises control over economic entities, a group of economic entities if one or several of them exercise control over others. Bodies of state power, bodies of local self-government and bodies of administrative and economic management and control with respect to their activities associated with production, sale, purchase of products or with respect to other economic entities are also considered as economic entities. Law No. 2132 defines the term “control” as a decisive impact on economic activities of an economic entity, irrespective of the means owing to which the impact is exerted.

Application of Law No. 2132 is limited with respect to exercising control over activities of state bodies that are not defined directly by the law. For example, the sphere of application of the mentioned law does not affect the Cabinet of Ministers of Ukraine, the National Bank of Ukraine, other state bodies that are not mentioned in Law No. 2132.

The state bodies to be affected by the law are as follows: central and local bodies of executive power, state bodies that regulate activities of natural monopolies and securities markets, state bodies of privatization. The law does not affect bodies of local self-government.

If an international agreement establishes rules different from those contained in Law No. 2132, the rules of the international agreement should be applied.

Law No. 236 affects relations involving economic entities, the bodies of state power defined by Law No. 2132, bodies of local self-government, private citizens and legal persons not being economic entities in connection with unfair competition, including actions committed outside Ukraine, if those actions have a negative impact on competition in its territory.

Law No. 236 does not affect relations involving the mentioned subjects if results of

their activities take place outside Ukraine, unless an international treaty to which Ukraine is a party provides for otherwise.

State bodies authorized to apply the antimonopoly legislation

The Antimonopoly Committee of Ukraine is the state body called to exercise control over the observance of the antimonopoly legislation.

The basic tasks of the Committee are as follows:

- exercising state control over the observance of the antimonopoly legislation;
- protection of the legitimate interests, of entrepreneurs and consumers by means of taking measures associated with prevention and termination of violations of the antimonopoly legislation, with imposition of penalties for violations of the antimonopoly legislation, within its competence;
- favouring development of fair competition in all spheres of the economy.

The Committee is established to be composed of the Chairman and ten state commissioners. The Chairman of the Committee is appointed by the President of Ukraine by consent of the Supreme Rada (Parliament) of Ukraine. The Committee is subordinate to the Cabinet of Ministers of Ukraine and is accountable to the Supreme Rada (Parliament) of Ukraine.

The Committee, in accordance with its basic tasks, has, in particular, the right:

- to examine cases on violations of the antimonopoly legislation and, proceeding from the results of the examination, to take binding decisions about termination of the violations of the antimonopoly legislation, about imposition of fines on legal persons being economic entities and legal persons not being economic entities (for commitment of unfair competition), about renewal of the initial state of affairs, about compulsory split-up of monopoly formations, about termination of anticompetitive concerted actions, about repealing or making changes in unlawful acts contradicting the antimonopoly legislation by the state bodies defined by Law No. 2132 and bodies of local self-government that adopted those acts;
- to apply to a court of justice or a court of arbitration with actions (applications) in connection with violations of the antimonopoly legislation, in particular in connection with recovering imposed fines, withdrawal of profits got unlawfully owing to abuse of monopoly position or anticompetitive concerted actions, nullification of constituent documents of economic entities established without consent of the Committee or its bodies if that sort of consent was necessary;
- to send statements of the administrative violations being violations of the antimonopoly legislation committed by natural persons to courts of justice;
- to send recommendations to take measures directed towards development of entrepreneurship and competition to state bodies;

- to place submissions - compulsory for consideration - on annulment of licenses, on termination of operations of economic entities in the sphere of foreign economic activities before the relevant state bodies if the economic entities violate the antimonopoly legislation;
- to request economic entities - legal and natural persons, the state bodies that are mentioned in Law No. 2132, bodies of local self-government - to submit necessary information.

The Committee cooperates with central and local bodies of executive power, bodies of local and regional self-government for the purpose of coordinating activities to develop competition and to demonopolize the economy. Central and local bodies of executive power and bodies of local self-government are obliged to come to an agreement with the Committee about their decisions concerning demonopolization of the economy, privatization, development of competition and antimonopoly regulation (in particular, regulation of prices).

The Committee takes part in demonopolizing the economy, in particular by means of:

- establishing requirements with respect to demonopolization in the course of coming to an agreement about plans to privatize monopoly formations or by means of preventing privatization of the formations without prior demonopolization;
- giving its consent, in some cases, to the establishment, reorganization (merger, annexation) of economic entities or purchase of shares (stocks) of economic societies on condition that measures of demonopolization are taken;
- placing proposals and recommendations with respect to carrying out demonopolization and other measures directed towards development of competition before the relevant state bodies.

The Committee imposes fines on economic entities being legal persons for:

- abuse of monopoly position, anticompetitive concerted actions, discrimination against economic entities - to the amount of 5 per cent of the receipts got by the economic entity in the last account year preceding the year in which the fine is imposed;
- unfair competition - to the amount of 3 per cent of the receipts got by the economic entity in the last account year preceding the year in which the fine is imposed.

A fine to the amount of 2,000 tax-free minimum private citizen incomes is imposed on legal persons not being economic entities for committing unfair competition. Fines may be imposed on the bodies of state power defined by Law No. 2132 and bodies of local self-government only in cases when the bodies commit violation in the course of their economic activities.

Administrative and criminal proceedings are instituted by courts of justice on the

basis of statements of violations drawn by officials of the Committee or its bodies against natural persons being economic entities, officials of bodies of state power and bodies of local self-government as well as natural persons not being economic entities for violations of the antimonopoly legislation.

Appeals against the Committee's decisions may be submitted to courts of justice or courts of arbitration.

Description of some ponderable violations

Abuse of monopoly position on the part of the Ukrainian State Scientific and Production Centre on Standardization, Metrology and Certification of Ukraine

The Ukrainian State Scientific and Production Centre on Standardization, Metrology and Certification of Ukraine (hereinafter referred to as "the Centre") is accredited by the State Committee on Standardization, Metrology and Certification of Ukraine in the Ukrainian state system of certification as the body to certify systems of quality and as the body to certify products. In addition, state functions to exercise control in the sphere of standardization and certification, to exercise supervision over the observance of state standards, norms and rules, to ensure the unity of making measurements and exercising state metrological supervision were delegated to the Centre. Thus the Centre in its activities combines functions of state control with entrepreneurial activities.

In 1996 (when the case was being examined), the Centre occupied monopoly position on the national markets of certifying products for medical purposes (with the exception of testing samples) and on those of certifying products of serial production for medical purposes.

With respect to a number of firms that brought different batches of the same product to Ukraine, the Centre established the payment for rendering its services whose amount depended not on the cost of its services, but on the cost of the batch of a product. In other words, different prices were paid, in fact, for the same service. Importers overstated their prices for their products in order to cover those costs, which resulted in additional expenses defrayed by consumers.

In addition, the Centre, owing to the overstated cost of a working day when work to certify products for medical purposes is done abroad, established monopoly high prices for doing the mentioned work. The System of settling accounts provides for that the profitableness of the work associated with the compulsory certification of products for medical purposes may not exceed 30 per cent, the real profitableness, however, was equal to 902 per cent. This made it possible for the Centre to get the unlawful profit equal to 48,655 gryvnias (\$1 = 3.4 gryvnias).

The Centre groundlessly refused the Firm "Modem-1" to test its samples at the Enterprise "Mira" and required that the work should be ordered directly at the Centre. At the same time, the cost of the work to be done by the Centre was nearly twice as high as that of the work to be done by the laboratory of the Enterprise "Mira".

The Committee qualified the actions of the Centre as abuse of monopoly position on the market in the form of setting such discriminatory tariffs for one's own products that restrict rights of certain consumers; setting monopoly high prices for one's own products,

which resulted in violations of consumer rights; discrimination against economic entities in the form of compulsion of entrepreneurs to practice a priority conclusion of contracts.

A fine was imposed on the Centre.

The Centre was ordered by the Committee to transfer voluntarily (i.e. the Committee should not apply to the court of arbitration) the unlawfully got profit to the state budget of Ukraine.

Unfair competition on the part of Ukrainian enterprises on the market of mineral water

Bodies of the Antimonopoly Committee, proceeding from an application of the State Antimonopoly Service of Georgia that acted to the interests of such 30 entrepreneurs of Georgia that have the priority right to use the name of origin of the product (Borzhomi) in the course of production and sale of mineral water from the Borzhomi mineral spring, conducted research of the market of mineral water for the purpose of detecting the unlawful use of the trademark “Borzhomi” on the labels of the mineral water that is sold on the Ukrainian market.

The results of the research having been taken into account, it was established that more than 33 enterprises, having no permission to be given by owners of licenses or by persons empowered by the owners, in order to mark their products (artificially mineralized water), used the designation “Borzhomi” (of the Borzhomi mineral water type) that contained comparison of the mineralized water produced by the enterprises with the real well-known medicinal and table mineral water that is produced in Georgia and is named “Borzhomi”. The volumes of production amounted to 1,000,000 decalitres per year. The use of the designation “Borzhomi” (of the Borzhomi mineral water type) on labels to mark products of Ukrainian enterprises resulted in confusion with respect to products of the Georgian origin.

In addition, the Committee’s bodies examined two other applications concerning the unlawful use of the designations “Narzan” and “Myrgorodska” in the course of production and sale of mineral water by two enterprises.

The Committee’s bodies qualified the actions of the enterprises as unfair competition in the form of such use of others’ trade mark without permission of an authorized person that can result in confusion with respect to activities of other entrepreneurs having the priority right to use the trade mark.

The violations were terminated. Fines were imposed on the enterprises.

Abuse of monopoly position on the part of the Enterprise “Kharkivkomunpromvod”

The Kharkiv Regional Territorial Production Amalgamation of Communal and Industrial Water-Supply “Kharkivkomunpromvod” (hereinafter referred to as the Enterprise “Kharkivkomunpromvod”) is the subject of natural monopoly on the market of rendering services in the sphere of centralized water-supply within the Kharkiv region.

As effective normative documents of the State Committee of Ukraine on Housing and Communal Economy and those of its legal successor - the State Committee of Ukraine on Construction, Architecture and Housing Policy - provide for, services in the

sphere of water-supply may be rendered by performers of the services with which consumers have contractual relations and which are represented by both enterprises or organizations that directly render communal services to consumers (housing and exploitation organizations, etc.) and producers (suppliers), including the Enterprise “Kharkivkomunpromvod”. Collection of payments for the use of water from the population may be carried out, respectively, by housing and exploitation organizations and directly by producers of the services.

From December 1995, the regional state administration introduced, by its order, the system of paying for services in the sphere of water-supply rendered to the population in accordance with which services in the sphere of centralized supply of cold water should be rendered to inhabitants of the city of Kharkiv directly by the Enterprise “Kharkivkomunpromvod” and the inhabitants should transfer payments for the services to the settling account of the enterprise.

Legislation of Ukraine establishes that the consumer has the right to pay for a service according to the quantity of the rendered service. Concerning the case of supply of cold water, that quantity may be defined, depending on the discretion of the consumer, either on the basis of calculated quotas of water consumption per inhabitant of a flat (in this case there is a so-called calculated price) or on the basis of real water consumption according to the readings on a water meter.

In order to make calculations based on the readings on a water meter, the device must be registered at the organization to which the consumer pays for a service. In the case under consideration, the device must be registered at the subscribers’ division of the Enterprise “Kharkivkomunpromvod”. Consumers being residents of the city of Kharkiv owing to the established system of settling have no other opportunities to use their legitimate right to pay for services in the sphere of water-supply at prices defined on the basis of real volumes of consumed cold water. Even if they applied to housing and exploitation organizations in this connection, the matter of settling on the basis of the readings on water meters could not be arranged because housing and exploitation organizations of the city of Kharkiv have no contractual relations with the Enterprise “Kharkivkomunpromvod” with respect to registering household cold water meters.

The Enterprise “Kharkivkomunpromvod”, however, not refusing directly to register household cold water meters installed by consumers at their expense, associated the registration with such conditions that could not be fulfilled by consumers (for example, the availability of a cold water meter on the lead-in of a multi-storey building or installation of household cold water meters having the diameter of the conventional passage equal to 10 millimetres, despite the fact that for the time of the violation there were no water meters having that sort of diameter to be fixed in the State Register of Ukraine). The statement that this is a function of housing and exploitation amalgamations is none other than a hidden refusal to take stock of meters.

Thus the Enterprise “Kharkivkomunpromvod” in practice refused consumers to take stock of household cold water meters. By this, it, in fact, blocked installing meters in the city of Kharkiv (for the time being, according to the information given by the Enterprise “Kharkivkomunpromvod” itself, they took stock of two cold water meters while in other regions the relevant number exceeds several thousand), which lays obstacles to settling the problem of the economical use of resources, requires additional subsidies from the budget, increases social tension.

The Enterprise “Kharkivkomunpromvod” compelled consumers to pay for rendered services in accordance with the quotas of water consumption and imposed the calculated price on them.

At the same time, the calculated price being imposed on a consumer who has a meter installed in his flat is a discriminatory price because it restricts rights of certain consumers, namely of those who wish to pay for rendered services, proceeding from readings on water meters. That price is also a monopoly high price because, first, it is established by a monopoly formation and, second, as statistical data show, that price is higher: the consumer, paying the calculated price, pays for a larger quantity of water than he uses in fact and thus he pays a higher price for a cubic meter of the used water. By the way, the calculated quotas of cold water consumption per inhabitant on the basis of which settling takes place for lack of meters, in Kharkiv are among the highest ones in Ukraine.

The Kharkiv Territorial Office of the Committee qualified the actions of the Enterprise “Kharkivkomunpromvod” as abuse of monopoly position in the form of such complete refusal to sell a product in the absence of alternative sources of supply that resulted in setting monopoly prices and setting such discriminatory prices for one’s own products that restrict rights of certain consumers. The Enterprise “Kharkivkomunpromvod” was obliged to terminate the violation. The Committee, taking into account the hard financial position of the enterprise, the high degree of the wear and tear of water pipeline network, imposed the fine equal to 450,000 hryvnias on the Enterprise “Kharkivkomunpromvod”.

Discrimination against economic entities practised by the Donetsk Regional State Administration

In 1997-98, the Donetsk Regional State Administration issued a number of orders introducing price regulation on the markets of liqueur, vodka and tobacco products. In particular, economic entities, irrespective of the form of ownership, were obliged to set such prices for vodka and liqueur products (including imported ones) being brought to the region that were equal to wholesale prices for that sort of products made by local producers (but not less than 2.5 hryvnias for a bottle, the cost of glass package not being taken into account); to set that sort of prices for vodka and liqueur products being the remainder as of 5 August 1997; to apply the single level of trade additional payments in the course of forming retail prices for vodka and liqueur products that are made within the region and are brought from other regions (with the exception of imported ones).

Later on, the regional state administration established that the enterprises of the region that make vodka, liqueur products, cognac, wine, beer, champagne were obliged to apply the special additional payment equal to 5 per cent to wholesale prices; economic entities, irrespective of the form of ownership, in the course of setting retail prices for vodka, liqueur products, cognac, wine, beer, champagne and beer in bottles were obliged to calculate trade additional payments proceeding from wholesale prices and taking into account the special additional payment and, in addition, to apply the special additional payment equal to 5 per cent to the amount of the trade additional payment; special additional payments should be applied to such products that were made within the region or were brought from other regions or from abroad.

The regional state administration, by its another order, obliged economic entities,

irrespective of the form of ownership, to set such prices for vodka and liqueur products being brought into the region that were equal to the highest wholesale prices for the analogous (from the point of view of their names) products made by local producers.

The Donetsk Regional State Administration, in fact, established price regulation on the market of vodka and liqueur products. Setting the special additional payment with respect to the mentioned products and setting such prices for vodka and liqueur products being brought into the region (including imported ones) that were equal to wholesale prices for those products made by local producers (but not less than 2.5 hryvnias for a bottle, the cost of glass package not being taken into account) restricted competition on the mentioned market, violated rights of both producers and consumers of those products, placed entry market barriers to economic entities from other regions.

In spite of the fact that the Committee, applying to the Donetsk Regional State Administration, had required to bring the mentioned orders to conformity with the requirements of the antimonopoly legislation, the administration did not respond, but issued new orders containing the analogous norms, in particular it obliged economic entities, irrespective of the form of ownership, to apply the special payment equal to 5 per cent to the amounts of wholesale and trade additional payments in the course of setting prices for tobacco, vodka and liqueur products, starting from 1 April.

The issued orders not only violated the antimonopoly legislation, but also restricted the right of economic entities to be engaged independently in economic activities, including the right to set prices independently.

The Antimonopoly Committee of Ukraine admitted that the Donetsk Regional State Administration, owing to the mentioned actions, had committed a violation of the antimonopoly legislation in the form of discrimination against economic entities by means of the restriction of their rights to purchase and sell products.

The Donetsk Regional State Administration was obliged to terminate the violation and to bring its orders to conformity with the requirements of the antimonopoly legislation.

Anticompetitive concerted actions between state enterprises of the grain-processing industry

Proceeding from the results of the research of markets of activities of enterprises of the grain-processing industry in the Poltava region, anticompetitive concerted actions of five enterprises operating on the market of flour and bran within the region were detected. The actions consisted in the fact that the enterprises, at their joint meeting, took a decision to set the single prices for flour of the highest grade, for rye-flour and bran. The decision was fulfilled by all those enterprises.

The arrival to the mentioned decision resulted in the removal of competition among those enterprises and, owing to the fact that their joint share in the market of flour was equal to 81.5 per cent and that of bran was equal to 74.8 per cent, this made it possible for them to raise the price for flour by 20 per cent and that for bran nearly in 2.5 times. The rise in the price for bran affected other markets, in particular the market of mixed feed where prices increased by more than 10 per cent because the share of bran in the production of mixed feed is up to 50 per cent.

The Poltava Territorial Office of the Committee qualified the actions of the five enterprises of the grain-processing industry as a violation of the antimonopoly legislation in the form of such anticompetitive concerted actions that resulted in setting monopoly prices.

The violation was terminated. A fine was imposed on the enterprise. The unlawfully got profit was withdrawn.

Demonopolization of the State Communal Enterprise of Everyday Repairs and Other Services “Artemivsk-Servis”

The State Communal Enterprise of Everyday Repairs and Other Services “Artemivsk-Servis” (hereinafter referred to as the Enterprise “Artemivsk-Servis”) occupies monopoly position on the market of rendering services in the sphere of everyday repairs and other services in the city of Artemivsk (the Donetsk region) and includes 36 separated structural subdivisions.

That economic entity was to be demonopolized in the course of privatization. The Artemivsk Representatives’ Office of the State Property Fund of Ukraine, violating the effective legislation, approved, without participation of a representative of the Donetsk Territorial Office of the Committee, the plan to privatize the Enterprise “Artemivsk-Servis” and the chairman of the Artemivsk City Council of People’s Deputies, by his order, registered the Enterprise “Artemivsk-Servis” as the Public Corporation “Artemivsk-Servis”. In this connection the Donetsk Territorial Office of the Committee brought an action to the Court of Arbitration of the Donetsk Region in order to annul the plan to privatize the Enterprise “Artemivsk-Servis”.

The Court of Arbitration of the Donetsk Region complied with the action of the Donetsk Territorial Office of the Committee.

To fulfil the court decision and to demonopolize the Enterprise “Artemivsk-Servis”, the Artemivsk Representatives’ Office of the State Property Fund of Ukraine, taking into account the fact that the structural subdivisions must be separated from the Enterprise “Artemivsk-Servis”, changed the privatization plan and came to an agreement with the Donetsk Territorial Office of the Committee about it.

Refusal of the Ivano-Frankivsk Territorial Office of the Committee to give its consent to joining the Transport Production Amalgamation “Ivano-Frankivskavtotrahs” by the Ivano-Frankivsk Regional Enterprise of Bus Stations

The transport Production Amalgamation “Ivano-Frankivskavtotrans” (hereinafter referred to as “the Amalgamation”) applied to the Ivano-Frankivsk Territorial Office of the Committee for giving its consent to joining the Amalgamation by the Ivano-Frankivsk Regional Enterprise of Bus Stations (hereinafter referred to as “the Enterprise”) and to the establishment, on their basis, of the Ivano-Frankivsk Enterprise of Motor Transport Services “Ivano-Frankivskavtotrans” that was to be privatized later on.

The Ivano-Frankivsk Territorial Office of the Committee did not give its consent to the mentioned joining because it might lead to strengthening of monopolization of passenger transportation markets, restriction of competition, setting of monopoly high prices for transport services in the sphere of passenger transportation in the region. At

the same time, it was proposed to privatize the Enterprise as a legal person and to transfer functions of control over stocks and shares of the all-state ownership enterprises to the Ivano-Frankivsk Regional Office of the State Property Fund of Ukraine, having withdrawn them from the Amalgamation.

The Committee's requirements being taken into account, the Enterprise was privatized as an independent legal person.

The Ministry of Transport of Ukraine, proceeding from materials of the Ivano-Frankivsk Regional State Administration, issued an order to liquidate the Amalgamation.

The Association of Motor Entrepreneurs "Ivano-Frankivsktrans" was established on the basis of the Amalgamation property by consent of the Ivano-Frankivsk Territorial Office of the Committee.

UNITED REPUBLIC OF TANZANIA

COMMENTARY OF THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA ON THE FAIR COMPETITION ACT, 2003 (ACT NO. 8 OF 2003)

Explanatory Notes on the Fair Competition Act, 2003 (Act No. 8 of 2003)

1. The Fair Competition Act, 2003 is a replacement of the previous Fair Trade Practices Act of 1994 (Act No. 4 of 1994) which was passed by Parliament and assented by the President on May 23, 2003. The main object of the Act is to (“.....promote and protect competition...” in the economy.
2. The main role of competition policy and law in the economy is to create, promote, and protect economic environment in order to minimize costs, to improve quality and other services through availability of many competing goods and services providers. The Act outlaws anti-competitive agreements and misuse of market power.
3. However, competition policy cannot succeed where monopolies are predominant. The Act, therefore, also outlaws misuse of monopoly powers and prevents creation of monopolies through mergers and acquisitions which are likely to reduce competition in the particular market.
4. Out of realization that there are natural monopolies and therefore competition is not the suitable method for disciplining them, Tanzania has enacted other laws parallel to the Fair Competition Act. These parallel laws provide for administrative economic regulation to cater for natural monopolies. While the operating methods used by competition and economic regulation authorities are differ, the ultimate aims are same. Both sets of institutions aim at lowering costs in the economy while ensuring quality and other attributes which consumers want. Also the basic requirements in their administrations i.e. accountability, independence, due process, and transparency, and code of conduct are similar in both sets of institutions. The economic regulatory Acts which cater for natural monopolies in utility and infrastructural services provision in the economy are as follows:
 - 4.1 The Energy and Water Utilities Regulatory Authority Act of 2001
 - 4.2 The Surface and Maritime Transport Regulatory Authority Act of 2001
 - 4.3 The Civil Aviation Regulatory Authority of 2003
 - 4.4 The Communication Regulatory Authority of 2003
5. The salient attributes of the Fair Competition Act, 2008 are:
 - 5.1 The implementing institutions of the Act are the Competition Commission and the Fair Competition Tribunal
 - 5.2 The Act provides for appeals against decisions by the Commission to the Fair Competition Tribunal which is chaired by a High court judge and whose jurisdiction on relevant issues is equivalent to that of the High Court.

- 5.3 While the main Act deals with competition in the economy, it also contains provisions for regulating fair business practices and consumer protection in the economy. In particular it deals with misleading and deceptive conduct, unfair business practices, unconscionable conduct, implied conditions in consumer contracts, manufacturers' obligations, product safety and product information, and product recall. However the adjudication of all these direct consumer protection related issues is neither dealt by the Commission nor the Tribunal. It is dealt by the normal courts.
 - 5.4 The Act allows for the co-existence with economic multi-sector regulatory laws
 - 5.5 The crucial attributes of competition laws of; accountability, independence, due process and transparency are clearly spelt out in the Act.
 - 5.6 The need to raise consumers' organizational capacity and awareness has been taken into account by making provision for the establishment of a National Consumer Advocacy Council.
 - 5.7 Given the need of encouraging SMEs to grow, their merger and acquisition requirements have been allowed for by establishing a threshold provision below which mergers and acquisitions of SMEs can take place without notifying the Commission.
 - 5.8 The Act provides room for anti-competitive conduct and actions under certain conditions. This allows for developmental and environmental requirements of a country to be taken into account, if need be.
 - 5.9 The Act provides for action against anti-competitive action or conduct from foreign companies or foreign persons that may affect the economy.
 - 5.10 The Act also emphasizes the role of advocacy in competition policy and law especially for Tanzania, a developing country where deregulation, privatization and trade liberalization and therefore the private sector is at its infancy.
6. The draft Bill took into account the core principles as contained in the Model laws of UNCTAD and the OECD. Thereafter, the Bill was submitted twice to meetings with stakeholders for comments before it was submitted to the Government Committees for normal processing. The Investment and Trade Parliamentary Committee called a public hearing during its deliberation and scrutiny of the Bill in order to give the public another chance before it was submitted to the full parliamentary session. In all these stages agreeable changes were incorporated into the Bill.
7. The recruitment process that is also provided for in the Act is about to begin. It is expected the initial complement of staff of the Fair Competition Commission and Fair Competition Tribunal shall be in place by the end of the year.

Godfrey Mkocha
Commissioner
Fair Competition Commission

THE FAIR COMPETITION ACT, 2003

ARRANGEMENT OF SECTIONS

Section Title

PART I PRELIMINARY PROVISIONS

1. Short title and commencement.
2. Definitions.
3. Object of the Act.
4. Bodies corporate under common control to be regarded as a single person for the purposes of sections 8, 9, and 10.
5. Competition in markets and dominant position in a market.
6. Application of the Act to the State, State bodies and local government bodies.
7. Extra-territorial operation.

PART II RESTRICTIVE TRADE PRACTICES

8. Anti-competitive agreements.
9. Prohibition of certain agreements irrespective of their effect on competition.
10. Misuse of market power.
11. Mergers and acquisitions.
12. Exemption of agreements by the Commission.
13. Exemption of mergers.
14. Exceptions.

PART III MISLEADING AND DECEPTIVE CONDUCT

15. Misleading or deceptive conduct.
16. False or misleading representations.
17. Cash price to be stated in certain circumstances.
18. Misleading conduct in relation to goods.
19. Misleading conduct in relation to services.

20. Misleading representations about certain business activities.
21. Application of provisions of Part III to prescribed information providers.

**PART IV
UNFAIR BUSINESS PRACTICES**

22. Bait Advertising.
23. Accepting payment without intending or being able to supply as ordered.
24. Harassment and coercion.

**PART V
UNCONSCIONABLE CONDUCT**

25. Unconscionable conduct.

**PART VI
IMPLIED CONDITIONS IN CONSUMER CONTRACTS**

26. Conflict of laws.
27. Application of provisions not to be excluded or modified.
28. Limitation of liability for breach of certain conditions or warranties.
29. Implied undertakings as to title, encumbrances and quiet possession.
30. Supply description.
31. Implied undertakings as to quality and fitness.
32. Supply by sample.
33. Liability for loss or damage from breach of certain contracts.
34. Warranties in relation to the supply of services.
35. Rescission of contracts.
36. Standard form contracts.

**PART VII
MANUFACTURER'S OBLIGATIONS**

37. Definitions.
38. Actions in respect of unsuitable goods.
39. Actions in respect of false descriptions.
40. Actions in respect of goods of unmerchantable quality.

41. Actions in respect of non-correspondence with samples etc.
42. Actions in respect of failure to provide facilities for repairs or parts.
43. Actions in respect of non-compliance with express warranty.
44. Right of seller to recover against manufacturer or importer.
45. Time for commencing actions.
46. Application of this Part not to be excluded or modified.
47. Limitation in certain circumstances of liability of manufacturer to a seller.

**PART VIII
PRODUCT SAFETY AND PRODUCT INFORMATION**

48. Warning notice to public.
49. Product safety standards and unsafe goods.
50. Product Information.
51. Power of Minister to declare product safety information standards.
52. Copies of certain notices to be given to supplier or be published in certain newspapers.

**PART IX
PRODUCT RECALL**

53. Compulsory product recall.
54. Compliance with product recall order.
55. Loss or damage caused by contravention of product recall order.
56. Notification of voluntary recall.

**PART X
OFFENCES, PENALTIES AND REMEDIES**

57. Person involved in an offence.
58. Compliance orders and compliance agreements.
59. Compensatory orders.
60. Offences.

