

**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT**

**HANDBOOK ON COMPETITION LEGISLATION**

**VOLUME II**

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## 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 (UN Review Conference), 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 the general 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 need to improve their competition legislation or strengthen their institutions for effective enforcement, and therefore 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.7/8). Moreover, this Handbook together with the Model Law could be used in the provision of UNCTAD's technical assistance activities to countries introducing or revising their legislation.

The Handbook contains commentaries on competition legislation provided by States and published by the Secretariat in 2013-2014, as well as commentaries not included or provided after the publication of the previous (first) edition of the Handbook. It includes competition legislation of Albania, Algeria, Argentina, Armenia, Brazil, Chile, China, Colombia, Comoros, Ecuador, Ethiopia, Fiji, India, Israel, Jamaica, Malaysia, Mexico, Mongolia, Namibia, Pakista, Papua New Guinea, Paraguay, Peru, Philippines, Senegal, Seychelles, and Zambia. The UNCTAD Secretariat is grateful to the States that contributed to 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, as well as their revised competition laws.

**ALBANIA**

**LAW**

**NO. 9121 date 28.07**

**“ON COMPETITION PROTECTION”**

In pursuance of article 11 point 1, 78 and 83, point 1 of the Constitution, by the proposal of Council of Ministers,

THE ASSEMBLY

OF REPUBLIC OF ALBANIA

DECIDED

**PART I GENERAL**

**PROVISIONS**

Article 1

**Subject of the Law**

This law aims the protection of fair and effective market competition, defining the rules of conduct by undertakings, as well as the institutions responsible for protection of competition and their competencies.

Article 2

**Applicability**

1. This Law shall apply to:

- a) all undertakings and associations of undertakings, which directly or indirectly have or may have an influence in the market;
- b) all undertakings, as in paragraph 1 of this article, that exert activities in the territory of the Republic of Albania, as well as to the undertakings that exert activities abroad, when the consequences of this activity are demonstrated in the domestic market.

2. This Law shall not apply to relations between employers and employees, and to relations which are object of a collective contract between employers and trade union.

Article 3

**Definitions**

Under this Law, the below-mentioned terms have these meanings:

1. “Undertaking” means any legal or natural person, private or public, which performs economic activity. Public and local administration bodies, as well as public authorities and entities, are considered as undertaking if they engage in economic activity.
2. “Associations of undertakings” means any kind of associations, having regard to the considerations of fact or law involved, legal or natural person, private or public, profitable or not profitable, which protects the interests of member undertakings.
3. “Economic Activity” means the type of manufacturing, commercial, financial or professional activity, associated with purchase or sale of goods, as well as with offering of service.
4. “Agreements” means agreements of any kind between undertakings, with or without compelling force, decisions, or recommendations of associations of undertakings, or concerted practices among them operating at the same level(s), so horizontal agreements, or different level (s), so vertical agreements in the market.
5. “Dominant position” means the position of one or more undertakings if they are capable, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants in the market, such as competitors, clients or consumers.
6. “Product” means any goods sold or purchased, or services offered in the market by an undertaking.
7. “Relevant Market” means the market of products, which are mutually interchangeable from the point of view of the consumer related to its characteristics, price and their intended use in the area, and which are supplied and demanded by the undertakings concerned in a geographic area where the competition conditions are sufficiently homogenous and which can be clearly distinguished from neighboring areas.
8. “Authority of Competition”, hereinafter the Authority, is the body charged with the control of the application of this law.
9. “Commission of Competition”, hereinafter the Commission, is the decision-taking body of the Competition Authority.

## **PART II RESTRAINTS OF**

### **COMPETITION CHAPTER I**

#### **AGREEMENTS**

##### **Article 4**

##### **Prohibition of agreements**

1. All agreements which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which:

- 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;
  - ç) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - d) 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;
- shall be prohibited.

2. The prohibited agreements, under paragraph 1 of this article and those exempted under articles 5, 6 and 7 are not valid.

#### Article 5

#### **Exemption for Horizontal Agreements**

1. May be exempted from prohibition under article 4 the horizontal agreements which in particular, have as their object or effect the specialization or rationalization of economic activities, the research and development of products and processes, the joint purchasing or selling of products, from and to a single source, provided that they are justified on grounds of economic efficiency.

2. Agreements are deemed to be justified on grounds of economic efficiency, when they:

- a) reduce production and distribution costs, increase productivity, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally, promote development of small and medium enterprises, results, which cannot be achieved otherwise;
- b) allow consumers a fair share of resulting benefit;
- c) do not substantially restrict competition.

#### Article 6

#### **Exemption for Vertical Agreements**

1. May be exempted from prohibition under article 4 of this law, the vertical agreements, which are justified on grounds of economic efficiency, and have, in particular, as their object or effect:

- a) The restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer;
- b) The restriction of sales to end users by a buyer operating at the wholesale level of trade;

- c) The restriction of sales to unauthorized distributors by the members of a selective distribution system, where the supplying undertaking, directly or indirectly, sells the contracted products to selected distributors on the basis of specific criteria;
- ç) The restriction of the buyers ability to sell components, supplied for the purposes of incorporation to customers who use them to manufacture the same type of products as those produced by the supplier.

2. Article 5, paragraph 2 of this law shall apply mutatis mutandis for paragraph 1 of this article.

#### Article 7

### **Exemption for License Agreements**

1. License agreements and selling agreements of industrial property rights, may be exempted from the prohibition under article 4 of this law, if:

- a) the commercial freedom of the acquirer or licensee or other undertakings is not unfairly restricted, and
- b) competition on the market is not substantially impaired.

2. The prohibition under article 4, in particular, shall not apply to commitments restricting the acquirer or licensee if:

- a) they are justified by the seller's or licensor's interest in a technically satisfactory exploitation of the subject matter of the protected right,
- b) impose an obligation to exchange experience or to grant non-exclusive licenses in respect of inventions relating to improvements or new applications, provided such obligations correspond to similar obligations on the part of the seller or licensor,
- c) don't challenge the licensed protected right,
- ç) make minimum use of the licensed protected right or to pay a minimum fee,
- d) label the licensed products in a manner which does not exclude the reference to the manufacturer,

insofar as such restrictions do not exceed the term of the acquired or licensed protected right or of the right which constitutes the object of the license.

## **CHAPTER II**

### **THE ABUSE WITH MARKET DOMINANCE**

#### Article 8

### **Appraisal of dominant position**

The dominant position of one or more undertakings shall be determined particularly by establishing the following:



- a) the relevant market share of the investigated undertaking/s and that of the other competitors;
- b) the barriers to entry to the relevant market;
- c) the potential competition;
- ç) the economic and financial power of the undertakings;
- d) the economic dependence of the suppliers and purchasers;
- dh) the countervailing power of buyers/customers;
- e) the development of the undertaking's distribution network, and access to the sources of supply of products;
- ë) the undertaking's connections with other undertakings;
- f) other characteristics of the relevant market such as the homogeneity of the products, the transparency of the market, the undertaking cost and size symmetries, the stability of the demand or the free production capacities.

Article 9  
**Abuse of dominant position**

1. Any abuse by one or more undertakings of a dominant position in the market shall be prohibited.
2. Such abuse may, in particular, consist in:
  - a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
  - b) limiting production, markets or technical development;
  - c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - ç) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations;
  - d) the under-cutting of prices or other conditions which have as their object or effect the prevention of entry or the expulsion from the market for specific competitor(s) or one of their products;
  - dh) refusal to deal or refusal to license;
  - e) refusal to allow another undertaking access to its own networks or other infrastructure facilities of undertakings with a dominant position, against adequate remuneration, provided that without such concurrent use the other undertaking is unable to operate as a competitor of the undertaking with a dominant position.
3. Practices of one or more undertakings with a dominant position in the market shall not be considered abusive if these undertakings prove that these practices are committed for objective reasons, such as technical reasons or legal commercial reasons.

## **CHAPTER III**

### **CONTROL OF CONCENTRATIONS**

#### Article 10

##### **Definition of concentration**

1. Concentration of undertakings means:

- a) the merger of two or more undertakings or parts of undertakings hitherto independent of each other;
- b) any transaction when one or more undertakings acquire, directly or indirectly, a controlling interest in all or parts of one or more other undertakings;
- c) joint ventures exercising all the functions of an autonomous economic entity.

2. Control, under paragraph 1, point b) of this article, shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- a) ownership or the right to use all or part of the assets of an undertaking;
- b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

#### Article 11

##### **Acquiring shares for reselling**

If financial, credit or insurance institutions acquire shares in another undertaking for the purpose of resale, this shall not be deemed to constitute a concentration as long as they do not exercise the voting rights attaching to the shares and provided that the resale occurs within one year.

#### Article 12

##### **Scope of application**

1. The concentrations of undertakings are notified for authorization nearby the Authority if, in the last business year preceding the concentration:

- a) the combined worldwide turnover of all participating undertakings is more than 70 milliard Lek, or the domestic combined turnover of all participating undertakings is more than 800 million lek, and
- b) the domestic turnover of at least one participating undertaking is more than 500 million lek.

2. The concentrations, under paragraph 1 of this article, shall be notified within one week after the conclusion of the agreement, or the acquisition of a controlling interest, or the announcement of the public bid.

3. Participating undertakings, under this article, means:

- a) the undertakings merged, in case of a merger;
- b) the undertakings which acquire control and those subject of the control acquisition, in case of control acquisition;
- c) part of the undertaking, if the transaction has influence on it.

#### Article 13

#### **Appraisal of concentrations**

1. Commission prohibits a concentration which is expected to create or strengthen a dominant position by one or more undertakings.

2. Commission may not prohibit concentrations where one of the undertakings risks seriously a failure, there is no less anti-competitive alternative to the concentration, when:

- a) this undertaking is in such a situation that without the concentration it would exit the market in the near future;
- b) there is no serious prospects of re-organizing the activity of this undertaking.

#### Article 14

#### **Suspension of concentration**

1. A concentration, under article 10, shall not be put into effect either:

- a) before its notification nearby the Authority or
- b) until it has been authorized by the Authority, or
- c) until conditions attached to the authorization are fulfilled.

2. Legal and contractual transactions violating the prohibition of paragraph 1 of this article shall be of no effect, unless derogation has been granted as in article 60.

#### Article 15

#### **Calculation of turnover**

1. Aggregate turnover shall comprise the amounts derived by the undertakings concerned in the preceding business year from the sale of products falling within the undertakings ordinary activities after deduction of taxes directly related to turnover.

2. Where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

3. Two or more transactions, within the meaning of paragraph 2 of this article, which take place within a two-year period between the same undertakings, shall be treated as one and the same concentration arising on the date of the last transaction.

#### Article 16

#### **The turnover of participating undertakings part of a group**

1. If an undertaking concerned is part of a group, its aggregate turnover, under the meaning of article 15, shall be calculated by adding together the respective turnovers of the following:

- a) the undertaking concerned;
- b) those subsidiary 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 supervisory board, the administrative board or bodies legally representing the undertakings, or has the right to manage the undertakings' affairs;
- c) those parent undertakings which have in an undertaking concerned the rights or powers listed in point b);
- ç) those subsidiary of parent undertakings in which an undertaking as referred to in point c) of this paragraph has the rights or powers listed in point b);
- d) those undertakings in which two or more undertakings as referred to in a), b), c) and ç) of this paragraph jointly have the rights or powers listed in point b).

2. The aggregate turnover of the undertakings concerned does not include the sale of products amongst undertakings as listed in paragraph 1 of this article.

3. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 1, point b) of this article, in calculating the aggregate turnover of the undertakings concerned:

a) no account shall be taken of the turnover resulting from the sale of products between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 1, points b) to d) of this article;

b) account shall be taken of the turnover resulting from the sale of products between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

## Article 17

### **The turnover of credit institutions, other financial institutions and insurance undertakings**

1. For credit institutions and other financial institutions, in place of turnover as regards Article 15, paragraph 1, shall be used the sum of the following income items on the annual accounts and consolidated accounts of banks and other financial institutions, after deduction of taxes directly related to those items:

- a) interest income and similar income;
- b) income from shares and other variable yield securities, income from participating interests, income from shares in affiliated undertakings;
- c) commissions receivable;
- ç) net profit on financial operations;
- d) other operating incomes.

2. For insurance undertakings, in place of turnover as regards Article 15, paragraph 1, shall be used the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes charged by reference to the amounts above-mentioned.

3. Article 15, paragraphs 2, 3, and article 16 shall apply mutatis mutandis for paragraphs 1 and 2 of this article.

## **PART III**

### **COMPETITION AUTHORITY AND ADMINISTRATIVE PROCEDURES**

#### **CHAPTER I**

#### **ORGANIZATION AND FUNCTIONING OF COMPETITION AUTHORITY**

### Article 18

#### **Competition Authority**

1. The Authority is a public entity, independent in performing the tasks. The Authority is a legal entity, with its office in Tirana.
2. The Authority is compound of Commission and the Secretariat.

## Article 19

### **Competition Commission**

Commission is the decision-taking body of the Authority and is compound of five members. It acts as a permanent collegial body.

## Article 20

### **Criteria to be elected as a Commission member**

A Commission member can be elected if s/he complies with requirements as follow:

- a) to be an Albanian citizen;
- b) to have a working professional experience not less than 15 years;
- c) to be , for at least 5 years, members of the university academic body or to have title or scientific degree in economic or justice field, specialty “Civil/Administrative Law”;
- d) not to be dismissed from work or civil service by disciplinary action.

## Article 21

### **Commission members' election**

1. Commission members are appointed by the majority of the votes, in the presence of more than half of all the members of the Assembly of Albania, for a period of five years. The Assembly appoints the Chairman of the Commission. The Vice- Chairman is elected by the majority of the votes of all the members in the first meeting of the Commission.
2. Commission members may be reappointed not more than twice consecutively. Only for the first time of appointment, when this law will enter into force, the Chairman shall serve a five year term, the Vice Chairman four year term and three other members three year term.
3. Commission members are appointed by the Assembly, with alternative candidates, on the basis of the proposals as following:
  - a) One member is proposed by the President of the Republic of Albania;
  - b) Two members are proposed by the Council of Ministers;
  - c) Two members are proposed by the Assembly.
4. The compensation of the Commission members is determined by the Assembly.

## Article 22

### **Irreconcilability and release of Commission members**

1. Persons being part of high leading structures of political parties, members of leading structures of commercial associations or persons who exercise economic activity shall not be Commission members.

2. Commission members shall be replaced:

- a) by the end of its serving term;
- b) when he is released according to paragraph 3 of this article;
- c) when s/he dies;
- ç) when s/he resigns;
- d) is condemned by a Court final decision for committing a penal offence;
- e) is prohibited or suspended by the Court to exercise a duty as a civil servant or other function in public service or leading functions nearby juridical persons.

3. Commission member shall be released by a decision of the majority, in the presence of more than half of all the members of the Assembly, when:

- a) Has strongly infringed work ethics carrying out his/her duties;
- b) Is affected by mental or physical incapacity to carry out his/her duties;
- c) Is absent for more than one months unjustifiably;
- d) Lose his/her Albanian nationality.

## Article 23

### **Conflicts of interests**

No members of the Commission, including Commission Chairman and Vice Chairman, may take part in a case in which s/he has an interest, or if s/he represents or has represented one of the concerned parties. Where the challenge is contested, the Commission shall take a decision in the absence of Chairman, Vice Chairman or the member concerned.

## Article 24

### **Duties and Competences of the Commission**

Commission shall have these competencies:

- a) To compile the national competition policy;
- b) (*abolished*);
- c) To approve the internal functioning regulation of the Authority;
- ç) To supervise the Secretariat work for the application of the provisions of this Law;
- d) To take decisions on the basis of this Law;
- e) To issue by-laws and guidelines in compliance with this Law;

- f) To submit an annual report of the Authority to the Assembly within the first three months of the consequent year;
- g) To give evaluations to the Commissions of the Assembly, upon their requests, on issues related with competition and legislation in this field;
- h) To give evaluations and recommendations to central and local administration and other public institutions, trade associations, labor unions, consumer associations, commercial and industrial chambers on issues related with competition;
- i) To represent the Authority, within and abroad the country, in relationships with other and homologue institutions.

#### Article 25

#### **Duties of Commission Chairman**

1. Commission Chairman shall have these duties:
  - a) To prepare, call and lead Commission meetings;
  - b) To co-ordinate work amongst Commission members;
  - c) To sign Commission's acts, with the exception of the decisions to be signed by all the present members in the meeting;
  - d) to represent Authority in relation with third parties.
2. The Vice-Chairman carries out these duties in the absence of the Chairman.

#### Article 26

#### **Decision taking**

1. Commission meetings for decision taking are valid when at least four members are present, from which one will be either the Chairman or the Vice- Chairman, with the exception of the stipulated case in article 23 of this Law.
2. The simple majority of present members take decisions. The vote of meeting leader breaks the ties. The abstention is not allowed.

#### Article 27

#### **Competition Secretariat**

1. The Secretariat shall be managed by the General Secretary, who is elected by the Commission.
2. The Secretariat employee shall enjoy the status of civil servant.
3. The Secretariat investigators shall conduct the administrative investigations in compliance with the Code of Administrative Procedures, this Law and other legislation in force.

#### Article 28

#### **Competencies of the Secretariat**



- For the supervision of the application of the provisions of this Law, the Secretariat shall: a) monitor and analyze the conditions on the market to the extent necessary for the development of free and effective competition;
- b) conduct investigation in compliance with the procedures of Code of Administrative Procedures, this Law and other legislation in force;
  - c) compile and submit investigation reports to the Commission for decision-taking;
  - d) ensure publishing the decisions taken, by-laws issued according to this Law, and also the annual report of the Authority;
  - e) follow and supervise the implementation of the decisions taken by the Commission.

#### Article 29

### **Competencies of the General Secretary**

1. The General Secretary is in charge of the day-to-day work of the Secretariat. S/he, in absence or in incapacity to act, may delegate, by the approval of the Commission, his/her competences to one of the directors of Secretariat.
2. General Secretary is responsible for:
  - a) applying the procedures of this Law to deal with the cases;
  - b) compiling and submitting the concluding report of the investigation nearby the Commission for decision taking;
  - c) coordinating the departments work of the Secretariat;
  - d) preparing the annual report of the Authority;
  - e) co-operating with other institutions, within and abroad the country for resolving the cases;
  - f) signing Secretariat written correspondence.

#### Article 30

### **Keeping confidentiality and commercial secrets**

1. The members of the Commission and all Secretariat employees, or the other persons authorized by the Commission to apply this Law shall be subject to professional secrecy and shall not divulge to any person or authority whatsoever confidential information acquired owing to their duties, save in the event that they are to testify before a court. This is even after the termination of the duty.
2. Secretariat publications shall not contain information constituting commercial secret.

#### Article 31

### **Financing of the Authority**

1. The Assembly approves the annual budget for financing the Authority activity, which constitutes a separate article in State Budget.

2. The revenues collected according to this Law, including revenues from sanctions, are disbursed to the State Budget and are used according the legal acts in force.
3. The authority keeps accounts on factual expenditures and revenues, in compliance with Albanian accounting legislation.

## CHAPTER II

### GENERAL INVESTIGATIVE PROCEDURES

#### Article 32

##### **General principle**

In carrying out its duties, the Authority applies the Code of Administrative Procedures, in so far this Law doesn't provide otherwise.

#### Article 33

##### **Obligation to inform**

1. Undertakings being under investigation, undertakings requiring for an exemption, undertakings participating in a concentration, as well as other undertakings or persons whom might provide valuable information for the case, are obliged to provide any information by a request of Secretariat and at any time of the procedure.
2. Where the undertakings or persons do not supply the information requested within the period set in the request of the Secretariat or supplies incomplete information, or when the Commission considers as necessary, the Commission may demand the information concerned by a decision.
3. The Secretariat request and the Commission decision shall set the legal basis, the purpose and the time limit within which such information must be provided, as well as the stipulated sanctions in this Law in case of incompliance with the request or decision.
4. The undertakings and the persons, determined in paragraph 1 of this article, shall not refuse giving the information having commercial secrets.

#### Article 34

##### **Duties of public administration structures**

Central and local administration bodies, as well as other public institutions, co-operate with the Authority to ensure the provision of necessary information and evidences.

## Article 35

### **Investigative Competencies**

1. The Secretariat conducts all the necessary investigations nearby the undertakings and associations of undertakings, according to the procedures stipulated in this Law.
2. Upon the Secretariat request, Commission gives a written authorization to the Secretariat investigators to conduct necessary investigation, according to the procedures stipulated in this Law. To conduct the investigation, the Secretariat investigators must present the authorization, which contains the object and the purpose of the investigation and also the foreseen sanctions in article 73, 74, 76 and 78 of this Law.
3. When the necessary investigations are impeded, the Authority requests the Tax Police assistance.

## Article 36

### **Investigation in undertakings**

The Secretariat investigators and other authorized persons by the Commission, to investigate, may carry out searches by:

- a) entering into the premises, the means of transport, and on the land of undertakings during working hours;
- b) examining the books and other business records, irrespective of the medium on which they are stored, such as in a written or electronic form;
- c) taking or providing, copies, or extracts from the books or records;
- d) sealing any premises or books or business records, for not more than 72 hours, if such is necessary for the investigation;
- e) asking any representative or member staff of the undertaking for explanation relating to the subject-matter for facts and documents regarding the object and the purpose of the inspection.

## Article 37

### **Inspections in other environments**

1. The Secretariat investigators authorized by the decision of District Court where the inspection takes place, are empowered to enter:
  - a) at the domicile of the administrators, managers, directors and other staff members, as well as at the domicile and on the business premises of natural and legal persons, whether external or internal, in charge of commercial, accounting, administrative, tax and financial management, between 7.00 and 18.00;
  - b) on other premises, equivalent to the domicile, if there is reason based on facts and concrete circumstances to believe that on such premises, books or other professional documents are found, which might be deemed necessary to prove a serious infringement of articles 4 and 9 of this Law.
2. The Secretariat investigators, authorized by a Commission decision to investigate,

possess the powers stipulated in article 36, points a, b, c, d and in article 38 of this Law.

#### Article 38

##### **Seizure**

1. If it is necessary for the investigation, the investigators of the Authority may seize objects which may be of importance as evidence in the investigation for not more than 72 hours. The person affected by the seizure shall be informed thereof without undue delay.
2. The District Court where the seizure takes place, by a request of the Authority may extend the time limit of keeping the seizure as referred in paragraph 1 of this article, for not more than 6 months.
3. The investigators must take minutes, a copy of which shall be presented to the person affected by the seizure. The person affected shall be informed of the right to request judicial review of the seizure.

#### Article 39

##### **Hearings of the parties**

Before the Commission takes a final decision, the undertakings and the associations of undertakings have the right of being heard on the subject of the proceedings. The Commission shall base its decisions only on objections on which parties concerned have been able to comment.

#### Article 40

##### **Complaining against decisions**

1. A complaint can be made against the Authority decisions nearby Court of Tirana District, within 30 days from the decision notification.
2. The complaint does not suspend the application of the decisions which authorize concentrations and interim measures pursuant article 44 of this Law.
3. The Court of Tirana District may decide for a suspension, entirely or partly of these measures.

## CHAPTER III

### PROCEDURES ON AGREEMENTS AND ABUSE OF DOMINANT POSITION

#### SECTION I

#### PROCEDURES ON INVESTIGATIONS

##### Article 41

##### **Inquiries into sectors of the economy**

If, in any sector of the economy, the rigidity of prices or other circumstances suggest that competition is being restricted or distorted in the market, the Authority, by its initiative or at the request of the Assembly or of regulatory institutions of specific sectors, may conduct a general inquiry into that sector.

##### Article 42

##### **Procedures of preliminary investigations**

1. The Secretariat, by its own initiative, by the request of the undertakings concerned, or by a complaint of a third party, may initiate preliminary investigations. It initiates such a procedure in all cases when the Commission requires it. The procedures of preliminary investigations are followed on the basis of regulation on authority functioning.
2. The preliminary investigation procedure does not imply the right to consult files.

##### Article 43

##### **In-depth investigations**

1. If signs of a restraint of competition exist, the Secretariat, by the approval of Commission, shall open an in-depth investigation. It initiates such a procedure in all cases when the Commission requires it.
2. The Commission shall determine the order in which investigations shall be conducted, on the basis of regulation on Authority functioning.

##### Article 44

##### **Interim measures**

1. The Commission, by its initiative or by a request from the undertakings concerned and at any time of the procedure, may adopt interim measures, as stipulated in article 61, c),

ç), d) and dh) of this law, in cases of an emergency justified from a risk of serious and irreparable harm to competition and where there might be an infringement of articles 4 and 9.

2. The decision, as referred to paragraph 1 of this article, is taken for a specific time and may be renewed when it is necessary.

#### Article 45

### **Commission decisions**

1. Where the Commission finds that there is an infringement of articles 4 and 9, it by decision requires the undertakings concerned and associations of undertakings to bring such infringement to an end. To ensure the prohibition of the infringement, the Commission may impose on undertakings and association of undertakings any obligations necessary, including remedies of a structural nature. On the basis of the principle of the proportionality, structural remedies can be envisaged when the measures to act in a specified way or not to act, are not efficient.

2. Where the undertakings concerned offer commitments such as to meet the Commission's objections expressed in a preliminary estimation communicated to the undertakings, the Commission may, by decision, make those commitments binding on the undertakings as conditions and obligations.

#### Article 46

### **Revocation of the decisions**

Commission may revoke or modify its decisions by imposing conditions, or supplemented obligations, insofar as:

- a) One or some of the facts which has served as a basis of taking the decision has changed;
- b) The parties contravene an obligation attached to the decision;
- c) The decision is based on incorrect information or was obtained by means of deceit.

#### Article 47

### **Publication of opening the investigation and of decisions**

1. The Authority shall give notice of the opening of an in-depth investigation in the Authority Official Bulletin. Such notice shall state the purpose of the investigation and the parties concerned. It shall further invite concerned third parties to come forward if they wish to take part in the investigation. Non-publication shall not prevent the investigation from being conducted. In case of non-publication, the notification shall be published in the first succeeding number of Official Bulletin.

2. The Commission decisions taken for the infringement of articles 4 and 9 shall be published in the Authority Official Bulletin. The publication shall state the names of the

undertakings, their office, economic activity of the undertakings concerned, the main content of the decision, including also any penalties imposed.

## SECTION II

### PROCEDURES FOR EXEMPTION OF THE AGREEMENTS FROM PROHIBITION

#### Article 48

#### **Competencies to grant exemptions**

Commission is the only competent body to decide upon granting exemptions as referred in articles 5, 6 and 7 of this Law.

#### Article 49

#### **Notification of the agreements**

1. In order to be exempted from the prohibition, as referred to articles 5, 6 and 7, the horizontal, vertical and license agreements and changes and amendments thereto, must be notified to the Authority.

2. Notifications shall include the following particulars:

- a) name or other designation and place of business or registered seat of the participating undertakings;
- b) kind of economic activity;
- c) form, content and object of the agreements;
- d) market shares of the undertakings indicating the basis of their calculation and estimation;
- e) the authorized person to represent the undertaking during the procedures.

3. The notification, given to the Authority under paragraph 1 and 2 of this article, shall not contain incorrect information in order to obtain an exemption for the notifying party or for a third party, as referred in articles 5 and 6 of this Law, or to cause the Authority not to object in the cases stipulated in article 7. The Authority issues the guidelines for the notification form.

#### Article 50

#### **Decision on granting the exemption**

1. Agreements described in Articles 5 and 6 of this Law, may be exempted from the prohibition under Article 4 only by a decision of the Commission. The exemptions for agreements as referred in article 7 shall take effect, unless the Commission objects, by a decision, within a period of three months from receipt of the notification.

2. Exemptions may be granted with effect from the date of notification. The exemptions as referred in articles 5, 6, and 7 of this Law are limited in time and may be granted to the

undertakings subject to conditions and obligations.

3. Exemptions may, upon application, be extended in time, if the conditions of article 5, 6 and 7 of this Law continue to be satisfied. An extension shall be granted at least for those participating undertakings which have declared their consent thereto in writing to the Authority. The declaration shall be made independently by each undertaking and may be made only three months prior to the expiry of the exemption.

#### Article 51

#### **Revocation of the exemption**

1. Commission may revoke or modify its decisions, by imposing conditions or supplemented obligations, insofar as:

- a) one or some of the facts which has served as a basis of taking the decision has changed;
- b) the parties contravene an obligation attached to the decision;
- c) the exemption is based on incorrect information or was obtained by means of deceit;
- d) the parties abuse the granted exemption.

2. In the cases of points b), c) and d) of paragraph 1 of this article, the exemption decision shall be revoked with retroactive effect.

#### Article 52

#### **Publication of the notifications and decisions for exemptions**

1. The requests for exemption are published in the Authority Official Bulletin. The publication shall state the names, office, economic activity of the undertakings concerned, the main content of the agreement, and time limit within which third parties communicate their opinions.

2. Commission decisions taken in compliance with articles 5, 6 and 7 of this Law are published in the Authority Official Bulletin. The Publication shall state the name of the undertaking, its office, and economic activity of the undertakings concerned and the main content of the decision.



CHAPTER IV PROCEDURES ON  
CONCENTRATIONS

Article 53  
**Obligation to notify**

1. The obligation to notify shall be:
  - a) upon undertakings participating in the concentration;
  - b) upon the undertaking acquiring control of the whole or parts of one or more undertakings.
  
2. The notification shall indicate the form of the concentration and the following particulars with respect to every participating undertaking:
  - a) name and place of business or registered seat;
  - b) type of business;
  - c) the turnover in domestic market and worldwide;
  - d) the market shares of undertaking, including the bases for their calculation or estimate; d) in the case of an acquisition of shares in another undertaking, the size of the interest acquired by any undertaking and of the total interest held in this undertaking;
  - e) person authorized to represent the undertaking during the procedures.
  
3. The Authority issues the guidelines for the notification form and for the opportunity of a simplified notification.

Article 54

**Confirmation upon receipt of the notification**

The Authority shall acknowledge in writing to the notifying undertakings the receipt of notification and shall communicate them that the notification is complete. Where the notification is incomplete, the Authority shall ask the undertakings to complete the notification within a time limit.

Article 55

**Additional Information and Documents**

1. Undertakings concerned, undertakings being a part of a group as referred in article 16 of this Law, and undertakings which sell a participation or part of an undertaking, shall provide to the Authority, within a time limit specified by it, additional information and documents, as so far as they are of interest for assessing the concentration, even though the confirmation for receiving the complete information has been sent to them.

2. Authority may provide from other undertakings additional information and documents, as so far as they are of interest for assessing the concentration. Authority may inform them for the concentrations concerned, keeping the business secrecy of the participating undertakings, of the undertakings being a part of a group as referred in article 16 of this Law, and also of undertakings which sell a participation or part of an undertaking.

#### Article 56

##### **Preliminary procedures**

1. When it is found that the concentration reveals signs that it creates or strengthens a dominant position, within two months after received notification, the Commission shall decide to initiate an in-depth procedure or to authorize a concentration by conditions and obligations. Otherwise the Commission shall decide to authorize the concentration.

2. In case of an authorization with conditions and obligations, the time limit of paragraph 1 of this article, shall be extended with two weeks, if the undertaking concerned are committed to take measures to eliminate signs of creating or strengthening the dominant position. The proposed commitments from the undertaking are presented to the Authority not later than one month upon the date of notification receipt.

3. When it has not communicated within the deadlines set, concentration shall be deemed valid and may be put into effect without prejudice.

#### Article 57

##### **In-depth procedures**

1. The Commission, within three months starting from the initiation of in-depth proceeding, shall decide to declare if the concentration is prohibited or not.

2. In case of an authorization with conditions and obligations, the time limit set in paragraph 1 of this article is extended up to one month, if the undertakings concerned are committed to take measures to eliminate the creation or strengthening of the dominant position. The commitments proposed by undertakings are presented to the Authority not later than two months from the date of initiating the in-depth procedures.

3. When it has not communicated within the deadlines set, it shall be considered as a decision which authorizes a concentration and it may be put into effect without prejudice with the exception when:

- a) the time limit has been extended by the Commission with the consent of notifying undertakings;
- b) the time limit is extended by the request of the notifying undertakings;
- c) the time limit has been suspended by the Commission when it finds, by a decision, that participating undertakings have impeded the in-depth procedure.

## Article 58

### **Time limit**

1. The period of two months to initiate the preliminary procedure, on the basis of article 56 of this Law shall start at the following working day of complete concentration notification. The period of three months to initiate the in-depth procedure, on the basis of article 57, paragraph 1 of this Law shall start at the beginning of the working day following the date of the decision taken to initiate the in-depth procedure.

2. The periods foreseen in this Law shall end with expiry of the day of the last week having the same name with that day with which has started the period, when the period is defined in weeks and with expiry of the day of the last month having the same number with that day with which has started the period, when the period is defined in months. When such a day does not occur in the last month, the period shall end with the expiry of the last day of this month. Where the last day of the period is not a working day, the period shall end with the expiry of the following working day.

## Article 59

### **Procedures in the absence of notification**

If the concentration of the undertaking has taken place without notification, Commission, after finding out the infringement on the obligation to notify, shall start, by its initiative, procedures stipulated in this chapter. The time limit, set forth in article 56 of this Law, begin to run when the Commission is in possession of complete information that should be provided in a notification of concentration.

## Article 60

### **Derogation from prohibition**

1. The Commission may, on request from the undertaking concerned and at any time of the proceedings, grant derogation for a concentration, which shall exempt the undertakings from the obligations set in article 14 of this Law. The derogation may be granted if there are important reasons, in particular, to prevent serious and not repairable damages to participating undertaking or to a third party and taking into account the threat to competition posed by the concentration.

2. The derogation may be subject to conditions and obligations in order to ensure an effective competition.

## **Conditions and Obligations**

1. In case of an authorization with conditions and obligations, proportionally to the anti-competitive effects of the concentration, conditions and obligations may include, in particular:

- a) Sale of parts of undertakings;
- b) Sale of any kind of participation in an undertaking activity;
- c) Breaking or concluding contractual relationship;
- d) Giving licenses;
- e) Obligation to act or not to act in a certain way;
- e) Any other remedy enabling the elimination of anti-competitive effects;
- f) Any other remedy enabling the correct application of conditions and obligations.

2. The Authority shall give the opportunity to the undertakings to participate in the process of determining the conditions and obligations.

### Article 62

#### **Re-establishment of competition**

1. If a prohibited concentration has been carried out or if a concentration is prohibited after completion and if a concentration has been carried out without achieving and completing entirely the conditions attached to the authorization decision given on the basis of article 56 and 57 of this Law, the Commission imposes the participant undertakings to take the necessary steps to restore the former situation, in particular to conduct the separation of the merged undertakings or to rescind from the participations or acquired assets.

2. The Commission may require the participant undertakings to make proposals with a view to re-establish effective competition and setting them a deadline to this end. If the Commission accepts the proposed measures, it may decide how and by when the undertakings taking part shall implement them.

3. If the undertakings do not take the necessary measures or the Commission receives the proposals and it rejects them, it may order, by a decision, any necessary measure to restore the previous situation. It may take interim measures in order not to restrict the effective competition.

### Article 63

#### **Revocation**

The Commission may revoke the decision if:

- a) it is being taken based on the basis of inaccurate information supplied by the undertakings taking part;
- b) it has being taken by means of deceit;
- c) the undertakings concerned are in breach of an obligation attached to the authorization.

## Article 64

### **Publication of the notification and initiation of in-depth procedures**

1. Notification of a concentration and the decision to initiate an in-depth procedure are published in the Authority Official Bulletin. Non-publication shall not prevent the beginning of time limits and of in-depth procedures.
2. The publication shall state the names, office, economic activity of the undertakings concerned, the main content of the concentration, and time limit within which third parties communicate their opinions. The opinions of third parties communicate must be in written.
3. Commission decisions are published in the Authority Official Bulletin. The publication shall state the names, office, economic activity of the undertakings concerned, the main content of the concentration, including also any penalties imposed.

## PART IV

### CIVIL PROCEDURES

## Article 65

### **Actions arising from an obstacle to competition**

1. A person impeded in its activity, by a prohibited agreement as referred in article 4 of this Law, or by an abusive practice as referred in article 9 of this Law, may take an action in court and request:
  - a) removal or prevention of the restricting practices of competition which risks to be carried out or are carried out in contradiction of these articles;
  - b) reparations or compensations from damages caused, in accordance with relevant provisions of the Civil Code.
2. The actions may be taken despite an initiated procedure nearby the Authority.
3. The requests for exemption from prohibition of an agreement and the procedures of concentrations control shall not be within the jurisdiction of courts.

## Article 66

### **Exercise of actions**

1. In order to ensure removal or prevention of the obstacle, the District Court of Tirana may rule, at the plaintiff's request, in particular, that:
  - a) contracts are null in whole or in part, with a retroactive effect;
  - b) the undertaking, at the origin of the obstacle, must conclude contracts on market terms

with the undertaking impeded, under the conditions usually pertaining in the business concerned.

2. Within one month from the day of giving the decision, the District Court of Tirana sends to Authority copies of any decision, judged applying this Law.

#### Article 67

### **Provisional remedies**

In cases of infringements of articles 4 and 9 of this Law and of justified emergencies from the risk of causing serious and irreparable damages for the plaintiffs, the District Court of Tirana may take a decision on provisional remedies at plaintiff's request.

#### Article 68

### **Jurisdiction**

1. The actions taken from the application of this Law are arisen to the District Court of Tirana.

2. When the respondent party asks Authority for the exemption from prohibition of an agreement, the District Court of Tirana suspends the procedure and waits for the Commission decision.

## PART V

### COOPERATION WITH OTHER INSTITUTIONS

#### Article 69

### **Duties of central and local administration structures**

1. Central and local administration bodies require the Authority estimation for any draft normative act which, in particular, deals with:

- a) quantitative restrictions concerning trading and market access;
- b) establishment of exclusive rights or special rights in certain zones, for certain undertakings or products;
- c) imposing uniform practices in prices and selling conditions.

2. The Authority estimates the level of restriction or prevention of competition from draft normative acts, defined in paragraph 1 of this article.

## Article 70

### **Role of the Authority with regard to regulation and regulatory reform**

1. When carrying out the assigned tasks related to the regulation of the economic activity within the Republic of Albania, central and local administration bodies, regulatory entities shall ensure fair and effective competition.
2. In particular, regulatory barriers to competition incorporated in the economic and administrative regulation, for general-interest reasons, should be assessed by the Authority. In this case, the Authority makes relevant recommendations.
3. The Authority, in applying this law in regulated sectors, co-operates with regulatory entities and other regulatory institutions.

## Article 71

### **Exchange of information with homologue authorities**

1. The Authority may, upon a bilateral or multilateral agreement, within his purview, communicate information or the documents it holds or receives, on request, to relevant structure of the Commission of European Communities or to authorities of other States exercising similar functions, subject to reciprocity and on the conditions that the competent foreign authority is subject to trade secrecy rules with the same guaranties as in Albania.
2. Also, it may conduct investigation at the request of foreign authorities exercising similar functions and under condition of reciprocity.
3. The assistance requested by a foreign authority exercising similar functions in the conduct of investigations or transmission of information held or received by the Authority can be refused if the acceptance of the request can undermine Albania's sovereignty, security, essential economic interests or public order.

## Article 72

### **Suspension or termination of proceedings**

Where Authority and competition authorities of other States, which have reached a bilateral or multilateral agreement between them, have received a complaint or are acting on their own initiative under this law against the same infringement, the fact that one authority is dealing with the case may be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint.

## PART VI

### ADMINISTRATIVE VIOLATIONS AND SANCTIONS

## Article 73

### **Fines for not serious infringement**

1. The Commission, by decision, impose on undertakings or associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where:

a) they supply incorrect, incomplete or misleading information in response to a request made or decision taken pursuant article 33, paragraph 1 and 2 of this Law, or do not supply information within the time-limit fixed by a decision adopted pursuant to article 33, paragraph 2 and article 41 of this Law;

b) they supply incorrect, incomplete or misleading information in notifications pursuant articles 12 and 49 of this Law, or additional incorrect and incomplete information and documents pursuant article 55 of this Law;

c) they produce the required books or other business records in incomplete form during inspections under article 36, b) and c) of this Law, or refuse to submit to inspections ordered by a decision adopted pursuant to article 35, paragraph 1 and article 36, a) of this Law;

ç) they refuse to answer a question, as referred to evidences, under article 36, d) or give an incorrect, incomplete or misleading answer, or impede the foreseen inspection in article 36;

d) they break the seal authorized by officials of the Authority in accordance with Article 36, ç) of this Law.

2. For calculating the aggregate turnover, articles 15, 16 and 17 shall apply mutatis mutandis for paragraph 1 of this article.

## Article 74

### **Fines for serious infringements**

1. The Commission may, by decision, impose on undertakings fines from 2% to 10% of the total turnover of the preceding business year of each of the undertakings participating in the infringement where:

a) they infringe article 4 or article 9 of this Law;

b) they contravene a decision ordering interim measures under article 44 of this Law;

c) they fail to comply with a conditions and obligations by a decision pursuant to article 45, article 50, paragraph 2, articles 56, 57, and 60 paragraph 2 of this Law;

ç) they do not notify a concentration under the meaning of articles 10 and 12 of this Law;

d) they put into effect a concentration in contradiction with the obligation of article 14, except where the concentration is authorized expressly as referred in article 60 of this Law;

dh) they put into effect a concentration prohibited by the Commission or do not take the necessary measures to restore the competition as referred in article 62 of this Law.