PART XI
APPEALS TO THE FAIR COMPETITION TRIBUNAL

61. Appeals against decisions of the Commission.

PART XII
FAIR COMPETITION COMMISSION

- 62. Establishment of the Commission.
- 63. Appointment of members.
- 64. Removal of members.
- 65. Functions of the Commission.
- 66. Conflicts of interest.
- 67. Code of Conduct.
- 68. Power to hold inquiries.
- 69. Initiating a complaint.
- 70. Interim relief.
- 71. Power to obtain information.
- 72. Employment and Consultant.
- 73. Meetings of the Commission
- 74. Delegation
- 75. Establishment of divisions of the Commission.
- 76. Confidentiality.
- 77. Public register.
- 78. Funds of the Commission.
- 79. Accounts and financial audit.
- 80. Performance audit.
- 81. Annual report.
- 82. Budget.

PART XIII
FAIR COMPETITION TRIBUNAL

83. Establishment of the Fair Competition Tribunal and a nomination committee.
84. Judgement and Orders of Tribunal.
85. Functions of Tribunal.
86. Registrar and other staff of the Tribunal.
87. Financial arrangements of the Tribunal.
88. Obstruction of Tribunal.
89. Rules of Tribunal.
90. Procedure on appeals to the Tribunal.
91. Stay of the Commission's orders pending determination of appeal.

PART XIV
NATIONAL CONSUMER ADVOCACY COUNCIL

92. Establishment of the Council.
93. Functions and powers of the Council.
94. Proceedings of the Council.
95. Funds of the Council and Annual Report.

PART XV
INCONSISTENCY WITH OTHER LAWS

96. Inconsistency with other laws.

PART XVI
MISCELLANEOUS PROVISIONS

97. Functions of the Minister.
98. Regulations.
99. Rules.
100. Savings and provisions
101. Rights of employees.
102. Repeal of Act No.4 of 1994.

PART XVII
CONSEQUENTIAL AMENDMENTS

AMENDMENT OF THE SURFACE AND MARINE TRANSPORT
REGULATORY AUTHORITY ACT, 2001

- 103. Construction .
- 104. Amendment of section 3.
- 105. Amendment of section 4
- 106. Amendment of section 6.
- 107. Amendment of section 7.
- 108. Amendment of section 9.
- 109. Amendment of section 11.
- 110. Amendment of section 13.
- 111. Amendment of section 14.
- 112. Amendment of section 17.
- 113. Amendment of section 20.
- 114. Amendment of section 26.
- 115. Amendment of section 27.
- 116. Amendment of section 28.
- 117. Amendment of section 29.
- 118. Amendment of section 30.
- 119. Amendment of section 33.
- 120. Amendment of section 34.
- 121. Amendment of section 36.
- 122. Amendment of section 39.
- 123. Amendment of section 42.
- 124. Amendment of section 43.

125. Amendment of section 45.

126. Amendment of section 46.

AMENDMENT OF THE ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY ACT, 2001

127. Construction.

128. Amendment of section 3.

129. Amendment of section 5.

130. Amendment of section 7.

131. Amendment of section 8.

132. Amendment of section 9.

133. Amendment of section 11.

134. Amendment of section 12.

135. Amendment of section 14.

136. Amendment of section 15.

137. Amendment of section 17.

138. Amendment of section 18.

139. Amendment of section 21.

140. Amendment of section 24.

141. Amendment of section 27.

142. Amendment of section 29.

143. Amendment of section 30.

144. Amendment of section 32.

145. Amendment of section 34.

146. Amendment of section 35.

147. Amendment of section 36.

148. Amendment of section 40.

149. Amendment of section 41.

- 150. Amendment of section 43.
- 151. Amendment of section 44.
- 152. Amendment of section 45.
- 153. Amendment of section 47.
- 154. Amendment of section 48.

FIRST SCHEDULE

THE NOMINATION COMMITTEE

SECOND SCHEDULE

QUALIFICATIONS AND FUNCTIONS OF
THE DIRECTOR-GENERAL

THE UNITED REPUBLIC OF TANZANIA



No.8 OF 2003
I ASSENT,
BENJAMIN W. MKAPA,
President
23RD MAY, 2003

An Act to promote and protect effective competition in trade and commerce, to protect consumers from unfair and misleading market conduct and to provide for other related matters.

ENACTED by the Parliament of the United Republic of Tanzania.

PART I
PRELIMINARY PROVISIONS

- | | |
|------------------------------|--|
| Short title and commencement | <p>1.-(1) This Act may be cited as the Fair Competition Act, 2003.
(2) This Act shall come into operation upon such date as the Minister may, by notice published in the Gazette appoint.
(3) The Minister may appoint different dates for the commencement of different parts or provisions.</p> |
| Definitions | <p>2. In this Act, unless the context requires otherwise:
“acquire” includes:
(a) acquire by purchase, exchange, lease, hire, hire-purchase or gift; and
(b) in relation to services, accept,
and “acquirer” has a corresponding meaning.
“acquisition” in relation to shares or assets means acquisition, either alone or jointly with another person, of any legal or equitable interest in such shares or assets but does not include acquisition by way of charge only.
“agreement” means any agreement, arrangement or understanding between two or more persons, whether or not it is:
(a) formal or in writing; or
(b) intended to be enforceable by legal proceedings,
and includes a decision of an association.
“asset” includes any real or personal property, whether tangible or intangible, intellectual property, goodwill, chose in action, right, licence,</p> |

cause of action or claim and any other asset having a commercial value.

“association” means a body or person (whether incorporated or not) which is formed for the purposes of furthering the interests of its members or of persons represented by its members.

“commission” means the Fair Competition Commission established by section 62;

“competition” has the meaning provided in section 5.

“competition”, “market” and “dominant position in a market” are economic concepts and, subject to the provisions of this Act, shall be interpreted accordingly.

“competitor” has the meaning provided in section 5.

“conduct” includes doing or refusing to do any act, refraining (otherwise than inadvertently) from doing any act, making it known an act will not be done, making an agreement or giving effect to an agreement.

“consumer” includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale.

“customer” includes any person who purchases or offers to purchase goods or services unless the context indicates otherwise.

“Council” means the National Consumer Advocacy Council established by section 92.

“Director General” means the Director General appointed under section 62(7);

“dominant position in a market” has the meaning provided in section 5 and “dominance” has a corresponding meaning.

“EWURA” means the Energy and Water Utilities Regulatory Authority.

“EWURA Act” means the Energy and Water Utilities Regulatory Authority Act, 2001.

“give effect to”, in relation to an agreement, includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce.

“goods” include but not limited to;

- (a) ships, aircraft and vehicles;
- (b) animals, including fish;
- (c) minerals, trees and crops, whether on, under, or attached to land or not; and
- (d) gas and electricity.

“intermediate goods” means goods used as inputs in manufacturing.

“licence” means a licence, permit or authority that allows the licensee to supply or acquire goods or services or to carry on any other activity.

“local government body” means a body established by or under a law for the purposes of local government.

“make”, in connection with an agreement, means make, enter into or arrive at.

“manufacture” or “manufacturing” includes any artificial process which transforms goods in order to add value to them for the purpose of resale and any operation of packing or repacking not linked to a form of transportation within a single enterprise.

“market” has the meaning provided in section 5.

“member”, in connection with the Commission, means the Chairman and any other member of the Commission.

“merger” means an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania.

“Minister” means the Minister for the time being responsible for the Commission.

“person” means any natural or legal person, irrespective of its legal status.

“public register” means the public register required to be kept by the Commission under section 77.

“regulatory body” means any one of EWURA, SUMATRA, the Tanzania Communications Regulatory Authority, the Civil Aviation Authority or such other utility or transport regulatory authorities;

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

“service” includes any rights (including interests in, and rights in relation to, real or personal property), benefits, privileges or facilities and, without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities provided, granted or conferred under any contract for or in relation to:

- (a) the performance of work, including work of a professional nature, whether with or without the supply of goods;
- (b) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation, education or instruction;
- (c) insurance;
- (d) banking;
- (e) the lending of money,

and any right, benefit or privilege for which remuneration is payable in the form of a royalty, tribute, levy or similar charge, but does not include the performance of work or the supply of goods under a contract of employment .

“State” means Mainland Tanzania.

“state body” means:

- (a) a body corporate established by or under a law for a purpose of the State; or
- (b) a body corporate in which the State or a body corporate referred to in (a) has a controlling interest.

“SUMATRA” means the Surface and Marine Transport Regulatory Authority.

“SUMATRA Act” means the Surface and Marine Transport Regulatory Authority Act, 2001.

“supply” includes:

- (a) in relation to goods, supply or re-supply by way of sale, exchange, lease, hire or hire purchase; and
- (b) in relation to services, provide, grant or confer,

Act No.9
of 2001

and “supplier” has a corresponding meaning.

“trade” includes commerce.

“Tribunal” means the Fair Competition Tribunal established by section 83.

Object of
the Act

3. The object of this Act is to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania in order to:

- (a) increase efficiency in the production, distribution and supply of goods and services;
- (b) promote innovation;
- (c) maximise the efficient allocation of resources; and
- (d) protect consumers.

Bodies
corporate
under
common
control to
be regarded
as a single
person for
the
purposes of
sections 8,
9, and 10

4.-(1) For the purposes of sections 8, 9 and 10, if a body corporate controls another body corporate, the bodies corporate shall be regarded as a single person.

(2) A body corporate shall control another body corporate within the meaning of sub-section (1) if the first-mentioned body corporate:

- (a) owns or controls a majority of the shares carrying the right to vote at a general meeting of the other body corporate;
- (b) has the power to control the composition of a majority of the board of directors or other governing organ of the other body corporate; or
- (c) has the power to make decisions in respect of the conduct of the affairs of the other body corporate.

Competitio
n in
markets and
dominant
position in
a market

5.-(1) The expressions referred to under Part II in accordance to this section shall be interpreted in accordance with this section.

(2). “Competition” means competition in a market in Tanzania and refers to the process whereby two or more persons:

- (a) supply or attempt to supply the same or substitutable goods or services to the persons in the same relevant geographical market; or
- (b) acquire or attempt to acquire the same or substitutable goods or services from the persons in the same relevant geographical market.

(3) A person is a “competitor” of another person if they are in competition with each other or would, but for an agreement to which the two persons are parties, be likely to be in competition with each other.

(4) “Market” means a market in Tanzania or a part of Tanzania and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers or acquirers, or potential suppliers or acquirers, of those goods or services.

(5) In defining markets, assessing effects on competition or determining whether a person has a dominant position in a market, the following matters, in addition to other relevant matters, shall be taken into account:

(a) competition from imported goods and services supplied by persons not resident or carrying on business in Tanzania; and

the economic circumstances of the relevant market including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.

(6) A person has a dominant position in a market if both (a) and (b) apply:

(a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and

(b) the person's share of the relevant market exceeds 35 per cent.

Application of the Act to the State, State bodies and local government bodies

6.-(1) This Act shall apply to Mainland Tanzania, State bodies and local government bodies in so far as they engage in trade.

(2) Notwithstanding the provisions of sub-sections (1), the State shall not be liable to any fine or penalty under this Act or be liable to be prosecuted for an offence against this Act.

(3) For the purposes of this section, without affecting the meaning of "trade" in other respects -

(a) the sale or acquisition of a business, part of a business or an asset of a business carried on by the State, a State body or a local government body constitutes engaging in trade; and

(b) the following do not constitute engaging in trade:

(i) the imposition or collection of taxes;

(ii) the grant or revocation of licences, permits and authorities;

(iii) the collection of fees for licences, permits and authorities;

(iii) internal transactions within the Government, a State body or a local government body.

Extra-territorial operation

7. This Act shall apply to conduct outside mainland Tanzania:

(a) by a citizen of Tanzania or a person ordinarily resident in Tanzania;

(b) by a body corporate incorporated in Tanzania or carrying on business within Tanzania;

(c) by any person in relation to the supply or acquisition of goods or services by that person into or within Tanzania; or

(d) by any person in relation to the acquisition of shares or other assets outside Tanzania resulting in the change of control of a business, part of a business or an asset of a business, in Tanzania.

PART II RESTRICTIVE TRADE PRACTICES

Anti-

8.-(1) A person shall not make or give effect to an agreement if

competitive agreements the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition.

(2) An agreement in contravention of this section is unenforceable except to the extent the provisions of the agreement causing it to be in contravention of the section are severable from the other provisions of the agreement

(3) Unless proved otherwise, it shall be presumed that an agreement does not have the object, effect or likely effect of appreciably preventing, restricting or distorting competition if none of the parties to the agreement has a dominant position in a market affected by the agreement and either (a) or (b) applies:

(a) the combined shares of the parties to the agreement of each market affected by the agreement is 35 per cent or less; or

(b) none of the parties to the agreement are competitors.

(4) For the purposes of this section in determining whether the effect or likely effect of an agreement is to appreciably prevent, restrict or distort competition, the fact that similar agreements are widespread in a market affected by the agreement shall be taken into account.

(5) This section does not apply to an agreement to the extent it provides for a merger.

(6) For the purposes of sub-section (1), an object is the object of an agreement if it is a significant object of the agreement even if it is only one of a number of objects of the agreement.

(7) Any person who intentionally or negligently acts in contravention of the provisions of this section commits an offence under this Act.

Prohibition of certain agreements irrespective of their effect on competition

9.(1) A person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is:

price fixing between competitors;

a collective boycott by competitors;

output restrictions between competitors; or

(d) collusive bidding or tendering.

(2) In this section:

(a) “price fixing between competitors” means to fix, restrict or control the prices, tariffs, surcharges or other charges for, or the terms or conditions upon which, a party to an agreement supplies or acquires, or offers to supply or acquire, goods or services, in competition with any other party to the agreement;

(b) “collective boycott by competitors” means:

(i) to prevent a party to an agreement from supplying goods or services to particular persons, or acquiring goods or services from particular persons, in competition with any other party to the agreement; or

(ii) to restrict or control the terms and conditions on which, or the circumstances in which, a party to an agreement supplies goods or services to particular persons, or acquires goods or services from particular persons, in competition with any other party to the agreement;

(c) “output restrictions between competitors” means to prevent,

restrict or control the production by a party to an agreement of goods or services to be supplied in competition with any other party to the agreement;

(d) “collusive bidding or tendering” means:

(i) to fix or control the prices or terms or conditions of any bid or tender by any of the parties to an agreement at an auction or in any tender or other form of bidding, in competition with any other party to the agreement; or

(ii) to prevent a party to an agreement from making a bid or tender at an auction or in any tender or other form of bidding, in competition with any other party to the agreement.

(3) An agreement in contravention of this section is unenforceable except to the extent the provisions of the agreement causing it to be in contravention of the section are severable from the other provisions of the agreement.

(4) Any person who intentionally or negligently acts in contravention of the provisions of this section commits an offence, under this Act.

Misuse of
market
power

10.-(1) A person with a dominant position in a market shall not use his position of dominance if the object, effect or likely effect of the conduct is to appreciably prevent, restrict or distort competition.

(2) If the Commission has granted an exemption under section 12 for an agreement, conduct of a person in making or giving effect to that agreement is not prohibited by this section during the period of the exemption.

(3) For the purposes of sub-section (1), an object is the object of conduct if it is a significant object of the conduct even if it is only one of a number of objects.

(4) Any person who intentionally or negligently acts in contravention of the provisions of this section commits an offence.

Mergers
and
acquisitions

11.-(1) A merger is prohibited if it creates or strengthens a position of dominance in a market.

(2) A merger is notifiable under this section if it involves turnover or assets above threshold amounts the Commission shall specify from time to time by Order in the Gazette, calculated in the manner prescribed in the Order.

(3) If, within 14 days after receipt of a notification of a merger under sub-section (2), the Commission determines that the proposed merger should be examined, the merger shall be prohibited for a period of 90 days thereafter or such further period as the Commission determines under sub-section (4), unless the Commission earlier determines the merger should not be prohibited.

(4) The Commission may extend the period of 90 days referred to in sub-section (3) -

(a) for such further period not exceeding 30 days as the Commission sees fit; and

(b) in addition, where the Commission determines its consideration

of the merger has been delayed in obtaining information from any of the parties to the proposed merger, for such further period as the Commission considers it has been so delayed.

(5) Without limiting the operation of sub-section (1), a person shall not give effect to a notifiable merger unless it has, at least 14 days before doing so, filed with the Commission a notification of the proposed merger supplying such information as the Commission may by Order require to be included in such notification.

(6) Any person who intentionally or negligently acts in contravention of the provisions of this section commits an offence under this Act.

Exemption
of
agreements
by the
Commission

12.-(1) The Commission may, upon the application of a party to an agreement, grant an exemption for that agreement, either unconditionally or subject to such conditions as the Commission sees fit, if the Commission is satisfied in all the circumstances that both paragraph (a) and (b) apply:

(a) the agreement either contravenes section 9 or has, or is likely to have, the effect of appreciably preventing, restraining or distorting competition; and

(b) the agreement results or is likely to result in benefits to the public in one or more of the following ways:

(i) by contributing to greater efficiency in production or distribution;

(ii) by promoting technical or economic progress;

(iii) by contributing to greater efficiency in the allocation of resources; or

and the agreement:

(v) prevents, restrains or distorts competition no more than is reasonably necessary to attain the benefits; and

(vi) the benefits to the public resulting from the agreement outweigh the detriments caused by preventing, restraining or distorting competition.

(2) The Commission may grant block exemption, either unconditionally or subject to such conditions as the Commission sees fit, for all agreements falling within a class of agreements if the Commission is satisfied in all the circumstances that paragraph (a) of sub-section (1) shall not apply to the class of agreements.

(3) When granting an exemption under this section the Commission shall fix a period, not exceeding 5 years from the date the exemption is granted, as the period of the exemption.

(4) An agreement exempted under this section is not prohibited by section 8 or section 9 during the period of the exemption.

(5) For the purposes of this section, "agreement" includes proposed agreement and 'party' includes party to a proposed agreement.

(6) The Commission may revoke or vary an exemption at any time during the period of the exemption if it is satisfied that circumstances since the grant of the exemption have materially changed or the exemption was granted wholly or partly on the basis of false, misleading or incomplete information.

Exemption
of mergers

13.-(1) The Commission may, upon the application of a party to a merger, grant an exemption for that merger, either unconditionally or subject to such conditions as the Commission sees fit, if the Commission is satisfied in all the circumstances that paragraph (a) and either paragraph (b) or (c) applies:

(a) the merger is likely to create or strengthen a position of dominance in a market;

(b) the merger results or is likely to result in benefits to the public in one or more of the following ways:

(i) by contributing to greater efficiency in production or distribution;

(ii) by promoting technical or economic progress;

(iii) by contributing to greater efficiency in the allocation of resources; or

(iv) by protecting the environment;

and the merger:

(v) prevents, restrains or distorts competition no more than is reasonably necessary to attain those benefits; and

(vi) the benefits to the public resulting from the merger outweigh the detriments caused by preventing, restraining or distorting competition;

(c) in the case of a merger resulting in the change of control of a business, the business faces actual or imminent financial failure and the merger offers the least anti-competitive alternative use of the assets of the business.

(2) When granting an exemption under this section the Commission shall fix a period, not exceeding one year from the date the exemption is granted, as the period of the exemption.

(3) A merger exempted under this section is not prohibited by section 11 during the period of the exemption.

(4) The Commission may revoke or vary an exemption at any time during the period of the exemption if it is satisfied that circumstances since the grant of the exemption have materially changed or the exemption was granted wholly or partly on the basis of false, misleading or incomplete information.

Exceptions

14.-(1) This Part shall not prohibit an agreement to the extent it relates to the remuneration, conditions of employment, hours of work or working conditions of employees.

(2) This Part shall not prohibit an agreement to the extent it provides for compliance with or application of standards of dimension, design, quality or performance prepared or approved by the Tanzania Bureau of Standards or any other association, institution or body prescribed by regulations.

(3) This Part shall not prohibit an agreement to the extent it relates to the export of goods from Tanzania or the supply of services outside Tanzania if such particulars of the agreement as the Commission may by Order require are filed with the Commission within 21 days after it is made.

(4) Sub-section (3) shall cease to apply to an agreement if the Commission decides the agreement may have an effect on competition

in Tanzania and notifies the parties to the agreement of that decision.

(5) If it is necessary to do so in order to comply with the obligations of the United Republic under an agreement with the government of another country, the particular agreement or conduct, or agreements or conduct of particular kind, shall be excluded from the prohibitions in this Part.

PART III MISLEADING AND DECEPTIVE CONDUCT

Misleading or deceptive conduct 15.-(1) No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in this Part shall be taken as limiting by implication the generality of subsection (1).

False or misleading representations 16. No person shall, in connection with supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

- (a) falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use;
- (b) falsely represent that services are of a particular standard quality or grade;
- (c) falsely represent that goods are new;
- (d) falsely represent that a particular person has agreed to acquire goods or services;
- (e) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (f) represent that he has a sponsorship, approval or affiliation he does not have;
- (g) make a false or misleading representation with respect to the price of goods or services;
- (h) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;
- (i) make a false or misleading representation concerning the place of origin of goods;
- (j) make a false or misleading representation concerning the need for any goods; or
- (k) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee right or remedy.

Cash price to be stated in certain circumstances 17. No person shall, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, make a representation with respect to an amount that, if paid, would constitute a part of the

es consideration for the supply of the goods or services unless he also specifies the cash price for the goods or services.

Misleading conduct in relation to goods 18. No person shall, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

Misleading conduct in relation to services 19. No person shall engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

Misleading representations about certain business activities 20.-(1) No person shall, make a representation that is false or misleading in a material particular concerning the profitability or risk or any other material aspect of any business activity that he has represented as one that can be, or can be to a considerable extent, carried on at or from a person's place of residence.

(2) Where a person, invites, whether by advertisement or otherwise, persons to, engage or participate, or to offer or apply to engage or participate, in a business activity requiring the performance by the persons concerned of work, or the investment of moneys by the persons concerned and the performance by them of work associated with the investment, he shall not make, with respect to the profitability or risk or any other material aspect of the business activity, a representation that is false or misleading in the material particular.

Application of provisions of Part III to prescribed information providers 21.-(1) This Part does not apply to a prescribed publication of matter by a prescribed information provider, other than:

(a) a publication of matter in connection with:
(i) the supply or possible supply of goods or services; or
(ii) the promotion by any means of the supply or use of goods or services,
where:

(iii) the goods or services were relevant goods or services, in relation to the prescribed information provider; or

(iv) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:

(a) a person who supplies goods or services of that kind; or

(b) body corporate that is related to a body corporate that supplies goods or services of that kind; or

(b) a publication of an advertisement.

(2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if:

(a) in any case - the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or

(b) in the case of a person who is a prescribed information provider

by virtue of paragraph (a), (b) or (c) of the definition of prescribed information provider in sub-section (3) (whether or not the person is also a prescribed information provider by virtue of another operation of that definition) - the publication was by way of radio or television broadcast by the prescribed information provider.

(3) In this section:

“prescribed information provider” means a person who carries on a business of providing information.

“relevant goods or services” in relation to a prescribed information provider, means goods or services of a kind supplied by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

PART IV UNFAIR BUSINESS PRACTICES

Bait Advertising 22.-(1) No person shall advertise goods or services for supply at a specified price if there are reasonable grounds, of which he is aware, or ought reasonably to be aware, for believing that he will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which he carries on business and the nature of the advertisement.

(2) Any person who has, in trade, advertised goods or services for supply at a specified price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which he carries on business and the nature of the advertisement.

(3) In a prosecution of a person in relation to a failure to offer goods or services to a person (in this sub-section referred to as the ‘customer’) in accordance with sub-section (2), it is a defence for that person if he establishes that:

(a) he offered to supply or to procure another person to supply goods or services of the kind advertised to the customer within a reasonable time, in a reasonable quantity and at the advertised price; or

(b) he offered to supply immediately, or to procure another person to supply within a reasonable time, equivalent goods or services to the customer in a reasonable quantity and at the price at which the first-mentioned “goods” or “services” were advertised, and, in either case, where the offer was accepted by the customer, he has so supplied, or procured another person to supply, goods or services.

Accepting payment without intending or being able to supply as ordered 23. No person shall accept payment or other consideration for goods or services where, at the time of the acceptance: he intends:

(i) not to supply the goods or services; or

(ii) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted; or

(b) there are reasonable grounds, of which he is aware or ought reasonably to be aware, for believing that he will not be able to supply the goods or services within the period specified by him or, if no period is specified, within a reasonable time.

Harassment and coercion 24. No person shall use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

PART V UNCONSCIONABLE CONDUCT

Unconscionable conduct 25.-(1) No person shall, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a person has contravened sub-section (1) in connection with the supply or possible supply of goods or services to a person (in this sub-section referred to as the 'consumer'), the Court may have regard to:

(a) the relevant strengths of the bargaining positions of the person and the consumer;

(b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than a body corporate.

(3) A person shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that he institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purposes of determining whether a person has contravened sub-section (1) in connection with the supply or possible supply of goods or services to a person:

(a) the Court shall not have regard to any circumstances that were not reasonably forceable at the time of the alleged contravention; and

(b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section

(5) A reference in this section to goods or services is a

reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

PART VI IMPLIED CONDITIONS IN CONSUMER CONTRACTS

Conflict of laws 26.-(1) Where:

(a) the proper law of a contract for the supply by any person of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of the United Republic; or

(b) a contract for the supply by any person of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country for all or any of the provisions of this Part.

(2) This Part shall apply to any type of contract made or entered between parties under this Act..

Application of provisions not to be excluded or modified

27.-(1) Any term of a contract (including term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify has the effect of excluding, restricting or modifying:

(a) the application of all or any of the provisions of this Part;
(b) the exercise of a right conferred by such a provision;
(c) any liability of the person for breach of a condition or warranty implied by such a provision; or
(d) the application of section 35,
is void.

(2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Part or the application of section 35 unless the term does so expressly or is inconsistent with that provision or section.

Limitation of liability for breach of certain conditions or warranties

28.-(1) Subject to this section, a term of a contract for the supply by a person of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under this section by reason only that the term limits his liability for a breach of a condition or warranty (other than a condition or warranty implied by section 29) to:

(a) in the case of goods:
(i) the replacement of the goods or the supply of equivalent goods;
(ii) the payment of the cost of replacing the goods or of acquiring

equivalent goods;

(iii) the payment of the cost of having the goods repaired; or

(b) in the case of services:

(i) the supplying of the services again; or

(ii) the payment of the cost of having the services supplied again.

(2) The provisions of sub-section (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the supplier to rely on that term of the contract.

(3) In determining for the purposes of sub-section (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters:

(a) the strength of the bargaining positions of the supplier and the person to whom the goods or services were supplied, in this sub-section referred to as 'the buyer' relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;

(b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term, having regard, among other things, to any custom of the trade and any previous course of dealing between the parties; and

(d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

Implied
undertaking
as to title,
encumbrances
and
quiet
possession

29.-(1) Where in a contract for the supply of goods by a supplier to a consumer, other than a contract to which sub-section (3) applies, there is:

(a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass;

(b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and

(c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer- implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.

(2) A person is not, in relation to a contract for the supply of goods, in breach of the implied warranty referred to in paragraph (c) of subsection (1) by reason only of the existence of a floating charge over assets of the supplier unless and until the charge becomes fixed and

enforceable by the person to whom the charge is given.

(3) In a contract for the supply of goods by the supplier to a consumer in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the supplier should transfer only such title as he or a third person may have, there is:

(a) an implied warranty that all charges of encumbrances known to the supplier and not known to the consumer have been disclosed to the consumer before the contract is made; and

(b) an implied warranty that:

(i) the supplier;

(ii) in a case where the parties to the contract intend that the supplier should transfer only such title as a third person may have - that person; and

(iii) any one claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made,

will not disturb the consumer's quiet possession of the goods.

Supply by description

30.-(1) Where there is a contract for the supply, otherwise than by way of sale, by auction, by a person in the course of a business of goods to a consumer by description, there is an implied condition that goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(2) A supply of goods is not prevented from being a supply by description for the purposes of sub-section (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

Implied undertakings as to quality and fitness

31.-(1) Where a person supplies, otherwise than by way of sale, by auction, goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:

(a) as regards defects specifically drawn to the consumer's attention before the contract is made; or

(b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

(2) Where a person supplies otherwise than by way of sale, by auction goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of that person.