2. For calculating the aggregate turnover, articles 15, 16 and 17 shall apply mutatis mutandis for paragraph 1 of this article.



Article 75  
**Determining the fine**

1. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement. When it is possible to calculate or estimate objectively the illegal profits of undertakings acquired infringing this Law, such a profit constitutes the minimal amount of fine.

2. Where a fine is imposed on an association of undertakings, under this Law the fine shall not exceed 1%, in case of article 73 of this Law, of the aggregate turnover of the preceding business year, or 10%, in case of article 74 of this Law, of aggregate turnover of preceding business year of each of the active member undertakings in the market concerned in the infringement of the association of undertaking.

3. If the association is not solvent, the Authority may require payment of the fine by any of the undertakings which were members of the association at the time the infringement was committed. The amount required to be paid by each individual member cannot exceed respectively 1%, in case of article 73 of this Law, of its aggregate turnover in the preceding business year, or 10%, in case of article 74 of this Law, of aggregate turnover in the preceding business year.

Article 76  
**Periodic penalty payments**

1. The Authority may, by decision, impose on undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year which is calculated from the date the decision has been taken, in order to compel them:

- a) to put an end to an infringement of Article 4 and 9, in accordance with a decision taken pursuant to Article 45 of this Law;
- b) to comply with a decision ordering interim measures taken pursuant to Article 44 of this Law;
- c) to comply with a commitment made binding by a decision pursuant to Article 45, article 50, paragraph 2, articles 56, 57, and 60 paragraph 2 of this Law;
- d) to supply complete and correct information which the Commission has requested by decision taken pursuant to Article 33, paragraph 2 of this Law;
- e) to submit to an inspection which it has ordered by decision taken pursuant to Article 36 of this Law;
- f) to fulfill the commitments to take the necessary measures for restoring the competition as referred in article 62 of this Law.

2. For calculating the aggregate turnover, articles 15, 16 and 17 shall apply *mutatis mutandis* for paragraph 1 of this article.

3. Where the undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Authority may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 75, paragraph 2 shall apply mutatis mutandis for this paragraph of this article.

#### Article 77

#### **Leniency**

1. Total or partial relief from the financial penalties may be granted to an undertaking which, together with others, engaged in a practice prohibited by the provisions of article 4, if it helped establishing the reality of the prohibited practice and identifying the perpetrators by providing items of information not previously available to the Authority.
2. The Commission issues an advice of leniency to the undertakings indicating the conditions for its application, specified in “Regulation for fines and leniency”. This advice is transmitted to the undertakings and remains confidential.
3. In the event of a decision the Commission may, if the conditions specified in the advice of leniency were observed, grant relief from financial penalties in proportion to the contribution made to identify and prohibit the violation.

#### Article 78

#### **Individual fines**

1. The Commission imposes fines on individuals up to amount 5 million lek on individuals, if they, intentionally or negligently, carry out or co-ordinate in actions stipulated in article 74, paragraph 1 and article 75, paragraph 1 of this Law.
2. Imposing fines as referred in paragraph 1 of this article shall be subject of prescribed time limits of 3 years in case of article 74, paragraph 1 and of 5 years in case of article 75, paragraph 2 of this Law.

#### Article 79

#### **Complaining**

Against Commission decisions imposing fines a complaint can be made to the District Court of Tirana within 30 days from the decision taken.

#### Article 80

#### **The body in charged of fine execution**

The body in charge of fine execution from this Law is Tax Police.

## **PART VII TRANSITIONARY**

### **PROVISIONS**

#### Article 81

#### **The Assembly obligation for Commission election**

The Assembly is in charge of electing five members of the Commission and to appoint its Chairman within 30th of November 2003.

#### Article 82

#### **Estimation of normative acts in force**

1. The Authority estimates, on the date of entrance into force of this Law, the level of restriction or prevention of competition from normative acts into power, in particular from acts stipulated in article 69, paragraph 1.
2. After two years and after being consulted with the relevant state bodies, the Authority prepares a particular report, accompanied with the recommendations for due changes for the Council of Ministers and for the Assembly, with the problems raised in these acts concerning with competition restrictions.

#### Article 83

#### **Transition provisions**

1. The existing agreements, on the date of entrance into power of this Law, must be notified within nine months in order to be exempted from the prohibition referred to article 4. The exemption, on this case, shall be granted from the time of entrance into power of this Law.
2. This Law shall not be applied for concentrations of undertakings if they are put into effect within one month from the entrance into power of this Law and when the agreement for merger or control acquisition and also the announcement of public bid for buying or exchange have been made before entrance into power of this Law. For such concentrations the Law no. 8044, dated 7.12.1995 "On Competition" shall be applied.
3. If the agreement which restrict competition or abusive practices of dominant position are notified and the effects on competition are eliminated within 6 months from the entrance into force of this Law, the foreseen sanctions of this Law shall not be applied.

#### Article 84

#### **Issuance of normative acts**

The Authority is in charge of issuing the normative acts as follows:

1. The regulation on the Authority functioning;
2. The regulation on defining the expenses to follow the procedures nearby the Authority;
3. The regulation for applying concentrations procedures of undertakings;
4. The regulation on fines and leniency.

Article 85  
**Abrogation**

Law no.8044, date 7.12.1995, “On Competition” shall be abrogated.  
3536

Article 86  
**Entrance into force**

This Law enters into force on 1st of December 2003.

**CHAIRMAN**  
**Servet PELLUMBI**

## ALGERIA

### Compilation of the Law in force of the Ordinance n° 03-03 of July 19<sup>th</sup>, 2003 relating to competition<sup>3</sup>

Title 1 - General provisions ( 1-3) Title 2 - Principles of competition Chapter one - Freedom of prices (4-5) Chapter two - Competition restrictive practices ( 6-14) Chapter three - Economic concentrations ( 15-22)  Title 3 – The competition council ( 23-33) Chapter two - Attributions of competition council (34-49) Chapter three – Procedure of Instruction ( 50-55) Chapter four - Penalties of restrictive practices and concentrations (56-62(a1)) Chapter five -Procedure of the appeal against decisions of the competition council (63-70)
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Title 4 -Transitional and final provisions (71-74)

#### **Title 1: GENERAL PROVISIONS**

**Article 1-** The present Ordinance aims to set conditions of competition practice on the market, to prevent any competition restrictive practice and to control economic concentrations, in order to stimulate economic efficiency and to improve consumers' welfare.

**Article 2-** The provisions of the present Ordinance are applied, despite any other provisions opposite to:

- Activities of production, including agriculture and breeding, activities of distribution, including those realized by the importers of goods for the resale in the state, attorneys, horse dealers and wholesale butchers; activities of services, crafts and fishing as well as activities realized by public legal entities, professional associations and corporations, whatever their status, their form and their object;
- Procurement contracts, from the publication of the tender until the final attribution of the contract.

However, the application of these provisions must not hinder the accomplishment of the public service missions or the exercise of public authority prerogatives.

**Article3-** It is agreed, within the meaning of the present Ordinance the following:

- a) Undertaking: shall mean any natural person or legal entity, whatever its nature, performing permanently activities of production, distribution, services or of importation.
- b) Market: shall mean any market of goods or services concerned by restrictive practice and those which are regarded identical or substitutable by the consumer, notably by reason of their characteristics, their prices and their intended use, as well as on the geographical area in which the undertakings concerned are involved in the supply of goods or services.

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<sup>3</sup>Modified and completed by the Law n° 08-12 of June 25<sup>th</sup>, 2008, in particular Articles 3,6,10,19,21(a),23,24,25,26,27,28,31,32,33,34,36,37,39,47,49,49(a),50,56,58,59,62(a),62(a1),63 and 70 and the Law n°10-05 of august 15<sup>th</sup>, 2010, in particular Articles 2,4,5,24 and 73(a).

- c) Dominant position : shall mean a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers or its suppliers;
- d) Condition of economic dependence: shall mean the commercial relationship in which one of the undertakings has no comparable alternative solution, if it refuses to contract within the conditions imposed by another undertaking, customer or supplier;
- e) Regulation: shall mean any measure whatever its nature, undertaken by any public institution and aiming to consolidate and guarantee the balance of the market forces and the rules of free competition, to remove obstacles that may hinder its access and its well-functioning as well as allowing an optimal economic allocation of market's resources between its different actors, in accordance with the provisions of the hereof Ordinance.

## **Title 2 -Principles of competition**

### **Chapter one- Freedom of prices**

**Article 4-**The prices of goods and services are freely determined pursuant to free and honest competition rules.

- The Freedom of prices is extended within the respect of the provisions of the legislation and the regulation in force, as well as equity and transparency rules concerning notably:
- The structure of prices of activities of production, distribution, supply of services and importation of goods for the resale in state;
- Profit margins for the production and the distribution of goods or supply of

services;

- Transparency in commercial practices.

**Article 5-** As regards to the application of the provisions of Article 4 above, it may be proceeded, by regulation, to the fixation, to the upper limit or ratification of margins and prices of goods and services, or homogenous categories of goods and services.

The measures of fixation, of upper limit or ratification of margins and prices of goods and services are taken on the basis of the proposals of the relevant sectors, for the main following grounds:

- The stabilization of the pricing level of essential goods and services or of wide consumption, in case of a significant market disruption;
- The fight against speculation under all its forms and the preservation of the consumer purchasing power.

The temporary measures of fixation or of upper limit of margins and prices of goods and services may be undertaken within the same forms, in the case of excessive and unjustified rise in prices, notably caused by a serious disruption of the market, a calamity, continuous difficulties of the supply process in a relevant activity sector or a concerned geographic area or by situations of natural monopolies.

## **Chapter two- Restrictive practices of competition**

**Article 6-** Shall be prohibited, if they result on the prevention, restriction or harm of the freedom of competition on the same market or on its substantial part, the practices and the concerted acts, conventions and explicit or tacit agreements, and in particular when they aim at:

- Restricting the access to market or carrying out commercial activities;
- Limiting or controlling the production, outlets, investments or technical progress;
- Allocating markets or supply resources.
- Hindering the process of price fixing through free rules of the market by favoring artificially their increase or decrease ;
- Applying unequal conditions to equivalent transactions with other trading partners, thereby placing them in a position of competitive disadvantage;
- Making the conclusion of agreements subject to acceptance by partners of supplementary transactions, which, by their nature or according to commercial usage, have no connection with the subject of such agreements;
- Allowing the grant of procurement contract for the benefit of authors of these restrictive practices.

**Article 7 -** Shall be prohibited, any abuse of a dominant or monopolistic position on the relevant market or in a substantial part of it, aiming at:

- Restricting the access to market or carrying out commercial activities;
- Limiting or controlling the production, outlets, investments or technical progress;
- Allocating markets or supply resources.

- Hindering the process of price fixing through free rules of the market by favoring artificially their increase or decrease ;
- Applying unequal conditions to equivalent transactions with other trading partners, thereby placing them in a position of competitive disadvantage;
- Making the conclusion of agreements subject to acceptance by partners of supplementary transactions, which, by their nature or according to commercial usage, have no connection with the subject of such agreements;

**Article 8-** The competition council may, upon an application of the concerned undertakings, notice that it is not appropriate, with regards to the elements in its possession, to intervene vis-à-vis an agreement, a concerted act, a convention or a practice as stated in Articles 6 and 7 mentioned above.

The procedures of application insertion from enjoying the provisions of the preceding subparagraph are determined by decree.

**Article 9 -** Are not subject to the provisions of Articles 6 and 7, agreements and practices resulting from the implementation of a legislative or a regulatory Law adopted for its application.

Shall be authorized, agreements and practices whose authors may justify that they have effects to ensure economic or technical progress, or contribute to improve employment, or allow small and medium enterprises to consolidate their competitive position on the market. Only agreements and practices that are authorized by the competition council shall benefit from this provision.

**Article 10 -** Shall be considered as a practice having an effect to prevent, to restrict or to distort efficient competition, and shall be prohibited, any act and/or contract, whatever its nature and its object, conferring to an undertaking the exclusive right to carry an activity within the scope of the application of the present Ordinance.

**Article 11-** Shall be prohibited, if it seems to harm efficient competition, the abusive exploitation by an undertaking towards another undertaking, customer or supplier who are on a dependent position. These abuses may consist on:

- Refusal to sale without legitimate ground ;
- Concomitant or discriminatory sale;
- Pre-packaged sale by purchasing minimal quantity ;
- Imposing a minimum resale price ;
- Breach of a trading relation on the sole ground that the partner refuses to submit to the unjustified trading conditions ;
- Any other action that aims at reducing or eliminating advantages of competition on a market.



**ARTICLE 12** - Shall be prohibited, pricing offers or practices of predatory pricing for consumers comparing to the cost of production, of transformation and of marketing, ever since these offers or practices have as object or may have as effect to eliminate from a market or to prevent the access to a market, an undertaking or one of its products.

**Article 13-** Without prejudice to the provisions of Articles 8 and 9 of the Ordinance hereof, is null any engagement, convention or contractual clauses relating to one of the prohibited practices by Articles 6,7,10,11,and 12 above.

**Article 14** - The practices referred to in Articles 6, 7, 10, 11, and 12 above, are qualified as restrictive competition practices.

### **Chapter three - Economic concentration**

**Article 15-** Pursuant to the Ordinance hereof, a concentration occurs when:

1. Two or more previously independent undertakings amalgamate;
2. One or more natural persons hold at least the control of one undertaking, or one or more other undertakings acquire directly or indirectly, either by capital shareholding or by purchase of assets, by contract or by any other mean, the control of the whole or parts of one or more other undertakings;
3. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

**Article 16-** The control referred to in subparagraph 2 of Article 15 above, result from the contract rights or other means which confer, either separately or jointly, and have regard to the circumstances of fact or Law involved, the possibility to enjoy decisive and sustainable influence over the activity of an undertaking in particular:

- 1- The rights of ownership or of use over all or a part of goods of an undertaking;
- 2- The rights or contracts that confer a decisive influence on the composition, the deliberations or the decisions of the undertaking's bodies.

**Article 17-** The concentrations which may violate the competition by strengthening in particular the dominant position of a single undertaking on a market, must be subject by their authors to the competition council which shall take a decision within three months.

**Article 18-** The provisions of Article 17 above are applied each time that the concentration aims at achieving a threshold more than 40 % from sales or purchases carried out on a market.

**Article 19-** The competition council, after obtaining the opinion of the Minister of Trade and the Minister in charge of the sector concerned by the concentration, may authorise or reject the concentration, with a substantiated decision.

The competition council authorisation may be accompanied with provisions in order to mitigate the concentration effects on competition. The merging undertakings may, by themselves, subscribe commitments aiming to mitigate the concentration effects on the competition.

The decision of reject of the concentration may be the subject of an appeal before the State Council.

**Article 20-** During the required time for the decision of the competition council, the authors of the operation of concentration may not take any measure rendering the concentration irreversible.

**Article 21-** When the general interest justifies it, the government may, on the basis of the report of the Minister of Trade and of the Minister in charge of the sector concerned by the concentration, authorize automatically or upon application of the parties involved, the implementation of the concentration previously rejected by the competition council.

**Article 21 (a) -** Shall be authorized, the concentrations of the undertakings resulting from the implementation of a legislative or a regulatory Law.

Besides, shall not be subject to the threshold stipulated in Article 18 mentioned above, the concentrations whose authors may justify that they have as effect, to improve their competitiveness, to contribute to develop employment or to allow small and medium enterprises to consolidate their competitive position on the market. However, only such concentrations having the competition council's authorization, shall benefit from this provision, within the conditions stipulated in Articles 17, 19 and 20 of the hereof Ordinance.

**Article 22-** The conditions and the procedures of the application for authorization concerning the operations of concentrations are determined by decree.

### **Title 3- The competition council**

**Article 23-** An autonomous administrative authority is created, hereinafter called "the Competition Council", enjoying legal status and financial autonomy, placed under the Minister of Trade.

The competition council's headquarters is located in Algiers.

**Article 24-** The competition council consists of twelve (12) members appropriate to the followings categories.

- 1- Six (06) members selected among personalities and experts holding at least a degree or an equivalent university degree and of professional experience of at least eight (8) years in juridical and/ or economic fields, and having competences in the fields of competition, distribution, consumption and intellectual properties;
- 2- four (04) members selected among the qualified professionals holding a university degree practicing or having practiced tasks of responsibility and having professional experience of at least five (05) years in the sectors of production, distribution, crafts, services and liberal professions ;

3- Two (02) qualified members representing the associations of consumers' protection.

The members of the competition council may perform their functions on a full- time basis.

**Article 25-** The President and the two (02) Vice- Presidents and the other members of the competition council are appointed by a Presidential decree.

The dismissal from their functions occurs within the same forms.

The President of the competition council is selected among the members of the first category, and his two Vice-

Presidents are respectively selected among the members of the second and the third categories referred to in

Article 24

above.

The competition council's members are renewed every four (4) years on the basis of half of the members constituting each of the categories mentioned in Article 24 above.

**Article 26-** Shall be appointed by the competition council, one secretary general, one general reporter and five

(05) reporters, appointed by a Presidential decree.

The general reporter and the reporters must have at least a degree or an equivalent university degree, and

having a professional experience of at least five (05) years, in accordance with missions assigned to them through the provisions of the Ordinance hereof.

The Minister of Trade appoints by order, his permanent representative and his substitute at the competition council. They attend the competition council's workshops without deliberative vote.

### **Chapter one- The functioning of the competition council**

**Article 27-** The competition council submits an annual activity report to the highest legislative body, to the head of the government and to the Minister of Trade.

The activity report is published in competition official bulletin provided for in Article 49 of the Ordinance hereof. It may also be published in full or in excerpts on any other appropriate data recording medium.

**Article 28-** The workshops of the competition council are directed by the President or the Vice - President who replaces him in case of absence or in case of impediment.

The competition council shall only be valid if at least eight (08) of its members attend the council. Meetings of the competition council shall not be public.

Decisions of the competition council shall be taken by the majority of the attendees; in case votes were equal, the President side shall be considered predominant.

**Article 29-** No member shall have the right to participate in deliberations concerning an issue brought before the council in which he bears any personal interest or he has family relationship with any party down to the fourth degree or in case he is representing any party.

Members of the competition council are bound by the professional secrecy.

The function of the competition council member is incompatible with any

other professional activity.

**Article 30-** Concerning the issues submitted to the competition council, and after due hearing the parties involved who have to submit an accurate report. The parties may be represented or be assisted by their lawyers or by any other person of their choice. The parties involved and the representative of the Minister of Trade have the right to access to the file and to obtain a copy of it.

However, the President may refuse, on his own initiative or on the application of the parties involved, the communication of attachments or documents compromising the business secrecy. In this case, these attachments or documents shall be withdrawn from the file. The decision of competition council cannot be founded on attachments or documents removed from the file.

**Article 31-** The organization and the functioning of the competition council are fixed by an executive decree.

**Article 32-** The remuneration scheme of the council competition's members, of the general secretary, of the general reporter and of the reporters, is fixed by an executive decree.

**Article 33-** The budget of the competition council is included in the indicative budget of the Trade's Ministry, pursuant to legislative and regulatory procedures in force. The President of the competition council is the authorizing officer of the budget. The budget of the competition council is subject to the rules of general functioning and control applicable to the budget of the State.

## **Chapter two- Attributions of the competition council**

**Article 34-** The competition council has the competence to decide, to propose and to give opinion, on its own initiative or at the application of the Minister of Trade or by any other concerned party, in order to promote and to guarantee by all useful means, the efficient regulation of the market and to fix all policies or measures to ensure the well-functioning of competition and to promote the competition in geographical areas where the activity sectors or competition do not exist or is inadequately developed.

Within this scope, the competition council may take any measure under the form of regulation, instruction or decree which shall be published in the competition Official Bulletin referred to in Article 49 of the Ordinance hereof.

The competition council may call upon any expert or listen to any person who is susceptible to provide the information.

It can also request departments in charge of economic investigations, in particular those of the Ministry of Trade, for the achievement of any inquiry or expertise relating to its competence.

**Article 35-** The competition council shall give its opinion on any question related to competition submitted by the government, and shall provide any proposal concerning the aspects of competition.

The competition council may also be consulted, on the same questions, by local authorities, economic and financial institutions, enterprises, vocational associations and syndicates as well as consumers' associations.

**Article 36-** The competition council is consulted on any legislative or regulatory draft relating to competition or introducing measures having effects, notably:

- 1- To subject the practice of a profession or an activity, or the access to a market, to quantitative restrictions ;
- 2- To establish exclusive rights in certain areas or activities ;
- 3- To set particular conditions to carry activities of production, of distribution and of services ;
- 4- To fix unified practices in matter of sale conditions.

**Article 37-** the competition council may undertake all useful actions within the scope of its competence, particularly any inquiry, study and expertise.

In case where initiated measures reveal restrictive competition practices, the competition council engages all necessary actions to put an end by fully applying the Law.

When the conducted investigations concerning conditions of application of legislative and regulatory texts relating to competition, reveal that the implementation of these texts results restriction to competition, why the competition council engages any appropriate action to put an end to these restrictions.

**Article 38-** For the affair processing linked to restrictive practices, as defined in this Ordinance; the jurisdictions shall seize the competition council to give its opinion.

The opinion is given only after a contradictory procedure, except when the council has already examined the concerned affair. The jurisdictions communicate to the competition council, upon its application, minutes or inquiries reports.

**Article 39-** When the competition council is seized of an affair related to an activity sector within the scope of competence of a regulatory authority, it immediately transfers one copy of the file to the concerned regulatory authority, in order to provide its opinion within no later than 30 days.

Within the scope of its missions, the competition council develops relations of cooperation, of coordination and exchange of information with regulatory authorities.

**Article 40-** Subject to reciprocity, the competition council may, within the limits of its competencies and in relation with competent authorities, communicate information or statements in its possession, or whatever it can collect, upon their application, for the foreign competition's authorities, enjoying the same competencies on the condition to ensure the professional secrecy.

**Article 41-** Under the same conditions as those stated in Article 40 mentioned above, the competition council may, on the application of foreign competition's authorities, launch investigations related to the competition restrictive practices. The investigation is carried out under the same conditions and procedures as those referred to in the attributions of the competition council.

**Article 42-** The provisions of Articles 40 and 41 mentioned above, are not applied in the case where the required information, documents or inquiries undermine the national sovereignty, Algerian economic interests or the internal public order.

**Article 43-** The competition council may, for the implementation of Articles 40 and 41 mentioned above; conclude conventions organizing relations with foreign authorities of competition having the same competencies.

**Article 44-** The competition council may be seized by the Minister of Trade. It may examine the matter of its motion or may be seized by any enterprise or, for any issue in which they are concerned, by the institutions and bodies referred to in subparagraph 2 of Article 35 of the Ordinance hereof. The competition council shall examine, if the practices and acts brought before it intervene within the scope of application of Articles 6, 7, 10, 11 and 12 mentioned above where are justified by the implementation of Article 9 above.

It may proclaim, through a substantiated decision, the inadmissible seisin, if it considers that the facts invoked do not fall within the scope of its competence or are not supported by enough cogent elements.

The competition council cannot be seized of affairs dating back more than three years, if no attempt aiming at their investigation, their certifying and their sanction has been made.

**Article 45-** In the case where the demands and files of which the council is seized or when it takes in hand, fall under the scope of its competencies, the competition council makes motivated injunctions aiming at putting an end to the competition restrictive practices noticed before. The council may impose pecuniary penalties applicable either immediately or in case of non-performance of the injunctions within the time-limit.

The council may also order the publication, distribution or the posting of its decision or an extract of thereof.

**Article 46-** The competition council may, upon a request of the complainant or of the Minister of Trade, takes interim measures to suspend presumed restrictive practices being the object of instruction, if it is so urgent to avoid situation likely to cause an imminent and an irreparable prejudice towards undertakings whose interests are affected by these practices or shall harm the general economic interest.

**Articles 47-** The decisions rendered by the competition council, are notified for execution, to the concerned parties by judicial officer.

Decisions are communicated to the Minister of Trade.

Under pain of nullity, the decisions must specify the time-limit for appeal, names, qualifications and addresses of the parties for whom they have been notified.

The execution of the decisions of competition council intervenes pursuant to the legislation in force.

**Article 48-** Any natural or legal person who feels aggrieved by a restrictive practice, as referred to in the hereof

Ordinance, may seize the appropriate court for redress in accordance with the legislation in force.

**Article 49-** The decisions rendered by the competition council, the Court of Algiers, the Supreme Court and the State Council in matter of competition, are published by the competition council in the competition Official Bulletin.

Extracts of these decisions and all other information shall furthermore be published under any other data recording medium.

The creation, the content and the elaboration methods of the competition Official Bulletin are defined by a regulatory process.

**Article 49 (a) -** Besides the officers and the judiciary police constables referred to in the penal code, are authorized to carry out investigations related to the application of the hereof Ordinance and to notice breaches to its provisions, the state employees cited below:

- The staff belonging to the specific bodies of control linked to the Trade administration;
- The concerned officers belonging to the services of the fiscal administration;
- The general reporter and the reporters of the competition council.

The general reporter and the reporters cited above should take an oath within the same conditions and

methods as those fixed for the staff belonging to the specific bodies of control linked to the administration of trade, and be commissioned pursuant to the legislation in force.

Within the execution of their missions and according to the implementation of provisions of the hereof Ordinance, the state employees cited above must decline their functions and present their employment commission.

The methods of control and the infringements certifying referred to in the hereof Ordinance intervene within the same conditions and forms as those fixed by the Law n° 04-02 of 5 Joumada El Oula 1425, corresponding to June 23<sup>rd</sup>, 2004, fixing the rules applied on trading practices and its application texts.

### **Chapter three - Procedure of instruction**

**Article 50** -The general reporter and the reporters instruct the affairs entrusted by the President of the competition council.

If they conclude to the inadmissibility pursuant to Article 44 of the hereof Ordinance, they inform the President of the competition council through a reasoned notice.

The general reporter ensures the coordination, the monitoring and the supervision of the reporters' workshops. The affairs linked to the activity sectors placed under the control of a regulatory authority are instructed in coordination with the services of the concerned authority.

**Article 51**- The reporter may, without being subject to oppose the professional secrecy, consult any document necessary for the instruction of the affair of which he is assigned.

He may demand the communication from any source of information and proceed with the documentation whatever its nature, in order to facilitate the accomplishment of his mission. These documents are joined to the report or returned at the end of the inquiry.

The reporter may collect all data and information necessary for his inquiry to the undertakings or to any other person. He determines the time-limit within which the information must be in his possession.

**Article 52**- The reporter draws up a preliminary report containing a presentation of facts as well as the reserved grievances. The report is notified by the president of the council to the concerned parties, to the Minister of Trade, as well as to the involved parties, who may formulate written observations within a time-limit which does not exceed three months.

**Article 53**- The auditions which the reporter proceeds, in case of need, give rise to a drawing up of minutes signed by the heard persons. In case of refusing to sign, the reporter should mention it. The heard persons may be assisted by a council.

**Article 54**- At the end of the instruction, the reporter tables a well-founded report before the competition council, containing reserved grievances, the reference to the committed infringements and a proposal for a decision as well as, in case of need, proposals with regulatory measures in accordance with the provisions of Article 37 mentioned above.

**Article 55**- The president of the competition council notifies the report to the parties and to the Minister of Trade who may present written observations within a time-limit of two months. He indicates as well the date of the hearing in relation to the affair. Written observations cited in subparagraph 1 mentioned above, shall be consulted by the parties within fifteen days before the audience date.

The reporter points out his observations upon the eventual written observations cited in subparagraph 1 mentioned above.



#### **Chapter four- Penalties of restrictive practices and concentrations**

**Article 56** - Restrictive practices referred to in Article 14 of the hereof Ordinance, are sanctioned by a fine which does not exceed 12% of the turnover's amount duty-free achieved in Algeria during the last financial year closed, or by a fine equals at least twice the illicit profit realized through these practices without being superior to four times this illicit profit; and if the contravener has no defined turnover, the fine shall not exceed 6 million dinars (6.000.000 DA).

**Article 57-** Is punished by a fine of 2.000.000 DA, any natural person who shall participate personally and fraudulently to the organization and to the implementation of the restrictive practices as defined by the present Ordinance.

**Article 58-** If the injunctions or the provisional measures referred to in Articles 45 and 46 of the hereof Ordinance, are not executed within the time-limit, the competition council may pronounce constraint with an amount which must not be lower than one hundred and fifty thousand dinars (150.000 DA) per day of delay.

**Article 59-** The competition council may, upon the reporter's report, decide a fine with a maximum amount of eight hundred thousand dinars (800.000DA), against the undertakings who, deliberately or by negligence, supply incorrect, misleading or incomplete information to a request for information pursuant to the provisions of Article 51 of the hereof Ordinance, or do not provide any required information within the time-limit fixed by the reporter.

Besides, the council may order a constraint which could not be lower than one hundred thousand dinars (100.000 DA) per day of delay.

**Article 60-** The competition council may decide to reduce the fine amount or may not order the fine against the undertakings that, during the instruction of the affair concerning them, recognize infringements referred to them, cooperate to the acceleration of the instruction and engage to commit no more infringements related to the implementation of provisions of the hereof Ordinance.

The provisions of subparagraph (1) above shall not be applied in case of recidivism, whatever the nature of the committed infringement.

**Article 61-**The operations of concentration subject to the provisions of Article 17 above and realized without the competition council authorization, are sanctioned with pecuniary fines may reach 7% of the turnover, duty – free realized in Algeria, during the last financial year closed, for each undertaking engaged in concentration or the undertaking resulting from concentration.

**Article 62-** In case of non-respect of the recommendations or the commitments mentioned in Article 19 above, the competition council may decide a pecuniary fine that may reach 5% of the turnover, duty–free realized in Algeria, during the last financial year closed, for each undertaking engaged in concentration or the undertaking resulting from concentration.

**Article 62 (a)**- in the case where each of the closed financial years mentioned in Articles 56, 61 and 62 of this Ordinance, do not reach the period of one year, the calculation of the pecuniary fines applied towards offenders is effectuated in reference to the amount of the turnover duty-free realized in Algeria during the accomplished activity period.

**Article 62 (a1)**- The fines stipulated in the provisions of Articles 56 to 62 of this Ordinance, are submitted by the competition council on the basis of criteria notably related to the gravity of offending practice, to the prejudice caused to economy, to the earnings accumulated by the offenders, at the level of the cooperation of the undertakings incriminated with the competition council during the instruction of the affair and to the importance of the involved undertaking position on the market.

#### **Chapter five- Procedure of appeal against the decisions of the competition council**

**Article 63**- The decisions of the competition council concerning restrictive practices of competition may be the object of an appeal before the Court of Algiers, ruling on commercial issue, by the concerned parties or by Minister of Trade, within a time-limit of no more than one (01) month from the date of receipt of the decision. The appeal formulated against provisional measures referred to in Article 46 of this Ordinance, is submitted within twenty (20) days.

The appeal before the Court of Algiers is not suspensive from the competition council decisions.

However, the President of the Court of Algiers may decide, within no later than fifteen days, to postpone the execution of the measures provided for in Articles 45 and 46 above pronounced by the competition council, when circumstances or serious facts require it.

**Article 64**- The appeal before the Court of Algiers against the decisions of the competition council is formulated by the proceeding parties, pursuant to the provisions of the Civil Code.

**Article 65**- Since the filing of the appeal request, a copy is transmitted to the President of the Competition Council and to the Minister of Trade, when this latter is not engaged in the proceeding.

The President of the Competition Council shall transmit to the President of the Court of Algiers the file of the affair, the object of the appeal, within the time-limit fixed by him.

**Article 66**- The magistrate reporter shall transmit to the Minister of Trade and to the President of the Competition Council for eventual observations, a copy of all new documents exchanged between the proceeding parties.

**Article 67-** The Trade Minister and the President of the competition council may present written observations within the time- limit fixed by the magistrate reporter. These observations are communicated to the proceeding parties.

**Article 68-** The relevant parties before the competition council and who are not engaged in the appeal, may join the proceeding or be implicated at any moment of the current procedure pursuant to the provisions of the Civil Code.

**Article 69-** An application for stay of execution stipulated in subparagraph 2 of Article 63 above, is formulated pursuant to the provisions of the Civil Code.

The application for suspension is submitted by the applicant to the main appeal or by the Trade Minister. This application is accepted only after the filing of the appeal, and must be accompanied with the decision of the competition council.

The President of the Court of Algiers requires the opinion of the Trade Minister upon the application for stay of execution, when he is not engaged in the proceeding.

**Article 70-** The decisions of the Court of Algiers, of the Supreme Court and of the State Council in matter of competition, are transmitted to the Trade Minister and to the President of the competition council.

#### **Title four- Transitional and final provisions**

**Article 71-**The recovery of fines and constraints decided by the competition council is carried out as being State duties.

**Article 72-** The affairs introduced before the competition council and the Court of Algiers before the entry in force of the hereof Ordinance continued to be instructed in accordance to the provisions of the Ordinance n°95-06 of January 25<sup>th</sup>, 1995, related to the competition and the texts taken for its application.

**Article 73-** Shall be abrogated, any provision contrary to those of the present Ordinance, notably the provisions of the Ordinance n°95-06 of January 25<sup>th</sup>, 1995, aforementioned. As a transitional measure, the provisions related to the title 4, to the title 5 and to the title 6 of the Ordinance n° 95-06 of January 25<sup>th</sup>, 1995, mentioned above as well as the texts taken for its application, remain in force, in the exception of:

- The Executive Decree n° 2000-314 of October 14<sup>th</sup>, 2000, defining the criteria conferring to an economic officer, the dominant position as well as those qualifying the acts constituting the abuses of dominant position;
- The Executive Decree n°2000-315 of October 14<sup>th</sup>, 2000, defining the appreciation criteria of the
  - projects of the concentration or concentrations that are abrogated.

**Article 73 (a)** - The provisions of the present Ordinance are accurate, in case of necessity, by regulatory process.

**Article 74-** The present Ordinance will be published in the Official Journal of People' Democratic Republic of Algeria.

## ARGENTINA

Esta norma fue consultada a través de InfoLEG, base de datos del Centro de Documentación e Información, Ministerio de Economía y Finanzas Públicas.

### DEFENSA DE LA COMPETENCIA

Ley 25.156

Acuerdos y prácticas prohibidas. Posición dominante. Concentraciones y Fusiones. Autoridad de aplicación. Presupuesto del Tribunal Nacional de Defensa de la Competencia. Procedimiento. Sanciones. Apelaciones. Prescripción. Disposiciones transitorias y complementarias.

Ver Antecedentes Normativos

Sancionada: Agosto 25 de 1999.

Promulgada: Septiembre 16 de 1999.

El Senado y Cámara de Diputados de la Nación Argentina reunidos en Congreso, etc., sancionan con fuerza de Ley:

### LEY DE DEFENSA DE LA COMPETENCIA

#### CAPITULO I

#### DE LOS ACUERDOS Y PRACTICAS PROHIBIDAS

ARTICULO 1° — Están prohibidos y serán sancionados de conformidad con las normas de la presente ley, los actos o conductas, de cualquier forma manifestados, relacionados con la producción e intercambio de bienes o servicios, que tengan por objeto o efecto limitar, restringir, falsear o distorsionar la competencia o el acceso al mercado o que constituyan abuso de una posición dominante en un mercado, de modo que pueda resultar perjuicio para el interés económico general.

Queda comprendida en este artículo, en tanto se den los supuestos del párrafo anterior, la obtención de ventajas competitivas significativas mediante la infracción declarada por acto administrativo o sentencia firme, de otras normas.

ARTICULO 2° — Las siguientes conductas, entre otras, en la medida que configuren las hipótesis del artículo 1°, constituyen prácticas restrictivas de la competencia:

- a) Fijar, concertar o manipular en forma directa o indirecta el precio de venta, o compra de bienes o servicios al que se ofrecen o demanden en el mercado, así como intercambiar información con el mismo objeto o efecto;
- b) Establecer obligaciones de producir, procesar, distribuir, comprar o comercializar sólo una cantidad restringida o limitada de bienes, o prestar un número, volumen o frecuencia restringido o limitado de servicios;
- c) Repartir en forma horizontal zonas, mercados, clientes y fuentes de aprovisionamiento;
- d) Concertar o coordinar posturas en las licitaciones o concursos;
- e) Concertar la limitación o control del desarrollo técnico o las inversiones destinadas a la producción o comercialización de bienes y servicios;
- f) Impedir, dificultar u obstaculizar a terceras personas la entrada o permanencia en un mercado o excluirlas de éste;
- g) Fijar, imponer o practicar, directa o indirectamente, en acuerdo con competidores o individualmente, de cualquier forma precios y condiciones de compra o de venta de bienes, de prestación de servicios o de producción;
- h) Regular mercados de bienes o servicios, mediante acuerdos para limitar o controlar la investigación y el desarrollo tecnológico, la producción de bienes o prestación de servicios, o para dificultar inversiones destinadas a la producción de bienes o servicios o su distribución;

i) Subordinar la venta de un bien a la adquisición de otro o a la utilización de un servicio, o subordinar la prestación de un servicio a la utilización de otro o a la adquisición de un bien;

j) Sujeter la compra o venta a la condición de no usar, adquirir, vender o abastecer bienes o servicios producidos, procesados, distribuidos o comercializados por un tercero;

k) Imponer condiciones discriminatorias para la adquisición o enajenación de bienes o servicios sin razones fundadas en los usos y costumbres comerciales;

l) Negarse injustificadamente a satisfacer pedidos concretos, para la compra o venta de bienes o servicios, efectuados en las condiciones vigentes en el mercado de que se trate;

ll) Suspender la provisión de un servicio monopolístico dominante en el mercado a un prestatario de servicios públicos o de interés público;

m) Enajenar bienes o prestar servicios a precios inferiores a su costo, sin razones fundadas en los usos y costumbres comerciales con la finalidad de desplazar la competencia en el mercado o de producir daños en la imagen o en el patrimonio o en el valor de las marcas de sus proveedores de bienes o servicios.

ARTICULO 3° — Quedan sometidas a las disposiciones de esta ley todas las personas físicas o jurídicas públicas o privadas, con o sin fines de lucro que realicen actividades económicas en todo o en parte del territorio nacional, y las que realicen actividades económicas fuera del país, en la medida en que sus actos, actividades o acuerdos puedan producir efectos en el mercado nacional.

A los efectos de esta ley, para determinar la verdadera naturaleza de los actos o conductas y acuerdos, atenderá a las situaciones y relaciones económicas que efectivamente se realicen, persigan o establezcan.

## CAPITULO II

### DE LA POSICION DOMINANTE

ARTICULO 4° —A los efectos de esta ley se entiende que una o más personas goza de posición dominante cuando para un determinado tipo de producto o servicio es la única oferente o demandante dentro del mercado nacional o en una o varias partes del mundo o, cuando sin ser única, no está expuesta a una competencia sustancial o, cuando por el grado de integración vertical u horizontal está en condiciones de determinar la viabilidad económica de un competidor participante en el mercado, en perjuicio de éstos.

ARTICULO 5° — A fin de establecer la existencia de posición dominante en un mercado, deberán considerarse las siguientes circunstancias:

- a) El grado en que el bien o servicio de que se trate, es sustituible por otros, ya sea de origen nacional como extranjero; las condiciones de tal sustitución y el tiempo requerido para la misma;
- b) El grado en que las restricciones normativas limiten el acceso de productos u oferentes o demandantes al mercado de que se trate;
- c) El grado en que el presunto responsable pueda influir unilateralmente en la formación de precios o restringir al abastecimiento o demanda en el mercado y el grado en que sus competidores puedan contrarrestar dicho poder.

## CAPITULO III

### DE LAS CONCENTRACIONES Y FUSIONES

ARTICULO 6° — A los efectos de esta ley se entiende por concentración económica la toma de control de una o varias empresas, a través de realización de los siguientes actos:

- a) La fusión entre empresas;
- b) La transferencia de fondos de comercio;



c) La adquisición de la propiedad o cualquier derecho sobre acciones o participaciones de capital o títulos de deuda que den cualquier tipo de derecho a ser convertidos en acciones o participaciones de capital o a tener cualquier tipo de influencia en las decisiones de la persona que los emita cuando tal adquisición otorgue al adquirente el control de, o la influencia sustancial sobre misma;

d) Cualquier otro acuerdo o acto que transfiera en forma fáctica o jurídica a una persona o grupo económico los activos de una empresa o le otorgue influencia determinante en la adopción de decisiones de administración ordinaria o extraordinaria de una empresa.

ARTICULO 7° — Se prohíben las concentraciones económicas cuyo objeto o efecto sea o pueda ser restringir o distorsionar la competencia, de modo que pueda resultar perjuicio para el interés económico general.

(Artículo sustituido por art. 1° del Decreto N° 396/2001 B.O. 5/4/2001.- Vigencia a partir del 9/4/2001).

ARTICULO 8° — Los actos indicados en el artículo 6° de esta Ley, cuando la suma del volumen de negocio total del conjunto de empresas afectadas supere en el país la suma de DOSCIENTOS MILLONES DE PESOS (\$ 200.000.000), deberán ser notificadas para su examen previamente o en el plazo de una semana a partir de la fecha de la conclusión del acuerdo, de la publicación de la oferta de compra o de canje, o de la adquisición de una participación de control, ante el Tribunal de Defensa de la Competencia, contándose el plazo a partir del momento en que se produzca el primero de los acontecimientos citados, bajo apercibimiento, en caso de incumplimiento, de lo previsto en el artículo 46 inciso d). Los actos sólo producirán efectos entre las partes o en relación a terceros una vez cumplidas las previsiones de los artículos 13 y 14 de la presente ley, según corresponda. (Párrafo sustituido por art. 2° del Decreto N° 396/2001 B.O. 5/4/2001.- Vigencia a partir del 9/4/2001).