(3) Sub-sections (1) and (2) shall apply to a contract for the

supply of goods made by a person who in the course of a business is acting as agent for another person as they apply to a contract for the supply of goods made by a person in the course of a business, except where that person is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

Supply by sample

32. Where in a contract for the supply, otherwise than by way of supply by sale by auction by a person in the course of a business of goods to a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by reference to a sample:

- (a) there is an implied condition that the bulk will correspond with the sample in quality;
- (b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

Liability for loss or damage from breach of certain contracts

33.-(1) Where:

(a) a person, in this section referred to as the 'supplier' supplies goods, or causes goods to be supplied, to a linked certain credit provider of the supplier and a contracts consumer enters into a contract with the linked credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hire purchase of the goods to the consumer; or

(b) a consumer enters into a contract with a linked credit provider of a supplier for the provisions of credit in respect of the supply by the supplier of goods or services, or goods and services, to the consumer; and the consumer suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the contract, or as a result of a breach of a condition that is implied in the contract by virtue of sections 30, 31 and 32 or of a warranty that is implied in the contract by virtue of section 34, the supplier and the linked credit provider are, subject to this section; jointly and severally liable to the consumer for the amount of the loss or damage, and the consumer may recover that amount by action in accordance with this section in a court of competent jurisdiction.

(2) Where:

(a) a supplier supplies goods, or causes goods to be supplied, to a credit provider who is not a linked credit provider of the supplier;

(b) a consumer enters into a contract with the credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hire-purchase of the goods to the consumer;

(c) antecedent negotiations in relation to the contract were conducted with the consumer by or on behalf of the supplier; and

(d) the credit provider did not take physical possession of the goods before they were delivered to the consumer;

or where a consumer enters into a contract with a credit provider for the provision of credit in respect of the supply of services to the consumer

by a supplier of which the credit provider is not a linked credit provider, and the consumer suffers loss or damage as a result of a breach of a condition that is implied in the contract by virtue of section 30, 31 and 32 or of a warranty that is implied in the contract by virtue of section 34, the credit provider is not under any liability to the consumer for the amount of the loss or damage but the consumer may recover that amount by action in a court of competent jurisdiction against the supplier.

(3) A linked credit provider of a particular supplier is not liable to a consumer by virtue of sub-section (1) in proceedings arising under that sub-section if the credit provider establishes:

(a) that the credit provided by the credit provider to the consumer was the result of an approach made to the credit provider by the consumer that was not induced by the supplier;

(b) where the proceedings relate to the supply by way of lease, hire or hire-purchase of goods by the linked credit provider to the consumer, that:

(i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the suppliers financial standing and business conduct was good; and

(ii) after becoming a linked credit provider of the supplier the credit provider had not had cause to suspect that:

(aa) the consumer might be entitled to recover an amount of loss or damage suffered as a result of misrepresentation or breach of a condition or warranty referred to in sub-section (1); and

(bb) the supplier might be unable to meet the liabilities of the supplier liabilities as and when they fall due;

(c) where the proceedings relate to a contract of sale with respect to which a tied loan contract applies, that:

(i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and

(ii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the linked credit provider had not had cause to suspect that:

(aa) the consumer might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as result of misrepresentation, breach of contract or failure of consideration in relation to the contract or as a result of a breach of a sub-section (1); and

(bb) the supplier might be unable to meet the liabilities of the suppliers as and when they fall due; or

(d) where the proceedings relate to a contract of sale with respect to which a tied continuing credit contract entered into by the linked credit provider applies, that, having regard to:

(i) the nature and volume of business carried on by the linked credit provider; and

(ii) such other matters as appear to be relevant in the circumstances of the case;

the linked credit provider, before becoming aware of the contract of sale or of proposals for the making of the contract of sale, whichever the linked credit provider first became aware of, had no cause to suspect that a person entering into such a contract with the supplier might be entitled to claim damages against, or recover a sum of money from, the supplier for misrepresentation, breach of contract, failure of consideration, breach of a condition or breach of a warranty as referred to in sub-section (1).

(4) Subject to sub-section (5), in any proceedings in relation to a contract referred to in paragraph (a) or (b) of subsection (1) in which a credit provider claims damages or an amount of money from a consumer, the consumer may set up the liability of the credit provider under sub-section (1) in diminution or extinction of the consumers liability.

(5) Subject to sub-section (6), a consumer may not, in respect of a liability for which, by reason of this section, a supplier and a linked credit provider are jointly and severally liable:

(a) bring proceedings to recover an amount of loss or damage from the credit provider; or

(b) where proceedings are brought against the consumer by the credit provider, make a counter claim or exercise the right conferred by sub-section (4) against the credit provider:

unless the consumer brings the action against the supplier and the credit provider jointly or, in the case of a counter claim or right conferred by sub-section (4), claims in the proceedings against the supplier in respect of the liability by third party proceedings or otherwise.

(6) Sub-section (5), paragraph (a) of subsection (8) and (9)(a) do not apply in relation to proceedings where:

(a) the supplier has been dissolved or is commenced to be wound up; or

(b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgement obtained against the supplier would be satisfied and the court has, on the application of the consumer, declared that sub-section (5) and paragraphs (a) of sub-section (8) and paragraph (a) of sub-section (9) do not apply in relation to the proceedings.

(7) The liability of a linked credit provider to a consumer for damages or a sum of money in respect of a contract referred to in sub-section (1) does not exceed the sum of:

(a) the amount financed under the tied loan contract, tied continuing credit contract, lease contract, contract of hire or contract of hire purchase;

(b) the amount of interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the court; and

(c) the amount of costs (if any) awarded by the court against the linked credit provider or supplier or both.

(8) Where in proceedings arising under sub-section (1), judgement is given against a supplier and a linked credit provider, the judgement:

- (a) shall not be enforced against the linked credit provider unless a written demand made on the supplier for satisfaction of the judgement has remained unsatisfied for not less than thirty days; and
- (b) may be enforced against the linked credit provider only to the extent of:
 - (i) the amount calculated in accordance with sub-section (7); or
 - (ii) so much of the judgement debt as has not been satisfied by the supplier;whichever is the lesser.

(9) Unless the linked credit provider and supplier otherwise agree, the supplier is liable to the linked credit provider for the amount of a loss suffered by the linked credit provider, being an amount not exceeding the maximum amount of the linked credit provider's liability under sub-section (7) and, unless the court otherwise determines, the amount of costs (if any) reasonably incurred by the linked credit provider in defending the proceedings by reason of which the liability was incurred.

(10) Notwithstanding any other law, where in proceedings arising under sub-section (1), judgement is given against a supplier and a linked credit provider or against a linked credit provider for an amount of loss or damage, the court in which the proceedings are taken shall, on the application of the consumer, unless good cause is shown to the contrary, award interest to the consumer against the supplier and credit provider or against the credit provider, as the case may be, upon the whole or part of the amount, from the time when the consumer became entitled to recover the amount until the date on which the judgement is given, at whichever of the following rates is the greater:

- (a) where the amount payable by the consumer to the credit provider for the reason of obtaining credit in connection with the goods or services to which the proceedings relate may be calculated at a percentage rate per annum – that rate or, if more than one such rate may be calculated, the lower or lowest of those rates;
- (b) eight percent or such other rate as is prescribed.

(11) In determining whether good cause is shown against awarding interest under sub-section (10) on the whole or part of an amount of loss or damage, the court shall take into account any payment made into court by the supplier or credit provider.

(12) Where a judgement given in proceedings arising under sub-section (1) is enforced against a linked credit provider of a particular supplier, the credit provider is subrogated to the extent of the judgement so enforced to any rights that the consumer would have had but for the judgement against the supplier or any other person.

(13) In this section:

“credit provider” means a person, providing, or proposing to provide, in the course of a business carried on by him, credit to consumers in relation to the acquisition of goods or services;

“linked credit provider”, in relation to a supplier, means a credit provider:

- (a) with whom the supplier has a contract, arrangement or understanding relating to:

- (i) the supply to the supplier of goods in which the supplier deals;
- (ii) the business carried on by the supplier of supplying goods or services; or
- (iii) the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services;
- (b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit;
- (c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or
- (d) with whom the supplier has a contract, arrangement or understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at premises of the supplier.

“tied continuing credit contract” means a continuing credit contract under which a credit provider provides credit in respect of the payment by a consumer for goods or services supplied by a supplier in relation to whom the credit provider is a linked credit provider;

“tied loan contract” means a loan contract entered into between a credit provider and a consumer where:

- (a) the credit provider knows or ought reasonably to know that the consumer enters into the loan contract wholly or partly for the purposes of payment for goods or services supplied by a supplier; and
- (b) at the time the loan contract is entered into the credit provider as a linked credit provider of the supplier.

Warranties
in relation
to the
supply of
services

34.-(1) In every contract for the supply by a supplier in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection on or with those services will be reasonably fit for the purpose for which are supplied.

(2) Where a person supplies services, other than services of a professional nature provided by a qualified architect or engineer, to a consumer in the course of a business and the consumer, expressly or by implication, makes known to him any particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connection with those services will be reasonably fit or are of such a nature and quality that they, for that purpose, might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely on, the person’s skill or judgment.

(3) A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:

- (a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are

transported or stored; or
(b) a contract of insurance.

- Rescission of contracts 35.-(1) Where:
- (a) a person supplies goods to a consumer in the course of a business; and
 - (b) there is a breach of a condition that is, by virtue of a provision in this Part, implied in the contract for the supply of the goods, the consumer is, subject to this section, entitled to rescind the contract by:
 - (i) causing to be served on the supplier a notice in writing signed by him giving particulars of the breach; or
 - (ii) causing the goods to be returned to the supplier and giving to him either orally or in writing, particulars of the breach.
- (2) Where a consumer purports to rescind under this section a contract for the supply of goods by any person, the purported rescission does not have any effect if:
- (a) the notice is not served or the goods are not returned within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods;
 - (b) in the case of a rescission effected by services of a notice after the delivery of the goods to the consumer but before the notice is served:
 - (i) the goods were disposed of by the consumer, were lost, or were destroyed otherwise than by reason of a defect in the goods;
 - (ii) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
 - (iii) the goods were damaged by abnormal use; or
 - (c) in the case of a rescission effected by return of the goods, while the goods were in the possession of the consumer:
 - (i) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
 - (ii) the goods were damaged by abnormal use.
- (3) Where a contract for the supply of goods by any person to a consumer has been rescinded in accordance with this section:
- (a) if the property in the goods had passed to the consumer before the notice of rescission was served on, or the goods were returned to him, the property in the goods re-vests in the supplier upon the service of the notice or the return of the goods; and
 - (b) the consumer may recover from the supplier as a debt, the amount or value of any consideration paid or provided by him for the goods.
- (4) The right of rescission conferred by this section is in addition to, and not in derogation of, any other right or remedy under this Act or any other Act.

Standard form contracts 36. Whenever the terms and conditions which are to govern any consumer transaction are to be included, whether wholly or in part, in a standard form contract the terms and conditions shall be registered with

the Commission in accordance with the regulations under this Act.

PART VII
MANUFACTURER'S

OBLIGATIONS

Definitions 37.-(1) In this Part:
“express warranty” in relation to goods, means an undertaking, assertion or representation in relation to:
(a) the quality, performance or characteristics of the goods;
(b) the provision of services that are or may at any time be required in respect of the goods;
(c) the supply of parts that are or may at any time be required for the goods; or
(d) the future availability of identical goods, or of goods constituting or forming part of a set of which the goods in relation to which the undertaking, assertion or representation is given or made form part;
given or made in connection with the supply of the goods or in connection with the goods or in connection with the promotion. by any means of the supply or use of the goods, the natural tendency of which is to induce persons to acquire the goods
“manufactured” includes grown, extracted, produced, processed and assembled.

(2) For the purposes of this Part, where a person makes a representation with respect to any future matter, including doing of or the refusing to do, any act, and the person does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

(3) For the purposes of the application of sub-section (1) in relation to a proceeding concerning a representation made by a person with respect to any future matter, the person shall, unless he adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

(4) Sub-section (1) shall be deemed not to limit by implication the meaning of a reference in this Part to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

(5) In this Part:
(a) a reference to goods shall, unless the contrary intention appear, be read as a reference to goods of a kind ordinarily acquired for personal, domestic or household use or consumption;
(b) a reference to a person who acquires goods from a consumer does not include a reference to a person who acquires goods for the purpose of re-supply;
(c) a reference to the quality of goods includes a reference to the state or condition of the goods; and
(d) a reference to antecedent negotiations in relation to the acquisition of goods by a consumer shall be read as a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of business carried on by the other person

whereby the consumer was induced to acquire the goods or which otherwise promoted the acquisition of the goods by the consumer.

(6) A person shall be deemed, for the purposes of this Part, to be the manufacturer of goods, if -

(a) the person holds himself out to the public as the manufacturer of those goods;

(b) the person supplies those goods and causes or permits his name, a name by which he carries on business or his brand or mark to be applied to those goods; or

(c) the person causes or permits another person, in connection with the supply or possible supply of those goods by that other person, or in connection with the promotion by that other person by any means of the supply or use of those goods, to hold out the person to the public as the manufacturer of the goods.

(7) A person shall be deemed, for the purposes of this Part, to be the manufacturer of goods if he imports into the country goods of which he is not the manufacturer provided that at the time of the importation the manufacturer of the goods does not have a place of business in the country.

(8) For the purposes of paragraph (b) of sub-section (6):

(a) a name, brand or mark shall be deemed to be applied to goods if:

(i) it is woven in, impressed on, worked into or annexed or affixed to the goods; or

(ii) it is applied to a covering, label, reel or thing in or with which the goods are supplied; and

(b) where a person's name in which he carries on business or his brand or mark is applied to goods, it shall be presumed, unless the contrary is established, that he caused or permitted the name brand or mark to be applied to the goods.

(9) The reference in sub-section (8) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and the reference in that sub-section to a label includes a reference to a brand or ticket.

(10) If goods are imported into the country on behalf of a person, such person shall be deemed, for the purposes of this Part, to have imported the goods into the country.

(11) For the purposes of this Part, goods shall to a consumer notwithstanding that, at the time of the supply, they are affixed to land or premises.

Actions in respect of unsuitable goods

38.-(1) Where:

(a) a person, supplies goods manufactured by him to another person who acquires the goods for resupply;

(b) a person, whether or not the person who acquired the goods from another person supplies the goods otherwise than by way of sale by auction, to a consumer;

(c) the goods are acquired by the consumer for a particular purpose that was, expressly or by implication, made known to the person, either directly, or through the person from whom the consumer acquired the

goods or a person by whom any antecedent negotiations in connection with the acquisition of the goods were conducted;

(d) the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied; and

(e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose, he has little to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against him in a court of competent jurisdiction.

(2) Sub-section (1) does not apply:

(a) if the, goods are not reasonably fit for the purpose referred to in that sub-section by reason of:

(i) an act or default of any person, not being the person or a servant or agent of the person; or

(ii) a cause independent of human control; occurring after the goods have left the control of the person; or

(b) where the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgment of the person.

Actions in respect of false descriptions

39.-(1) Where:

(a) a person supplies goods manufactured by the person to another person who acquires the goods for resupply;

(b) a person (whether or not the person who acquired the goods from the person) supplies the goods (otherwise than by way of sale by auction) to a consumer by description;

(c) the goods do not correspond with the description; and

(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, suffers loss or damage by reason that the goods do not correspond with the description, he is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against him in a court of competent jurisdiction.

(2) Sub-section (1) does not apply if the goods do not correspond with the description referred to in that sub-section by reason of -

(a) an act or default of a person;

(b) a cause independent of human control, occurring after the goods have left the control of that person.

(3) A person is not liable to compensate a person for loss or damage suffered by the person by reason that goods do not correspond with a description unless the description was applied to the goods:

(a) by or on behalf of him; or

(b) with his consent, whether express or implied.

(4) If the goods referred to in sub-section (1) are supplied to the consumer by reference to a sample as well as by description, it is not

a defence to an action under this section that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(5) A supply of goods is not prevented from being a supply by description for the purposes of sub-section (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

Actions in respect of goods of unmerchantable quality

40.-(1) Where:

a person supplies goods manufactured by him to another person who acquires the goods for resupply;

a person (whether or not the person acquired the goods from him) supplies the goods (otherwise than by way of sale by auction) to a consumer;

the goods are not of merchantable quality; and

the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not of merchantable quality,

such person is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against him in a court of competent jurisdiction.

(2) Sub-section (1) does not apply -

(a) if the goods are not of merchantable quality by reason of:

(i) an act or default of any person; or

(ii) a cause independent of human control,

occurring after the goods have left the control of the person;

(b) as regards defects specifically drawn to the consumer's attention before the making of the contract for the supply of the goods to the consumer; or

(c) if the consumer examines the goods before that contract is made, as regards defects that the examination ought to reveal.

(3) Goods of any kind are of merchantable quality within the meaning of this section if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to -

(a) any description applied to the goods by him;

(b) the price received by him for the goods (if relevant); and

(c) all the other relevant circumstances.

Actions in respect of non-correspondence with samples etc

41.-(1) Where:

(a) a person, supplies goods manufactured by him to another person who acquires the goods for re-supply;

(b) a person (whether or not the person who acquired the goods from the other person) supplies the goods (otherwise than by way of sale by auction) to a consumer;

(c) goods are supplied to the consumer by reference to a sample;

(d) the bulk of the goods does not correspond with the sample in quality or the goods have a defect, rendering them unmerchantable, that

is not, or would not be, apparent on reasonable examination of the sample; and

(e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the bulk does not correspond with the sample in quality or by reason that the goods have that defect,

he is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the loss or damage by action against him in a court of competent jurisdiction.

(2) Sub-section (1) does not apply where -

(a) the sample is not supplied by the person;

(b) the supply by sample is made without the express or implied concurrence of the person; or

(c) the failure of the bulk of the goods to correspond with the sample in quality or the existence of the defect is due to:

(i) default of any person or a cause independent of human control, occurring after the goods have left the control of the person; or

(ii) other circumstances that were beyond the control of him and that he could not reasonably be expected to have foreseen.

Actions in respect of failure to provide facilities for repairs or parts

42.-(1) Where:

(a) a person supplies goods (otherwise than by way of sale by auction) manufactured by him to a consumer;

(b) a person, supplies goods manufactured by him to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from him) supplies the goods (otherwise than by way of sale by auction) to a consumer; and:

(c) at a time (in this section referred to as the “relevant time”) after the acquisition of the goods by the consumer:

(i) the goods required to be repaired but facilities for their repair are not reasonably available to the consumer or a person who acquires the goods from or derives title to the goods through or under, the consumer; or

(ii) a part is required for the goods but the part is not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer;

(d) the person acted unreasonably in failing to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time; and

(e) the consumer or that other person suffers loss or damage by reason of the failure of the supplier to ensure that facilities for the repair of goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time,

he is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against him in a court of competent jurisdiction.

(2) Sub-section (1) does not apply where the person took

reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when he acquired the goods that:

(a) he did not promise that facilities for the repair of the goods, or that parts for the goods, would be available; or

(b) he did not promise that facilities for the repair of the goods, or that parts for the goods, would be available after a specified period, being a period that expired before the relevant time.

(3) Where the person took reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when he acquired the goods that he did not promise that:

(a) facilities for the repair of the goods, being facilities of a kind specified in the notice, would be available;

(b) parts for the goods, being parts of a kind specified in the notice, would be available; or

(c) facilities for the repair of the goods would be available at, or parts for the goods would be available from, a place or places specified in the notice,

he is not liable to compensate the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer for loss or damage suffered by the consumer or that other person by reason of the failure of person to ensure that facilities or parts of the kind specified in the notice, were available, or that facilities for the repair of the goods were available at, or parts for the goods were available from a place or places specified in the notice, as the case may be.

(4) In determining whether a person acted unreasonably in failing to ensure that facilities for the repair of goods were, or that a part was, reasonably available to a person at the relevant time, a court shall have regard to all the circumstances of the case, and in particular to the existence, at the relevant time, of circumstances that prevented those facilities or that part being so available, being circumstances beyond the control of the person.

Actions in respect of non-compliance with express warranty

43.-(1) Where-

a person supplies goods (otherwise than by way of sale by auction) manufactured by him to a consumer; or

a person supplies goods manufactured by him to another person who acquires the goods for re-supply and a person (whether or not the person acquired the goods from him) supplies the goods (otherwise than by way of sale by auction) to a consumer; and:

(c) a person fails to comply with an express warranty given or made by him in relation to the goods; and

(d) the consumer who acquires the goods from him suffers loss or damage by reason of the failure,

he is liable to compensate the consumer for the loss or damage and the consumer may recover the amount of the compensation by action against him in a court of competent jurisdiction.

(2) For the purposes of any action instituted by a person against a person under this section, where:

(a) an undertaking, assertion or representation was given or made in connection with the supply of goods or in connection with the promotion

by any means of the supply or use of goods; and
 (b) the undertaking, assertion or representation would, if it had been given or made by him or a person acting on his behalf, have constituted an express warranty in relation to the goods,
 it shall be presumed that the undertaking, assertion or representation was given or made by him or a person acting on his behalf unless he proves that he did not give or make, and did not cause or permit the giving or making of, the undertaking, assertion or representation.

Right of seller to recover against manufacturer or importer

44. Where -

- (a) a person (in this section referred to as the “seller”) is under a liability to another person in respect of loss or damage suffered by the consumer as a result of a breach of a condition or warranty implied by a provision of this Part in a contract for the supply of goods (whether or not the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption) by the seller to the consumer; and
- (b) a third person (in this section referred to as the “manufacturer”):
 - (i) is liable to compensate the consumer in respect of the same loss or damage by reason of the provisions of this Part; or
 - (ii) in a case where the goods referred to in paragraph (a) are not of a kind ordinarily acquired for personal, domestic or household use or consumption would, if the provisions of sections 38, 39, 40 and 41 applied in relation to those goods, be liable to compensate the consumer in respect of the same loss or damage by reason of any of those provisions,
 the manufacturer is liable to indemnify the seller in respect of the liability of the seller to the consumer and the seller may, in respect of the manufacturer’s liability to indemnify the seller, institute an action against the manufacturer in a court of competent jurisdiction for such legal or equitable relief as the seller could have obtained if the liability of the manufacturer to indemnify the seller had arisen under a contract of indemnity made between the manufacturer and the seller.

Time for commencing actions

45.-(1) Subject to this section, an action under a provision of this Part may be commenced at any time within three years after the day on which the cause of action accrued.

(2) For the purposes of this section, a cause of action shall be deemed to have accrued -

- (a) in the case of an action other than an action under section 44, on the day on which the consumer or a person who acquired the goods from or derived title to the goods through or under, consumer first became aware, or ought reasonably to have become aware:
 - (i) in the case of an action under section 44, that the goods were not reasonably fit for the purpose referred to in that section;
 - (ii) in the case of an action under section 39, that the goods did not correspond with the description referred to in that section;
 - (iii) in the case of an action under section 40, that the goods were not of merchantable quality;
 - (iv) in the case of an action under section 41, that the bulk of the

goods did not correspond with the sample in quality or the goods had the defect referred to in the section;

(v) in the case of an action under section 42 that the goods required to be repaired or that the part was required for the goods, as the case may be; or

(vi) in the case of an action under section 43, of the failure of the corporation to comply with the express warranty referred to in that section; or

(b) in the case of an action under section 44, on

(i) the day, or the first day, as the case may be, on which the seller referred to in that section made a payment in respect of, or otherwise discharged in whole or in part, the liability of that seller to the consumer or that other person; or

(ii) the day on which a proceeding was instituted by the consumer or that other person against that seller in respect of that liability or, if more than one such proceeding was instituted, the day on which the first such proceeding was instituted, whichever was the earlier.

(3) In an action under a provision of this Part, it is a defence if the defendant proves that the action was not commenced within ten years after the time of the first supply to consumer of the goods to which the action relates.

Application of this Part not to be excluded or modified

46.-(1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying, any liability of a person to compensate or indemnify another person that may arise under this Part, is void.

(2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provisions of this Part unless the term does so expressly or is inconsistent with that provision.

(3) Nothing in this section shall apply to a term of a contract referred to in sub-section (4) of section 47.

Limitation in certain circumstances of liability of manufacturer to a seller

47.-(1) Notwithstanding section 44, in the case of goods other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption, the liability under that section of a manufacturer to a seller is limited to a liability to pay to the seller an amount equal to:

- (a) the cost of replacing the goods;
 - (b) the cost of obtaining equivalent goods; or
 - (c) the cost of having the goods repaired;
- whichever is the lowest amount.

(2) Sub-section (1) shall not apply in relation to particular goods if the seller established that it is not fair or reasonable for the liability of the manufacturer in respect of those goods to be limited as

mentioned in sub-section (1).

(3) In determining for the purposes of sub-section (2) whether or not it is fair or reasonable for the liability of a manufacturer to a seller in respect of goods to be limited as mentioned in sub-section (1), a court shall have regard to all the circumstances of the case and, in particular, to -

- (a) the availability of suitable alternative sources of supply of the goods;
- (b) the availability of equivalent goods; and
- (c) whether the goods were manufactured, processed or adapted to the special order of the seller.

(4) Any term of a contract between the manufacturer and the seller imposing on the manufacturer a greater liability than the liability mentioned in sub-section (1), shall be subject to this section.

(5) In this section, the expressions “manufacturer” and “seller” have the same respective meanings as provided for under section 44.

PART VIII

PRODUCT SAFETY AND PRODUCT INFORMATION

Warning
notice to
public

48.-(1) Notwithstanding the provisions of this Act, the Commission may publish a notice in the Gazette containing -

- (a) a statement that goods of a kind specified in the notice are under public investigation to determine whether the goods will or may cause injury to any person; or
- (b) a warning of possible risks involved in the use of goods of a kind specified in the notice.

(2) Where an investigation referred to in sub-section (1) has been completed the Commission shall, as soon as practicable after the investigation has been completed, by notice published in the Gazette, announce the results of the investigation, and may announce in the notice whether and if so, what action is proposed to be taken in relation to the goods under this Part.

Product
safety
standards
and unsafe
goods

49.-(1) No person shall supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind -

- (a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;
- (b) in respect of which there is in force a notice under this section declaring the goods to be unsafe goods; or
- (c) in respect of which there is in force a notice under this section imposing a permanent ban on those goods.

(2) The regulations may, in respect of goods of a particular kind, prescribe a consumer product safety standard consisting of such requirements as to -

- (a) performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods;
- (b) testing of the goods during, or after the completion of, manufacture or processing; and
- (c) the form and content of markings, warnings or instructions to accompany the goods, as are reasonably necessary to prevent or reduce risk of injury to any person.

(3) No person shall export goods or supply goods in the country which are prohibited by sub-section (1) unless the Minister has, by notice in writing given to such person, approval to export such goods.

(4) Where the Minister approves the export of goods under sub-section (3), the Minister shall cause a statement setting out particulars of the approval to be laid before the Nation Assembly at the next sitting after the approval.

(5) Where it appears to the Minister after consultation with the Commission that goods of a particular kind will or may cause injury to any person, the Minister may, by notice published in the Gazette, declare the goods to be unsafe, and shall forthwith impose a temporary ban on such goods.

(6) A notice and the temporary ban under sub-section (5) shall remain in force until the end of three months after the publication of the notice in the Gazette unless it is revoked before the end of that period.

(7) Where:

(a) period of three months has elapsed after the date of publication of the notice in the Gazette declaring goods to be unsafe and a temporary ban has been imposed; and

(b) the supplier has failed to make good the defect, the Minister may, by notice published in the Gazette impose a permanent ban.

(8) Where:

(a) the supplying of goods by any person constitutes a contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;

(b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information in relation to the goods; and

(c) the person would not have suffered the loss or damage if the goods had complied with that standard, the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods.

(9) Where:

(a) the supplying of goods by any person constitutes a contravention of this section by reason that there is in force a notice under this section declaring the goods to be unsafe goods or imposing a temporary or permanent ban on the goods; and

a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of the goods, or by reason of not having particular information as to a characteristic of the goods,

that person, shall be deemed for the purposes of this Act to have suffered the loss or damage by supplying of such goods.

Product Information Act No.3 of 1975

50.-(1) Subject to the provisions of the Standards Act, 1975 no person shall supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless he has complied with that Standard in relation to those goods.

(2) The regulations may, in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to:

(a) the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods; and

(b) the form and manner in which that information is to be disclosed on or with the goods,

as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods.

(3) Where:

(a) the supplying of goods by any person constitutes a contravention of this section by reason that he has not complied with a prescribed consumer product information standard in relation to the goods;

(b) a person suffers loss or damage by reason of not having particular information in relation to the goods; and

(c) the person would not have suffered the loss or damage if he had complied with that standard in relation to the goods,

that person shall be deemed, for the purposes of this Act, to have suffered the loss or damage by supplying such goods.

Power of Minister to declare product safety information standards

51.-(1) The Minister may, by a notice published in the Gazette, declare that, in respect of goods of a kind specified in the notice, a particular standard, or a particular part of a standard, prepared or approved by the Bureau of Standards or by a prescribed association or body, or such a standard or part of a standard with additions or variations specified in the notice, is a consumer product safety standard for the purposes of section 49 or a consumer product information standard for the purposes of section 50.