A los efectos de la presente ley se entiende por volumen de negocios total los importes resultantes de la venta de productos y de la prestación de servicios realizados por las empresas afectadas durante el último ejercicio que correspondan a sus actividades ordinarias, previa deducción de los descuentos sobre ventas, así como del impuesto sobre el valor agregado y de otros impuestos directamente relacionados con el volumen de negocios.

Para el cálculo del volumen de negocios de la empresa afectada se sumarán los volúmenes de negocios de las empresas siguientes:

a) La empresa en cuestión;

b) Las empresas en las que la empresa en cuestión disponga, directa o indirectamente:

1. De más de la mitad del capital o del capital circulante.

2. Del poder de ejercer más de la mitad de los derechos de voto.

3. Del poder de designar más de la mitad de los miembros del consejo de vigilancia o de administración o de los órganos que representen legalmente a la empresa, o

4. Del derecho a dirigir las actividades de la empresa.

c) Aquellas empresas que dispongan de los derechos o facultades enumerados en el inciso b) con respecto a una empresa afectada.

d) Aquellas empresas en las que una empresa de las contempladas en el inciso c) disponga de los derechos o facultades enumerados en el inciso b).

e) Las empresas en cuestión en las que varias empresas de las contempladas en los incisos a) a d) dispongan conjuntamente de los derechos o facultades enumerados en el inciso b).

ARTICULO 9º — La falta de notificación de las operaciones previstas en el artículo anterior, será pasible de las sanciones establecidas en el artículo 46 inciso d).

ARTICULO 10. — Se encuentran exentas de la notificación obligatoria prevista en el artículo anterior las siguientes operaciones:

a) Las adquisiciones de empresas de las cuales el comprador ya poseía más del cincuenta por ciento (50%) de las acciones;

b) Las adquisiciones de bonos, debentures, acciones sin derecho a voto o títulos de deuda de empresas;

c) Las adquisiciones de una única empresa por parte de una única empresa extranjera que no posea previamente activos o acciones de otras empresas en la Argentina;

d) Adquisiciones de empresas liquidadas (que no hayan registrado actividad en el país en el último año).

e) Las operaciones de concentración económica previstas en el artículo 6° que requieren notificación de acuerdo a lo previsto en el artículo 8°, cuando el monto de la operación y el valor de los activos situados en la República Argentina que se absorban, adquieran, transfieran o se controlen no superen, cada uno de ellos, respectivamente, los VEINTE MILLONES DE PESOS (\$ 20.000.000), salvo que en el plazo de doce meses anteriores se hubieran efectuado operaciones que en conjunto superen dicho importe, o el de SESENTA MILLONES DE PESOS (\$ 60.000.000) en los últimos treinta y seis meses, siempre que en ambos casos se trate del mismo mercado. (Inciso incorporado por art. 3° del Decreto N° 396/2001 B.O. 5/4/2001.- Vigencia a partir del 9/4/2001).

ARTICULO 11. — El Tribunal Nacional de Defensa de la Competencia fijará con carácter general la información y antecedentes que las personas deberán proveer al Tribunal y los plazos en que dicha información y antecedentes deben ser provistos.

ARTICULO 12. — La reglamentación establecerá la forma y contenido adicional de la notificación de los proyectos de concentración económica y operaciones de control de empresas de modo que se garantice el carácter confidencial de las mismas.

ARTICULO 13. — En todos los casos sometidos a la notificación prevista en este capítulo, el Tribunal por resolución fundada, deberá decidir dentro de los cuarenta y cinco (45) días de presentada la solicitud y documentación respectiva:

a) Autorizar la operación;

b) Subordinar el acto al cumplimiento de las condiciones que el mismo Tribunal establezca;

c) Denegar la autorización.

La solicitud de documentación adicional deberá efectuarse en un único acto por etapa, que suspenderá el cómputo del plazo por una sola vez durante su transcurso, salvo que fuere incompleta. (Párrafo incorporado por art. 4° del Decreto N° 396/2001 B.O. 5/4/2001.- Vigencia a partir del 9/4/2001).

ARTICULO 14. — Transcurrido el plazo previsto en el artículo anterior sin mediar resolución al respecto, la operación se tendrá por autorizada tácitamente. La autorización tácita producirá en todos los casos los mismos efectos legales que la autorización expresa.

ARTICULO 15. — Las concentraciones que hayan sido notificadas y autorizadas no podrán ser impugnadas posteriormente en sede administrativa en base a información y documentación verificada por el Tribunal, salvo cuando dicha resolución se hubiera obtenido en base a información falsa o incompleta proporcionada por el solicitante.

ARTICULO 16. — Cuando la concentración económica involucre a empresas o personas cuya actividad económica esté reglada por el Estado nacional a través de un organismo de control regulador, el Tribunal Nacional de Defensa de Competencia, previo al dictado de su resolución, deberá requerir a dicho ente estatal un informe opinión fundada sobre la propuesta de concentración económica en cuanto al impacto sobre la competencia en el mercado respectivo o sobre el cumplimiento del marco regulatorio respectivo. El ente estatal deberá pronunciarse en el término máximo de noventa (90) días, transcurrido dicho plazo se entenderá que el mismo no objeta operación.

La opinión se requerirá dentro de los (TRES) 3 días de efectuada la solicitud. El plazo para su contestación será de (QUINCE) 15 días, y no suspenderá el plazo del artículo 13. (Párrafo incorporado por art. 5° del Decreto N° 396/2001 B.O. 5/4/2001.- Vigencia a partir del 9/4/2001).

## CAPITULO IV

### AUTORIDAD DE APLICACION

ARTICULO 17. — Créase el Tribunal Nacional de Defensa de la Competencia como organismo autárquico en el ámbito del Ministerio de Economía y Obras y Servicios Públicos de la Nación con el fin de aplicar y controlar el cumplimiento de esta ley. Tendrá su sede en la Ciudad de Buenos Aires pero podrá actuar, constituirse sesionar en cualquier lugar de la República

mediante delegados que designe el Presidente del Tribunal. Los delegados instructores podrán ser funcionarios nacionales, provinciales o municipales.

ARTICULO 18. — El Tribunal Nacional de Defensa de la Competencia estará integrado por siete (7) miembros con suficientes antecedentes e idoneidad para ejercer el cargo, de los cuales dos por lo menos serán abogados y otros dos profesionales en ciencias económicas, todos ellos con más de cinco (5) años en el ejercicio de la profesión. Los miembros del tribunal tendrán dedicación exclusiva durante su mandato, con excepción de la actividad docente.

Los integrantes del Tribunal deberán excusarse por las causas previstas en los incisos 1), 2), 3), 4), 5), 7), 8), 9 y 10) del artículo 16 del Código Procesal Civil y Comercial de la Nación.

ARTICULO 19. — Los miembros del Tribunal serán designados por el Poder Ejecutivo nacional previo concurso público de antecedentes y oposición ante un Jurado integrante por el procurador del Tesoro de la Nación, el secretario de Industria, Comercio y Minería del Ministerio de Economía Obras y Servicios Públicos de la Nación, los presidentes de las comisiones de Comercio de ambas Cámaras del Poder Legislativo de la Nación, el presidente de la Cámara Nacional de Apelaciones en lo Comercial y los presidentes de la Academia Nacional de Derecho y de la Academia Nacional de Ciencias Económicas.

ARTICULO 20. — Los miembros del Tribunal durarán en el ejercicio de sus funciones seis (6) años. La renovación de los mismos se hará parcialmente cada tres años y podrán ser reelegidos por los procedimientos establecidos en el artículo anterior. Al finalizar los tres primeros años se renovarán tres miembros y al finalizar los otros tres años, los cuatro miembros restantes. Sólo podrán ser removidos previa decisión —por mayoría simple— del Jurado mencionado en el artículo anterior.

La causa por remoción se formará obligatoriamente si existe acusación del Poder Ejecutivo nacional o del presidente del Tribunal y sólo por decisión del Jurado si la causa tuviera cualquier otro origen.

El Jurado dictará normas de procedimiento que aseguren el derecho de defensa y el debido trámite de la causa.

ARTICULO 21. — Son causas de remoción los miembros del tribunal:

a) Mal desempeño en sus funciones;

b) Negligencia reiterada que dilate la substanciación de los procesos;

c) Incapacidad sobreviniente;

d) Condena por delito doloso;

e) Violaciones de las normas sobre incompatibilidad;

f) No excusarse en los presupuestos previstos por el Código Procesal Civil y Comercial de Nación.

ARTICULO 22. — Será suspendido preventivamente y en forma inmediata en el ejercicio de sus funciones aquel integrante del Tribunal sobre el que recaiga auto de procesamiento por delito doloso.

ARTICULO 23. — Créase en el ámbito del Tribunal Nacional de Defensa de la Competencia Registro Nacional de Defensa de la Competencia, en el que deberán inscribirse las operaciones de concentración económica previstas en el Capítulo III y las resoluciones definitivas dictadas por el Tribunal. El Registro será público.

ARTICULO 24. — Son funciones y facultades del Tribunal Nacional de Defensa de la Competencia:

a) Realizar los estudios e investigaciones de mercado que considere pertinentes. Para ello podrá requerir a los particulares y autoridades nacionales, provinciales o municipales, y a las asociaciones de Defensa de Consumidores y de los usuarios, la documentación y colaboración que juzgue necesarias;

b) Celebrar audiencias con los presuntos responsables, denunciados, damnificados, testigos y peritos, recibirles declaración y ordenar careos, para lo cual podrá solicitar el auxilio de la fuerza pública;

c) Realizar las pericias necesarias sobre libros, documentos y demás elementos conducentes a la investigación, controlar existencias, comprobar orígenes y costos de materias primas u otros bienes;

d) Imponer las sanciones establecidas en la presente ley;

e) Promover el estudio y la investigación en materia de competencia;

f) Cuando lo considere pertinente emitir opinión en materia de competencia y libre competencia respecto de leyes, reglamentos, circulares y actos administrativos, sin que tales opiniones tengan efecto vinculante;

g) Emitir recomendaciones de carácter general o sectorial respecto a las modalidades de la competencia en los mercados;

h) Actuar con las dependencias competentes en la negociación de tratados, acuerdos o convenios internacionales en materia de regulación política de competencia y libre competencia;

i) Elaborar su reglamento interno, que establecerá, entre otras cuestiones, modo de elección y plazo del mandato del presidente, quien ejerce representación legal del Tribunal;

j) Organizar el Registro Nacional de la Competencia creado por esta ley;

k) Promover e instar acciones ante la Justicia, para lo cual designará representante legal a tal efecto;

l) Suspender los plazos procesales de la presente ley por resolución fundada;

ll) Acceder a los lugares objeto de inspección con el consentimiento de los ocupantes o mediante orden judicial la que será solicitada por el Tribunal ante el juez competente, quien deberá resolver en el plazo de 24 horas;

m) Solicitar al juez competente las medidas cautelares que estime pertinentes, las que deberán ser resueltas en el plazo de 24 horas;

n) Suscribir convenios con organismos provinciales o municipales para la habilitación de oficinas receptoras de denuncias en las provincias;

ñ) Al presidente del Tribunal le compete ejercer la función administrativa del organismo y podrá efectuar contrataciones de personal para la realización de trabajos específicos o extraordinarios que no puedan ser realizados por su planta permanente, fijando las condiciones de trabajo y su retribución. Las disposiciones de la ley, de contrato de trabajo regirán la relación con el personal de la planta permanente.

o) Propiciar soluciones consensuadas entre las partes;

p) Suscribir convenios con asociaciones de usuarios y consumidores para la promoción de la participación de las asociaciones de la comunidad en la defensa de la competencia y la transparencia de los mercados.

## CAPITULO V

### DEL PRESUPUESTO

ARTICULO 25. — El Tribunal Nacional de Defensa de la Competencia formulará anualmente el proyecto de presupuesto para su posterior elevación al Poder Ejecutivo nacional.

El Tribunal establecerá la fijación de aranceles que deberán abonar los interesados por las actuaciones que inicien ante el mismo. Su producido será destinado a sufragar los gastos ordinarios del organismo.

## CAPITULO VI

### DEL PROCEDIMIENTO



ARTICULO 26. — El procedimiento se iniciará de oficio o por denuncia realizada por cualquier persona física o jurídica, pública o privada.

ARTICULO 27. — Todos los plazos de esta ley se contarán por días hábiles administrativos.

ARTICULO 28. — La denuncia deberá contener:

- a) El nombre y domicilio del presentante;
- b) El nombre y domicilio del denunciante;
- c) El objeto de la denuncia, diciéndola con exactitud;
- d) Los hechos en que se funde, explicados claramente;
- e) El derecho expuesto suscintamente.

ARTICULO 29. — Si el Tribunal estimare que la denuncia es pertinente correrá traslado por diez (10) días al presunto responsable para que dé las explicaciones que estime conducentes. En caso de que el procedimiento se iniciare de oficio se correrá traslado de la relación de los hechos y la fundamentación que lo motivaron.

Se correrá traslado por el mismo plazo de la prueba ofrecida. (Párrafo incorporado por art. 6° del Decreto N° 396/2001 B.O. 5/4/2001.- Vigencia a partir del 9/4/2001).

ARTICULO 30. — Contestada la vista, o vencido su plazo, el Tribunal resolverá sobre la procedencia de la instrucción del sumario.

ARTICULO 31. — Si el Tribunal considera satisfactorias las explicaciones, o si concluida la instrucción no hubiere mérito suficiente para la prosecución del procedimiento, se dispondrá su archivo.

ARTICULO 32. — Concluida la instrucción del sumario el Tribunal notificará a los presuntos responsables para que en un plazo de quince (15) días efectúen su descargo y ofrezcan la prueba que consideren pertinente.

ARTICULO 33. — Las decisiones del Tribunal en materia de prueba son irrecurribles.

Sin embargo podrá plantearse al Tribunal reconsideración de las medidas de prueba dispuestas con relación a su pertinencia, admisibilidad, idoneidad y conducencia. (Párrafo incorporado por art. 7° del Decreto N° 396/2001 B.O. 5/4/2001.- Vigencia a partir del 9/4/2001).

ARTICULO 34. — Concluido el período de prueba, que será de noventa (90) días, — prorrogables por un período igual si existieran causas debidamente justificadas— o transcurrido el plazo para realizarlo, las partes podrán alegar en el plazo de seis (6) días sobre el mérito de la misma. El Tribunal dictará resolución en un plazo máximo de sesenta (60) días. La resolución del Tribunal pone fin a la vía administrativa.

ARTICULO 35. — El Tribunal en cualquier estado del procedimiento podrá imponer el cumplimiento de condiciones que establezca u ordenar el cese o la abstención de la conducta lesiva. Cuando se pudiere causar una grave lesión al régimen de competencia podrá ordenar las medidas que según las circunstancias fueren más aptas para prevenir dicha lesión. Contra esta resolución podrá interponerse recurso de apelación con efecto devolutivo, en la forma y términos previstos en los artículos 52 y 53.

En igual sentido podrá disponer de oficio o a pedido de parte la suspensión, modificación o revocación de las medidas dispuestas en virtud de circunstancias sobrevinientes o que no pudieron ser conocidas al momento de su adopción.

ARTICULO 36. — Hasta el dictado de la resolución del artículo 34 el presunto responsable podrá comprometerse al cese inmediato o gradual de los hechos investigados o a la modificación de aspectos relacionados con ello.

El compromiso estará sujeto a la aprobación del Tribunal Nacional de Defensa de la Competencia a los efectos de producir la suspensión del procedimiento.

Transcurridos tres (3) años del cumplimiento del compromiso del presente artículo, se archivarán las actuaciones.

ARTICULO 37. — El Tribunal podrá de oficio o a instancia de parte dentro de los tres (3) días de la notificación y sin substanciación, aclarar conceptos oscuros o suplir cualquier omisión que contengan sus resoluciones.

ARTICULO 38. — El Tribunal Nacional de Defensa de la Competencia decidirá la convocatoria a audiencia pública cuando lo considere oportuno para la marcha de las investigaciones.

ARTICULO 39. — La decisión del Tribunal Nacional de Defensa de la Competencia respecto de la realización de la audiencia deberá contener, según corresponda:

- a) Identificación de la investigación en curso;
- b) Carácter de la audiencia;
- c) Objetivo;
- d) Fecha, hora y lugar de realización;
- e) Requisitos para la asistencia y participación.

ARTICULO 40. — Las audiencias deberán ser convocadas con una antelación mínima de veinte (20) días y notificadas a las partes acreditadas en el expediente en un plazo no inferior a quince (15) días.

ARTICULO 41. — La convocatoria a audiencia pública deberá ser publicada en el Boletín Oficial y en dos diarios de circulación nacional con una antelación mínima de diez (10) días. Dicha publicación deberá contener al menos, la información prevista en el artículo 39.

ARTICULO 42. — El Tribunal podrá dar intervención como parte coadyuvante en los procedimientos que se substancien ante el mismo, a los afectados de los hechos investigados, a las asociaciones de consumidores y asociaciones empresarias reconocidas legalmente, a las provincias y a toda otra persona que pueda tener un interés legítimo en los hechos investigados.

ARTICULO 43. — El Tribunal podrá requerir dictámenes sobre los hechos investigados a personas físicas o jurídicas de carácter público o privado de reconocida versación.

ARTICULO 44. — Las resoluciones que establecen sanciones del Tribunal, una vez notificadas a los interesados y firmes, se publicarán en el Boletín Oficial y cuando aquél lo estime conveniente en los diarios de mayor circulación del país a costa del sancionado.

ARTICULO 45. — Quien incurriera en una falsa denuncia será pasible de las sanciones previstas en el artículo 46 inciso b) de la presente ley, cuando el denunciante hubiese utilizado datos o documentos falsos, con el propósito de causar daño a la competencia, sin perjuicio de las demás acciones civiles y penales que correspondieren.

## CAPITULO VII

### DE LAS SANCIONES

ARTICULO 46. — Las personas físicas o de existencia ideal que no cumplan con las disposiciones de esta ley, serán pasibles de las siguientes sanciones:

a) El cese de los actos o conductas previstas en los Capítulos I y II y, en su caso la remoción de sus efectos;

b) Los que realicen los actos prohibidos en los Capítulos I y II y en el artículo 13 del Capítulo III, serán sancionados con una multa de diez mil pesos (\$ 10.000) hasta ciento cincuenta millones de pesos (\$ 150.000.000), que se graduará en base a: 1. La pérdida incurrida por todas las personas afectadas por la actividad prohibida; 2. El beneficio obtenido por todas las personas involucradas en la actividad prohibida; 3. El valor de los activos involucrados de las personas indicadas en el punto 2 precedente, al momento en que se cometió la violación. En caso de reincidencia, los montos de la multa se duplicarán.

c) Sin perjuicio de otras sanciones que pudieren corresponder, cuando se verifiquen actos que constituyan abuso de posición dominante o cuando se constate que se ha adquirido o consolidado una posición monopólica u oligopólica en violación de las disposiciones de esta ley, el Tribunal podrá imponer el cumplimiento de condiciones que apunten a neutralizar los aspectos distorsivos

sobre la competencia o solicitar al juez competente que las empresas infractoras sean disueltas, liquidadas, desconcentradas o divididas;

d) Los que no cumplan con lo dispuesto en los artículos 8º, 35 y 36 serán pasibles de una multa de hasta un millón de pesos (\$ 1.000.000) diarios, contados desde el vencimiento de la obligación de notificar los proyectos de concentración económica o desde el momento en que se incumple el compromiso o la orden de cese o abstención.

Ello sin perjuicio de las demás sanciones que pudieren corresponder.

ARTICULO 47. — Las personas de existencia ideal son imputables por las conductas realizadas por las personas físicas que hubiesen actuado en nombre, con la ayuda o en beneficio de la persona de existencia ideal, y aún cuando el acto que hubiese servido de fundamento a la representación sea ineficaz.

ARTICULO 48. — Cuando las infracciones previstas en esta ley fueren cometidas por una persona de existencia ideal, la multa también se aplicará solidariamente a los directores, gerentes, administradores, síndicos o miembros del Consejo de Vigilancia, mandatarios o representantes legales de dicha persona de existencia ideal que por su acción o por la omisión de sus deberes de control, supervisión o vigilancia hubiesen contribuido, alentado o permitido la comisión de la infracción.

En tal caso, se podrá imponer sanción complementaria de inhabilitación para ejercer el comercio de uno (1) a diez (10) años a la persona de existencia ideal y a las personas enumeradas en el párrafo anterior.

ARTICULO 49. — El Tribunal en la imposición de multas deberá considerar la gravedad de la infracción, el daño causado, los indicios de intencionalidad, la participación del infractor en el mercado, el tamaño del mercado afectado, la duración de la práctica o concentración y la reincidencia o antecedentes del responsable, así como su capacidad económica.