(2) Where a notice is so published, the standard, or the part of the standard, referred to in the notice, or the standard or part of a standard so referred to with additions or variations specified in the notice, as the case may be, shall be deemed to be a prescribed consumer product safety standard for the purposes of section 49 or a prescribed consumer product information standard for the purposes of section 50, as the case may be.

(3) Sub-section (1) shall not authorise the publication of a notice in relation to goods of a particular kind if the standard or the part of the standard referred to in the notice, or the standard or the part of the standard so referred to with additions and variations specified in the notice is inconsistent with a standard prescribed in relation to goods of

that kind by regulations made for the purposes of section 49 or 50.

Copies of certain notices to be given to supplier or be published in certain newspapers

52.-(1) Where the Commission publishes notice in the Gazette under paragraph (1) of section 48 the Commission shall, within fourteen days, either:

- (a) cause a copy of the notice to be given to each person who, to the knowledge of the Commission, supplies goods of the kind to which the notice relates; or
- (b) cause a copy of the notice to be published in a newspaper circulating in each part of the country where goods of the kind to which the notice relates are, to the knowledge of the Commission supplied.

(2) Any failure to comply with sub-section (1) in relation to a notice shall not invalidate the notice.

PART IX PRODUCT

RECALL

Compulsory product recall

53.-(1) Where-

(a) any person supplies goods that are intended to be used, or are of a kind likely to be used, by a consumer, and:

- (i) it appears to the Minister that the goods are goods of a kind which will or may cause injury to any person;
- (ii) the goods are goods of a kind in respect of which there is a prescribed consumer product safety standard and the goods do not comply with that standard; or
- (iii) the goods are goods of a kind in relation to which there is in force a notice under sub-section (5) or (7) of section 49, and

(b) it appears to the Minister that the supplier has not taken satisfactory action to prevent the goods causing injury to any person, the Minister may, by notice published in the Gazette, require the supplier:

(c) to take action within the period specified in the notice to recall the goods;

(d) disclose to the public, or to a class of persons specified in the notice, in the manner and within the period specified in the notice, one or more of the following:

- (i) the nature of a defect in, or a dangerous characteristic of, the goods identified or the notice;
 - (ii) the circumstances, being circumstances identified in the notice, in which the use of the goods is dangerous;
 - (iii) the procedures for disposing of the goods specified in the notice;
- or

(e) to inform the public, or a class of persons specified in the notice, in the manner and within the period specified in the notice that the supplier undertakes to do whichever of the following the supplier thinks is appropriate:

- (i) except where the notice identifies a dangerous characteristic of the goods - repair the goods;
- (ii) replace the goods;

(iii) refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods, within the period specified in the notice.

(2) Notwithstanding the provisions of subparagraph (iii) of subsection(1)(e), where the Minister, in a notice under sub-section (1), requires the supplier to take action under paragraph (e) of subsection (1), the Minister may specify in the notice that, where:

(a) the supplier chooses to refund the price of the goods; and
(b) a period of more than 12 months has elapsed since a person (whether or not the person to whom the refund is to be made) acquired the goods from the supplier, the amount of a refund may be reduced by the supplier by an amount attributable to the use which a person has had of the goods, being an amount calculated in a manner specified in the notice.

(3) The Minister may, by notice published in the Gazette, give directions as to the manner in which the supplier is to carry out a recall of good required under sub-section (1).

(4) Where the supplier, under sub-section (1) undertakes to repair goods, the supplier shall cause the goods to be repaired so that:

(a) any defect in the goods identified in the notice under sub-section (1) is remedied; and
(b) if there is a prescribed consumer product safety standard in respect of the goods - the goods comply with that standard.

(5) Where the supplier, under sub-section (1), undertakes to replace goods, the supplier shall replace the goods with like goods which:

(a) if a defect in, or a dangerous characteristic of, the first mentioned goods was identified in the notice under sub-section (1), do not contain that defect or have that characteristic; and
(b) if there is a prescribed consumer product safety standard in respect of goods of that kind, comply with that standard.

(6) Where the supplier, under sub-section (1) undertakes to repair goods or replace goods, the cost of the repair or replacement, including any necessary transportation costs, shall be borne by the supplier.

(7) Where goods are recalled, whether voluntarily or in accordance with a requirement made by the Minister under paragraph (d) of subsection (1), a person who has supplied any of the recalled goods to another person outside the country shall, as soon as practicable after the supply of those goods, give a notice in writing to that other person:

(a) stating that the goods are subject to recall;
(b) if the goods contain a defector have a dangerous characteristic - setting out the nature of that defect or characteristic; and
(c) if the goods do not comply with a prescribed consumer product safety standard in respect of the goods - setting out the nature of the non compliance.

(8) Where a person is required under sub-section (7) to give a notice in writing to another person, the first-mentioned person shall, within ten days after giving that notice, provide the Minister with a copy of that notice.

(9) Any person who contravenes sub-section (8) commits an offence and is liable on conviction:

(a) in the case of a person not being a body corporate, to a fine not less than fifty thousand and not exceeding one million shillings or to imprisonment for a term not exceeding twelve months; or

(b) in the case of a person being a body corporate, to a fine not less than one hundred thousand shilling and not exceeding five million shillings.

Compliance
with
product
recall order

54. Where a notice under sub-section 53(1) is in force in relation to any person such person:

(a) shall comply with the requirements and directions in the notice; and

(b) shall not:

(i) where the notice identifies a defect in, or a dangerous characteristic of the goods, supply goods of the kind to which the notice relates and which contain that defect and have that characteristic; or

(ii) in any other case, supply goods of the kind to which the notice relates.

Loss or
damage
caused by
contravention
of
product
recall order

55. Where:

(a) a person contravenes the provisions of section 54 by:

(i) supplying goods of a kind in relation to which a notice under sub-section (1) of section 53 is in force; or

(ii) failing to comply with the requirements of such a notice; and

(b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information as to a characteristic of the goods,

that person shall be deemed for the purposes of this Act to have suffered loss or damage by the supplying of the goods; or by the failure of supplier to comply with the notice, as the case may be.

Notification
of
voluntary
recall

56.-(1) Notwithstanding the provisions of this Act, where a person voluntarily takes action to recall goods because the goods will or may cause injury to any person, he shall, within two days after taking that action, give a notice in writing to the Commission:

(a) stating that the goods are subject to recall; and

(b) setting out the nature of the defect in, or dangerous characteristics of, the goods.

(2) A person who contravenes sub-section (1) commits an offence and is liable on conviction:

(a) in the case of a person not being a body corporate to a fine not less than fifty thousand shillings and not exceeding one million shillings

or to imprisonment for a term not exceeding twelve months; or
(b) in the case of a person being a body corporate to a fine not less than one hundred thousand shillings and not exceeding five million shillings.

PART X OFFENCES, PENALTIES AND REMEDIES

Person involved in an offence 57.-(1) A person shall not:
(a) aid, abet, counsel or procure;
(b) conspire with others to commit;
(c) be directly or indirectly knowingly concerned in;
an offence against this Act by another person (in this section referred to as the “primary offence”).
(2) For the purposes of this Part, a person who commits an offence against sub-section (1) is “involved” in the primary offence.

Compliance orders and compliance agreements 58.-(1) Where the Commission is satisfied that a person has committed or is likely to commit an offence against this Act (other than Parts VI or VII), it may make a compliance order under this section against the person and any person involved in the offence.

(2) A person against whom a compliance order is made commits an offence if the person fails to comply with the order.

(3) A compliance order may require a person to refrain from conduct in contravention of this Act or to take actions to comply with this Act, and shall specify the time for compliance with the order and the duration of the order.

(4) The Commission may make an interim compliance order pending a proper consideration of a matter if the Commission is of the opinion that there is an imminent danger of substantial damage to a person if a threatened or likely offence is committed or there are other good reasons for making such an order.

(5) Without limiting the generality of sub-section (3), where the Commission is satisfied that a person (in this sub-section referred to as the “acquirer”) has acquired shares or other assets in breach of sub-section (1) of section 11, the Commission may make an order at any time within three years after the acquisition -

(a) requiring the acquirer to dispose of some or all of the shares or assets within such time as the Commission specifies in the order; or

(b) declaring the acquisition to be void, requiring the acquirer to transfer some or all of the shares or assets back to the person from whom the acquirer acquired the shares or assets (in this sub-section referred to as the “vendor”) and requiring the vendor to refund to the acquirer some or all of the amounts received by the vendor in respect of the acquisition, as the Commission specifies in the order.

(6) Without limiting the generality of the provisions of sub-section (3), where the Commission is satisfied that a person has committed an offence against this Act (other than under Parts VI and VII), the Commission may order that person to publish, in such manner

and within such time as the Commission sees fit, such information as Director General it considers appropriate relating to the offence.

(7) A compliance order shall be made in writing specifying the grounds for making the order.

(8) The Commission may enter into an agreement in writing, referred to in this section as a “compliance agreement”, whereby a person undertakes to the Commission to refrain from conduct in contravention of this Act from a date, and for a period of time, specified in the compliance agreement or for the disposal of shares or assets and other matters referred to in sub-section (5), on such terms and conditions as the Commission deems appropriate.

(9) A compliance order shall be enforceable as an order of the High Court.

(10) A copy of a compliance order or compliance agreement shall be placed on the Public Register and, in the case of a compliance order, a copy shall be served on the person against whom it is made.

(11) Notwithstanding any law to the contrary, a copy of a compliance order or compliance agreement duly certified by the Commission shall be conclusive evidence in any court of the making of the order and the grounds for making it or the making of the compliance agreement.

(12) The Commission does not have jurisdiction to make compliance orders or enter into compliance agreements in relation to breaches of conditions or warranties implied under Part VI or manufacturers obligations under Part VII.

Compensat
ory orders

59.-(1) Any person who suffers loss or damage as a result of an offence against this Act (other than under Parts VI or VII) may apply to the Commission for compensatory orders under this section against the person who committed the offence and any person involved in the offence, whether or not they have been convicted of the offence.

(2) An application under sub-section (1) may be made at any time within three years after the loss or damage was suffered or the applicant became aware of the offence, whichever is the later.

(3) The Commission may make orders under this section against the person who committed the offence and any person involved in the offence (in this section referred to as the “respondents”) as the Commission considers appropriate to compensate the applicant for the loss or damage suffered by the applicant or to prevent or reduce such loss or damage, including the orders in sub-section (4).

(4) The orders referred to in sub-section (3) are:

- (a) an order requiring the respondents to pay money;
- (b) an order requiring the respondents to supply goods or services for specified periods or on specified terms and conditions;
- (c) an order declaring void, terminating or varying a contract;
- (d) an order requiring the respondents to pay the costs of the applicant or of a person appearing at the hearing or producing documents.

(5) Any person against whom a compensatory order is made commits an offence if that person fails to comply with the order.

(6) Any person who suffers loss or damage as a result of breach of a condition or warranty implied under Part VI or a manufacturer's obligation under Part VII may seek a relief in a Court of competent jurisdiction but shall not seek, and the Commission shall not grant, a compensatory order under this section.

(7) Orders of the Commission under this section shall be enforceable as orders of the High Court.

Offences

60.-(1) Where a person commits an offence against this Act (other than under Part VI, Part VII or section 58, 59 or 88) or is involved in such an offence, the Commission may impose on that person a fine of not less than five percent of his annual turnover and not exceeding ten percent of his annual turnover.

(2) If the Commission is satisfied that a monetary value can reasonably be placed on the damage including loss of income suffered by a person as a result of an offence against this Act, the convicted person shall, in addition to any other penalty which may be imposed, be liable to a fine of two times such monetary value, which the Commission shall order to be paid to the person suffering the damage.

(3) Where a person charged with an offence under this Act is a body corporate, every person who, at the time of the commission of the offence, was a director, manager or officer of the body corporate may be charged jointly in the same proceedings with such body corporate and where the body corporate is convicted of the offence, every such director, manager or officer of the body corporate shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

(4) For the purposes of this section, any partner of a firm shall be jointly and severally liable for the acts or omissions of any other partner of the same firm done or omitted in the course of the firm's business.

(5) A person who contravenes section 16 is not liable to fines under this section but may be subject to compliance orders under section 58 and compensatory orders under section 59.

(6) Any person who contravenes section 15 is not liable to fines under this section but may be subject to compliance orders under section 58 and compensatory orders under section 59.

(7) Any person who breaches a condition or warranty implied under Part VI or a manufacturer's obligation under Part VII is not liable to fines under this section.

(8) The Commission may act upon an offence at any time within six years after the commission of the offence.

PART XI

APPEALS TO THE FAIR COMPETITION TRIBUNAL

Appeals against decisions of

61.-(1) Any person that has a pecuniary and material grievance arising from a decision of the Commission:

the
Commission
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(a) to grant or refuse to grant an exemption under section 12 or section 13;

(b) to make or not to make a compliance order under section 58; or to make or not to make a compensatory order under section 59, may appeal to the Tribunal for review of the decision within 28 days after notification or publication of the decision.

(2) An appeal under sub-section (1) shall be by way of a rehearing.

(3) Any person that has a pecuniary and material grievance arising from a decision of the Commission other than a decision referred to in sub-section (1) may appeal to the Tribunal for review of the decision within 28 days after the notification or publication of the decision.

(4) The grounds for an appeal under sub-section (3) shall be that:

(a) the decision made was not based on evidence produced;

(b) there was an error in law;

(c) the procedures and other statutory requirements applicable to the Commission were not complied with and non-compliance materially affected the determination;

(d) the Commission did not have power to make the determination.

(5) On an appeal under this section the Tribunal shall make a determination affirming, setting aside or varying the decision of the Commission or it may direct the Commission to reconsider the matter or specified parts of the matter to which the appeal relates.

(6) In reconsidering a matter referred back to it under sub-section (5), the Commission shall have regard to the Tribunal's reasons for giving the direction.

(7) For the purposes of an appeal under this section, the Tribunal:

(a) may perform all the functions and exercise all the powers of the Commission; and

(b) may make such orders as to the payment of any person's costs of the review as it deems appropriate.

(8) The decisions of the Tribunal on appeals under this section shall be final.

PART XII FAIR COMPETITION COMMISSION

Establishm
ent of the
Commission
n

62.-(1) There is hereby established a Commission to be known as the Fair Competition Commission.

(2) The Commission shall be independent and shall perform its functions and exercise its powers independently and impartially without fear or favour.

(3) The Commission shall be a body corporate with perpetual succession and subject to this Act, shall -

(a) be capable of suing and being sued in its corporate name;

(b) be capable of acquiring, holding and disposing of real and personal property;

(c) have power to exercise and perform the powers and functions conferred on it by or under this Act;

(d) have power to do and suffer all such other acts and things a body corporate may by law do and suffer.

(4) Subject to the provisions of this Act, the Commission shall have power to do all things necessary to enable it to perform its functions and duties.

(5) The common seal of the Commission shall be judicially noticed and shall be duly affixed if witnessed under the hand of the Chairman or Director General of the Commission.

(6) The Commission shall be constituted by five members as follows:

(a) a Chairman, who shall be a non-executive appointed by the President;

(b) three non-executive members appointed by the Minister;

(c) the Director General.

(7) There shall be a Director General of the Commission, who shall be appointed by the Minister, from amongst a list of names submitted by the Nomination Committee, to serve on such terms and conditions as may be set out in the letter of his appointment or as may from time to time be determined by the Commission with the approval of the Minister.

(8) A person appointed as a Director General under this section shall have the functions and qualifications set out in the Second Schedule to this Act.

(9) No civil liability will attach to any member, or employee of the Commission in his personal capacity as a result of any act or thing done in good faith in the performance or exercise, or purported performance or exercise, of any function or power of the Commission.

Appointment of members

63.-(1) Whenever a member or members are to be appointed to the Commission a Nomination Committee shall be established in accordance with the provisions of the First Schedule.

(2) Subject to this section, the composition, functions and procedures of the Nomination Committee shall be as provided under the provisions of the First Schedule.

(3) The President shall appoint the Chairman of the Commission from candidates nominated by the Nomination Committee.

(4) The Minister shall appoint other members of the Commission from candidates nominated by the Nomination Committee.

(5) Before nominating a person as a candidate for appointment to the Commission, the Nomination Committee shall satisfy itself that the person is qualified for the appointment because of his knowledge of, or experience in, industry, commerce, economics, law, public administration or other related fields.

(6) In order to maintain impartiality of the Commission and for the purpose of avoiding conflict of interest, a person shall not be qualified for appointment as a member to the Commission if owing to

the nature of the office he holds is likely to exert influence on the Commission.

(7) The first Chairman and members of the Commission shall be appointed for the following fixed terms:

Chairman - four years;

Director-General - four years;

one member - three years;

two members - five years.

(8) Members shall be eligible for reappointment for one further consecutive term but shall not be eligible for re-appointment thereafter.

(9) The members of the Commission shall be paid such fees and allowances as shall be set out in their letters of appointment as determined by the President or the Minister, as the case may be, on the advice of the Commission and after consultation with relevant Ministers.

(10) The members of the Commission may not be removed from office except in accordance with the provisions of section 64.

(11) Members may resign by giving written notice of resignation to the Minister.

Removal of members

64.-(1) The President may, acting upon an advise given by the Minister remove a member, including the Chairman, from office at any time if:

(a) the member is declared bankrupt, takes the benefit of any law for the relief of insolvent debtors or assigns the member's remuneration for the benefit of creditors;

(b) the member is convicted of a criminal offence;

(c) if the member is required by section 66 to resign;

(d) the President decides that member is incapable of carrying out the member's duties because of ill health or physical or mental impairment;

(e) the member fails to attend at least two thirds of all meetings of the Commission in any period of twelve consecutive months; or

(f) the member has committed a material breach of a code of conduct to which the Commission is subject or a material breach of the provisions of this Act.

(2) Before removing a member from office the President shall inform a member in writing stating the grounds for removal.

Functions of the Commission

65.-(1) The Commission shall administer this Act and develop and promote policies for enhancing competition and consumer welfare.

(2) Without limiting sub-section (1), the Commission shall -

(a) control, manage and efficiently perform the functions of the Commission under the Act;

(b) promote and enforce compliance with the Act;

(c) promote public knowledge, awareness and understanding of the

obligations, rights and remedies under the Act and the duties, functions and activities of the Commission;

(d) make available to consumers information and guidelines relating to the obligations of persons under the Act and the rights and remedies available to consumers under the Act;

(e) carry out inquiries studies and research into matters relating to competition and the protection of the interests of consumers;

(f) study government policies, procedures and programmes, legislation and proposals for legislation so as to assess their effects on competition and consumer welfare and publicise the results of such studies;

(g) investigate impediments to competition, including entry into and exit from markets, in the economy as a whole or in particular sectors and publicise the results of such investigations;

(h) investigate policies, procedures and programmes of regulatory authorities so as to assess their effects on competition and consumer welfare and publicise the results of such studies;

(i) participate in deliberations and proceedings of government, government commissions, regulatory authorities and other bodies in relation to competition and consumer welfare;

(j) make representations to government, government commissions, regulatory authorities and other bodies on matters related to competition and consumer welfare;

(k) consult with consumer bodies, regulatory authorities, business organizations and other interested persons;

(l) consult with the competition authorities of other countries;

(m) represent Tanzania at international fora concerned with matters relating to competition or the interests of consumers.

(3) The Chairman of the Commission shall in consultation with the other members of the Commission determine from time to time the priority to be given to any of the functions and activities set out in subsection (2) for effective and efficient administration of this Act.

(4) The Commission shall be entitled to participate in the proceedings of courts, tribunals, regulatory authorities, government inquiries, commissions, committees and working groups for the purpose of observing the proceedings and making representations on matters relevant to the Commission's functions.

Conflicts of interest

66.-(1) A member or employee of the Commission shall be considered to have a conflict of interest for the purposes of this Act if he acquires any pecuniary or other interest that could conflict with the proper performance of his duties as a member or employee of the Commission.

(2) If at any time a member of the Commission has a conflict of interest in relation to:

(a) any matter before the Commission for consideration or determination; or

(b) any matter the Commission could reasonably expect might come before it for consideration or determination;

the member shall immediately disclose the conflict of interest to the other members of the Commission and refrain from taking part, or any further part, in the consideration or determination of the matter.

(3) Where the Commission becomes aware that a member has a conflict of interest in relation to any matter before the Commission, the Commission shall direct the member to refrain from taking part, or taking any further part, in the consideration or determination of the matter.

(4) If the Chairman has a conflict of interest he shall, in addition to complying with the other provisions of this section, disclose the conflict to the Minister by written notice.

(5) Upon the Commission becoming aware of any conflict of interest it shall make a determination as to whether in future the conflict is likely to interfere significantly with the proper and effective performance of the functions and duties of the member or the Commission and the member with the conflict of interest shall not vote on this determination.

(6) Where the Commission determines that the conflict is likely to interfere significantly with the member's proper and effective performance as provided in sub-section (5), the member shall resign unless the member has eliminated the conflict to the satisfaction of the Commission within 30 days.

(7) The Commission shall report to the Minister any determination by the Commission that a conflict is likely to interfere significantly with performance as above and whether or not the conflict has been eliminated to the satisfaction of the Commission.

(8) The Annual Report of the Commission shall disclose details of all conflicts of interest and determinations arising during the period covered by the Report.

Code of
Conduct

67.-(1) Within twelve months of the commencement of this Act, the Commission shall adopt a code of conduct prescribing standards of behaviour to be observed by the members and employees of the Commission in the performance of their duties.

(2) Subject to sub-section (1), before adopting any code of conduct or making any substantial amendments to an existing code of conduct, the Competition Commission shall publish the proposed code or amendments in the Gazette and in a newspaper circulating nationally, inviting public comment.

(3) The Commission shall include in its Annual Report a report on compliance with the code during the period covered by the Annual Report.

(4) Code of conduct adopted or prescribed under this section shall be binding on the Commission and its employees.

Power to
hold
inquiries

68.-(1) The Commission may conduct an inquiry where it considers it necessary or desirable for the purpose of carrying out its functions.

(2) The Commission shall conduct an inquiry before exercising a power to grant, revoke or vary a block exemption under section 12.

(3) The Minister may, by a direction in writing to the Commission, require the Commission to conduct an inquiry into a matter specified in the direction and may specify in the direction a time within which the Commission shall submit its report on the inquiry and, if so, the Commission shall submit its report to the Minister within that time.

(4) At the request of a regulatory body the Commission may conduct an inquiry into the matter specified by the regulatory body and provide a report within a period agreed with the regulatory body.

(5) The Commission shall give notice of an inquiry by:

(a) publishing a notice in the Gazette and in a daily newspaper circulating generally in Tanzania specifying the purpose of the inquiry, the time within which submissions may be made to the Commission and the form in which submissions should be made, the matters the Commission would like submissions to deal with and in the case of an inquiry conducted at the direction of the Minister, the Minister's terms of references;

(b) sending written notice of the inquiry, including the information in paragraph (a) to -

(i) undertakings whose interests the Commission considers are likely to be affected by the outcome of the inquiry;

(ii) the National Consumer Advocacy Council, established under Part XIV;

(iii) industry and consumer organizations which the Commission considers may have an interest in the matter;

(iv) the Minister.

Initiating a complaint

69.-(1) The Commission may initiate a complaint against an alleged prohibited practice.

(2) Any person may -

(a) submit information concerning an alleged prohibited practice to the Commission, in any manner or form; or

(b) submit a complaint against an alleged prohibited practice to the Commission in the prescribed form.

Interim relief

70.-(1) At any time, whether or not a hearing into an alleged prohibited practice, has commenced the complainant may apply to the Commission for an interim order in respect of the alleged practice.

(2) The Commission -

(a) shall give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(b) may grant an interim order if it is reasonable and just to do so, having regard to -

(i) the evidence relating to the alleged prohibited practice;

(ii) the need to prevent serious or irreparable damage to the applicant; and

(iii) the balance of convenience.

Power to obtain

71.-(1) Where the Commission has reason to believe that a person is capable of supplying information, producing a document or

information giving evidence that may assist in the performance of any of its functions, a member of the Commission may, by summons signed by the Chairman or Director General of the Commission served on that person, require that person:

- (a) to furnish the information in writing signed by him, in the case of a body corporate signed by a competent authorized officer or a legal officer of the body corporate;
- (b) to produce the document to the Commission;
- (c) to appear before the Commission to give evidence orally.

(2) A summons under this section shall specify the required time and manner of compliance.

(3) The Commission may require that any evidence referred to under this section be given on oath or affirmation and, for this purpose, the Chairman, the Director General or any member of the Commission may administer the oath or affirmation.

(4) A person shall not be excused from complying with a summons under this section on the grounds that compliance may tend to incriminate the person or make the person liable to a penalty, save that information, documents and evidence provided in answer to a summons will not be admissible in any proceedings against the person other than proceedings under this Act.

(5) Where the Commission has reason to believe that a person is in possession or control of any documents that may assist it in the performance of any of its functions, the Chairman, the Director General or any member of the Commission, may apply to the Tribunal who, acting through the Chairman, shall issue a warrant authorizing any police officer, accompanied by staff of the Commission duly authorized by the Chairman of the Commission to enter premises to conduct a search and make copies or take extracts of documents therein.

(6) Any person who -
knowingly gives false or misleading information or evidence in purported compliance with a summons
without lawful excuse refuses or fails to comply with a summons;
under this section commits an offence.

Employees
and
Consultants

72.-(1) The Commission shall employ such staff as it considers appropriate to enable it to perform its functions and exercise its powers.

(2) The Commission may engage consultants and experts, as it considers appropriate, to assist it to perform its functions and exercise its powers.

(3) The Commission shall establish a competitive selection procedure for the appointment of all employees, consultants and experts.

(4) The terms and conditions on which the Commission employs staff and engages consultants and experts shall be as determined by the Commission but shall include the following -

- (a) an employee, consultant or expert shall, without delay, notify the Commission in writing of any conflict of interest as soon as it arises and failure to comply with this requirement, whether willfully or

inadvertently, will be a ground for immediate dismissal;

(b) where the Commission becomes aware of a conflict of interest, whether as a result of a notification under paragraph (a) or by any other means, the Commission may direct the person not to participate in the consideration of any matter in relation to which the person has the conflict of interest and, in that case, the person shall comply with the direction.

(5) Before employing or engaging any person, the Commission shall obtain from the person a written declaration of any existing conflict of interest.

(6) Persons employed by the Commission as full-time employees shall not undertake any other paid employment or remunerated activities.

(7) The Commission may enter into agreements with government departments and other government authorities and agencies to share the services of particular employees, as the Chairman considers appropriate.

(8) The Commission shall include in its Annual Report a report of its competitive selection procedure and its employment practices.

Meetings of
the
Commission

73.-(1) The Commission shall hold meetings not less than six times in any period of twelve months and the interval between successive meetings shall not on any occasion exceed two months.

(2) The Director General shall convene meetings of the Commission as directed by the Chairman or if requested in writing by at least half of the members.

(3) Subject to the provisions of sub-sections (1) and (2), the Chairman may convene meetings of the Commission, after consultation with the members, at such times and places as he sees fit.

(4) The Chairman shall preside at meetings of the Commission and the members may appoint from amongst themselves a Deputy Chairman to preside at meetings in his absence.

(5) A quorum will be three members including the Chairman or a Deputy Chairman.

(6) All questions shall be decided by a majority of votes of the members present and voting and, in the event of an equality of votes, the presiding member shall have a deliberative and a casting vote.

(7) The Chairman may decide that particular meetings of the Commission should be held by telephone, closed circuit television or other method of communication as the Chairman thinks fit.

(8) A minute of a resolution signed by all members of the Commission shall constitute a valid resolution of the Commission as if it were duly passed at a validly constituted meeting of the Commission.

Delegation

74.-(1) The Commission may delegate to a member of the Commission, either generally or otherwise as provided by the instrument of delegation, any of its powers other than -

- (a) duties to make decisions under Part II of the Act;
- (b) this power of delegation itself; and

- (c) the powers to revoke or vary delegation.
 - (2) A delegated power shall be exercised in accordance with the instrument of delegation.
 - (3) A delegation may be revoked or varied at will and shall not prevent the exercise of a power by the Commission.

Establishment of divisions of the Commission

75.-(1) The Commission shall establish one or more divisions which shall be responsible for investigation and compliance in respect to matters falling under Part II.

(2) The Commission shall appoint an employee or employees of the Commission as Directors of the divisions.

(3) The Commission may establish one or more other divisions to perform other functions, subject to the directions of the Commission as the Commission may from time to time determine.

Confidentiality

76.-(1) In this section “material” includes any information, document or evidence.

(2) Any person who gives or discloses any material to the Commission, whether under compulsion of law or otherwise, may claim confidentiality in respect of the whole or any part of the material.