ARTICULO 50. — Los que obstruyan o dificulten la investigación o no cumplan los requerimientos del Tribunal podrán ser sancionados con multas de hasta quinientos pesos (\$ 500) diarios.

Cuando a juicio del Tribunal se haya cometido la infracción mencionada, se dará vista de la imputación al presunto responsable, quien deberá efectuar los descargos y ofrecer pruebas en el plazo de cinco (5) días.

ARTICULO 51. — Las personas físicas o jurídicas damnificadas por los actos prohibidos por esta ley, podrán ejercer la acción de resarcimiento de daños y perjuicios conforme las normas del derecho común, ante el juez competente en esa materia.

## CAPITULO VIII

### DE LAS APELACIONES

ARTICULO 52. — Son apelables aquellas resoluciones dictadas por el Tribunal que ordenen:

- a) La aplicación de las sanciones de multa;
- b) El cese o la abstención de una conducta;
- c) La oposición o condicionamiento respecto de los actos previstos en el Capítulo III;
- d) La desestimación de la denuncia por parte del Tribunal de Defensa de la Competencia.

Las apelaciones previstas en el inciso a) se otorgarán con efecto suspensivo, y la de los incisos b), c), y d) se concederán con efecto devolutivo.

ARTICULO 53. — El recurso de apelación deberá interponerse y fundarse ante el Tribunal Nacional de Defensa de la Competencia dentro del plazo de quince (15) días de notificada la resolución. Dicho Tribunal dentro de los cinco (5) días de interpuesto el recurso deberá elevar el expediente a la Cámara Nacional de Apelaciones en Comercial o a la Cámara Federal que corresponda en el interior del país.

## CAPITULO IX

### DE LA PRESCRIPCIÓN

ARTICULO 54. — Las acciones que nacen de las infracciones previstas en esta ley prescriben los cinco (5) años.

ARTICULO 55. — Los plazos de prescripción se interrumpen con la denuncia o por la comisión de otro hecho sancionado por la presente ley.

## CAPITULO X

### DISPOSICIONES TRANSITORIAS Y COMPLEMENTARIAS

ARTICULO 56. — Será de aplicación en los casos no previstos por esta ley y su reglamentación el Código Penal de la Nación, el Código Procesal Penal y el Código Procesal Civil y Comercial de la Nación en cuanto sean compatibles con las disposiciones de esta ley.

ARTICULO 57. — No serán aplicables a las cuestiones regidas por esta ley las disposiciones de la ley 19.549.

ARTICULO 58. — Derógase la ley 22.262. No obstante ello, las causas en trámite a la fecha de entrada en vigencia de la presente ley, continuarán tramitando de acuerdo con sus disposiciones ante el órgano de aplicación de dicha norma, el que subsistirá hasta la constitución y puesta en funcionamiento del Tribunal Nacional de Defensa de la Competencia. Asimismo, entenderá en todas las causas promovidas a partir de la entrada en vigencia de esta ley. Constituido el Tribunal las causas serán giradas a éste a efectos de continuar con la substanciación de las mismas.

ARTICULO 59. — Queda derogada toda atribución de competencia relacionada con el objeto finalidad de esta ley otorgada a otros organismos o entes estatales.

ARTICULO 60. — El Poder Ejecutivo reglamentará la presente ley, en el término de ciento veinte (120) días, computados a partir de su publicación.

ARTICULO 61. — Comuníquese al Poder Ejecutivo.

DADA EN LA SALA DE SESIONES DEL CONGRESO ARGENTINO, EN BUENOS AIRES,  
LOS VEINTICINCO DIAS DEL MES DE AGOSTO DEL AÑO MIL NOVECIENTOS  
NOVENTA NUEVE.

—REGISTRADA BAJO EL N° 25.156—

ALBERTO R. PIERRI. — CARLOS RUCKAUF. — Juan Estrada. — Juan C. Oyarzún.

NOTA: Los textos en negrita, fueron observados por Decreto 1019/99.



## ARMENIA

### THE LAW OF THE REPUBLIC OF ARMENIA ON PROTECTION OF ECONOMIC COMPETITION (With further amendments and supplements)

Adopted on November 6, 2000

#### CHAPTER 1

#### GENERAL PROVISIONS ARTICLE 1.

##### PURPOSE OF THE LAW

The purpose of this Law is to protect and encourage free economic competition, ensure appropriate environment for fair competition, promote development of entrepreneurship and protection of consumers rights in the Republic of Armenia.

(Article 1 was supplemented by # HO-N Law adopted on 22.02.2007)

#### ARTICLE 2. SUBJECT OF REGULATION OF THE LAW

1. This Law shall apply to such targeted activities or conduct of economic entities, state and local government bodies, as well as their officials, which lead or may lead to restriction, prevention, prohibition of economic competition, or action of unfair competition, other than cases stipulated by the Law, as well as may prejudice the rights of consumers.
2. This Law shall not apply to relations connected with intellectual property rights, except for cases when these rights are used for the purpose of preventing, restricting or prohibiting the economic competition.
3. If international treaties of the Republic of Armenia define norms other than those stipulated by this Law, the international treaties shall apply.

(Parts 1 and 2 of Article 2 were amended by # HO-107-N Law adopted on 22.02.2007)

#### ARTICLE 3. THE LEGISLATION ON ECONOMIC COMPETITION PROTECTION

The legislation on economic competition protection comprises the Constitution of the Republic of Armenia, the Civil Code of the Republic of Armenia, this Law and other legal acts.

#### ARTICLE 4. BASIC CONCEPTS

1. Basic concepts used in this Law are as follows:  
*Economic competition or competition* – economic activity aimed at ensuring the most favorable conditions for selling or acquiring products, as a result of which possibilities of

each competitor to unilaterally influence on general conditions of the product circulation in the product market is objectively limited;

**Product** – any object of civil law, including property, work, service (including financial), which is envisaged for sale;

**Mutually substitutable products** – products which are comparable in terms of the significance of their use, application, qualitative, technical, price or other features, in a way that the acquirer substitutes or is ready to substitute them for one another;

**Product market** – the field of circulation of a product and its mutually substitutable products in a certain territory, the boundaries of which are defined by economic opportunities and expediency of the product acquisition by the buyer in the relevant territory. Product market is characterized by product type and geographic boundaries, the composition and volume of its subjects;

**Product type boundary of a product market** – completeness of a given product and its mutually substitutable products;

**Geographic boundary of a product market** – certain geographic territory (including road, air, water and overground route, etc), within which it is economically possible and expedient for the buyer to acquire the given product and its mutually substitutable products, and such possibility and expedience is not available outside the given territory. The geographic boundary of a product market may cover the entire territory of the Republic of Armenia or a part thereof, or the territory of the Republic of Armenia (or a part thereof) and other state (a part thereof);

**Subjects of a product market** – seller (realizer, supplier, alienator, provider, executor) and acquirer (buyer, recipient, acceptor, consumer) of the product and its mutually substitutable products;

**Product market volume** – the total sale or acquisition volume of a product and its mutually substitutable products within the geographic boundary of a product market in terms of quantity and (or) value:

**Realization** – sale, supply, alienation, provision, execution;

**Acquisition** – purchase, receipt, acceptance;

**Economic entity** – natural person (including sole proprietor), legal entity, other organization, its representative, representation, branch, a group of persons;

**A group of persons** – a group of legal and (or) natural persons with respect to which at least one of the following conditions is met:

- a person or several persons are entitled to dispose of (including by trading, trust management, joint activity contracts, commission or other transactions), whether directly or indirectly, more than a half of the authorized capital or share of an organization as a result of a contract (concerted practices), according to the procedure defined by the legislation;
- a person or persons obtain, either on a contractual basis or otherwise, the possibility to predetermine the decisions (including conditions for conducting entrepreneurial activity) adopted by other person or persons, or to exercise the powers of executive body;
- a person is entitled to appoint a sole executive body and (or) more than a half of the composition of a collective executive body, and (or) more than a half of the composition of an organization's management body has been elected upon his/her proposal;
- a natural person exercises the powers of an organization's executive body;
- the same natural persons, their spouses, parents, children, brothers, sisters and (or) other persons, who are elected upon proposal of the same organization, constitute more than a half of the composition of two or more organizations' management bodies, or upon proposal of the same organizations are elected in the composition of more than a half of their management bodies;

- the same natural persons, their spouses, parents, children, brothers, sisters and (or) legal entities are entitled to dispose of more than a half of shares in the authorized capital of more than one organizations;
- natural persons and(or) organization(s) dispose of, either independently or through their representatives, more than a half of shares in the authorized capital of one organization, and simultaneously the same natural persons, their spouses, parents, children, brothers, sisters, or persons proposed by the same organization constitute more than a half of the composition of an organization's management body;
- natural persons are spouses, parents, children, brothers or sisters.

***Delivery of an administrative (legal) act or other document*** (hereinafter referred to as "Correspondence") – sending a notification by registered mail to an addressee's location, place of residence or business, or postal or other address specified by the addressee, or delivering in person, or transmitting via other means of communication ensuring the proper execution of the message being delivered, or delivering in any other proper manner. Correspondence shall be deemed as properly sent (delivered) to the venue (address) or postal address specified in this paragraph, irrespective of the circumstance to whom it was provided. The organization providing postal communication service shall bear responsibility for damage caused to an addressee due to improper delivery of correspondence.

***Asset value*** – computed value of an asset in accordance with the accounting standards;

***Share*** - right to participate (share, stock, other security) in the authorized capital (capital stock) of a legal person.

2. The concepts defined in this Article shall be used only within the context of this Law and other legal acts adopted on the basis thereof.
3. Other concepts specified in this Law shall be applied in the meaning defined by the Constitution of the Republic of Armenia, Civil Code of the Republic of Armenia, other laws and other legal acts.

(Article 4 was amended by # HO-29-N Law adopted on 25.12.2003 and by # HO-107-N Law adopted on 22.02.2007)

## CHAPTER 2

### ANTICOMPETITIVE AGREEMENTS

#### ARTICLE 5. ANTICOMPETITIVE AGREEMENTS AND THEIR PROHIBITION

1. Within the context of this Law, anticompetitive agreements shall be deemed such transactions signed between economic entities, their agreements, directly or indirectly concerted practices or conduct, and decisions adopted by unions of economic entities (hereinafter "agreements"), which lead or may lead to, directly or indirectly, restriction, prevention or prohibition of competition in any product market, except for the cases stipulated in Part 6 of this Article.
2. Anticompetitive agreements shall refer to:
  - a) Establishment of discriminatory and/or differentiated sale and/or acquisition prices;
  - b) Unjustified increase, decrease or maintenance of a product price;

Within the context of this Sub-Clause, unjustified increase of price shall be deemed the increase of a product's and/or its substitutable products' price by two or more economic entities during a certain period of time.

Within the context of this Sub-Clause, unjustified decrease of price shall be deemed the decrease of a product's and/or its substitutable products' price by two or more economic entities during a certain period of time.

Within the context of this Sub-Clause, unjustified maintenance of a product price shall be deemed the maintenance of the price (including up to 5% change in the price) of a product and/or its substitutable products by two or more economic entities during a certain period of

time, in case when the occurrence of certain conditions (factors) could lead or would have led to establishment of lower or higher price.

- c) Division of the market according to territorial principle, sale or purchase volumes, product assortment, groups of sellers or acquirers, or otherwise;
  - d) Impediment to the market entry (restriction of the market entry) of other economic entities, or ousting them out from the market, as a result of which the economic entity did not enter the market or was ousted out from the market or made additional expenses not to be ousted out from the market;
  - e) Establishment, change or maintenance of discounts or privileges for sale or purchase prices, if they are targeted at ousting other economic entities out from the market;
  - f) Coming to an arrangement in regard to tender or auction conditions or falsification (distortion) of their results;
  - g) Offering or applying such conditions which lead or may lead to unequal competitive conditions;
  - h) Restriction of modernization or development or investments in trade or production of other economic entities;
  - i) Binding additional obligations to a contract party, including trading objects, which in their nature or implementation aspect are not related to the main subject of the contract;
  - j) Creation or maintenance of deficit in a product market to the prejudice of consumers' interests by means of product imports or unjustified contraction of production, or keeping, spoiling and destroying the products.
3. Anticompetitive agreements are signed between:
    - a) Economic entities (competitors) operating on the same product market (horizontal agreements);
    - b) Economic entities (non competitors – sellers and acquirers of the product and(or) its mutually substitutable products) with certain interrelation, operating on different product markets (vertical agreement);
  4. Anticompetitive agreements shall be deemed proven when:
    - a) any factual details (including any written document or other written evidence, video or record), or any other evidence not prohibited by the Law, are available;
    - b) the actions or conduct of economic entities as specified in Part 2 of this Article testify it.
  5. Conclusion (establishment) of anticompetitive agreements between economic entities shall be prohibited.
  6. Agreements of economic entities aimed at ensuring or enhancing their competitiveness shall not be deemed as anticompetitive if the total share of participants of such agreements does not exceed 20% of the given product market.
  7. Prior to signing (coming to) an agreement, the economic entities, in order to receive a conclusion, may apply to the state body for the protection of economic competition (The State Commission for the Protection of Economic Competition of the Republic of Armenia).

(Article 5 was amended by # HO-107-N Law adopted on 22.02.2007)  
(Chapter 2 was amended by # HO-107-N Law adopted on 22.02.2007)

### **CHAPTER 3 MONOPOLISTIC OR DOMINANT POSITION ARTICLE 6.**

#### **MONOPOLISTIC OR DOMINANT POSITION**

1. Within the meaning of this Law, an economic entity shall be deemed as having a monopolistic position on a product market if it has no competitor as a seller (acquirer).
2. An economic entity shall be deemed as having a dominant position on a product

market if as a seller (acquirer) it captures at least one third of the given market in terms of sale volumes.

3. Each of two economic entities having the largest sale (purchase) volumes on a product market shall be deemed as having a dominant position on the given product market if as seller (acquirer) they jointly capture at least ½ of the given market in terms of sale volumes.
4. Each of three economic entities having the largest sale (purchase) volumes on a product market shall be deemed as having a dominant position on the given product market if as seller (acquirer) they jointly capture at least two third of the given market in terms of sale volumes.
5. The Commission shall define the monopolistic or dominant position of economic entities, as well as the procedure on maintaining the Centralized Log (Register) of Economic Entities having Dominant Position.
6. An economic entity shall be recorded in the Centralized Log (Register) of Economic Entities having Dominant Position on product market, as well as shall be removed from the Log in case of losing that position.

(Article 6 was supplemented by # HO-398-N Law adopted on 28.06.2002 and amended by # HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 7. ABUSE OF MONOPOLISTIC OR DOMINANT POSITION**

1. Abuse of monopolistic or dominant position (hereinafter “Dominant Position”) by economic entities shall be prohibited.
2. Abuse of a dominant position shall be deemed:
  - a) Establishment or application of unjustified, discriminatory and (or) differentiated sale or acquisition prices or direct or indirect binding of other trading conditions conflicting the legislation;
  - b) Restriction of trade or modernization of production or investments of other economic entity;
  - c) Creation or maintenance of deficit in a product market to the prejudice of consumers’ interests by means of product imports, or unjustified contraction of production, or keeping, spoiling and destroying the products;
  - d) Application of discriminatory conditions towards consumers or other economic entities;
  - e) Binding additional obligations to a contract party, including trading objects, which in their nature or implementation aspect are not related to the subject of the contract;
  - f) Forcing economic entities to restructure or break economic relations;
  - g) Impediment to the market entry (restriction of the market entry) of other economic entities, or ousting them out from the market, as a result of which the economic entity did not enter the market or was ousted out from the market or made additional expenses not to be ousted out from the market
  - h) Offering or application of conditions that create or may create unequal competitive conditions, when similar conditions have not been offered to other economic entities operating on the product market;
  - i) Establishment, change or maintenance of discounts or privileges of sale or acquisition prices if they are targeted at the restriction of competition.

(Article 7 was supplemented by # HO-29-N Law adopted on 25.12.2003 and by # HO-91-N Law adopted on 04.05.2005, and was amended by # HO-107-N Law adopted on 22.02.2007)  
(Chapter 3 was amended by #HO-107-N Law adopted on 22.02.2007)

**CHAPTER 4**  
**CONCENTRATION**  
**ARTICLE 8. CONCEPT OF CONCENTRATION OF ECONOMIC ENTITIES**

The following shall be deemed as concentration of economic entities:

- a) Amalgamation or merger of economic entities;
- b) Acquisition of assets or shares of one economic entity by another if the acquisition per se or together with the assets or share already possessed by the acquirer constitutes 20% of assets or shares of such economic entity;
- c) Any amalgamation of economic entities due to which one economic entity may, directly or indirectly, influence on the decision making or competitiveness of another economic entity.

(Article 8 was amended by #HO-107-N Law adopted on 22.02.2007)

**ARTICLE 9. DECLARATION OF CONCENTRATION**

1. Concentration of economic entities, before its practicing or participation therein, shall be subject to declaration if:
  - a) The joint value of assets of the participants was at least 3 billion AMD in the financial year preceding its establishment;
  - b) Participants operate on the same product market, and the joint value of their assets was at least 1 billion AMD in the financial year preceding its establishment;
  - c) The value of assets of one of the participants was at least 3 billion AMD in the financial year preceding its establishment;
  - d) Participants operate on the same product market, and the value of assets of one of them was at least 1 billion AMD in the financial year preceding its establishment.
2. The declaration of concentration shall specify the type of concentration and the following information referring each participant:
  - a) Name, residency (location) address and business address;
  - b) Financial statements of annual activity as of the end of the year preceding the declaration and auditing conclusion concerning them. If one of the concentration participants started its activity in that year, the financial statements and auditing conclusion concerning them shall be presented as of the end of the month preceding the declaration.
  - c) Volumes of products sold during the preceding year according to their assortment, as well as the description of production capacities;
  - d) Other information referring the product market and activities of the market participants, if the declarer so wishes.
3. The procedure for declaration of concentration and the form of declaration shall be defined by the Commission.

(Article 9 was amended by #HO-107-N Law adopted on 22.02.2007)

**ARTICLE 10. STATE REGULATION OF CONCENTRATION**

1. Any concentration leading to a dominant position shall be prohibited, except for cases when it promotes the interests of consumers and (or) development of competitive environment in the product market.
2. The concentration which is subject to declaration or leads to a dominant position shall be permitted on the basis of the Commission's decision.
3. It shall be prohibited to practice or participate in concentration subject to declaration or leading to a dominant position prior to the adoption of Commission's decision.
4. Enacted prohibited concentration shall be subject to liquidation (annulment, ceasing)

according to the procedure defined by the legislation.

(Article 10 was amended by #HO-107-N Law adopted on 22.02.2007)

(Chapter 4 was amended by #HO-107-N Law adopted on 22.02.2007)

**CHAPTER 5**  
**UNFAIR COMPETITION ARTICLE 11.**  
**UNFAIR COMPETITION**

1. Any entrepreneurial activity or conduct conflicting this Law or business circulation traditions, breaking the principles of fairness, i.e. honesty, equity, verity and impartiality among competitors or between the latter and consumers shall be deemed as unfair competition.
2. Unfair competition shall be prohibited.
3. Any interested person, including consumer, who has incurred damage due to unfair competition shall be entitled to terminate unfair competition by applying to the Commission or court. This right shall also be reserved for organizations empowered to defend the interested persons' economic interests.

**ARTICLE 12. CREATING CONFUSION WITH RESPECT TO ECONOMIC ENTITY OR ITS ACTIVITY**

1. Any entrepreneurial activity or conduct, which causes or may cause confusion with respect to another economic entity, its activity or offered products, shall be deemed as an act of unfair competition.
2. In the context of this Article, confusion may be caused in particular with respect to:
  - a) Trademark and service mark, whether registered or not;
  - b) Trade name;
  - c) Appearance of products, for instance, industrial design, whether registered or not, packaging, color or any other non-functional features;
  - d) Civil circulation participants, products, other means of identification, for instance, business symbols, signs or letters substituting words, slogans;
  - e) Types of product presentation, including advertisement, uniform, product delivery style;
  - f) Use of names of celebrities, as well as popularity or reputation of recognized characters from fiction or art to foster product consumption demand.

**ARTICLE 13. DISCREDITING OF ECONOMIC ENTITY OR ITS ACTIVITY**

1. Any false or unjustified statement concerning entrepreneurial activity, which discredits or may discredit an economic entity, its activity or offered products, shall be deemed as an act of unfair competition.
2. In the context of the present Article, discrediting may occur while implementing measures to facilitate the promotion or dissemination of products, in particular with respect to:
  - Production process;
  - Suitability of products for certain purpose;
  - Quality, quantity or other features;
  - Offer and delivery conditions;
  - Price or its computation method.