(3) A claim for confidentiality may be made at any time before the material is disclosed to persons outside the Commission without any breach of the provisions of this section.

(4) In the case of oral evidence, the claim may be made orally at the time of giving the evidence and in all other cases it shall be in writing, signed by the person making the claim specifying the material and stating the reason for the claim.

(5) If the Commission is satisfied that material is of a confidential nature and:

(a) its disclosure could adversely affect the competitive position of any person; or

(b) is commercially sensitive for some other reason, the Commission shall grant confidentiality for the material.

(6) The Commission shall give notice in writing to a person making a claim for confidentiality of the Commission’s decision to grant or not grant confidentiality and, if it has not granted confidentiality, the Commission shall treat the material as confidential for a period of fourteen days after giving such notification.

(7) If a claim for confidentiality:

(a) is made in relation to material supplied to the Commission voluntarily; and

(b) the Commission decides not to grant confidentiality in whole or in part for the material;

that person who supplied the material may, within the fourteen days period provided under sub-section (6), withdraw the material from the Commission together with other material supplied with it.

(8) Notwithstanding that the Commission has granted a claim

for confidentiality under sub-section (5), the Commission may disclose the material:

- (a) at any time without notice to any other person if -
 - (i) the disclosure is made to another person who is also performing a function under this Act;
 - (ii) the disclosure is made with the consent of the person who gave the material;
 - (iii) the disclosure is authorised or required under any other Act or law; or
 - (iv) the disclosure is authorised or required by a court or tribunal constituted by law; or
 - (b) if the Commission is of the opinion that:
 - (i) disclosure of the material would not cause detriment to the person supplying it or the person to whom it relates; or
 - (ii) although the disclosure of the material would cause detriment to the person supplying it or the person to whom it relates, the public benefit in disclosing it outweighs the detriment;
- and the Commission has given fourteen days prior written notice to those persons of its intention to disclose the material pursuant to this provision.

(9) Any person who is aggrieved by a decision of the Commission under this section not to grant a claim for confidentiality for material or to disclose confidential material may, at any time while the Commission is obliged by this section to keep the material confidential, appeal to the Tribunal against the decision and the Commission shall continue to treat the material confidential pending determination of the appeal.

(10) Any person who discloses confidential information otherwise than as authorised by this section, commits an offence.

Public
Register

77.-(1) There shall be a Public Register kept by the Commission at its principal office, which shall be available for public inspection at all times during business hours.

(2) There shall be kept at any sub-offices of the Commission copies of the Public Register which shall be accessible for inspection by members of the public.

(3) The Commission shall promptly place on the Public Register copies of-

- (a) decisions made in respect to offences committed under sections 8, 9, 10 and 11, decisions to grant or refuse exemptions under sections 12 and 13 and decisions to make or refuse to make orders under Part X and section 70;
- (b) its reasons for granting or refusing exemptions or orders referred to in paragraph (a);
- (c) significant reports and studies;
- (d) all other documents required to be placed on the Public Register under any other provision of this Act; and
- (e) such other decisions and information as the Commission may determine from time to time.

(4) The Commission shall cause to be published in the Gazette

and placed on the Public Register as soon as may be practicable -

- (a) any proposed or adopted code of conduct or amendment to a code of conduct;
- (b) any Regulations, Rules or Orders;
- (c) any other decision or information the Commission may decide to publish in the Gazette.

(5) The Commission shall exclude from the Public Register any document or part of a document which is confidential within the provisions of section 74.

(6) The Commission shall ensure that, where possible, the Public Register shall be accessible to the public by internet.

Funds of
the
Commission

78.-(1) Funds of the Commission will comprise of -

- (a) fees not exceeding 2.5% of business licences ;
- (b) any grants, donations, bequests or other contributions made to the Commission;
- (c) funds allocated to the Commission from the funds of EWURA, SUMATRA, the Tanzania Communication Regulatory Authority, the Tanzania Civil Aviation Authority and such other regulatory authorities for work done by the Commission or as provided in the other relevant legislation or as may be agreed between the Commission and those authorities respectively; and
- (d) funds allocated to the Commission by Parliament;
- (e) fees collected by the commission;
- (f) all other payment due to the Commission in respect of any matter incidental to its functions;

(2) The Commission may make rules prescribing filing fees and other fees to be paid by persons in connection with the procedures of the Commission.

(3) The Commission shall disclose details of the sources of its funds in the Annual Report.

Accounts
and
financial
audit

79.-(1) The Commission shall keep books of accounts and maintain proper records of its operations in accordance with accounting standards.

(2) The accounts of the Commission may at any time and shall, at the end of each financial year, be audited by a person registered as an auditor under the Auditors and Accountants (Registration) Act, 1972 appointed by the Commission on such terms and conditions as the Commission may determine.

Act No.33
of 1972

Performance
audit

80.-(1) The Controller and Auditor General shall at the request of the Minister conduct performance audit of the Commission's functions particularly in relation to the Commission's key performance indicators, on such terms and conditions as the Minister may determine.

(2) Before the beginning of each financial year the Commission

shall adopt key performance indicators for that year and shall include them in its annual report.

Annual
report

81.-(1) Before 30th September each year, the Commission shall prepare an Annual Report in respect of the year up to the immediately preceding 30th June and submit it to the Minister before 30th November in that year.

(2) The Annual Report shall provide information regarding the activities and plans of the Commission during the year to which it relates sufficient to impart an accurate understanding of the nature and scope of its activities and its plans and priorities and, without limitation, shall include:

- (a) a copy of the audited accounts of the Commission;
- (b) a copy of any report of the Controller and Auditor General on any performance audit carried out by the Controller and Auditor General during the year to which the Annual Report relates;
- (c) details of the performance of the Commission against its key performance indicators including the number and nature of complaints and applications the Commission has decided or are under consideration, the number and nature of investigations completed and continuing, significant studies and reports completed, undertaken or planned, and the number and nature of inquiries completed, undertaken or planned;
- (d) such information and other material as the Commission may be required by this Act or the regulations to include in the Annual Report;
- (e) such additional information or other material as the Minister may request in writing.

(3) The Minister shall cause a copy of the Annual Report to be laid before the National Assembly within two months after receiving it from the Chairman or at the following meeting of the National Assembly.

Budget

82. Before the end of each financial year the Commission shall cause to be prepared a budget for the following financial year showing estimates of its receipts and expenditures for that financial year and shall submit the budget to the Minister for information and approval.

PART XIII FAIR COMPETITION TRIBUNAL

Establishment of the Fair Competition Tribunal and a nomination committee

83.-(1) There shall be established an independent tribunal which shall be known as the Fair Competition Tribunal to exercise the functions conferred upon it by this Act.

(2) The Tribunal shall consist of -

- (a) a Chairman who shall be a person holding the office of a the High Court appointed by the President after consultation with the Chief Justice, and shall serve on part time basis; and

(b) six other members appointed to serve on part time basis by the President after consultation with the Attorney General from candidates nominated by a Nomination Committee established under sub-section (4) of this section.

(3) No person shall be appointed as a member of the Tribunal other than the Chairman, unless he qualifies for appointment by virtue of his knowledge of, or experience in industry, commerce, economics, law or public administration.

(4) Whenever a member or members of the Tribunal, other than the Chairman, are to be appointed to the Tribunal, a Nomination Committee shall be established as follows -

(a) the committee shall be separate from any Nomination Committee established under section 63; and

(b) the composition, functions and procedure of the Nomination Committee shall be as provided under the First Schedule subject to the substitution of the Attorney-General for the Minister and of the Permanent Secretary of the Ministry responsible for Justice for the Permanent Secretary of the Ministry responsible for the Commission.

(5) A member of the Tribunal shall hold office for a period not exceeding three years as specified in the instrument of his appointment and shall be eligible for re-appointment unless, prior to the expiration of that period -

(a) he resigns his office by written notification under his hand addressed to the President; or

(b) the President, being satisfied that the member is unfit by reason of mental or physical infirmity to perform the duties of his office, or that the member has failed to attend at least three consecutive meetings of the Tribunal, revokes his appointment.

(6) The quorum for a meeting of the Tribunal shall be the Chairman and two other members.

Judgment
and Orders
of Tribunal

84.-(1) A judgment or order of the Tribunal on any matter before it shall, subject to sub-section (2), be final.

(2) Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of the High Court.

Functions
of Tribunal

85.-(1) The Tribunal shall have jurisdiction -

(a) to hear and determine appeals under Part XI of the Act;

(b) to issue warrants in accordance with section 71;

Acts Nos
11
and 9
of 2001

(c) to carry out the functions conferred on it under the EWURA Act, 2001, the SUMATRA Act, 2001, the Tanzania Communication Regulatory Authority Act, 2003, the Tanzania Civil Aviation Authority Act, 2003 and any other written law.

(d) to exercise such other functions and powers as are conferred upon it by the Act;

(2) The Tribunal may decline to hear an appeal if it considers that the person does not have a pecuniary and material grievance arising from the decision of the Commission. In reaching its decision the Tribunal shall have regard to any regulations on the matters made by the

Minister under section 98.

(3) The Tribunal shall in the exercise of its functions under this Act be guided by the rules of natural justice and shall publish its decisions and the reasons for its decisions in the Public Register.

(4) Notwithstanding the provisions of subsection (4) of section 90 the Tribunal shall maintain a Public Register into which all the proceedings and decisions made by it shall be entered.

(5) The Tribunal shall in the discharge of its functions have all the powers of the High Court in respect of -

- (a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;
- (b) compelling the production of documents; and
- (c) the issue of a Commission or request to examine witnesses abroad.

(6) The Tribunal shall be duly constituted if at any time the Chairman and two other members are present.

(7) Any decision shall be deemed to be a decision of the Tribunal if it is supported by a majority of the members.

(8) A witness before the Tribunal shall have the immunities and privileges as if he were a witness before the High Court.

Registrar and other staff of the Tribunal

86. The Minister shall, after consultation with the Chief Justice, appoint an officer to be known as the Registrar of the Tribunal and shall provide to the Tribunal the services of such other officers as the Tribunal may reasonably require for carrying out its functions under this Act.

Financial arrangements of the Tribunal

87.-(1) Funds of the Tribunal shall comprise -

- (a) fees paid to the Tribunal;
- (b) funds allocated to the Tribunal by Parliament;
- (c) grants, donations, bequests or other contributions made to the Tribunal; and
- (d) funds allocated to the Tribunal from the funds of EWURA, SUMATRA, the Tanzania Communication Regulatory Authority, the Tanzania Civil Aviation Authority and other Regulatory Authorities as provided for in the relevant legislation.

(2) Before the end of each financial year the Tribunal shall cause to be prepared a budget for the following financial year showing estimates of its receipts and expenditures for that financial year and shall submit the budget to the Minister for information and approval.

(3) The members of the Tribunal, the Registrar and staff of the Tribunal shall be paid from the funds of the Tribunal such remunerations and allowances as the Minister shall determine.

Obstruction of Tribunal

88.-(1) Any person who -

- (a) when summoned, fails or refuses to attend without reasonable excuse;

- (b) having attended as a witness refuses or fails to take an oath or make an affirmation as required by the Tribunal;
- (c) makes any statement before the Tribunal which he knows to be false or which he has no reason to believe to be true;
- (d) omits or suppresses any information required by the Tribunal in the discharge of its functions or relevant to the discharge of those functions; or
- (e) in any manner misleads, obstructs, insults or disturbs the Tribunal, commits an offence.

(2) The Tribunal shall be empowered to impose a fine of not less than one hundred thousand shilling and not exceeding five million shillings on a person that commits an offence under sub-section (1) of this section.

Rules of Tribunal

89.- Subject to the provisions of this Act, the Tribunal may make rules-

- (a) prescribing the manner in which an appeal shall be made to the Tribunal and the fees to be paid in respect of an appeal;
- (b) prescribing the procedure to be adopted by the Tribunal in hearing an appeal and the records to be kept by the Tribunal;
- (c) prescribing the manner in which the Tribunal shall be convened and places where and the time at which the sittings shall be held;
- (d) generally for the better carrying out of the provisions of this Act relating to the Tribunal and appeals thereto.

Procedure on appeals to the Tribunal

90.-(1) The parties to an appeal may appear before the Tribunal either in person or by an advocate.

(2) The costs of the appeal shall be at the discretion of the Tribunal.

(3) The Tribunal may, if it considers it is in the interest of the parties or of any of them and is not contrary to the interest of other persons concerned or the public interest, order that a hearing or any part of it shall be held in camera.

(4) The Tribunal may make an order prohibiting the publication of any report or description of proceedings or of any part of proceedings before it (whether heard in public or in camera) but no such order shall be made prohibiting the publication of the names and descriptions of the parties to an appeal or a decision of the Tribunal.

Stay of the Commission's orders pending determination of appeal

91. Where an appeal is brought under Part XI against an order of the Commission, the order shall, unless the Tribunal otherwise orders, be stayed pending the determination of the appeal.

PART XIV
NATIONAL CONSUMER ADVOCACY COUNCIL

Establishment of the Council

92.-(1) There is hereby established a Council to be known as the National Consumer Advocacy Council.

(2) The Council shall consist of not less than five members and not more than ten members appointed by the Minister.

(3) The Minister shall appoint the Chairman and the Members shall elect the Deputy Chairman from amongst themselves.

(4) Before making the appointments of members pursuant to sub-section (2), the Minister shall, by notice published in the Gazette, and in any newspaper or newspapers circulating widely in the country, invite nominations for appointments and having received them publish the names and call for comments, objections or representations from the public.

(5) In appointing persons to the Council, the Minister shall have regard to the desirability of the Council as a group having knowledge and understanding of the interests of consumers, including the interest of

- (a) low income, rural and disadvantaged persons;
- (b) industrial and business users;
- (c) government and community organization.

(6) Subject to the provisions of this Part the Council in consultation with the Minister shall make its own rules for regulating its procedures and other matters relating to its functions.

Functions and powers of the Council

93.-(1) In carrying out its functions conferred under this Act, the Council shall -

- (a) represent the interests of consumers by making submissions to, providing views and information to and consulting with the Commission, regulatory authorities and government ministries;
- (b) receive and disseminate information and views on matters of interest to consumers;
- (c) establish regional and sector consumer committees and consult with them;
- (d) consult with industry, government and other consumer groups on matters of interest to consumers.

(2) The Commission shall in the first three years of the existence of the Council provide for the secretarial functions of the Council, and thereafter the Council shall maintain its own secretariat.

Proceedings of the Council

94.-(1) The Council shall hold meetings at least four times in any period of twelve months.

(2) The Chairman of the Council shall convene meetings of the Council as directed by the Council or if requested by members in writing so to do.

(3) At least seven days written notice of a meeting shall be

given to all members, except in the case of extra-ordinary meetings for which the requirement may be waived.

(4) Subject to sub-sections (1), (2) and (3), the Chairman in consultation with the members may convene meetings at such time and places as he may think fit.

(5) The Chairman in his absence the Deputy Chairman, shall preside at meetings of the Council. .

(6) A quorum at a meeting of the Council shall be five members.

Funds of
the Council
and Annual
Report

95.-(1) The funds of the Council shall comprise -

(a) such sums as may be appropriated by Parliament for the purposes of the Council;

(b) grants, donations, bequests or other contributions.

(2) The Council shall keep books of accounts and maintain proper records of its operations in accordance with commercial accounting standards.

(3) The Council may at any time, and shall at the end of each financial year have the accounts of the Council audited by a person registered under the Auditors and Accountants (Registration) Act, 1972 appointed by the Council on such terms and conditions as the Council may determine.

(4) The Council shall prepare an Annual Report in relation to each year ending 30th June and submit it to the Minister before 30th November in that year.

(5) The Annual Report shall provide detailed information regarding the activities of the Council during the previous year and any additional information requested by the Minister.

(6) Within twenty eight days of its receipt or on the first available sitting day thereafter, the Minister shall table in the National Assembly the Annual Report of the Council.

(7) Subject to sub-section (5), the Annual Report of the Council shall include the financial statements of the Council for the immediately preceding financial year and the auditor's report based on the aforementioned financial statements.

(8) The Council shall prepare a budget and submit to the Minister for approval before the end of each financial year for the following financial year showing estimates of its receipts and expenditures for the following financial year.

(9) At the Minister's request, the Council shall commission its auditors to assess and report on the extent to which the budget represents a fair and reasonable projection of the income and expenditure of the Council for the relevant year and shall submit that report to the Minister.

Act No.33
of 1972

PART XV INCONSISTENCY WITH OTHER LAWS

Inconsisten

96.-(1) Subject only to this section, this Act applies to all

cy with
other laws

persons in all sectors of the economy and shall not be read down, excluded or modified -

(a) by any other Act except to the extent that the Act is passed after the commencement of this Act and expressly excludes or modifies this Act; or

(b) by any subsidiary legislation whether or not such subsidiary legislation purports to exclude or modify this Act.

(2) A person shall not contravene this Act by reason only of engaging in a conduct, unless a provision of an enactment specified in sub-section (3):

(a) requires the person to engage in the conduct or conduct of that kind; or

(b) authorises or approves the person engaging or refraining from engaging in conduct of that kind.

Acts No.11
and No.9
of 2001

(3) The enactments referred to in sub-section (2) are: EWURA Act, 2001 SUMATRA Act, 2001 the Tanzania Communication Regulatory Authority Act, 2003 the Tanzania Civil Aviation Authority Act, 2003 and sector legislation referred to in the sector legislation, enactments for the protection of the environment; and, any subsidiary legislation or instrument under any of the aforementioned Acts.

(4) Where the Commission is of the opinion that any conduct required, authorised or approved by a regulatory authority under an enactment referred to in sub-section (3) would be in breach of this Act if sub-section (1) did not apply to the conduct the Commission shall report the matter to the Minister.

(5) Where the Minister receives a report from the Commission under sub-section (4), he may direct the relevant regulatory authority to take the necessary steps to ensure that the conduct described by the Commission is not required, authorised or approved by the regulatory authority.

(6) A person shall not contravene this Act by reason only of engaging in conduct required in order to comply with an enactment other than an enactment referred to in sub-section (3) of this section.

PART XVI MISCELLANEOUS

Functions
of the
Minister

97. The functions and powers of the Minister are:

(a) to appoint members of the Commission other than the Chairman as provided for under section 63;

(b) to receive reports of any conflicts of interest by the Chairman or other members of the Commission as provided for under section 66;

(c) to direct the Commission to conduct an inquiry under section 68;

(d) to request performance audits of the Commission as provided for under section 80;

(e) to receive the Annual Reports of the Commission and cause a copy to be laid before the National Assembly under section 81;

(f) to receive the budgets of the Commission and request assessments of the budgets under section 82;

- (g) to appoint members to the Council, to receive Annual Reports and budgets of the Council and to request assessments of the budgets under section 95; and
- (h) to make regulations under section 98.
- Regulations 98. The Minister may, in consultation with the Commission or Tribunal, make regulations not inconsistent with this Act as he considers necessary or desirable to give effect to the provisions of this Act.
- Rules 99. The Commission may make rules or orders not inconsistent with this Act with respect to:
- (a) matters referred to in the Act as matters on which the Commission may make rules or orders; and
- (b) such other matters as the Commission considers necessary or desirable to give effect to this Act.
- Savings and provisions 100.-(1) Notwithstanding the repeal of the Fair Competition Act, 1994 any rules, regulations, certificates or anything done under the repealed Act or made immediately before the commencement of this Act shall continue to have force until amended or revoked or otherwise dealt with under this Act.
- (2) The property, rights and liabilities to which the Commissioner of Trade Practices was entitled or subject immediately before and after the commencement of this Act shall vest in the Commission.
- Rights of employees 101.-(1) The terms and conditions of employment of any employee or staff from the former Fair Competition Commission who joins the Commission through a competitive recruitment process established in terms of section 63 and 72 shall not be less favourable than those enjoyed by that employee immediately prior to the date on which he joined the service of the Commission.
- (2) The service of any employee or staff of the former Fair Competition Commission who joins the service of the Commission shall be deemed to be continuous with the Fair Competition Commission or with any respective Ministry, public institution.
- (3) An employee or staff of the Fair Competition Commission whose service does not continue with the Commission and where such employee or staff is a member of any statutory, voluntary pension or other supernumerary benefits scheme prior to such termination, such employee or staff shall be paid terminal benefits in accordance with the laws and regulations governing such scheme immediately before such termination.
- (4) Where an employee or staff of the former Fair Competition Commission is not absorbed by the Commission he may be transferred to any other Ministry or public institution, and his service shall be deemed to be continuous and if he was a member of any statutory, voluntary pension or any other superannuate scheme, such employee shall continue to be governed by the same laws and regulations governing such scheme and the employer shall contribute to such scheme accordingly.

(5) Where an employee or staff whose service with the Fair Competition Commission is deemed to be continuous is a member of any statutory, voluntary pension or any other superannuate scheme, such employee shall continue to be governed by the same laws and regulations governing such scheme and the Commission shall contribute to such scheme accordingly.

(6) Nothing in this section shall operate so as to create an entitlement for any employee or staff of the Fair Competition Commission to become employees or staff of the Commission.

Repeal of Act No.4 of 1994 102. The Fair Competition Act, 1994 is hereby repealed.

PART XVII CONSEQUENTIAL AMENDMENTS

AMENDMENT OF THE SURFACE AND MARINE TRANSPORT REGULATORY AUTHORITY ACT, 2001

Construction Act No.9 of 2001 103. The Surface and Marine Transport Regulatory Authority Act, 2001, herein referred to as the “principal Act” is amended.

Amendment of section 3 Section 3 of the principal Act is amended by –
(a) adding the following definitions in their appropriate alphabetical positions -
“Code of Conduct” means a code of conduct adopted by the Authority in accordance with section 10(2);
“consultation” means notify or seek views of the other party or person;
(b) by deleting the definition of the word “Division”, and substituting for it on its appropriate alphabetical order the following-
“Committee” means a Committee established by the Authority under section 20;”

Amendment of section 4 105. Section 4 of the principal Act is amended in subsection (3), by adding immediately after the word “Authority” which appears at the end of that subsection the words “and any other person duly authorized in that behalf”.

Amendment of section 6 106. Section 6 of the principal Act is amended -
(a) in subsection (1)(b)(v), by adding the words “for carrying out the purposes and provisions of this Act and the sector legislation” immediately after the words “rules” appearing at the end of that subsection;
(b) by adding immediately after subsection (4) the following new subsection -

“(5). Any direction given by the Minister in accordance with subsection (4) of this section shall be in writing and shall be published in the Government Gazette.”

Amendment of section 7

107. Section 7 of the Principal Act is amended -
in subsection (2), by adding immediately after the word “Minister’s” appearing at the end of that subsection the words “and the appointments shall be made from the respective lists of short listed candidates submitted by the Nomination Committee”;

by deleting subsection (3) and substituting for it the following -

“(3)) In order to maintain impartiality of the Authority and for the purpose of avoiding conflict of interest, a person shall not be qualified for appointment as a member to the Authority if owing to the nature of the office he holds is likely to exert influence on the Authority.

Amendment of section 9

108. Section 9 of the principal Act is amended by adding immediately after subsection (3) the following new subsection -

“(4) The Nomination Committee shall submit to -

the Minister, three names of persons to be forwarded to the President by the Minister to be considered for appointment as Chairman;

(b) the Minister, ten names of persons to be considered for appointment as Board members;

(c) the Minister, three names of persons to be considered for appointment as Director General.”

Amendment of section 11

109. Section 11 of the principal Act is amended in subsection (3), by deleting the words “Chairman” and “he” appearing in the first and second lines and substituting for them the words “Board” and “it” respectively.

Amendment of section 13

110. Section 13 subsection (1) of the principal Act is amended by deleting the words “the Board after consultation with” appearing on the second line.

Amendment of section 14

111. Section 14 of the principal Act is amended by deleting subsection (7) and substituting for it the following -

“(7) The Authority shall comply with the competitive selection procedure established under subsection (6) whenever it appoints employees and consultants.”

Amendment of section 17

112. Section 17 of the principal Act is amended -

(a) by deleting the words “a District Court for grant of a warrant permitting the Authority to enter into any premises at reasonable times to search or inspect the premises for documents in the possession or under the control of the person and make copies of, or take extracts from those documents” appearing in subsection (6), and substituting for them the

words “the Fair Competition Tribunal which acting through its Chairman, shall issue a warrant authorizing any police officer, accompanied by staff of the Authority duly authorized by the Director General to enter premises to conduct search and make copies or take extracts of documents therein”.

(b) by deleting subsection (8) and substituting for it the following new subsection -

“(8) The Chairman, or any authorized person may, on application, issue a warrant authorizing any police officer to enter by force in the premises to conduct the search and make copies or take extracts of documents therein.”

Amendment of section 20 113. Section 20 of the principal Act is amended by deleting the word “Division” wherever it appears in subsections (1),(2),(3),(4), and (5) and substituting for it the word “Committee”.

Amendment of section 26 114. Section 26 of the principal Act is amended-
by deleting subsection (2);
by renumbering subsections, (3), (4), (5), (6), (7), (8), (9) and (10) as subsections (2), (3), (4), (5), (6), (7), (8) and (9);
by adding the words “the Authority to” immediately after the word “to” which appears in the opening words of subsection (8) as renumbered.

Amendment of section 27 115. Section 27 of the principal Act is amended in subsection (1), by deleting the figure “17” and substituting for it the figure “26”.

Amendment of section 28 116. Section 28 of the principal Act is amended by-
deleting paragraph (d) of subsection (2);
by renaming paragraph (e) as (d);

Amendment of section 29 117. Section 29 of the principal Act is amended-
in subsection (2), by deleting the words “not less than six nor more than ten” appearing in the first line of that subsection, and substituting for them the word “seven”;
by adding immediately after subsection (5) the following new subsection -
“(6) After the members are appointed under subsection (2) they shall meet to elect their Chairman”.

Amendment of section 30 118. Section 30 of the principal Act is amended –
(a) in subsection (4), by deleting the words “such times and places as he may think fit” and substituting for them the words “at least four times a year”.

(b) in subsection (6) by deleting the word “five” and substituting for it the word “four”.

Amendment of section 33 119. Section 33 of the principal Act is amended by adding immediately after paragraph (e) of subsection (1) the following new paragraphs -

- “(f) imposing the fines and or refunds;
- (g) requiring specific performance;
- (h) setting up an escrow fund;
- (i) appointing Trustees;
- (j) such other relief as may be deemed reasonable and necessary”.

Amendment of section 34 120. Section 34 of the principal Act is amended in subsection (4)-

by adding the word “or” immediately after the word “part” appearing at the end of paragraph (a);
by deleting paragraph (c).

Amendment of section 36 121. Section 36 of the principal Act is amended-

in subsection (1), by inserting a word “not” between the words “shall” and “contravene”;
in subsection (2), by deleting the word “Practice” appearing immediately after the word “Competition” which appears in the first line of that subsection.

Amendment of section 39 122. Section 39 of the principal Act is amended by deleting the word “specific” appearing between the words “sector” and “Act”.

Amendment of section 42 123. Section 42 of the principal Act is amended in subsection (1), by deleting the words “at the end of the financial year” appearing at the end of that subsection.

Repeal of section 43 124. The principal Act is amended by repealing section 43.

Amendment of section 45 125. Section 45 of the principal Act is amended-

in subsection (1), by deleting the words “on such terms and conditions as the Minister may determine” appearing at the end of that subsection;
in subsection (2), by deleting the word “shall” appearing between the words “General” and “conduct” and substituting for it the words “may, in a proper case;”
by deleting subsection (3).

Amendment 126. Section 46 of the principal Act is amended in subsection

t of section (2) by-
46

deleting the figure “45” appearing in paragraph (a), and substituting for it the figure “44”;
deleting the figure “45” appearing in paragraph (b), and substituting for it the figure “44.”

AMENDMENT OF THE ENERGY AND WATER UTILITIES
REGULATORY AUTHORITY ACT, 2001

Constructio
n Act No.
11 of 2001

127. The Energy and Water Utilities Regulatory Authority Act, 2001, herein referred to as “principal Act” is amended.

Amendmen
t of section
3

128. Section 3 of the principal Act is amended-

by adding the following definitions in their appropriate alphabetical positions-

““Code of Conduct” means a code of conduct adopted by the Authority in accordance with section 11(2);

“consultation” means notify or seek views of the other party or person;

“Committee” means a Committee established by the Authority under section 21;”

(b) by deleting the definition of the words “regulated sector” and substituting for it the following -

““regulated sector” means -

(a) electricity;

(b) petroleum;

(c) natural gas;

(d) water and sewerage;”

(c) by deleting the definition of the word “standards” and substituting for it the following -

““standards” includes technical and safety standards in the regulated sectors”;

(d) by deleting the words “supply” and “distribution” appearing in the definition of the word “standards”;

Amendmen
t of section
5

129. Section 5 of the principal Act is amended in subsection (3) by deleting the words “the Chairman” and the “comma”, and by adding immediately after the word “Authority” which appears at the end of that subsection the words “and any other person duly authorised in that behalf”.

Amendmen
t of section
7

130. Section 7 of the principal Act is amended-

by adding the words “for carrying out the purposes and provisions of this Act and the sector legislation” immediately after the word “rules”

appearing at the end of subsection (1)(b) (v);
by adding immediately after subsection (4) the following new subsection -
“(5) Any direction given by the Minister in accordance with subsection (4) of this section shall be in writing and shall be published in the Government Gazette.”

Amendment of section 8

131. Section 8 of the principal Act is amended by-
adding immediately after the word “Minister” appearing at the end of subsection (2) the words “and the appointments shall be made from the respective lists of shortlisted candidates submitted by the Nomination Committee”;

(b) by deleting subsection (3) and substituting for it the following -

“(3) In order to maintain impartiality of the Authority and for the purpose of avoiding conflict of interest, a person shall not be qualified for appointment as a member of the Authority if owing to the nature of the office he holds is likely to exert influence on the Authority.” -

(c) by deleting the word “remuneration” appearing under subsection (4) and substituting for it the word “fees”.

Amendment of section 9

132. Section 9 of the principal Act is amended in subsection (4), by deleting the word “cause” appearing in the third line of that subsection and substituting for it the word “course”.

Amendment of section 11

133. Section 11 of the principal Act is amended-

by adding immediately after subsection (2) the following new subsection -

“(3) The Nomination Committee shall submit to-
to the Minister, three names of persons to be forwarded to the President by the Minister to be considered for appointment as Chairman;
the Minister, ten names of persons to be considered for appointment as Board members;
the Minister, three names for appointment as Director General.”
by renumbering subsections (3) and (4) as subsections (4) and (5).

Amendment of section 12

134. Section 12 of the principal Act is amended in subsection (3), by deleting the word “Chairman” appearing in the first line of that subsection and substituting for it the word “Board.”

Amendment of section 14

135. Section 14 of the principal Act is amended in subsection (1), by deleting the words “ the Board after consultation with” appearing in the second line of that subsection.

Amendment of section

136. Section 15 of the principal Act is amended in subsection (7), by deleting the words “unless, because of the urgency of the

15 appointment or other special circumstance, the procedure is not reasonably practical in any particular case” appearing immediately after the word “experts”.

Amendment of section 17 137. Section 17 of the principal Act is amended in subsection (3), by deleting the word “Board” which appears at the end of that subsection, and substituting for it the word “Authority”.

Amendment of section 18 138. Section 18 of the principal Act is amended-
in subsection (6), by deleting the words “a District Court for grant of a warrant permitting the Authority to enter into any premises at reasonable times to search or inspect the premises for documents in the possession or under the control of the person and make copies of or take extracts from those documents” appearing in that subsection and substituting for them the words “the Fair Competition Tribunal which acting through its Chairman, shall issue a warrant authorising any police officer, accompanied by staff of the Authority duly authorised by the Director General to enter premises to conduct search and make copies or take extracts of documents therein;”
by deleting subsection (8) and substituting for it the following new subsection -

“(8) The Chairman, or any authorised person may, on application, issue a warrant authorising any police officer to enter by force in the premises to conduct the search and make copies or take extracts of documents therein.”

Amendment of section 21 139. Section 21 of the principal Act is amended by-
deleting subsection (1);
renumbering subsection (3) as subsection (1);
by deleting the word “Division” and substituting for it the word “Committee” wherever it appears in subsection (2) as renumbered.

Amendment of section 24 140. Section 24 of the principal Act is amended by deleting subsection (3) and substituting for it the following-

“(3) The Authority shall, determine the categories of decisions and information which is to be placed on the Public Register from time to time”.

Amendment of section 27 141. Section 27 of the principal Act is amended-
by deleting subsection (2);
by renumbering subsections, (3), (4), (5), (6), (7), (8), (9) and (10) as subsections (2), (3), (4), (5), (6), (7), (8) and (9);

by adding the words “the Authority to” immediately after the word “to” which appears in the opening words of subsection (8) as renumbered.

Amendment of section 29

142. Section 29 of the principal Act is amended in subsection (2) by-

deleting paragraph (d)
by renaming paragraph (e) as (d).

Amendment of section 30

143. Section 30 of the principal Act is amended in subsection (2) by deleting the words “not less than six members or more than ten” appearing in the first and second lines of that subsection, and substituting for them the word “seven”.

Amendment of section 32

144. Section 32 of the principal Act is amended in subsection (6) by deleting the word “five” appearing in that subsection and substituting for it the word “four”.

Amendment of section 34

145. Section 34 of the principal Act is amended in subsection (7), by deleting the words “in each Division” appearing in the second line of that subsection.

Amendment of section 35

146. Section 35 of the principal Act is amended -
designating section 35 as section 35(1);
in subsection (1) as designated, by -
(i) deleting paragraph (a) and substituting for it the following -
“(a) imposing fine;”
(ii) adding immediately after paragraph (e) the following new paragraphs -
“(f) requiring specific performance;
(g) setting up an escrow accounts;
(h) appointing Trustees;
for refunds;
such other relief as may be deemed reasonable and necessary”.

(iii)
under this section the phrase “escrow account” means a bank account generally held in the name of the depositor and an escrow agent that is returnable to the depositor or paid to a third person on fulfilment of specified conditions.

Amendment of section 36

147. Section 36 of the principal Act is amended by deleting paragraph (c) of subsection (4).

Amendment of section 40

148. Section 40 is amended in subsection (1) by deleting the opening words of that subsection and substituting for it the following -

“(1) In consultation with the Minister, the Authority may make rules in respect to”

Amendment of section 41 149. Section 41 of the principal Act is amended by deleting the word “specific” appearing between the words “sector” and “Act”.

Amendment of section 43 150. Section 43 of the principal Act is amended in subsection (1), by deleting the word “other” appearing in paragraph (c) and substituting for it the word “the.”

Amendment of section 44 151. Section 44 of the principal Act is amended in subsection (1), by deleting the words “at the end of the financial year” appearing at the end of that subsection.

Amendment of section 45 152. The principal Act is amended by repealing section 44.

Amendment of section 47 153. Section 47 of the principal Act is amended-
in subsection (1), by deleting the word “on such terms and conditions as the Minister may determine” appearing at the end of that subsection;
in subsection (2), by deleting the word “shall” appearing between the words “General” and “conduct” and substituting for it the words “may, in a proper case.”

Amendment of section 48 154. Section 48 of the principal Act is amended in subsection (2) by-
deleting the figure “46” appearing in paragraph (a) and substituting for it the figure “43”;
deleting the figure “47” appearing in paragraph (b),
and substituting for it the figure “43.”

FIRST SCHEDULE
(Made under sections 63 and 83)
THE NOMINATION COMMITTEE

Composition of Committee 1.-(1) The Nomination Committee shall consist of three members, namely:

- (a) the Permanent Secretary of the Ministry responsible for the Commission in the case of appointments to the Commission, or the Permanent Secretary of the Ministry responsible for Justice in the case of appointments to the Tribunal, as the case may be, who shall be the Chairman of the Committee; and
- (b) two other persons appointed by the Minister, in the case of appointments to the Commission, or by the Attorney-General in the case

of appointments to the Tribunal, as the case may be, one nominated by a body recognized as being representative of private sector and one nominated by a body recognized as being representative of consumers.

(2) In proposing names of persons for appointment to the Nomination Committee, the body representing the private sector and the body representing consumers shall strive to select persons with relevant knowledge, sound integrity and probity who do not have conflicts of interest.

Functions 2. The function of the Nomination Committee shall be to nominate persons for appointment as:

- (a) Member of the Commission;
- (b) Director- General of the Commission; or
- (c) Member of the Tribunal;

Nomination of members of the Tribunal and Commission 3. -(1) The Nomination Committee shall submit to the Attorney General twelve names of persons to be forwarded to the President by the Attorney General to be considered for appointment as members of the Tribunal.

(2) The Nomination Committee shall submit to -

- (a) the Minister, three names of persons to be forwarded to the President by the Minister to be considered for appointment as Chairman;
- (b) the Minister, six names of persons to be considered for appointment as members of the Commission;
- (c) the Minister, three names of persons to be considered for appointment as the Director General of the Commission.

Meetings of Committee 4.-(1) The Nomination Committee shall meet as often as there arises the need for exercise of the function of the Committee.

(2) Meetings of the Committee shall be convened by the Chairman and at such places and times as the Chairman may specify in the notice of the meeting.

(3) The Chairman may on his own motion, and shall, if requested in writing in that behalf by at least one of the other members, convene a meeting of the Committee.

(4) The Committee may invite any person who is not a member to participate in the deliberations of the Committee, but any person so invited shall have no vote at the meeting.

(5) A quorum at a meeting of the Committee shall be the Chairman and the two other members.

(6) Minutes in proper form of each meeting of the Committee shall be kept and shall be confirmed by the Committee at its next meeting.

Nominations 5. Nominations by the Committee shall be in writing signed by the Chairman and one other member.

Proceedings not invalidated by irregularity

6. No act or proceeding of the Committee shall be invalid by reason of any defect or irregularity in the appointment of any member or by reason that any person who purported bona fide to act as a member at the time of the act or proceeding was in fact disqualified or not entitled to act as a member.

Absence from three consecutive meetings

7. Where any member absents himself from three consecutive meetings of the Committee without sufficient cause, the Committee shall advise the Minister or the Attorney-General, as the case may be, of the fact and the Minister or the Attorney-General may terminate the appointment of the member and appoint another member in his place.

Committee may regulate its own proceedings

8. Subject to this Act, the Committee shall have power to regulate its procedure in relation to its meetings and the transaction of its business.

SECOND SCHEDULE
(Made under section 62)
QUALIFICATIONS AND FUNCTIONS
OF THE DIRECTOR - GENERAL

Qualifications

1.-(1) A person appointed as the Director General shall -

- (a) be graduate of a recognised university;
- (b) possess at least ten years experience in one or more of the fields of management, law, economics or finance;
- (c) satisfy the Board that he is unlikely to have a conflict of interest under section 11;
- (d) be willing to serve as the Director General;
- (d) be in the opinion of the Board otherwise well suited to perform the functions and duties of Director-General competently and honestly.

Director General to be Chief Executive Officer

2. The Director-General shall also be the Chief Executive Officer of the Commission and shall not engage in any other paid employment.

Responsibilities

3. The Director – General shall be responsible for the day to day operations of the Commission subject to the directions of the Board.

Passed in the National Assembly on the 2nd April, 2003

KIPENKA M. MUSSA,
Clerk of the National Assembly

UKRAINE

LAW OF UKRAINE

On Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities

The present Law shall define the legal grounds for limitation and forestalling of monopolism, for prevention of unfair competition in entrepreneurial activities, and for exercising State control over the observance of the antimonopoly legislation norms.

Section I General provisions

Article 1. Terms defined

For the purposes of the present Law the following terms shall be used:

product denoting a product of activities (including work, services, and securities) designed for sale;

market of a product (product market) denoting the sphere of circulation of a product having the same consumer value within which monopoly position is defined;

bodies of State power denoting ministries and other central bodies of executive power, bodies of executive power of the Autonomous Republic of the Crimea, State bodies which regulate both activities of economic entities being natural monopolies and securities markets, State bodies of privatization, local bodies of executive power;

bodies of administrative and economic management and control denoting amalgamations of enterprises, other economic entities, public organizations when they fulfil functions of management and control within such powers of bodies of State power or bodies of local self-government that were delegated to them;

competition denoting the contest between entrepreneurs when their independent actions limit opportunities of each of them to influence general conditions of product sale on the market and stimulate production of such products that are needed by the consumer;

monopoly position denoting such a dominant position of an economic entity that enables it to restrict competition on the market of a particular product independently or jointly with other economic entities. Position of an economic entity shall be considered as a monopoly one if its share in the market of a particular product exceeds 35 per cent. Position of an economic entity whose share in the market of a particular product is less than 35 per cent may be defined as a monopoly one by a decision taken by the Antimonopoly Committee of Ukraine;

monopoly price denoting such a price that is set by an economic entity occupying monopoly position on the market and that results in restriction of competition or in violation of the consumer rights;

monopoly activities denoting actions (inactivity) of an economic entity (a group of economic entities) on condition that the economic entity (the group of economic entities)

occupies monopoly position on the market with respect to production and sale of products as well as such actions (inactivity) of bodies of State power, bodies of local self-government, and bodies of administrative and economic management and control that are directed towards prevention, essential restriction or removal of competition;

monopoly formation denoting such an enterprise, amalgamation or an economic society and other formation that occupies monopoly position on the market;

economic entity denoting such a legal person, irrespective of its organization, legal, and ownership forms, or such a natural person that is engaged in production, sale, and purchase of products or in other economic activities; it also denotes any legal or natural person which exercises control over economic entities, a group of economic entities if one or several of them exercise control over others. Bodies of State power, bodies of local self-government, and bodies of administrative and economic management and control with respect to their activities associated with production, sale, purchase of products or with respect to other economic activities shall be considered as economic entities;

information denoting knowledge in any form, of any type, fixed in any media (including correspondence, books, notes, illustrations (maps, diagrams, organigrams, pictures, schemes, etc.), photographs, holographs, cine-films, videofilms, microfilms, sound records, computer system databases or complete or partial reproduction of their elements) explanations given by persons and any other publicly announced or documented knowledge;

control denoting a decisive influence exerted by a legal or natural person on economic activities of an economic entity, in particular owing to: the right to own or use all the assets or their considerable part; the right ensuring a decisive influence on complement formation of, voting results, and decisions of managing bodies of an economic entity; conclusions of such agreements and contracts that enable to set conditions of economic activities, to give binding instructions or to perform functions of a managing body of an economic entity; occupation of the position of head, deputy head of a supervisory board, board of directors or of other supervisory or executive body of an economic entity by the person occupying one or several of the mentioned positions in other economic entities; coincidence of more than half of members of a supervisory board, board of directors, other supervisory or executive bodies of an economic entity.

Article 2. Application of the present Law

1. The present Law shall be applied to the relations in which economic entities take part.
2. The present Law shall not affect the relations resulting from the rights to intellectual property objects with the exception of the cases provided for by the present Law.
3. Laws of Ukraine, in comparison with the present Law, may provide for peculiarities in regulating relations associated with monopoly activities and unfair competition on financial and securities markets.
4. If an international treaty with respect to whose binding nature the Supreme Rada of Ukraine (Parliament) gave its consent fixes rules different from those contained in the

present Law the rules of the international treaty shall be applied.

Section II **Abuse of monopoly position on the market**

Unlawful agreements. Discrimination against economic entities

Article 3. Definition of monopoly position

Monopoly position of economic entities on the market with respect to all kinds of capitalized products (industrial and technical production) and with respect to capitals (finances, securities, etc.) being in circulation shall be defined within the territory of Ukraine.

Monopoly position of economic entities on the market with respect to all kinds of consumer products and with respect to all kinds of work and services shall be defined by the Antimonopoly Committee of Ukraine, and its territorial offices within an administrative region or an autonomy (district, settlement).

Article 4. Abuse of monopoly position on the market

It shall be considered to constitute abuses of monopoly position:

imposition of such contract terms that create a disadvantage for contractors or imposition of such additional terms that have nothing in common with the subject of a contract, including imposition of a needless product on a contractor;

limitation or stoppage of production or products and their removal from circulation, which resulted or can result in creation or maintenance of deficit on the market or in setting monopoly prices;

partial or complete refusal to sell or purchase a product in the absence of alternative purchase or sales sources, which resulted or can result in creation or maintenance of deficit on the market or in setting monopoly prices;

other actions which resulted or can result in creation of barriers to entry into (withdrawal from) the market with respect to other economic entities;

setting of such discriminatory prices (tariffs, rates) for one's own products that restrict rights of certain consumers;

setting of monopoly high prices (tariffs, rates) for one's own products, which resulted or can result in violation of the rights of consumers;

setting of monopoly low prices (tariffs, rates) for one's own products, which resulted or can result in restriction of competition.

Article 5. Anticompetitive concerted actions

Anticompetitive concerted actions shall be considered to constitute such concerted actions (agreements) that resulted or can result in:

setting (maintenance) of monopoly prices (tariffs), rebates, extra charges (additional

payments), increases of prices;

distribution of markets on the principle of territory, assortment of products, volume of production sale or product purchase, or according to the circle of consumers, or according to other indications, which resulted or can result in their monopolization;

removal of sellers, buyers, and other economic entities from the market or restriction of their access into it.

Article 6. Discrimination against economic entities practised by bodies of State power, bodies of local self-government, and bodies of administrative and economic management and control

1. It shall be considered to constitute discrimination against economic entities practised by bodies of State power, bodies of local self-government, and bodies of administrative and economic management and control:

prohibition against establishment of new enterprises or other organization forms of entrepreneurship in any sphere of activities as well as putting restrictions on being engaged in some activities, on production of particular kinds of products, which resulted or can result in restriction of competition;

compulsion of economic entities to join associations, concerns, interbranch, regional, and other amalgamations of enterprises, to practise a priority conclusion of contracts, and to provide a primary supply to a particular circle of consumers;

making decisions about centralized distribution of products, which resulted or can result in monopoly position on the market;

establishment of prohibition against sale of products from one region of the republic into another one;

giving particular economic entities such as tax and other privileges that place them in a privileged position with respect to other economic entities, which resulted or can result in monopolization of the market of a particular product;

restriction of the rights of economic entities to purchase and sell products;

establishment of prohibitions or limitations with respect to particular economic entities or groups of economic entities.

2. Conclusion of agreements between bodies of State power, bodies of local self-government, bodies of administrative and economic management and control, conclusion of agreements between these bodies and economic entities as well as their giving natural or legal persons powers to perform the actions provided for by item 1 of the present article shall also be considered to constitute discrimination against economic entities.

3. Exemptions from the provisions of the present article may be established by legislative acts of Ukraine for the purpose of ensuring national security, defence, public interests.

Section III

Unfair competition

Article 7. Unfair competition

Legal grounds for protection against unfair competition shall be defined by the Law of Ukraine on Protection against Unfair Competition.

Section IV

State control over the observance of the antimonopoly legislation

Article 8. State policy in the sphere of limitation of monopolism in entrepreneurial activities

1. State policy in the sphere of limitation of monopolism in entrepreneurial activities, taking such measures concerning demonopolization of the economy, financial, material, technical, information, consultative, and other support of economic entities that favour development of competition shall be carried out by such bodies of State power, bodies of local self-government, bodies of administrative and economic management and control that are empowered to carry it out.
2. Demonopolization of the economy and development of competition in Ukraine shall be provided in accordance with the special programme elaborated by the Cabinet of Ministers of Ukraine and is approved by the Supreme Rada (Parliament) of Ukraine.
3. State control over the observance of the antimonopoly legislation, protection of the interests of economic entities and consumers against violations of the antimonopoly legislation including protection against abuses of monopoly position and against unfair competition shall be exercised by the Antimonopoly Committee of Ukraine in accordance with its competence.

Article 9. Antimonopoly Committee of Ukraine

The structure, competence, organization of activities, and accountability of the Antimonopoly Committee of Ukraine shall be defined by the Law of Ukraine on the Antimonopoly Committee of Ukraine.

Articles 10, 11, 12 are abrogated.

Article 13. Access to information

Economic entities, bodies of State power, bodies of local self-government, bodies of administrative and economic management and control as well as their officials - by order of State commissioners, heads of territorial offices of the Antimonopoly Committee of Ukraine - shall be obliged to provide documents, written and oral explanations, other information, including restricted information, necessary to the Antimonopoly Committee of Ukraine and its territorial offices for carrying out the tasks provided for by legislation.

Article 14. Control over establishment, reorganization (merger, annexation), liquidation of economic entities

To prevent monopoly position of particular economic entities on the market (monopolization of product markets), establishment, reorganization (merger, annexation), liquidation of economic entities, establishment of associations, concerns, interbranch, regional, and other amalgamations of enterprises, transformation of bodies of State power, bodies of local self-government, bodies of administrative and economic management and control into the mentioned amalgamations, entry of one or several economic entities into amalgamations in the cases provided for by legislation shall be carried out on condition that consent of the Antimonopoly Committee of Ukraine is received.

Article 15. Control over acquisition or lease of property

Purchase, acquisition - by other means, - receipt - for the purpose of management (use), - of the shares (stocks) as well as assets (property) in the form of integrated complexes of property of economic entities or of their structural subdivisions, lease of integrated complexes of property of economic entities or of their structural subdivisions shall be carried out by economic entities in the cases provided for by legislation on condition that consent of the Antimonopoly Committee of Ukraine is received.

Article 16. Compulsory split-up of monopoly formations

1. In the cases when economic entities abuse their monopoly position on the market, the Antimonopoly Committee of Ukraine and its territorial offices shall have the right to adopt a decision about compulsory split-up of monopoly formations.

2. Compulsory split-up shall not be applied in the following cases:

if it is found impossible to make organizational or territorial separation of enterprises, structural subdivisions or structural units;

if there is a close technological connection of enterprises, structural subdivisions or structural units (the share of the inner turnover in the gross output of the enterprise (amalgamation, etc.) accounts for less than 30 per cent).

3. A decision of the Antimonopoly Committee of Ukraine (its territorial office) on a compulsory split-up of enterprises (amalgamations, etc.) shall be fulfilled within a fixed period which cannot be less than six months.

Reorganization of a monopoly formation, subject to a compulsory split-up, shall be carried out at the discretion of the monopoly formation on condition that its monopoly position on the market is eliminated.

Articles 17 and 18 are abrogated.

Section V

Responsibility for violations of the antimonopoly legislation

Article 19. Imposition of fines on economic entities being legal person

Fines on economic entities being legal persons shall be imposed by the Antimonopoly Committee of Ukraine for:

commitment of the actions provided for by articles 4-6 of the present Law, evasion of fulfilment or a tardy fulfilment of decisions of the Antimonopoly Committee of Ukraine (its territorial office) on termination of violations of the antimonopoly legislation, renewal of the initial state of affairs or change of agreements contradicting the present Law - to the amount of 5 per cent of the receipts from sale of production (products, work, services) got by the economic entity in the last account year preceding the year in which the fine is imposed;

establishment, reorganization (merger, annexation), liquidation of economic entities (including an economic society, association, concern or other amalgamation of enterprises); entry of one or several economic entities into an amalgamation; purchase, acquisition - by other means, - receipt - for the purpose of management (use), - of shares (stocks) as well as assets (property) in the form of integrated complexes of property of economic entities or of their structural subdivisions as well as lease of integrated complexes of property of economic entities or of their structural subdivisions without consent of the Antimonopoly Committee of Ukraine, administrative boards, State commissioners, and territorial offices of the Antimonopoly Committee of Ukraine if legislation provides for the necessity to receive that sort of consent - to the amount of 5 per cent of the receipts from sale of production (products, work, services) got by the economic entity in the last account year preceding the year in which the fine is imposed;

lack of submission, a tardy submission of deliberately falsified information to the Antimonopoly Committee of Ukraine (its territorial office) - to the amount of 0.5 per cent of the receipts from sale of production (products, work, services) got by the economic entity in the last account year preceding the year in which the fines is imposed.

If it is impossible to calculate receipts of the economic entity or the receipts are absent, the fines mentioned in paragraph 2 and 3 of Part 1 of the present article shall be imposed to the amount of 10,000 tax-free minimum private citizen incomes, and the fines mentioned in paragraph 4 of Part 1 - to the amount of 200 tax-free minimum private citizen incomes.

If the economic entity worked less than a year, fines shall be calculated on the basis of the receipts got by the economic entity in the period preceding the violation.

Decisions about imposition of fines exceeding 1,000 tax-free minimum private citizen incomes shall be taken exclusively by the Antimonopoly Committee of Ukraine and administrative boards at their sittings.

Fifty per cent of fines shall be transferred to the State budget and 50 per cent of fines - to the special extrabudgetary fund established for the purpose of developing and protecting competition.

Article 20. Administrative responsibility of officials and private citizens engaged in

entrepreneurial activities

Officials of bodies of State power, bodies of local self-government, bodies of administrative and economic management and control, enterprises, institutions as well as private citizens engaged in entrepreneurial activities without creation of a legal person shall bear administrative responsibility according to legislation for:

commitment of the actions provided for by articles 4-6 of the present Law;

lack of submission, a tardy submission or submission of deliberately falsified information to the Antimonopoly Committee of Ukraine and its territorial offices;

evasion of fulfilment or a tardy fulfilment of decisions of the Antimonopoly Committee of Ukraine and its territorial offices.

Fines shall be recovered in accordance with court procedure.

Article 21. Withdrawal of unlawfully got profit

Profit got unlawfully by economic entities as a result of violations of articles 4 and 5 of the present Law shall be recovered by a court of justice or a court of arbitration to the State budget.

Article 22. Reparation of damages

Damages caused by abuse of monopoly position, anticompetitive concerted actions, discrimination against economic entities by bodies of State power, bodies of local self-government, and bodies of administrative and economic management and control shall be repaired in accordance with the procedure provided for by the civil legislation of Ukraine.

Section VI

Examination of cases and applications by the Antimonopoly Committee of Ukraine and appealing against its decisions

Article 23. Examination of cases on violations of the antimonopoly legislation

The Antimonopoly Committee of Ukraine, State commissioners, administrative boards, and territorial offices of the Committee, within their competence, shall examine cases on violations of the antimonopoly legislation and proceeding from the examination results shall take decisions in accordance with the procedure provided for by legislation.

Article 23¹. Examination of applications for giving consent to establishment, reorganization, and liquidation of economic entities

The Antimonopoly Committee of Ukraine, administrative boards, State commissioners, and territorial offices of the Antimonopoly Committee of Ukraine, within their competence, shall examine applications for giving their consent to establishment, reorganization (merger, annexation), liquidation of economic entities (including an economic society, association, concern or other amalgamation of enterprises); entry of one or several economic entities into an amalgamation; purchase, acquisition - by other means, - receipt - for the purpose of management (use), - of shares (stocks) as well as

assets (property) in the form of integrated complexes of property of economic entities or of their structural subdivisions as well as lease of integrated complexes of property of economic entities or of their structural subdivisions and proceedings from the examination results shall take decisions in accordance with the procedure provided for by legislation.

Article 23². Duty on submission of an application for giving consent to establishment, reorganization, and liquidation of economic entities

A duty shall be paid on submission of an application for giving consent to establishment, reorganization (merger, annexation), liquidation of economic entities (including an economic society, association, concern or other amalgamation of enterprises); entry of one or several economic entities into an amalgamation; purchase, acquisition - by other means, - receipt - for the purpose of management (use), - of shares (stocks) as well as assets (property) in the form of integrated complexes of property of economic entities or of their structural subdivisions as well as lease of integrated complexes of property of economic entities or of their structural subdivisions.

Amounts of the mentioned duties shall be distributed at the following ratio: 50 per cent of the amounts of the duties shall be transferred to the State budget and 50 per cent - to the State body for the purpose of reimbursing its expenses incurred as a result of examination of the application, making examination by experts, etc.

The list of duties, their amounts, the periods and procedure of payment shall be defined by the Cabinet of Ministers of Ukraine.

Article 24. Procedure of appealing against decisions of the Antimonopoly Committee of Ukraine

1. In cases of disagreement with decisions of the Antimonopoly Committee of Ukraine and its territorial offices, economic entities, bodies of State power, bodies of local self-government, and bodies of administrative and economic management and control as well as other interested persons shall have the right to apply to a court of justice or a court of arbitration with an application for annulment of or making complete or partial changes in the decisions of the Antimonopoly Committee of Ukraine and its territorial offices.
2. Submission of an application shall not suspend fulfilment of decisions for the period of case examination in a court of justice or a court of arbitration unless the court of justice or the court of arbitration suspended the mentioned acts.
3. Damages caused by unlawful decisions of the Antimonopoly Committee of Ukraine and its territorial offices shall be repaired at the expense of the State budget irrespective of the blame borne by specific officials of the Antimonopoly Committee of Ukraine and its territorial offices.

Article 25. Procedure of fulfilling decisions of the Antimonopoly Committee of Ukraine

1. Decisions of the Antimonopoly Committee of Ukraine and its territorial offices shall be fulfilled within the periods provided for by the decisions.
2. Economic entities upon whom the Antimonopoly Committee of Ukraine imposed

finer shall pay them within a 30-day period since the date of receipt of the decision about imposition of the fine. An additional fine equal to 1.5 per cent of the original fine shall be recovered for every day of the delay in payment of the original fine.