## **ARTICLE 14. PUBLIC MISLEADING**

1. Any entrepreneurial activity or conduct that misleads or may mislead the public with respect to an economic entity or its activities or its offered products shall be deemed as an act of unfair competition.
2. In the context of this Article, misleading may be caused while implementing measures to facilitate the promotion or advertisement of products, in particularly it may be caused with respect to geographic origin of a product as well as the peculiarities specified in Part 2 of Article 13 hereof. Any unjustified exaggeration of the product quality, the failure to provide relevant information regarding the quality, quantity or other features, which may lead to a false impression (misinformation), forgery with regard to the personality of an advertiser, shall be deemed as misleading.

(Article 14 was amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 15. DAMAGE TO REPUTATION OR GOODWILL OF ECONOMIC ENTITY**

1. Any entrepreneurial activity or conduct which, irrespective of creating confusion, causes or may cause damage to reputation or goodwill (non-tangible assets) of an economic entity, shall be deemed as an act of unfair competition.
2. In the context of this Article, the damage to reputation or goodwill of economic entity may result from impairment of reputation or goodwill connected with the objects listed in Part 2 of Article 12 hereof.

Impairment of reputation or goodwill shall mean the diminution of distinguishing features or advertising significances (meaning) specified in Part 2 of Article 12 hereof, particularly when applying a sign similar or identical to the registered or well-known trademark of a certain product on completely different products.

(Article 15 was amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 16. UNFAIR COMPETITION WITH RESPECT TO UNDISCLOSED INFORMATION**

1. In the context of this Article, technical, organizational or commercial data, including production secrets (know-how), shall be deemed as undisclosed, if:
  - a) they, as a whole or by accurate inter-arrangement and integrity of their parts, are completely unknown or not easily accessible to persons usually dealing with such information;
  - b) they have certain actual or possible commercial value due to being unknown to third persons, but legitimate grounds for their easy accessibility are lacking;
  - c) their legitimate owner, whether a natural person or legal entity, has undertaken reasonable steps to retain the confidentiality of information under existing circumstances, such steps being expressed in the form of signing a relevant contract and (or) ensuring its conditions, initiating other preventive steps, maintaining them on identification information-carriers in the form of documents, electronic files, video and audio records, items embodying such data, etc.

The subject matter of undisclosed information may be production methods, chemical formulas, drawings, test samples, product sale and distribution methods, contract types, business plans, details of contractual prices, professional activity fields (profiles) of consumers, advertising strategy, lists of suppliers or clients, computer software, databases, etc..



Materials and data collected through administrative observations enclosed in reports shall not be deemed as undisclosed information.

2. Any entrepreneurial activity or conduct which may lead to acquisition, use and disclosure of undisclosed information without the consent of its lawful owner or in violation of traditions of business circulation shall be deemed as an act of unfair competition.
3. The rights stated in Part 3 of Article 11 hereof shall arise irrespective of any formalities (registration, issuance of certificate, etc.) performed with respect to undisclosed information and shall be effective as long as conditions stipulated by Part 1 of this Article are met.
4. In the context of this Article, following methods of acquisition, use and disclosure of undisclosed information shall be deemed as violation of business circulation traditions:
  - a) Industrial or business espionage or compulsion of such;
  - b) Breach, dissolution of or compulsion to a contract related with undisclosed information;
  - c) Breach of or compulsion to confidentiality;
  - d) Acquisition of undisclosed information by a third person who was aware or could have been aware that such acquisition would assume conducting activities specified in aforementioned Clauses.
5. Use of undisclosed information shall mean its application in entrepreneurial activity, as well as the introduction into economic circulation of products received or processed due to its application.
6. Disclosure of undisclosed information shall mean its publication, as well as its transfer to any other person who, by keeping it in secret, may gain tangible or other profit.
7. Any entrepreneurial activity or conduct shall be deemed as an act of unfair competition, if it constitutes or is followed by:
  - a) Unfair commercial use of pharmaceutical or agricultural chemical products received by means of using new chemical mixture, composition or compound, which were submitted to the authorized body for approval and were originated as a result of unfair commercial use of data of tests involving considerable efforts or of other undisclosed data;
  - b) Disclosure of data stated in Part "a" of this Clause, other than cases when it is necessary for the protection of public interests or when guarantees of data protection against their unfair commercial use are already in place.

In the context of this Part, unfair commercial use of data shall mean their sale to other persons, their use to produce identical or similar product, etc.

8. If the person illegally using undisclosed information has acquired it from a person not entitled to disseminate (publish) it, of which fact the user was unaware or was not obliged to be aware (honest acquirer), the legal owner of undisclosed information shall be entitled to claim compensation for damage caused to him/her as a result of using undisclosed information starting from the moment when the honest acquirer has become aware that the use of such information is illegal.
9. Taking into consideration the expenses incurred by an honest acquirer in connection with the use of undisclosed information, the court may permit its further use until compensation of sustained expenses.
10. Any person who has independently and legally acquired data constituting the content of undisclosed information, shall be entitled to use them irrespective of the rights of the relevant undisclosed data owner, and shall not bear any responsibility for its use before the latter.
11. Legal owner of undisclosed information may, based on a relevant contract, wholly or partially provide the data constituting its content to another person.
12. The person possessing undisclosed information under a relevant contract shall be obliged to undertake appropriate measures to keep its confidentiality, and as such, on

equal terms with the legal owner of undisclosed information, shall have the right to protect it from illegal use by a third party. Unless otherwise provided by the contract, the obligation of the person possessing undisclosed information to keep the confidentiality thereof shall survive the validity term of the license agreement, should the information be still considered undisclosed.

(Article 16 was amended by #HO-398-N Law adopted on 28.06.2002, #HO-86-N Law adopted on 26.05.2004 and #HO-107-N Law adopted on 22.02.2007)

**CHAPTER 5-1.**  
**STATE AID**  
**ARTICLE 16-1. STATE AID AND ITS PROHIBITION**

1. Within the context of this Law, the state aid shall be deemed any aid (including financial means, such as assistance, credit, borrowing, property, privileges or other conditions) provided by the government, state or local government body, state organization or organization with state participation to a concrete economic entity or a certain group of economic entities.
2. The state aid which directly or indirectly leads or may lead to the restriction, prevention or prohibition of competition in any product market, shall be prohibited, except for cases when the stated aid is envisaged by the Law.
3. This Article shall not cover the state aids which are directed at protection of the environment, solution of problems of social nature, compensation of damages caused by natural calamities or other exceptional cases, discharging of obligations stipulated by the Law or international contract.
4. The body (organization) having initiated the provision of the state aid, or the economic entity having applied for such aid, shall prior to provision of the state aid or applying for such aid be entitled to apply to the Commission to receive its conclusion.
5. The economic entity which has received prohibited state aid shall be obliged to return it within the timeframe defined by the Commission.

(Chapter 5-1 was supplemented by #HO-107-N Law adopted on 22.02.2007)

**CHAPTER 6**  
**THE STATE BODY FOR PROTECTION OF ECONOMIC COMPETITION**  
**ARTICLE 17. THE STATE BODY FOR PROTECTION OF ECONOMIC**  
**COMPETITION OF THE REPUBLIC OF ARMENIA**

1. To implement the state policy in the field of economic competition protection, a state body for economic competition protection – the Commission - shall be established.
2. The Commission shall be established according to the procedure defined in this Law, shall operate on the basis of this Law, other legal acts and its statute, and shall be independent within the scope of its authorities.

(Article 17 was amended by #HO-107-N Law adopted on 22.02.2007)

**ARTICLE 18. OBJECTIVES AND FUNCTIONS OF THE COMMISSION**

1. The objectives of the Commission shall be as follows:
  - a) Protection and promotion of economic competition to protect the development of entrepreneurship and consumer rights;
  - b) Ensuring of favorable environment for fair and free competition;
  - c) Prevention, restriction and precaution against anticompetitive practices;
  - d) Control over the economic competition protection.

2. To accomplish its objectives, the Commission shall perform the following main functions:

- exercise control over the compliance of the economic competition protection legislation;
- examine breaches of the economic competition protection legislation and adopt decisions;
- maintain the Centralized Register (Log) of Economic Entities having a Dominant Position;
- apply to the court in connection with cases of infringement of the economic competition protection legislation;
- participate in drafting of legal acts regulating economic competition development and the state policy in this field, as well as in their presentation pursuant to the prescribed procedure ;
- participate in signing of interstate agreements pertaining to issues falling within its competence;
- cooperate with the state bodies and non-government organizations of foreign states as well as with international organizations;
- develop and implement measures preventing the infringements of the economic competition protection legislation;
- summarize the experience of implementation of the economic competition protection legislation and draft proposals on its improvement;
- ensure publicity of its activity; publish a bulletin;
- carry out public explanatory works to notify the public about the liability stipulated by provisions of this Law;
- implement other activities falling within its competence.

(Article 18 was supplemented and amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 19. POWERS OF THE COMMISSION**

1. The Commission shall be entitled to:

a) Make decisions with respect to:

- Possible or factual violations of this Law;
- Studies of product markets;
- Research, inspection, study and (or) monitoring in connection with initiating or conducting administrative cases;
- Boundaries of product markets, existence of dominant position of economic entities on these markets, as well as on implementation of measures conditioned by that;
- Disaggregation (division, separation, alienation of shares or assets) of economic entities abusing their dominant position twice or more within a year;
- Discontinuation of infringements of this Law by economic entities or elimination of their consequences, restoration of the original position, amendment or dissolution of contracts contradicting this Law, signing of contracts with other economic entities;
- Incompliance of legal acts adopted by the state and local government bodies or their officials with the legislation on economic competition protection, providing conclusions on agreements to be signed, state aids as well as concentrations;
- Suspension, liquidation (annulment, ceasing), recognizing void of concentration or state aid;
- Imposition of penalties upon economic entities and their officials, officials of the state and local government bodies for infringement of this Law.

b) Conducting research, inspection, study and (or) monitoring according to

c) Control over implementation (maintenance) of the Commission

decisions;

the procedure defined by the law in order to disclose the reliability of information presented by economic entities, the actual activity of economic entities, or to exercise control over fulfillment of the Commission decisions;

- d) Apply to the court in connection with violations of this Law, including legal acts adopted by the state and local government bodies, with the request to recognize void, fully or partially, the contracts signed by economic entities in violation of this Law, as well as to amend or dissolve such contracts;
- e) Apply to the Government of the Republic of Armenia with petition to cease the actions of the state bodies or their officials which conflict this Law;
- f) Impose fines, exercise other sanctions stipulated by this Law;
- g) Adopt appropriate procedures connected with anticompetitive agreements, dominant positions, concentrations, unfair competition, state aid, as well as determination of product market;
- h) Provide explanations with respect to issues relating to the enforcement of the economic competition protection legislation;
- i) Exercise other powers envisaged by the legislation.

1<sup>1</sup>. The Commission decision referring disaggregation as stipulated in Clause “a” of Part 1 of this Article shall be subject to execution by economic entities no later than within 6 months;

1<sup>2</sup>. If any economic entity fails to submit within the defined timeframe the documents and other information necessary for examination, proceedings, research, inspection, study and (or) monitoring, or otherwise hampers their process, or necessary documents and other information are lacking, the Commission shall be entitled to make decisions based on the documents and other information at its disposal. Adoption of decisions as stipulated by this part shall not dispense economic entities from obligation of submitting such documents and other information or from the liability for the failure to submit them.

- 2. The Commission shall be independent of other state bodies in performing the objectives and functions defined by this Law.

(Article 19 was amended and supplemented by #HO-398-N Law adopted on 28.06.2007, #HO-91-N Law adopted on 04.05.2005 and #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 20. COMPOSITION OF THE COMMISSION AND VALIDITY TERM OF ITS POWERS**

- 1. The Commission shall be composed of seven members: the chair, deputy and five members.
- 2. The President of the Republic of Armenia shall appoint the Commissioners. The Commissioners, except the first composition, shall be appointed for a 5-year period.
- 3. Terms of powers of the first Commissioners shall be defined as follows:
  - one member - one year; one
  - member - two years; three
  - members - three years;
  - Commission Deputy Chair - four years;
  - Commission Chair - five years.

4. Commissioners may not be engaged in entrepreneurial activity, be a member of any representative body, hold any other state post nor do a paid job, except for scientific, creative and pedagogical activities.
5. Commissioners shall not be entitled, whether directly or indirectly, to receive gifts or other tangible profits from the product market participants.
6. Persons may not be appointed as Commissioners if they:
  - a) do not have higher education;
  - b) are not citizens of the Republic of Armenia;
  - c) are recognized incompetent or partially competent by a valid court decision;
  - d) have been convicted for committing an intentional crime by a valid court decision;
  - e) have been deprived of the right to hold a certain state post according to the procedure defined by the Law.

## **ARTICLE 21. TERMINATION OF POWERS OF COMMISSIONERS**

1. Powers of a Commissioner may be terminated by the President of the Republic of Armenia on the basis of the Commissioner's application in cases specified in Clauses "c", "d" and "e" of Part 6 of Article 20, as well as upon suspension of his/her citizenship of the Republic of Armenia, taking another job, neglecting the official duties, or failure to perform the official duties for more than 6 months due to disease or for any other reason.
2. In case of termination of a Commissioner's powers, the President of the Republic of Armenia shall within ten days appoint a Commissioner for a 5-year period.
3. A Commissioner may be reappointed to the same position after expiry of the term of his/her powers.

(Article 21 was amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 22. THE COMMISSION STAFF**

The Commission shall organize its activities through its Staff, the statute of which shall be approved by the Commission.

(Article 22 was amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 23. THE COMMISSION CHAIR**

1. The Commission Chair shall:
  - a) Represent the Commission in the Republic of Armenia, other states and international organizations within his/her authority;
  - b) Manage and coordinate the normal functioning of the Commission, distribute official duties among the Commissioners;
  - c) Participate in the government sessions with an advisory vote and provide written comments on issues discussed during the sessions, which shall be enclosed with the session minute;
  - d) Call and preside at the Commission meetings, approve agendas of sessions;
  - e) Organize implementation of decisions adopted by the Commission;
  - f) Sign the Commission decisions and the session minutes;
  - g) Approve the list of the Commission staff, act as employer's representative for Commissioners and employees appointed by him/her, recruit and dismiss the

commission staff employees within the frame of his/her competence, act in the court on behalf of the Commission and issue powers of attorney to act in the court on behalf of the Commission, exercise other powers reserved by this Law, other legal acts and the Commission Statute.

2. In case of absence of the Chair or impossibility to perform his/her official duties the Commission Chair shall be replaced by the Deputy Chair, and in case of absence of the latter or impossibility to perform the official duties, by the eldest Commissioner.

(Article 23 was amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 24. CONFLICT OF INTERESTS**

1. Any Commissioner holding personal interest in any issue subject to discussion at the Commission session shall be obliged to disclose to other members the fact and nature of his/her interest, which should be recorded in the session minutes. After this notification, the stated Commissioner shall:
  - a) Renounce his/her participation in the session for discussion of the issue in question;
  - b) Not be regarded for ensuring the eligibility of the given session.
2. The person whose issue is the subject matter of discussion may challenge the Commissioner if the latter holds personal interest in the discussed issue.

## **ARTICLE 25. DECLARATION OF COMMISSIONERS' INCOMES**

Commissioners shall submit their income declarations according to the procedure defined in the Law.

(Article 25 was amended by #HO-91-N Law adopted on 04.05.2005)

## **ARTICLE 26. THE COMMISSION STATUTE**

1. The Commission Statute shall define the procedure of the Commission activity.
2. The Commission shall approve the Commission Statute.

(Article 26 was amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 27. ANNUAL PROGRAM AND REPORT**

The Commission shall:

1. Each year, by October 1, publish in the National Assembly its annual program for the coming year, which shall contain brief information on:
  - a) Analysis of economic competition environment and detection of existing key issues;
  - b) Measures and the schedule of implementation of economic competition protection;
  - c) Economic competition regulatory mechanisms;
  - d) Other necessary provisions defined by the Commission for the implementation of the objectives and functions set forth in this Law.
2. Each year, by May 1, the Commission shall publish a report on the previous year's activity which shall include:
  - 1) brief information on the Commission activities;
  - 2) product markets analysis;
  - 3) measures undertaken towards regulation and supervision of economic competition;
  - 4) financial report of its activity.

(Article 27 was amended by #HO-436-N Law adopted on 23.10.2002)

## **ARTICLE 28. DUTIES OF ECONOMIC ENTITIES, STATE ADMINISTRATION AND LOCAL GOVERNMENT BODIES IN PROVIDING DATA TO THE COMMISSION**

1. To perform the functions stipulated in this Law, the state administration and local government bodies, as well as their officials shall upon the Commission's request provide documents and other data.
2. In connection with conducting proceeding, research, inspection, study (including a study of a product market) and (or) monitoring, or with other issues related to economic entities, based on the decision adopted by the Commission the economic entities shall be obliged to submit documents and other information defined by the decision.
3. Economic entities registered in the Centralized Register of Economic Entities having Dominant Position shall be obliged to submit to the Commission, according to the procedure defined by the latter and at 6-month intervals, information regarding the volumes of products sold (acquired) by them on the given product market, cost structure and price flows (in case of price changes – with appropriate justifications) as of July 1<sup>st</sup> and January 1<sup>st</sup> of the coming year - by August 15<sup>th</sup> of the current year and February 15<sup>th</sup> of the coming year, respectively.

(Article 28 was amended and supplemented by #HO-29-N Law adopted on 25.12.2003, #HO-91-N Law adopted on 04.05.2005 and #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 29. ANNUAL EXPENSES OF THE COMMISSION**

1. Financing of the Commission shall be carried out on the account of the state budget. The Commission Chair, following the Law on Budget System, shall submit the Commission's budget of expenses within the defined timeframe to the Government of the Republic of Armenia for inclusion in the draft state budget. The budget request shall be included in the draft state budget without any changes if accepted by the Government of the Republic of Armenia, or with respective changes in case of objections by the latter, and shall be presented to the National Assembly together with the state budget.
2. The Commission's budget of expenses shall provide the possibility for proper implementation of objectives and functions as defined by this Law, including ensuring the representation in international organizations, as well as paying salaries to the Commission staff.

(Article 29 was amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 30. PROCEDURE FOR ORGANIZATION OF ACTIVITIES**

1. The Commission implements its activities through sessions.
2. The Commission session shall be eligible, if at least five Commissioners participate in it.
3. The Commission shall hear issues at open-door sessions, except for cases when such discussion may cause damage to interested parties.
4. The Commission sessions shall be recorded. The session minutes shall contain brief information about the venue, time, participants, agenda, speeches and voting results.
5. Sessions shall be called at a certain periodicity or upon the request of any of Commissioners, as appropriate.
6. The Commission shall adopt a decision as a result of discussion.



In case of discussing procedural issues or failure to adopt a decision to the point (including convocation of a closed-door session, withdrawal of an issue from discussion, adjournment of discussion, inclusion of additional issue in the agenda, giving instruction to the staff, etc.), the Commission shall adopt a verbal decision (for record) through voting, of which a record shall be made in the minutes.

Commission decisions shall be adopted at the Commission sessions based on the majority votes of the Commissioners participating in the session. In case of equal votes, the vote of the Commission Chair or the person replacing him/her shall be decisive.

Abstention from voting or transfer of a vote to other Commissioner is prohibited.

7. Following the adoption of an administrative act, a copy thereof shall be delivered to the addressee within 5 days' period.
8. The administrative act adopted by the Commission shall take effect on the day following the date of its delivery to the addressee, unless a later date is specified in the act. In case the administrative act has more than one addressee, the relevant part of the administrative act shall become effective on the day following the date of delivering its copy to the respective addressee, unless a later date is specified in the act.

Other individual legal acts adopted by the Commission shall take effect since the moment of their adoption, unless a later date is specified therein

9. The Commission decision may be appealed in administrative order within 10 days' period following its effective date. The Commission decision may be appealed in the court: in case of disagreement with the results of discussion of administrative appeal - within one month period from the moment of adoption of a decision on appeal, and in case of not filing administrative appeal - within one month following the effective date of the Commission decision.
10. Maximum timeframe for the Commission to conduct an administrative proceeding is 90 days.

(Article 30 was amended and supplemented by # HO-91-N Law adopted on 04.05.2005 and #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 31. PROCEDURE FOR IMPOSITION OF SANCTIONS BY THE COMMISSION**

The Commission is entitled to impose sanctions stipulated by the Law for violation of this Law, including a warning and an instruction to correct and (or) exclude violations in future, and (or) to impose fine at the size stipulated in the Law and (or) to cancel or annul concentration.

(Article 31 was amended by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 32. THE ORDER**

(Article 32 was recognized void by #HO-107-N Law adopted on 22.02.2007)

## **ARTICLE 33. THE COMMISSION DUTIES IN KEEPING COMMERCIAL, BANKING OR OFFICIAL SECRETS**

1. Data constituting commercial, banking or official secret, which have been received in the course of exercising the powers defined by this Law, shall be protected by the Commission according to the procedure stipulated by the Law.
2. The Commission members and employees shall not be entitled to publish or otherwise disseminate, as well as to use for their personal interests the confidential and official information received during the performance of their official duties.
3. In case of publication of data containing commercial, banking or official secret, the damage caused to an economic entity shall be subject to compensation out of the state

budget according to the procedure defined by the legislation.