3. If an economic entity refuses to pay the original and additional fines, they shall be recovered on the basis of a decision taken by a court of justice or a court of arbitration.

4. The Antimonopoly Committee of Ukraine shall have the right to postpone payment of a fine proceeding from an application submitted by the economic entity upon which the fine was imposed.

L. Kravchuk

President of Ukraine

The city of Kyiv

18 February 1992

No. 2132-XII

The amendments to the present Law were made by:

Decree of the Cabinet of Ministers of Ukraine of 12 May 1993 No. 49-93

Law of Ukraine of 28 February 1995 No. 75/95-BP

Law of Ukraine of 5 July 1995 No. 258/95-BP

Law of Ukraine of 18 November 1997 No. 642/97-BP

Law of Ukraine of 3 March 1998 No. 154/98-BP

**LAW OF UKRAINE
ON THE ANTIMONOPOLY COMMITTEE OF UKRAINE**

**Chapter I
General Provisions**

Article 1. Antimonopoly Committee of Ukraine

An Antimonopoly Committee of Ukraine shall be a State body called to secure - according to its competence - State control over antimonopoly legislations observance, protection of entrepreneur and consumer interests against antimonopoly legislation violations.

Article 2. Establishment, subordination, and accountability of the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine shall be established by the Supreme Rada of Ukraine* and shall be accountable to it.

The Antimonopoly Committee of Ukraine in its activities shall be subordinate to the Cabinet Ministers of Ukraine.

Article 3. Tasks of the Antimonopoly Committee of Ukraine

The basic tasks of the Antimonopoly Committee of Ukraine shall be the following:

exercising State control over antimonopoly legislation observance;

protection of legitimate interests of entrepreneurs and consumers by means of taking measures associated with prevention and termination of antimonopoly legislation violations, with imposition of penalties for antimonopoly legislation violations, within its competence;

favouring development of fair competition in all the economy spheres.

Article 4. Basic principles of activities of the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine shall build its activities according to the following principles:

legitimacy;

publicity;

protection of economic entities rights on the basis of their equality in terms of law and

priority of consumer rights.

* Supreme Rada of Ukraine is the parliament of Ukraine

Article 5. Legislation on the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine in its activities shall be guided by Constitution of Ukraine, Law of Ukraine on Limitation of Monopolism and Banning of Unfair Competition in Entrepreneurial Activities, this Law, other acts of legislation, by international treaties and agreements.

If an international treaty in which Ukraine takes part fixes rules other than those contained in this Law the rules of such an international treaty shall be applied.

Chapter II **Structure, competence, and organization of activities** **of the Antimonopoly Committee of Ukraine**

Article 6. System of bodies of the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine shall be established and composed of a Chairman and 10 State Commissioners.

A First Deputy Chairman of and three Deputy Chairmen of the Antimonopoly Committee of Ukraine shall be appointed from the State Commissioners.

The Antimonopoly Committee of Ukraine shall establish its territorial offices.

The Antimonopoly Committee of Ukraine and its territorial offices shall constitute the system, headed by the Chairman of the Committee, of bodies of the Antimonopoly Committee of Ukraine.

The Antimonopoly Committee of Ukraine, its territorial offices shall be legal persons having settlement and other accounts in bank branches, seals with the image of the State Emblem and the name of the Committee or its territorial office.

Article 7. Competence of the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine according to the entrusted tasks shall:

exercise control over antimonopoly legislation observance during establishment, reorganization, liquidation of economic entities; during transformation of management bodies into amalgamations of entrepreneurs; during procurement of stocks (shares), assets of economic societies and enterprises; during economic activities of entrepreneurs; during realization of powers by central and local bodies of State executive power and by institutions of local and regional self-government with respect to entrepreneurs;

consider cases on antimonopoly legislation violations and shall take decisions within its powers on the basis of consideration results;

address court or arbitration court with actions (applications) in connection with antimonopoly legislation violations, shall send materials on such legislation violations containing crime indications to law protective bodies;

give recommendations on taking measures directed at development of

entrepreneurship and competition to State bodies;

take part in elaboration of and shall submit - in accordance with established procedure - draft legislative acts regulating issues of competition development, antimonopoly policy, and the economy demonopolization;

take part in conclusion of international agreements, elaboration and realization of international projects and programmes and shall cooperate with governmental bodies and non-governmental organizations of foreign States on issues laying within the competence of the Antimonopoly Committee of Ukraine;

generalize practice of antimonopoly legislation application, shall work out proposals for its improvement;

work out and organize carrying out measures directed at prevention of antimonopoly legislation violations;

systematically inform the population of Ukraine on activities of the Committee;

take other actions to exercise control over antimonopoly legislation observance.

Article 8. Powers of the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine within the competence given to it shall have the right:

to define boundaries of product market and entrepreneurs monopoly position on product market;

give entrepreneurs compulsory regulations on termination of antimonopoly legislation violations, on renewal of the initial State of affairs, on compulsory split-up of monopoly formations, on termination of unlawful agreements between entrepreneurs;

give central and local bodies of State executive power, executive institutions of local and regional self-government compulsory regulations on abolishment or change of unlawful acts adopted by them, on termination of violation and on rupture of agreements which were concluded by them and which contradict antimonopoly legislation; shall prohibit or

allow establishment of monopoly formations by central and local bodies of State executive power, by institutions of local and regional self-government, and by economic entities;

place submissions - compulsory for consideration - on annulment of licences, on termination of operations of entrepreneurs in the sphere of external economic activities before respective State bodies if the entrepreneurs violate antimonopoly legislation;

impose fines in cases provided by current legislation;

elaborate and approve normative acts - compulsory for central and local bodies of

State executive power, institutions of local and regional self-government, entrepreneurs and their amalgamations - on issues laying within the competence of the Committee;

shall control fulfilment of such normative acts.

Article 9. Chairman of the Antimonopoly Committee of Ukraine

The Chairman of the Antimonopoly Committee of Ukraine shall be appointed by the Supreme Rada of Ukraine at the recommendation of the Chairman of the Supreme Rada of Ukraine.

The Chairman of the Antimonopoly Committee of Ukraine shall be a member of the Cabinet of Ministers of Ukraine.

The office term of the Chairman of the Antimonopoly Committee of Ukraine shall be seven years.

Dismissal (resignation) of the Chairman of the Antimonopoly Committee of Ukraine within his office term may take place only at his will, in case a crime was perpetrated by him, if he committed a flagrant violation of official duties and in connection with impossibility to fulfil his duties through State of health.

The Chairman of the Antimonopoly Committee of Ukraine shall have the right to submit his resignation to the Supreme Rada of Ukraine after having informed the Chairman of the Supreme Rada of Ukraine about his resignation. Resignation of the Chairman of the Committee shall not entail laying down powers by the State Commissioners of the Antimonopoly Committee of Ukraine.

In all cases the issue on dismissal of the Chairman of the Antimonopoly Committee of Ukraine shall be decided by the Supreme Rada of Ukraine at the recommendation of the Chairman of the Supreme Rada of Ukraine.

Resignation of the Cabinet of Ministers of Ukraine shall not entail resignation of the Chairman of the Antimonopoly Committee of Ukraine.

The Chairman of the Antimonopoly Committee of Ukraine shall:

direct activities of the Antimonopoly Committee of Ukraine;

place submissions on appointment and dismissal of the Deputy Chairmen and the State Commissioners of the Antimonopoly Committee of Ukraine before the Supreme Rada of Ukraine;

distribute duties among the Deputy Chairmen and the State Commissioners of the Antimonopoly Committee of Ukraine;

approve structure, staff, and estimates of maintenance costs of the Antimonopoly Committee of Ukraine; shall approve structure of each territorial office, the total number and salary fund of officials of each territorial office;

be the manager of budget allocations for maintenance of the Antimonopoly

Committee of Ukraine and for making provision for its activities;

make admission, transference, and dismissal of the staff of the Antimonopoly Committee of Ukraine and its territorial offices according to legislation; shall take encouraging measures and shall impose disciplinary punishments on officials of the Committee and its territorial offices;

establish provisional administrative boards of the Antimonopoly Committee of Ukraine for consideration of cases on antimonopoly legislation violations; shall appoint heads of such boards;

give officials of the Antimonopoly Committee of Ukraine and its territorial offices compulsory orders, regulations, statutes, instructions, and other acts;

represent the Antimonopoly Committee of Ukraine in relations with State bodies, institutions of local and regional self-government, entrepreneurs, citizens, and their amalgamations;

exercise other powers provided by legislation.

The Chairman of the Antimonopoly Committee of Ukraine - by order of the Supreme Rada of Ukraine, at least once a year - shall report on activities of the Committee to the Supreme Rada of Ukraine.

The Chairman of the Antimonopoly Committee of Ukraine shall have the State commissioner status provided by this Law.

Article 10. Deputy Chairmen of the Antimonopoly Committee of Ukraine

The Deputy Chairmen of the Antimonopoly Committee of Ukraine shall fulfil separate functions of the Chairman according to his instructions and shall deputize for the Chairman of the Committee in case of his absence or impossibility to exercise his power.

Article 11. State Commissioners of the Antimonopoly Committee of Ukraine

The State Commissioners of the Antimonopoly Committee of Ukraine shall be appointed by the Supreme Rada of Ukraine at the recommendation of the Chairman of the Antimonopoly Committee of Ukraine for a seven year term.

The State Commissioners shall not be appointed for more than two terms in succession.

A State Commissioner shall be a citizen of Ukraine, whose age is not less than 30 years, who has higher - as a rule legal or economic - education, length of service according to his speciality not less than 5 years for the last 10 years.

The State Commissioners shall be members of the Antimonopoly Committee of Ukraine being the highest collegiate body.

The State Commissioners shall be heads or members of administrative boards, shall fulfil other duties according to instructions of the Chairman of the Antimonopoly Committee of Ukraine.

Article 12. Territorial offices of the Antimonopoly Committee of Ukraine

The territorial offices of the Antimonopoly Committee of Ukraine shall be established in the Republic of Crimea, in the regions, in the cities of Kyiv and Sevastopol to realize tasks placed on the Antimonopoly Committee of Ukraine. The powers of the territorial offices shall be determined by the Committee within its competence. In case of need, territorial offices may be established in other administrative and territorial units.

The territorial offices shall act on the basis of the Statute approved by the Antimonopoly Committee of Ukraine.

Territorial office shall be under the direction of its Head. Head and Deputy Head of Territorial Office shall be appointed by the Chairman of the Antimonopoly Committee of Ukraine. Deputy Head of Territorial Office shall be appointed by the Chairman of the Antimonopoly Committee at the recommendation of Head of Territorial Office.

The Head of Territorial Office of the Antimonopoly Committee of Ukraine in the Republic of Crimea shall be appointed in agreement with the Supreme Rada of the Republic of Crimea.

Head of Territorial Office shall have rights and duties within his competence according to this Law and the Statute mentioned in the second paragraph of this article.

Article 13. Sittings of the Antimonopoly Committee of Ukraine

Sittings of the Antimonopoly Committee of Ukraine shall be a form of work of the Committee being the highest collegiate body.

The Antimonopoly Committee of Ukraine at its sittings shall:

consider and take decisions on cases laying within the jurisdiction of the Committee;

revise decisions of the State Commissioners or the administrative boards of the Committee on the basis of presentation made by the Chairman of the Committee;

approve the most important departmental normative acts the issuance of which lays within the powers of the Antimonopoly Committee of Ukraine; shall consider proposals for changes in current legislation on the basis of generalization results of antimonopoly legislation enforcement;

consider draft reports on activities of the Committee in order to submit them to the Supreme Rada of Ukraine;

consider statutes on consultative bodies of the Committee and their membership;

establish permanent administrative boards;

hear the State Commissioners, the Heads of Territorial Offices and reports of the leaders of the Committee's staff divisions.

The Heads of Territorial Offices may take part in sittings of the Antimonopoly Committee of Ukraine and may have an advisory vote.

Article 14. Administrative boards of the Antimonopoly Committee of Ukraine

Permanent and temporary administrative boards shall be established to consider particular cases on antimonopoly legislation violations. These boards shall include at least three persons and shall be formed from the State Commissioners and the Heads of Territorial Offices of the Antimonopoly Committee of Ukraine.

The administrative boards shall be formed according to branch, regional, and other principles.

The Head of Territorial Office of the Antimonopoly Committee of Ukraine who is a member of an administrative board - when taking decisions - shall have equal rights with the State Commissioners being members of the board.

Article 15. Staff of the Antimonopoly Committee of Ukraine and its territorial offices

Organization, technical, analytical, information, reference, and other of work directed at the maintenance of the Antimonopoly Committee of Ukraine, its territorial office and preparation of materials for consideration of cases on antimonopoly legislation violations shall be carried out by staff respectively of the Antimonopoly Committee of Ukraine or its territorial office.

Statute on structural staff divisions of the Antimonopoly Committee of Ukraine shall be approved by the Chairman of the Committee.

Chapter III Status of State Commissioner and Head of Territorial Office of the Antimonopoly Committee of Ukraine

Article 16. Rights and duties of State Commissioner and Head of Territorial Office of the Antimonopoly Committee of Ukraine

State Commissioner of the Antimonopoly Committee of Ukraine according to legislation shall have the right:

to enter enterprises, institutions, organizations freely by his identification card and shall have access to documents and other materials necessary for doing check-ups;

to demand oral or written explanations of officials and citizens;

to demand - in connection with realization of his powers - documents and other information necessary for check-up of antimonopoly legislation observance;

to enlist - after agreement with respective central and local bodies of State executive power, institutions of local and regional self-government, enterprises and amalgamations their specialists, deputies of local Radas of people's deputies for doing check-ups and inspections;

to consider cases on antimonopoly legislation violations according to distributed duties and to take decisions based on consideration results within his powers;

to represent the Committee without special warrant in court or arbitration court;

to empower officials of the Committee and its territorial offices to carry out separate powers mentioned in this article.

State Commissioner, Head of Territorial Office of the Antimonopoly Committee of Ukraine shall be responsible for:

exact fulfilment of demands of current legislation of Ukraine, shall be objective and unprejudiced while realizing his powers;

sending submissions on violations of antimonopoly legislation of Ukraine caused by officials to respective State bodies.

State Commissioner, Head of Territorial Office - without agreement of the Antimonopoly Committee of Ukraine - shall not be members of those commissions, committees and other formations which are established by central and local bodies of State executive power and by institutions of local and regional self-government.

Holding more than one office by the State Commissioners and the Heads of Territorial Offices of the Antimonopoly Committee of Ukraine (except for scientific and teaching activities) and their direct or indirect engagement in entrepreneurial activities shall be prohibited.

Article 17. Independence of State Commissioner of the Antimonopoly Committee of Ukraine

State Commissioner of the Antimonopoly Committee of Ukraine is independent in exercising his powers to control the antimonopoly legislation observance and during consideration of cases on its violations.

State Commissioner of the Antimonopoly Committee of Ukraine shall take decisions independently within his powers.

The State Commissioners of the Committee shall take decisions at sittings of the Antimonopoly Committee of Ukraine and administrative boards, have equal rights and be guided only by law.

Article 18. Disciplinary responsibility and dismissal of State Commissioner of the Antimonopoly Committee of Ukraine

State Commissioner of the Antimonopoly Committee of Ukraine may be brought to disciplinary responsibility (except for dismissal) on a universal basis according to procedure fixed by labour legislation of Ukraine.

State Commissioner of the Antimonopoly Committee of Ukraine may be dismissed:

through the state of health preventing him from further work;

at his will;

in the case of a flagrant violation of his official duties or when a crime was perpetrated by him.

Dismissal of the State Commissioners of the Antimonopoly Committee of Ukraine shall be carried out by the Supreme Rada of Ukraine at the recommendation of the Chairman of the Antimonopoly Committee of Ukraine.

State Commissioner of the Antimonopoly Committee of Ukraine shall have the right to resign according to procedure determined by current legislation of Ukraine.

Chapter IV **Legal basis for realization of the powers** **of the Antimonopoly Committee of Ukraine**

Article 19. Guarantee of realization of the powers of the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine shall realise its powers, observing Constitution and laws of Ukraine irrespective of central and local bodies of State executive power, institutions of local and regional self-government, their officials, entrepreneurs and amalgamations of citizens or their bodies.

Interference of central and local bodies of State executive power, institutions of local and regional self-government, their officials, amalgamations of citizens and their representatives with activities of the Antimonopoly Committee of Ukraine and its territorial offices shall be prohibited, except for cases provided by current legislation.

Influence in any form on an official of the Antimonopoly Committee of Ukraine and its territorial offices in order to prevent him from performance of his official duties or to have unlawful decisions taken by him shall entail liability provided by legislation.

Article 20. Relations of the Antimonopoly Committee of Ukraine with central and local bodies of State executive power, institutions of local and regional self-government

To coordinate the activities concerning issues of competition development and the economy demonopolization, the Antimonopoly Committee of Ukraine shall interact with central and local bodies of State executive power, institutions of local and regional self-government.

The territorial offices of the Antimonopoly Committee of Ukraine shall coordinate their activities with local State administrations, institutions of local and regional self-government.

Central and local bodies of State executive power, institutions of local and regional self-government shall be obliged to come to an agreement with the Antimonopoly Committee of Ukraine about their decisions concerning the economy demonopolization, competition development and antimonopoly regulation and to receive the Committee's consent, according to procedure fixed by it, to establishment, reorganization (merger, connection), liquidation of economic entities and societies, establishment of associations, concerns, interbranch, regional and other amalgamations of enterprises, transformation of management bodies into the mentioned amalgamations.

Article 21. Relations of the Antimonopoly Committee of Ukraine with attorney office bodies, the media

The Antimonopoly Committee of Ukraine and its territorial offices shall coordinate their activities concerning issues of revelation, prevention, and termination of antimonopoly legislation violations with attorney office bodies.

The Antimonopoly Committee of Ukraine and its territorial offices shall interact with the media and public organizations concerning their work directed at prevention of antimonopoly legislation violations.

Article 22. Binding nature of demands made by the State Commissioners and the Heads of Territorial Offices of the Antimonopoly Committee of Ukraine

Demands made by the State Commissioners and the Heads of Territorial Offices of the Antimonopoly Committee of Ukraine within their powers shall be met without fail within term fixed by them if current legislation has no other provisions.

Non-observance of lawful demands made by State Commissioner or Head of Territorial Office of the Antimonopoly Committee of Ukraine shall entail liability provided by legislation.

Documents, statistics, and other information necessary for exercising control over antimonopoly legislation observance and for consideration of cases on its violations shall be given at the demand of State Commissioner, Head of Territorial Office of the Antimonopoly Committee of Ukraine free of charge.

State Commissioner, Head of Territorial Office of the Antimonopoly Committee of Ukraine who received information the access to which is restricted by legislation shall use it according to current legislation.

Article 23. Procedural basis for activities of the Antimonopoly Committee of Ukraine

The activities concerning revelation, prevention, and termination of antimonopoly legislation violations shall be carried out by the Antimonopoly Committee of Ukraine, the administrative boards, the State Commissioners, and the Heads of Territorial Offices of the Committee with the observance of procedural basis determined by legislative acts of Ukraine.

The procedure followed by the Antimonopoly Committee of Ukraine and its territorial offices during consideration of cases on antimonopoly legislation violations shall ensure observance of rights and legitimate interests of citizens, entrepreneurs, and the State.

Article 24. Decisions of the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine, the State Commissioners, the administrative boards, and the Heads of Territorial Offices of the Committee - within their powers - shall pass compulsory resolutions and shall adopt compulsory regulations.

The Antimonopoly Committee of Ukraine, the administrative boards, the State Commissioners and the Heads of Territorial Offices of the Committee shall pass respective resolutions concerning issues of compulsory split-up of monopoly formations and imposition of fines on entrepreneurs for antimonopoly legislation violations.

The State Commissioners and the Heads of Territorial Offices of the Committee shall draw up Statements of antimonopoly legislation violations according to the Administrative Violations Code of Ukraine in case of antimonopoly legislation violations committed by entrepreneurs, officials of central and local bodies of State executive power, institutions of local and regional self-government, leaders of enterprises (amalgamations, economic societies, etc.).

Information about decisions of the Antimonopoly Committee of Ukraine shall be published in the newspapers Golos Ukrainy (The Voice of Ukraine) and Uriadovy Kurier (The Governmental Courier).

Article 25. Application to court or arbitration court

The Antimonopoly Committee of Ukraine and the State Commissioners of the Committee in order to protect interests of the State, consumers, and entrepreneurs in connection with antimonopoly legislation violations shall submit applications (actions) to court or arbitration court, including applications (actions) on the following issues:

nullification of acts of central local bodies of State executive power, institutions of local and regional self-government and their termination of actions restraining competition in case of their non-observance - in a fixed period - of regulation issued by the Antimonopoly Committee of Ukraine on abolishment of unlawful acts, termination of violations, etc.;

reparation of damages caused by antimonopoly legislation violations;

withdrawal of profit got unlawfully by subjects of entrepreneurial activities as a result of antimonopoly legislation violations;

on other grounds provided by current legislation and shall send Statements of administrative violations to court to have fines imposed on officials according to current legislation.

Chapter V

Other issues of activities of the Antimonopoly Committee of Ukraine

Article 26. Scientific and methodical support of activities of the Antimonopoly Committee of Ukraine

The Antimonopoly Committee of Ukraine in order to prepare recommendations on issues of organization and activities of the Antimonopoly Committee of Ukraine, methodology and methods for exercising control over antimonopoly legislation observance, to work out proposals for its application and improvement and concerning other issues shall establish advisory bodies, conduct technical and economic and scientific researches, enlist experts and consultants, train personnel according to special programmes.

Article 27. Staff number, posts, and salary fund for officials of the Antimonopoly Committee of Ukraine and its territorial offices

The maximum staff number and salary fund for officials of the Antimonopoly Committee of Ukraine shall be determined by the Chairman of the Committee by agreement with the Presidium of the Supreme Rada of Ukraine.

The posts of the Antimonopoly Committee of Ukraine and its territorial offices shall be approved respectively by the Chairman of the Committee and the heads of Territorial Offices within given allocations.

Labour payment terms for the Chairman of the Antimonopoly Committee of Ukraine, the State Commissioners, the Heads of Territorial Offices of the Committee shall be determined by the Presidium of the Supreme Rada of Ukraine.

Article 28. Financing and logistics support of the Antimonopoly Committee of Ukraine

Financing of the Antimonopoly Committee of Ukraine and its territorial offices shall be carried out at the expense of State budget resources. The volume of these allocations shall be fixed by the Supreme Rada of Ukraine annually when State budget is being approved.

Estimate of maintenance expenses for the Antimonopoly Committee of Ukraine and its territorial offices shall be approved respectively by the Chairman of the Antimonopoly Committee of Ukraine and the Heads of Territorial Offices within given allocations.

Local bodies of State executive power, local Radas of people's deputies shall provide the respective territorial offices of the Antimonopoly Committee of Ukraine with necessary office premises on terms of lease within a month after establishment of territorial offices.

The Antimonopoly Committee of Ukraine shall be provided with transport and logistics means at the expense of State budget of Ukraine according to procedure determined by the Cabinet of Ministers of Ukraine.

Article 29. Protection of individual and property rights of officials of the Antimonopoly Committee of Ukraine

Officials of the Antimonopoly Committee of Ukraine while on official duty shall be representatives of State power. Their individual and property rights shall be protected by law equally with those of officials of law protective bodies.

Article 30. Identification card of official of the Antimonopoly Committee of Ukraine

The State Commissioners, the Heads of Territorial Offices, executives of the Antimonopoly Committee of Ukraine and its territorial offices shall have identification card. The Statute of identification card of official of the Antimonopoly Committee shall be approved by the Presidium of the Supreme Rada of Ukraine.

L. Kravchuk

President of Ukraine

The city of Kyiv

26 November 1993

No 3659-XII

LAW OF UKRAINE

ON PROTECTION AGAINST UNFAIR COMPETITION

This Law determines the legal principles of protection of economic entities (entrepreneurs) and consumers against unfair competition.

The Law is aimed at establishing, developing, and ensuring trade and other fair traditions in competition in the course of entrepreneurial activities in market economy conditions.

Chapter I General Provisions

Article 1. Unfair competition

Unfair Competition shall be understood as any actions performed in the course of competition running counter to the rules, trade and other fair customs in entrepreneurial activities.

In particular, actions stipulated by Chapters 2-4 of this Law shall be qualified as unfair competition.

Terminology used for the purposes of this Law is defined by the Law of Ukraine “On Limitation of Monopolism and Banning of Unfair Competition in Entrepreneurial Activities”.

Article 2. Application of the Law

This Law shall apply to relations involving economic entities (entrepreneurs), their associations, bodies of State power, citizens, legal persons and their associations not being economic entities (entrepreneurs) in conjunction with unfair competition, including actions made by them outside Ukraine, provided these actions have negative effect on competition in its territory.

This Law shall not apply to relations involving the said entities if their actions have consequences only outside Ukraine, unless otherwise provided for by an international treaty to which Ukraine is a party.

Article 3. Legislation of Ukraine on protection against unfair competition

Relations in conjunction with protection against unfair competition shall be governed by this Law, the Law of Ukraine “On Limitation of Monopolism and Banning of Unfair Competition in Entrepreneurial Activities”, the Law of Ukraine “On the Antimonopoly Committee of Ukraine”, the Law of Ukraine “On Foreign Economic Activities”, and by other legislative acts issued as per laws or resolutions of the Supreme Rada of Ukraine.⁸³

⁸³ Supreme Rada of Ukraine is the Parliament of Ukraine.

Chapter II

Unlawful Use of an Economic Entity's (Entrepreneur's) Business Reputation

Article 4. Unlawful use of others' trademarks, advertizing material, and packing

Unauthorized use of others' Christian and company names, trademarks, logos, advertizing material, packing, titles of books, works of art, periodicals, place names of commodities' origin because of which there can be confusion in regard to activities of other economic entities (entrepreneurs) having the priority right to use them shall be qualified as unlawful.

Use of a natural person's name in a company name shall not be qualified as unlawful if the person's name is somehow made distinct, so as to rule out its confusion with the activities of other economic entity (entrepreneur).

Article 5. Unlawful use of goods made by other manufacturers

Unlawful use of goods made by other manufacturers shall be understood as launching into economic circulation under one's name goods belonging to a different manufacturer by changing or lifting that manufacturer's name without permission from an authorized person.

Article 6. Copying of outward appearance of goods

Copying of outward appearance of goods shall be understood as making outwardly exact replicas of goods belonging to other economic entities (entrepreneurs) and launching them into economic circulation without indicating the manufacturer of copies, which can be confusing in regard to the activities of those other economic entities (entrepreneurs).

Copying of outward appearance of goods or their parts shall not be qualified as unlawful if this copying is warranted by their purely functional use.

This article shall not apply to goods being protected as objects of intellectual property.

Article 7. Comparative advertizing

Comparative advertizing shall be understood as advertizing which includes comparison with goods, works, and services or activities of different economic entities (entrepreneurs).

Comparative advertizing shall not be considered unlawful if information contained therein, pertaining to goods, works or services, is corroborated by factual data, being authentic, unbiased, and useful for giving information to consumers.

Chapter III

Obstructing Other Entities' (Entrepreneurs') Business in the Course of Competition and Gaining Unlawful Advantage in Competition

Article 8. Discrediting an economic entity (entrepreneur)

Discrediting an economic entity (entrepreneur) shall be understood as spreading any form of untruthful, inaccurate or incomplete information about this entity or entrepreneur or their (his) activities which has damaged or could damage their (his) business reputation.

Article 9. Sales and purchase of goods, carrying out works, and rendering services with compulsory assortment

Sales and purchase of goods, carrying out works, and rendering services with compulsory assortment shall be understood as sales and purchase of certain goods, carrying out works, and rendering services on condition of sales and purchase of other goods, carrying out works, and rendering services that are not needed by the consumer or counterpart.

Article 10. Instigating boycott of an economic entity (entrepreneur)

Instigating boycott of economic entities (entrepreneurs) shall be understood as the competitor's actions aimed at instigating a third party – directly or via a go-between – to refuse to make contractual links with the given economic entity (entrepreneur).

Article 11. Instigating suppliers to discriminate against buyers (customers)

Instigating suppliers to discriminate against buyers (customers) shall be understood as the buyer's (customer's) competitor's actions aimed at instigating – directly or via a go-between – the supplier to give the buyer's (customer's) competitor certain unjustifiable advantages over the buyer (customer).

Article 12. Instigating an economic entity (entrepreneur) to abrogate contract with a competitor

Instigating an economic entity (entrepreneur) to abrogate a contract with another economic entity's (entrepreneur's) competitor shall be understood as the instigation motivated by mercenary considerations or made in the interests of a third party, to make the given economic entity (entrepreneur) being a party to a contract to abrogate or mishandle this contract by giving this party to the contract – directly or via a go-between – a material reward, compensation or other advantages.

Article 13. Bribing the supplier's employee

Bribing the supplier's employee shall be understood as the buyer's (customer's) competitor giving or offering this employee – directly or via a go-between – material values, property or non-property benefits in return for that employee's improper fulfilment or non-fulfilment of his duty ensuing from or in conjunction with the contract between the supplier and the buyer, concerning delivery of goods, carrying out works or rendering services, which has caused or could cause this competitor to receive certain advantages over the buyer (customer).

Any other person being under authority to make decisions on the supplier's behalf on delivery of goods, carrying out works or rendering services, and thus influence the supplier, or being otherwise involved with the supplier shall be placed on the same footing as that supplier's employee.

Article 14. Bribing the buyer's (customer's) employee

Bribing the buyer's (customer's) employee shall be understood as that buyer's (customer's) competitor's offering this employee – directly or via a go-between – material values, property or non-property benefits in return for improper fulfilment of his duties ensuing from or in conjunction with the contract between the supplier and the buyer, concerning delivery of goods, carrying out works or rendering services, which has caused or may cause this competitor to receive advantages over the supplier.

Any other person being under authority to make decisions on the buyer's behalf on purchase of goods, works or services, and thus influence the buyer, or being otherwise involved with the buyer shall be placed on the same footing as that buyer's employee.

Article 15. Gaining unlawful advantage in competition

Gaining unlawful advantage in competition shall be understood as gaining the advantage over another economic entity (entrepreneur) by breaching any of the laws currently in effect and reaffirmed by decisions made by a competent authority.

Chapter IV
Unlawful Collection, Disclosure, and Use of Commercial Secrets

Article 16. Unlawful collection of commercial secrets

Unlawful collection of commercial secrets shall be understood as illegally obtaining data qualified under legislation of Ukraine as confidential commercial information, if by doing so an economic entity (entrepreneur) has been or could be damaged.

Article 17. Disclosure of commercial secrets

Disclosure of commercial secrets shall be understood as disclosure of information qualified under legislation of Ukraine as confidential by the party entrusted with this information to a third party without the knowledge and consent of the authorized party, provided this information was entrusted to that party in due course or was made known in than party's line of duty, and provided this disclosure has damaged or could damage the given economic entity (entrepreneur).

Article 18. Instigation to disclose commercial secrets

Instigation to disclose commercial secrets shall be understood as instigating a person duly entrusted with information qualified under legislation of Ukraine as commercial secrets or made privy to it in the line of duty to disclose this information, provided this disclosure has damaged or could damage the given economic entity (entrepreneur).

Article 19. Unlawful use of commercial secrets

Unlawful use of commercial secrets shall be understood as information used in production or taken into account when planning and doing entrepreneurial activities, which information was illicitly obtained, without the knowledge and consent of the authorized person, and which is qualified as a commercial secret under legislation of Ukraine.

Chapter V Responsibility for Unfair Competition

Article 20. Types of responsibility

Committing acts of unfair competition as envisaged by this Law shall entail penalties imposed by the Antimonopoly Committee of Ukraine, as well as civil liability and criminal prosecution as provided by legislation.

Article 21. Penalties imposed on economic entities being legal persons and associations thereof

Acts of unfair competition, as envisaged by this Law, committed by economic entities, legal persons, and associations thereof, shall entail penalties imposed by the Antimonopoly Committee of Ukraine and its territorial offices in amounts of up to 3 per cent of the economic entity's proceeds from the sales of goods, works, and services over the fiscal year preceding the year in which this penalty was imposed.

If such proceeds are impossible to compute, or in the absence of such proceeds, penalties indicated in paragraph 1 hereinabove shall be imposed in amounts of up to 5,000 tax-free minimum citizens' incomes.

Article 22. Penalties imposed on legal persons, associations thereof, and citizens' associations not being legal persons

Acts of unfair competition, as envisaged by this Law, committed by legal persons, associations thereof, and by citizens' associations not being legal persons shall entail penalties imposed by the Antimonopoly Committee of Ukraine and its territorial offices in amounts of up to 2,000 tax-free minimum citizens' incomes.

Article 23. Administrative responsibility of citizens

Acts of unfair competition, as envisaged by this Law, committed by citizens engaged in entrepreneurial activities without forming legal persons, shall result in administrative liability as provided by legislation.

Acts of unfair competition, as envisaged by this Law, committed by citizens in the interest of a third party, these citizens not being engaged in entrepreneurial activities, shall entail administrative penalties in keeping with legally set procedures.

Article 24. Restitution

Damage caused by actions qualified by this Law as unfair competition shall be indemnified as per claims by the interested parties in keeping with procedures established

by the civil legislation of Ukraine.

Article 25. Confiscation of unlawfully labelled goods and duplicated goods originating from a different economic entity (entrepreneur)

On establishing unlawful use of others' trademarks, advertizing material, and/or packing, as set forth by article 4 hereinbefore, or on discovering duplicated goods envisaged by article 6 hereinbefore, the interested party may bring the issue before the Antimonopoly Committee of Ukraine or any of its territorial offices, requesting confiscation of unlawfully labelled goods or duplicated goods originally made by a different economic entity (entrepreneur) from both the manufacturer and seller.

Goods thus confiscated shall be disposed of in keeping with procedures determined by the Cabinet of Ministers of Ukraine.

Unlawfully labelled goods or duplicated goods originally made by a different economic entity (entrepreneur) shall be confiscated when there is no other way to prevent mistaken identity damaging that other entity's business.

Article 26. Refutation of untruthful, inaccurate or incomplete data

On discovering that an economic entity (entrepreneur) has been discredited, the Antimonopoly Committee of Ukraine and/or its territorial offices shall have the right to demand official retraction, by the guilty party and that party's own cost, of such untruthful, inaccurate or incomplete information, within a term and in a manner determined by law or by a decision passed in this case.

Chapter VI
Legal Principles of Protection Against Unfair Competition

Article 27. Procedural principles of handling unfair competition cases by the Antimonopoly Committee of Ukraine and its territorial offices

Unfair competition cases shall be dealt with by the Antimonopoly Committee of Ukraine and its territorial offices in keeping with procedures established by this Law, the Law of Ukraine "On Limitation of Monopolism and Banning of Unfair Competition in Entrepreneurial Activities", the Law of Ukraine "On the Antimonopoly Committee of Ukraine", and other legislative acts of Ukraine.

Article 28. Term of statement of claim

Persons whose rights are upset by actions defined by this Law as unfair competition may, within six month from the date on which they discovered or had to discover these transgressions, file statements of claim at the Antimonopoly Committee of Ukraine and/or its territorial offices.

Expiry of the term of statement of claim shall warrant rejection of such statements.

If the Antimonopoly Committee of Ukraine or any of its territorial offices finds that this term was surpassed due to valid reasons, the statement of claim shall be accepted.

Article 29. Means of securing the implementation of decisions made by the Antimonopoly Committee of Ukraine and its territorial offices

When handling a case as per statement of claim, the Antimonopoly Committee of Ukraine and its territorial offices shall have the right to take measures to secure the implementation of their rulings if in the absence of such measures their implementation will be difficult or impossible.

In order to secure the implementation of such decisions, the Antimonopoly Committee of Ukraine and its territorial offices shall issue directives:

- forbidding a person (respondent) to perform certain actions if there are signs of transgression in that person's conduct;
- seizing property or sums in the respondent's possession.

Such rulings may be appealed to a court of law or arbitration in keeping with procedures set forth by article 32 hereinafter, within 15 days from the date of receipt of a copy of the ruling.

The respondent, should the case be closed for lack of evidence, may, in keeping with procedures set by the laws of Ukraine, exact from the claimant damage in the amount of losses inflicted on the respondent when securing the implementation of the ruling.

Article 30. Decisions made by the Antimonopoly Committee of Ukraine and its territorial offices

The Antimonopoly Committee of Ukraine and its territorial offices, when handling unfair competition cases, shall make decisions to be complied with under all conditions, namely on:

- recognizing the fact of unfair competition;
- terminating unfair competition;
- ordering official retraction of untruthful, inaccurate information, to be made by the guilty party at its own cost;
- imposing penalties;
- confiscating unlawfully labelled goods or duplicated goods originally made by a different economic entity (entrepreneur);
- annulling or overriding unlawful acts and abrogating contracts and made by central or local bodies of State executive power, and executive bodies of local self-government.

Decisions imposing penalties in amounts surpassing 400 tax-free minimum citizens' incomes shall be the sole prerogative of the Antimonopoly Committee of Ukraine, each to be passed at a sitting thereof.

Decisions on confiscation of unlawfully labelled goods or duplicated goods

originally made by different economic entities (entrepreneurs) shall be complied with in keeping with procedures followed when implementing court rulings.

Article 31. Implementation procedures for decisions on penalties

A transgressor on whom a penalty is imposed shall pay it within 30 days from the date of receipt of the ruling on the penalty, unless otherwise instructed by the ruling.

Each day in default shall entail an additional penalty in the amount of one per cent of the sum of the penalty.

If a transgressor refuses to pay a fine, the Antimonopoly Committee or any of its territorial offices shall recover this fine in an indisputable mode.

Penalties collected shall be distributed as follows: 50 per cent shall be transferred to the State budget of Ukraine, 25 per cent to the budget of the Autonomous Republic of the Crimea and to local budgets, and 25 per cent to the State body imposing the penalty, to help create scientific, material, technical, and database on which to develop and protect competition.

Article 32. Contesting decisions of the Antimonopoly Committee of Ukraine and its territorial offices

Decisions made by the Antimonopoly Committee of Ukraine and its territorial offices in regard to cases on unfair competition shall be appealed, within 30 days from the date of receipt of a copy of the court ruling, to the Supreme Court of the Autonomous Republic of the Crimea, as well as to regional courts, the city courts of Kyiv and Sevastopol, the Arbitration Court of the Autonomous Republic of the Crimea, regional courts of arbitration and those of Kyiv and Sevastopol.

Article 33. Rules of professional ethics

Economic entities (entrepreneurs), assisted by the Chamber of Trade and Industry of Ukraine and other interested organizations, may develop rules of professional ethics to be adhered to in competition in certain entrepreneurial activities, as well as in certain sectors of the economy. The Rules of Professional Ethics in Competition, developed by economic entities (entrepreneurs), shall be agreed with the Antimonopoly Committee of Ukraine.

The Rules of Professional Ethics in Competition may apply when making contracts and drawing up constituent and other documents binding on economic entities (entrepreneurs).

L. Kuchma

President of Ukraine

The city of Kyiv

7 June 1996

ZIMBABWE

Commentary by the Government of Zimbabwe on Competition Legislation of Zimbabwe*

Reasons for Introducing Competition Legislation in Zimbabwe

The Government of Zimbabwe's concerns regarding restrictive business practices and abuse of market power date back to 1980, when the country attained its independence. Even though at independence the new State of Zimbabwe inherited a highly regulated economy, it wielded the regulatory system differently⁸⁴ from the former colonial regime. While the former regime worked in close cooperation with the private sector, the new regime was wary of business and sought to ensure that the ability of industry to capture monopoly and oligopoly rents was limited.

The new Government therefore followed four policies, which among other objectives countered the ability of monopolies and oligopolies to abuse market power:⁸⁵

1. Extensive price controls. Prices for *essential* products were determined directly by the Cabinet; those for *strategic* products were determined by the then Ministry of Industry and Commerce; and those for other consumer goods were determined on a cost-plus basis.
2. Intervention by the Government to fix wages and salaries and limit the ability of firms to dismiss workers. This policy had as its goals inflation control and redistribution of rents.
3. Informal use of the Foreign Exchange Allocation mechanism as leverage to keep firms in line.
4. Government ownership of and participation in the industrial and commercial sectors as a way to counter the influence of monopolies and oligopolies.

In 1991 the Government of Zimbabwe introduced an extensive Economic Structural Adjustment Programme (ESAP). Four major elements of ESAP intended to liberalize the economy and improve the competitive environment in the country were (i) trade liberalization; (ii) price decontrol; (iii) domestic deregulation; and (iv) public enterprise reform and privatization.

The Government realized, however, that market forces alone might not be able to address all the problems in the market place, especially in situations of market failure caused by market power and its abuse. An Inter-Ministerial Committee established to look into issues of competition in Zimbabwe commissioned a study on monopolies and competition policy in Zimbabwe. The study was undertaken by a team of local and

* The text of this legislation reflects the version supplied to UNCTAD by the Government of Zimbabwe.

⁸⁴ *Study of Monopolies and Competition Policy in Zimbabwe*, Implementing Policy Change (IPC), Sept. 1992.

⁸⁵ *Ibid.*

foreign consultants funded by the Implementing Policy Change (IPC) project, under the auspices of USAID.

The IPC study, whose report was released in September 1992, found that restrictive business practices were pervasive in Zimbabwe in both concentrated and unconcentrated industries, and it recommended the introduction of new competition legislation enforced by a competition authority.

Zimbabwe's competition legislation, the Competition Act of 1996 (No. 7 of 1996), was brought into effect through Statutory Instrument 21A of 1998 published in the *Extraordinary Government Gazette* of 6 February 1998. The Act provided for the establishment of an independent Competition Commission. Members of the Commission (the Commissioners) were appointed effective 28 January 1998 by the President of Zimbabwe through General Notice 58 of 1998 of 20 February 1998 on a part-time basis for terms of three years. The Director of the Commission was appointed on 9 November 1998 according to section 17 of the Act. The appointment of the Director paved the way for the recruitment of the Commission's other professional and administrative support staff members, a process that effectively began in January 1999.

Objectives of Zimbabwe's Competition Legislation

The preamble to the Competition Act, 1996, sets out the broad objectives of competition legislation in Zimbabwe as follows:

“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”.

Specific objectives of the legislation are stated in the statutory functions of the Industry and Trade Competition Commission (s.5(1) of the Act), which are to:

- Encourage and promote competition in all sectors of the economy;
- Reduce barriers to entry into any sector of the economy or to any form of economic activity;
- Investigate, discourage and prevent restrictive practices;
- 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;
- Advise the Minister of Industry and International Trade regarding all aspects of economic competition, including entrepreneurial activities carried on by institutions directly or indirectly controlled by the State, and the formation, coordination, implementation and administration of Government policy with regard to economic competition; and

- 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.

Controlled Practices and Behaviour

Zimbabwe's competition legislation controls practices and behaviour such as restrictive practices (including unfair trade practices), mergers and monopoly situations.

(a) "Restrictive practices" are defined in the Competition Act as:

"(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 effects:

(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."

"Unfair trade practice" is defined in the Act simply as "a restrictive practice or other conduct specified in the First Schedule". The First Schedule of the Act lists the following as unfair trade practices: (i) misleading advertising; (ii) false bargains; (iii) distribution of commodities or services above advertised price; (iv) undue refusal to distribute commodities or services; (v) bid-rigging; and (vi) collusive arrangements between competitors.

(b) “Mergers” are defined in the Act as:

“(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.”*

(c) “Monopoly situation” as defined in the Act means “a situation in which a single person exercises, or two or more persons with substantial economic connection exercise, substantial market control over any commodity or service”.

Like other countries’ competition legislation, the Competition Act of Zimbabwe deals with two types of offences: “*per se*” and “rule of reason” offences.

“*Per se*” offences are those that are prohibited outright – the mere fact of their commission is enough to constitute an offence. Unfair trade practices as defined in the Act are *per se* offences. “Any person who enters into, engages in or otherwise gives effect to an unfair trade practice shall be guilty of an offence” (s.42(3) of the Act).

“Rule of reason” offences require the competition authority to first make an assessment of the merits or demerits of the controlled practice or behaviour in order to determine whether it can be justified or not on the basis of public interest considerations. All other restrictive practices, mergers and monopoly situations as defined in the Act fall under this category.

A restrictive practice is regarded 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 competition authority is satisfied as to any one of the following (s.32(2) of the Act):

“(a) *that the restrictive practice is reasonably necessary, having regard to the character or the commodity of 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 in 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."*

A merger is regarded as contrary to the public interest if the competition authority is satisfied that the merger (s.32(4) of the Act):

- "(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."*

A monopoly situation is regarded as contrary to the public interest unless the competition authority is satisfied as to any one or more of the following (s.32(5) of the Act):

- "(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 termination 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.”*

Scope of Application of Competition Legislation

Even though Zimbabwe’s competition legislation does not expressly so state, it by implication applies to all sectors of the economy, with a few exceptions. The relevant provisions of the Act state that:

- “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” ... ; 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 an enactment.”

The Act does not give the competition authority extraterritorial jurisdiction over anti-competitive acts committed outside Zimbabwe. The competition authority can, however, examine the competitive effects of mergers between multinational companies insofar as the mergers result in combinations of the operations of the companies' subsidiaries in Zimbabwe.

Enforcement Machinery

The two principal arms of the Competition Commission are members of the Commission (the Commissioners), who are entrusted with all the statutory functions of the Commission, and the Directorate, which is headed by the Director.

Section 17(1) of the Competition Act provides for the appointment and functions of the Director of the Commission as follows:

“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.”

The Commission, in accordance with the above provisions of the Act, has delegated investigative functions to the Director and the Directorate, leaving itself free to concentrate on its adjudication functions. All of the Directorate's professional staff members (economists, lawyers, accountants and business administrators) have been designated “investigating officers” according to section 46(1) of the Act.

Section 28 of the Competition Act bestows on the Commission the power to investigate restrictive practices, mergers and monopoly situations. The relevant provisions read as follows:

“(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 ...*
- (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.”*

Before the Commission embarks on a full-scale investigation as provided for under section 28 of the Act, the Directorate undertakes preliminary investigations into the identified competition concerns in order to establish a *prima facie* case for such an investigation.

While most of the investigations are complaint-driven, the Commission often initiates its own investigations from newspaper reports and its studies on competition in various sectors of the economy.

While in the process of investigating a competition concern, the Commission can publish a notice prohibiting or staying any restrictive practice or merger that is the subject of the investigation, pending the outcome of the investigation (s.29(1) of the Act). The Commission can also negotiate with any person with a view to making an arrangement that would ensure the discontinuance of any restrictive practice or terminate, prevent or alter any merger or monopoly situation, whether or not it has embarked on a section 28 investigation into the concerned restrictive practice, merger or monopoly situation (s.30(1) of the Act).

The Act empowers the Commission to make certain corrective orders on identified competition concerns. With regard to identified restrictive practices, section 31(1) of the Act provides that:

“If the Commission is satisfied ... 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 affect 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."*

Section 31(2) provides for orders that can be made by the Commission regarding mergers and monopoly situations as follows:

"If the Commission is satisfied ... 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 provisions 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.”*

Orders made with respect to a merger or monopoly situation may provide for any of the following matters (s.31(3) of the Act):

- The transfer or vesting of property, rights, liabilities or obligations;
- The adjustment of contracts, whether by their discharge, or the reduction of any liability or obligation, or otherwise;
- The creation, allotment, surrender or cancellation of any shares, stocks or securities; or
- 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.

Orders made by the Commission may be lodged with the Registrar of the High Court or the clerk of any magistrates court that would have had jurisdiction to make the order, had the matter been determined by it (s.33(1) of the Act). For enforcement purposes, Commission orders recorded with the High Court or relevant magistrates court have the effect of a civil judgment of the High Court or the magistrates court concerned.

Failure to comply with any order made by the Commission constitutes an offence, which is liable to a fine or to imprisonment or to both (s.33(7) of the Act).

The Commission may authorize, upon application, certain restrictive practices, mergers and other anti-competitive conduct. Section 35(1) of the Act provides that:

“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.”

Applications for authorizations of restrictive practices, mergers and other conduct are examined in the same way as section 28 investigations. After conducting investigations into such applications, and taking into account any representations received from interested persons or parties, the Commission can either (s.36(2) of the Act):

- Grant the authorization sought by the applicant, subject to any terms and conditions, if the agreement, arrangement, practice or conduct concerned is not contrary to the public interest; or
- Refuse to grant the authorization sought by the applicant.

The merger notification provisions of the Act are contained in section 34, which provides that:

- “(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.”*

Any person who is aggrieved by a decision of the Commission may appeal against it to the Administrative Court of Zimbabwe.

Parallel or Supplementary Legislation

Zimbabwe does not presently have any parallel or supplementary legislation, including treaties or understandings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices under competition policy.

Zimbabwe is, however, actively involved in the current work of the Secretariat of the Common Market for East and Southern Africa (COMESA).

Major Competition Decisions Taken

The Competition Commission has handled some 54 different competition cases since effectively beginning its operations in January 1999. The cases have involved restrictive practices (44%), unfair trade practices (26%) merger assessments under section 34 of the Act (19%) and merger authorizations under section 35 of the Act (11%).

The Commission has also undertaken two competition studies in the financial services and telecommunications services sectors and is in the process of undertaking four other studies in the milling/bakery industries; the sugar manufacturing industry; the fertilizer manufacturing industry; and the cooking oil manufacturing industry.

Two of the competition cases handled have been selected for analysis. Following are the specific issues covered in the cases:

(a) Restrictive and Unfair Trade Practices in the Cement Industry

In November 1998, the Commission received complaints from some cement merchants regarding the supply and distribution of cement on the local Zimbabwean market. Preliminary investigations into the complaints undertaken by the Directorate showed that Zimbabwe's cement industry was highly concentrated, with only two major producers and relatively small importers from South Africa and Zambia. Evidence gathered suggested that the two cement producers might have been abusing their dominant positions in the industry by engaging in various restrictive and unfair trade practices such as vertical restraints on cement deliveries to their customers, discriminatory distribution of cement, bundling/tying of cement sales and collusive behaviour.

A full-scale investigation in terms of section 28 of the Competition Act was therefore undertaken into the allegations. The investigation found that both of Zimbabwe's two major cement producers at the time (there have been new entrants into the industry since the investigation) were engaged in anti-competitive practices. One producer was found to be restricting the distribution of its cement through its preferential cement collection system, while the other was found to be tying the sale of its cement to the use of its subsidiary company's trucking vehicles. While both producers were found to be enhancing or maintaining the price of cement on the Zimbabwean market at high levels by engaging in direct importation of higher-priced cement from South Africa, a public interest defence was found in that the producers only engaged in cement imports during periods of acute shortage of the product in Zimbabwe.

However, the investigation found no evidence linking the cement producers to

collusive and cartel-like behaviour.

A number of public interest concerns in the production, marketing and distribution of cement in Zimbabwe were also identified during the investigation. These related to irregular supplies of cement to building projects; unjustified demands for pre-delivery payments; parallel marketing of cement on the black market; a discriminatory cement sales tax regime; and prohibitively high and customs duty on imported cement clinker (a crucial raw material in the production of cement).

The Commission, in terms of section 31(1) of the Competition Act, ordered the two cement producers to stop engaging in the identified anti-competitive practices, and it made a number of recommendations to the relevant organizations and authorities regarding alleviation of the identified public interest concerns.

(b) The Rothmans of Pall Mall / British American Tobacco Merger

In January 1999, British American Tobacco Plc of the United Kingdom announced that it had reached an agreement with the shareholders of Rothmans International, Compagnie Financière Richemont AG of Switzerland and Rembrandt Group Limited of South Africa to merge their international tobacco businesses.

After completion of the international merger between British American Tobacco Plc and Rothmans International, Rothmans of Pall Mall (Zimbabwe) Limited applied to the Competition Commission in terms of section 35 of the Competition Act, 1996, for authorization to acquire the entire issued share capital of British American Tobacco Zimbabwe Limited. The merging parties also gave as motivations for the merger the declining market for cigarettes in Zimbabwe and the fact that British American Tobacco Zimbabwe Limited was a failing firm. It was presented that the Zimbabwean manufactured cigarette market had declined to such an extent that it was no longer big enough for the continued viability of two manufacturers, as evidenced by the poor performance of British American Tobacco Zimbabwe Limited in its financial year ended 31 December 1998.

While the Commission found that the merger would create a virtual monopoly situation in the Zimbabwean *manufactured* cigarette industry (but not in the tobacco industry as a whole), it also noted that the amalgamation had certain public interest benefits as outlined in section 32(5) of the Competition Act.

The Commission therefore authorized the merger with certain conditions aimed at alleviating the possible adverse effects of the monopoly situation to be created in the manufactured cigarette industry. The conditions were as follows:

- (i) That all the identified surplus cigarette making equipment of British American Tobacco Zimbabwe Limited be disposed of within a reasonable period of time and at fair and realistic prices to third parties interested in entering the cigarette-making industry; and
- (ii) That, upon consummation of the merger, the ex-factory price of all the cigarette brands presently being produced by the merging parties not be any higher than those charged immediately prior to the merger, and that future cigarette price increases be subject to surveillance by the Competition Commission and be

justified as long as the monopoly situation created in the Zimbabwean cigarette manufacturing industry remained in existence.

The merged party accepted the above conditions and signed an Undertaking to that effect.

Bibliography

The following is a short bibliography of the principal competition legislation in Zimbabwe and its subsidiary legislation:

- Competition Act, 1996 (No. 7 of 1996), Government Printer, Harare.
- Date of Commencement: Competition Act, 1996 (Statutory Instrument 21A of 1998), Supplement to Zimbabwe's *Government Gazette Extraordinary* of 6 February 1998, Government Printer, Harare.
- Competition (Authorization of Mergers) Regulations, 1999 (Statutory Instrument 295 of 1999), Supplement to Zimbabwe's *Government Gazette* of 27 August 1999, Government Printer, Harare.
- Competition (Notification of Mergers) Notice, 2000 (Statutory Instrument 63A of 2000), Supplement to Zimbabwe's *Government Gazette Extraordinary* of 14 March 2000, Government Printer, Harare.
- Competition (Notification of Mergers) (Financial Services) Notice, 2000 (Statutory Instrument 177 of 2000), Supplement to Zimbabwe's *Government Gazette* of 9 June 2000, Government Printer, Harare.
- Competition (Notification of Mergers) (Telecommunication Services) Notice, 2000 (Statutory Instrument 226 of 2000), Supplement to Zimbabwe's *Government Gazette* of 25 August 2000, Government Printer, Harare.
- Competition (Fees for Inspection and Copying of Documents) Regulations, 2001 (Statutory Instrument 32 of 2001), Supplement to Zimbabwe's *Government Gazette* of 9 February 2001, Government Printer, Harare.

COMPETITION ACT, 1996

Arrangement of Sections

Part I Preliminary

Section

1. Short title and date of commencement.
2. Interpretation.
3. Application of Act.

Part II Industry And Trade Competition Commission

4. Establishment of Commission.
5. Functions of Commission.
6. Membership of Commission.
7. Disqualifications for appointment as member.
8. Terms and conditions of office of members.
9. Vacation of office by members.
10. President may require member to vacate his office or may suspend him.
11. Filling of vacancies on Commission.
12. Chairman and vice-chairman of Commission.
13. Meetings and procedure of Commission.
14. Committees of Commission.
15. Remuneration and allowances of members of Commission and committees.
16. Members of Commission and committees to disclose certain connections and interests.
17. Appointment and functions of Director of Commission.
18. Policy directions to Commission.
19. Validity of decisions and acts of Commission and committees.
20. Execution of contracts and instruments by Commission.
21. Minutes of proceedings of Commission and committees.
22. Reports of Commission and supply of information to Minister.

Part III Financial Provisions Relating To Commission

23. Funds of Commission.
24. Investment of moneys not immediately required by Commission.
25. Accounts of Commission
26. Audit of Commission's accounts.
27. Powers of auditors.

Part IV
**Investigation And Prevention Of Restrictive Practices,
Mergers And Monopoly Situations**

28. Power of Commission to investigate restrictive practices, mergers and monopoly situations.
29. Prohibition of certain acts pending investigation.
30. Negotiations by Commission.
31. Orders by Commission.
32. Factors to be considered by Commission when making orders.
33. Enforcement of orders.
34. Notification of proposed mergers.

Part V
**Authorization Of Restrictive Practices, Mergers
And Other Conduct**

35. Application to Commission for authorization.
36. Grant or refusal of authorization.
37. Effect of authorization.
38. Amendment or revocation of authorization.
39. Register of authorizations.

Part VI
Appeals

40. Right of appeal to Administrative Court.
41. Composition of Administrative Court for purposes of this Act.

Part VII
General

42. Unfair trade practices.
43. Certain conduct to have no legal effect.
44. Right of action of injured parties.
45. Commission may require returns.
46. Investigating officers.
47. Powers of entry and inspection.
48. Secrecy to be observed.
49. Certificates of Director to be evidence.
50. Regulations.

FIRST SCHEDULE: Unfair Trade Practices
SECOND SCHEDULE: Powers of Commission.

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.**