#### **ARTICLE 34. GROUNDS FOR DISCUSSION OF VIOLATIONS OF THIS LAW BY THE COMMISSION**

The Commission is entitled to make decisions based on researches conducted by it, applications and information of the state administration and local government bodies, economic entities and consumers, announcements in the mass media and other documents under its disposal, which prove the violation of this Law.

#### **ARTICLE 35. ORDER OF IMPLEMENTATION OF THE COMMISSION DECISION**

1. The Commission decision shall be subject to execution by economic entities, the state administration and local government bodies and their officials within the timeframe indicated therein.
2. The Commission shall be entitled to file a claim to the court in case of failure to execute its decision.
3. Filing of a claim shall not terminate the enforcement (enactment) of the Commission decision.

(Article 35 was amended by #HO-107-N Law adopted on 22.02.2007)

#### **CHAPTER 7 LIABILITY FOR VIOLATION OF THIS LAW ARTICLE 36. LIABILITY FOR INFRINGEMENTS IN THE FIELD OF ECONOMIC COMPETITION**

1. Economic entities, the state administration and local government bodies and their officials shall incur liability for the violation of this Law according to the procedure defined by this Law and the legislation.
2. Entering into (establishing, participating in) anticompetitive agreement shall lead to imposition of a fine upon the economic entity-anticompetitive agreement participant at the rate of 2% of proceeds of the year preceding the entry into (establishment, participation in) the agreement, but not exceeding three hundred million AMD. In case the conducted activity lasted less than 12 months during the previous year, the infringements stipulated in this part shall lead to imposition of a fine at the rate of 2% of proceeds (however not exceeding three hundred million AMD) from the activity conducted prior to the entry into (establishment, participation in) that agreement but not exceeding 12 months' period.
3. Abuse of dominant position shall lead to imposition of a fine upon economic entity at the rate of 1% of proceeds of the previous year, but not exceeding three hundred million AMD. In case the conducted activity lasted less than 12 months during the previous year, the infringements stipulated in this part shall lead to imposition of a fine at the rate of 1% of proceeds (however not exceeding three hundred million AMD) from activity conducted in the period preceding the infringement but not exceeding 12 months' period.
4. Failure to declare the concentration as stipulated by this Law, or enactment of (participation in) prohibited concentration shall lead to imposition of a fine upon the economic entity-concentration participant at the rate of 4% of proceeds of the year preceding the participation in the concentration, but not exceeding five hundred million AMD. In case the activity conducted in the previous year lasted less than 12 month, the infringement stipulated in this part shall lead to imposition of a fine upon the economic entity-concentration participant at the rate of 4% of proceeds (however not exceeding five hundred million AMD) of the year preceding the concentration but not exceeding 12 months' period.

5. Action of unfair competition shall lead to imposition of a fine at the size of five hundred thousands AMD.

Repetition of an infringement stipulated in this part during 1 year shall lead to imposition of a fine at the size of one million AMD.

6. Receipt of prohibited state aid shall lead to imposition of a fine upon economic entity at the rate of 2% of proceeds of the year preceding the infringement, but not exceeding three hundred million AMD. In case the activity conducted in the previous year lasted less than 12 months, the infringement stipulated in this part shall lead to imposition of a fine at the rate of 2% of proceeds (however not exceeding three hundred million AMD) from activity conducted in the period preceding the infringement but not exceeding 12 months' period.

7. Failure to submit documents or other information as defined by the Commission decision, or submission of unreliable or false data shall lead to imposition of a fine at the size of five hundred thousand AMD. Repetition of the violation stipulated in this Part during one year shall lead to imposition of a fine at the size of two million AMD.

8. Preventing the Commissioners or Commission staff from performing the rights or duties reserved to them by this Law, the Statute or other legal acts shall lead to imposition of a fine at the size of five hundred thousands AMD.

(Article 36 was supplemented and amended by # HO-398-N Law adopted on 28.06.2002, # HO-29-N Law adopted on 25.12.2003, #HO-91-N Law adopted on 04.05.2005 and #HO-107-N Law adopted on 22.02.2007)

### **ARTICLE 37. FAILURE TO EXECUTE THE COMMISSION DECISION**

Failure by economic entities to execute the Commission Decision (except for decisions on submission of documents and other information) within the timeframe specified therein shall lead to imposition of a fine at the size of one million AMD.

(Article 37 was amended by #HO-91-N Law adopted on 04.05.2005 and #HO-107-N Law adopted on 22.02.2007)

### **ARTICLE 38. COMPENSATION OF DAMAGES**

Damages caused to other economic entities or persons due to activities (inaction) of an economic entity in violation of this Law shall be subject to compensation by the violating economic entity according to the procedure defined by the legislation.

Damages caused to economic entities or other persons due to unlawful decisions, activities (inaction) of the state and local government bodies shall be subject to compensation according to the procedure defined by the legislation.

(Article 38 was amended by #HO-107-N Law adopted on 22.02.2007)

### **ARTICLE 39. RESPONSIBILITY OF THE COMMISSION OFFICIALS**

The Commission officials shall bear responsibility for the violation of this Law according to the procedure defined by the legislation.

### **ARTICLE 40. RESPONSIBILITY OF OFFICIALS FOR VIOLATION OF THIS LAW**

Officials shall bear responsibility for violation of this Law according to the procedure defined by the administrative legislation of the Republic of Armenia.

(Article 40 was amended by #HO-107-N Law adopted on 22.02.2007)

**CHAPTER  
8  
FINAL  
PROVISIONS**

**ARTICLE 41. ESTABLISHMENT OF THE  
COMMISSION**

The President of the Republic of Armenia shall appoint the Chair, Deputy Chair and members of the Commission within 30 days following the enforcement of this Law.

**ARTICLE 42. ENFORCEMENT OF THE  
LAW**

This Law shall take effect since the date of its publication.

**ROBERT KOCH ARYAN  
PRESIDENT OF THE REPUBLIC OF ARMENIA  
c. Yerevan  
December 5, 2000  
HO-112**

**BRAZIL**

**Presidência da República  
Casa Civil  
Subchefia para Assuntos Jurídicos**

**LEI Nº 12.529, DE 30 DE NOVEMBRO DE 2011.**

Mensagem de veto

Vigência

Estrutura o Sistema Brasileiro de Defesa da Concorrência; dispõe sobre a prevenção e repressão às infrações contra a ordem econômica; altera a Lei nº 8.137, de 27 de dezembro de 1990, o Decreto-Lei nº 3.689, de 3 de outubro de 1941 - Código de Processo Penal, e a Lei nº 7.347, de 24 de julho de 1985; revoga dispositivos da Lei nº 8.884, de 11 de junho de 1994, e a Lei nº 9.781, de 19 de janeiro de 1999; e dá outras providências.

**A PRESIDENTA DA REPÚBLICA** Faço saber que o Congresso Nacional decreta e eu sanciono a seguinte Lei:

**TÍTULO I**

**DISPOSIÇÕES GERAIS**

**CAPÍTULO I**

**DA FINALIDADE**

Art. 1º Esta Lei estrutura o Sistema Brasileiro de Defesa da Concorrência - SBDC e dispõe sobre a prevenção e a repressão às infrações contra a ordem econômica, orientada pelos ditames constitucionais de liberdade de iniciativa, livre concorrência, função social da propriedade, defesa dos consumidores e repressão ao abuso do poder econômico.

Parágrafo único. A coletividade é a titular dos bens jurídicos protegidos por esta Lei.

**CAPÍTULO II**

**DA TERRITORIALIDADE**

Art. 2º Aplica-se esta Lei, sem prejuízo de convenções e tratados de que seja signatário o Brasil, às práticas cometidas no todo ou em parte no território nacional ou que nele produzam ou possam produzir efeitos.

§ 1º Reputa-se domiciliada no território nacional a empresa estrangeira que opere ou tenha no Brasil filial, agência, sucursal, escritório, estabelecimento, agente ou representante.

§ 2º A empresa estrangeira será notificada e intimada de todos os atos processuais previstos nesta Lei, independentemente de procuração ou de disposição contratual ou

estatutária, na pessoa do agente ou representante ou pessoa responsável por sua filial, agência, sucursal, estabelecimento ou escritório instalado no Brasil.

## TÍTULO II

### DO SISTEMA BRASILEIRO DE DEFESA DA CONCORRÊNCIA

#### CAPÍTULO I

#### DA COMPOSIÇÃO

Art. 3º O SBDC é formado pelo Conselho Administrativo de Defesa Econômica - CADE e pela Secretaria de Acompanhamento Econômico do Ministério da Fazenda, com as atribuições previstas nesta Lei.

#### CAPÍTULO II

#### DO CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA - CADE

Art. 4º O Cade é entidade judicante com jurisdição em todo o território nacional, que se constitui em autarquia federal, vinculada ao Ministério da Justiça, com sede e foro no Distrito Federal, e competências previstas nesta Lei.

##### Seção I

##### Da Estrutura Organizacional do Cade

Art. 5º O Cade é constituído pelos seguintes órgãos:

I - Tribunal Administrativo de Defesa Econômica;

II - Superintendência-Geral; e

III - Departamento de Estudos Econômicos.

##### Seção II

##### Do Tribunal Administrativo de Defesa Econômica

Art. 6º O Tribunal Administrativo, órgão judicante, tem como membros um Presidente e seis Conselheiros escolhidos dentre cidadãos com mais de 30 (trinta) anos de idade, de notório saber jurídico ou econômico e reputação ilibada, nomeados pelo Presidente da República, depois de aprovados pelo Senado Federal.

§ 1º O mandato do Presidente e dos Conselheiros é de 4 (quatro) anos, não coincidentes, vedada a recondução.

§ 2º Os cargos de Presidente e de Conselheiro são de dedicação exclusiva, não se admitindo qualquer acumulação, salvo as constitucionalmente permitidas.

§ 3º No caso de renúncia, morte, impedimento, falta ou perda de mandato do Presidente do Tribunal, assumirá o Conselheiro mais antigo no cargo ou o mais idoso, nessa ordem, até nova nomeação, sem prejuízo de suas atribuições.

§ 4º No caso de renúncia, morte ou perda de mandato de Conselheiro, proceder-se-á a nova nomeação, para completar o mandato do substituído.

§ 5º Se, nas hipóteses previstas no § 4º deste artigo, ou no caso de encerramento de mandato dos Conselheiros, a composição do Tribunal ficar reduzida a número inferior ao estabelecido no § 1º do art. 9º desta Lei, considerar-se-ão automaticamente suspensos os prazos previstos nesta Lei, e suspensa a tramitação de processos, continuando-se a contagem imediatamente após a recomposição do quorum.

Art. 7º A perda de mandato do Presidente ou dos Conselheiros do Cade só poderá ocorrer em virtude de decisão do Senado Federal, por provocação do Presidente da República, ou em razão de condenação penal irrecurável por crime doloso, ou de processo disciplinar de conformidade com o que prevê a Lei nº 8.112, de 11 de dezembro de 1990 e a Lei nº 8.429, de 2 de junho de 1992, e por infringência de quaisquer das vedações previstas no art. 8º desta Lei.

Parágrafo único. Também perderá o mandato, automaticamente, o membro do Tribunal que faltar a 3 (três) reuniões ordinárias consecutivas, ou 20 (vinte) intercaladas, ressalvados os afastamentos temporários autorizados pelo Plenário.

Art. 8º Ao Presidente e aos Conselheiros é vedado:

I - receber, a qualquer título, e sob qualquer pretexto, honorários, percentagens ou custas;

II - exercer profissão liberal;

III - participar, na forma de controlador, diretor, administrador, gerente, preposto ou mandatário, de sociedade civil, comercial ou empresas de qualquer espécie;

IV - emitir parecer sobre matéria de sua especialização, ainda que em tese, ou funcionar como consultor de qualquer tipo de empresa;

V - manifestar, por qualquer meio de comunicação, opinião sobre processo pendente de julgamento, ou juízo depreciativo sobre despachos, votos ou sentenças de órgãos judiciais, ressalvada a crítica nos autos, em obras técnicas ou no exercício do magistério; e

VI - exercer atividade político-partidária.

§ 1º É vedado ao Presidente e aos Conselheiros, por um período de 120 (cento e vinte) dias, contado da data em que deixar o cargo, representar qualquer pessoa, física ou jurídica, ou interesse perante o SBDC, ressalvada a defesa de direito próprio.

§ 2º Durante o período mencionado no § 1º deste artigo, o Presidente e os Conselheiros receberão a mesma remuneração do cargo que ocupavam.

§ 3º Incorre na prática de advocacia administrativa, sujeitando-se à pena prevista no art. 321 do Decreto-Lei nº 2.848, de 7 de dezembro de 1940 - Código Penal, o ex-presidente ou ex-conselheiro que violar o impedimento previsto no § 1º deste artigo.

§ 4º É vedado, a qualquer tempo, ao Presidente e aos Conselheiros utilizar informações privilegiadas obtidas em decorrência do cargo exercido.

#### Subseção I

#### Da Competência do Plenário do Tribunal

Art. 9º Compete ao Plenário do Tribunal, dentre outras atribuições previstas nesta Lei:

- I - zelar pela observância desta Lei e seu regulamento e do regimento interno;
- II - decidir sobre a existência de infração à ordem econômica e aplicar as penalidades previstas em lei;
- III - decidir os processos administrativos para imposição de sanções administrativas por infrações à ordem econômica instaurados pela Superintendência-Geral;
- IV - ordenar providências que conduzam à cessação de infração à ordem econômica, dentro do prazo que determinar;
- V - aprovar os termos do compromisso de cessação de prática e do acordo em controle de concentrações, bem como determinar à Superintendência-Geral que fiscalize seu cumprimento;
- VI - apreciar, em grau de recurso, as medidas preventivas adotadas pelo Conselheiro-Relator ou pela Superintendência-Geral;
- VII - intimar os interessados de suas decisões;
- VIII - requisitar dos órgãos e entidades da administração pública federal e requerer às autoridades dos Estados, Municípios, do Distrito Federal e dos Territórios as medidas necessárias ao cumprimento desta Lei;
- IX - contratar a realização de exames, vistorias e estudos, aprovando, em cada caso, os respectivos honorários profissionais e demais despesas de processo, que deverão ser pagas pela empresa, se vier a ser punida nos termos desta Lei;
- X - apreciar processos administrativos de atos de concentração econômica, na forma desta Lei, fixando, quando entender conveniente e oportuno, acordos em controle de atos de concentração;
- XI - determinar à Superintendência-Geral que adote as medidas administrativas necessárias à execução e fiel cumprimento de suas decisões;
- XII - requisitar serviços e pessoal de quaisquer órgãos e entidades do Poder Público Federal;
- XIII - requerer à Procuradoria Federal junto ao Cade a adoção de providências administrativas e judiciais;
- XIV - instruir o público sobre as formas de infração da ordem econômica;
- XV - elaborar e aprovar regimento interno do Cade, dispondo sobre seu funcionamento, forma das deliberações, normas de procedimento e organização de seus serviços internos;
- XVI - propor a estrutura do quadro de pessoal do Cade, observado o disposto no inciso II do caput do art. 37 da Constituição Federal;
- XVII - elaborar proposta orçamentária nos termos desta Lei;
- XVIII - requisitar informações de quaisquer pessoas, órgãos, autoridades e entidades públicas ou privadas, respeitando e mantendo o sigilo legal quando for o caso, bem como determinar as diligências que se fizerem necessárias ao exercício das suas funções; e
- XIX - decidir pelo cumprimento das decisões, compromissos e acordos.



§ 1º As decisões do Tribunal serão tomadas por maioria, com a presença mínima de 4 (quatro) membros, sendo o quorum de deliberação mínimo de 3 (três) membros.

§ 2º As decisões do Tribunal não comportam revisão no âmbito do Poder Executivo, promovendo-se, de imediato, sua execução e comunicando-se, em seguida, ao Ministério Público, para as demais medidas legais cabíveis no âmbito de suas atribuições.

§ 3º As autoridades federais, os diretores de autarquia, fundação, empresa pública e sociedade de economia mista federais e agências reguladoras são obrigados a prestar, sob pena de responsabilidade, toda a assistência e colaboração que lhes for solicitada pelo Cade, inclusive elaborando pareceres técnicos sobre as matérias de sua competência.

§ 4º O Tribunal poderá responder consultas sobre condutas em andamento, mediante pagamento de taxa e acompanhadas dos respectivos documentos.

§ 5º O Cade definirá, em resolução, normas complementares sobre o procedimento de consultas previsto no § 4º deste artigo.

## Subseção II

### Da Competência do Presidente do Tribunal

Art. 10. Compete ao Presidente do Tribunal:

- I - representar legalmente o Cade no Brasil ou no exterior, em juízo ou fora dele;
- II - presidir, com direito a voto, inclusive o de qualidade, as reuniões do Plenário;
- III - distribuir, por sorteio, os processos aos Conselheiros;
- IV - convocar as sessões e determinar a organização da respectiva pauta;
- V - solicitar, a seu critério, que a Superintendência-Geral auxilie o Tribunal na tomada de providências extrajudiciais para o cumprimento das decisões do Tribunal;
- VI - fiscalizar a Superintendência-Geral na tomada de providências para execução das decisões e julgados do Tribunal;
- VII - assinar os compromissos e acordos aprovados pelo Plenário;
- VIII - submeter à aprovação do Plenário a proposta orçamentária e a lotação ideal do pessoal que prestará serviço ao Cade;
- IX - orientar, coordenar e supervisionar as atividades administrativas do Cade;
- X - ordenar as despesas atinentes ao Cade, ressalvadas as despesas da unidade gestora da Superintendência-Geral;
- XI - firmar contratos e convênios com órgãos ou entidades nacionais e submeter, previamente, ao Ministro de Estado da Justiça os que devam ser celebrados com organismos estrangeiros ou internacionais; e
- XII - determinar à Procuradoria Federal junto ao Cade as providências judiciais determinadas pelo Tribunal.

### Subseção III

#### Da Competência dos Conselheiros do Tribunal

Art. 11. Compete aos Conselheiros do Tribunal:

I - emitir voto nos processos e questões submetidas ao Tribunal;

II - proferir despachos e lavrar as decisões nos processos em que forem relatores;

III - requisitar informações e documentos de quaisquer pessoas, órgãos, autoridades e entidades públicas ou privadas, a serem mantidos sob sigilo legal, quando for o caso, bem como determinar as diligências que se fizerem necessárias;

IV - adotar medidas preventivas, fixando o valor da multa diária pelo seu descumprimento;

V - solicitar, a seu critério, que a Superintendência-Geral realize as diligências e a produção das provas que entenderem pertinentes nos autos do processo administrativo, na forma desta Lei;

VI - requerer à Procuradoria Federal junto ao Cade emissão de parecer jurídico nos processos em que forem relatores, quando entenderem necessário e em despacho fundamentado, na forma prevista no inciso VII do art. 15 desta Lei;

VII - determinar ao Economista-Chefe, quando necessário, a elaboração de pareceres nos processos em que forem relatores, sem prejuízo da tramitação normal do processo e sem que tal determinação implique a suspensão do prazo de análise ou prejuízo à tramitação normal do processo;

VIII - desincumbir-se das demais tarefas que lhes forem cometidas pelo regimento;

IX - propor termo de compromisso de cessação e acordos para aprovação do Tribunal;

X - prestar ao Poder Judiciário, sempre que solicitado, todas as informações sobre andamento dos processos, podendo, inclusive, fornecer cópias dos autos para instruir ações judiciais.

### Seção III

#### Da Superintendência-Geral

Art. 12. O Cade terá em sua estrutura uma Superintendência-Geral, com 1 (um) Superintendente-Geral e 2 (dois) Superintendentes-Adjuntos, cujas atribuições específicas serão definidas em Resolução.

§ 1º O Superintendente-Geral será escolhido dentre cidadãos com mais de 30 (trinta) anos de idade, notório saber jurídico ou econômico e reputação ilibada, nomeado pelo Presidente da República, depois de aprovado pelo Senado Federal.

§ 2º O Superintendente-Geral terá mandato de 2 (dois) anos, permitida a recondução para um único período subsequente.

§ 3º Aplicam-se ao Superintendente-Geral as mesmas normas de impedimentos, perda de mandato, substituição e as vedações do art. 8º desta Lei, incluindo o disposto no § 2º do art. 8º desta Lei, aplicáveis ao Presidente e aos Conselheiros do Tribunal.

§ 4º Os cargos de Superintendente-Geral e de Superintendentes-Adjuntos são de dedicação exclusiva, não se admitindo qualquer acumulação, salvo as constitucionalmente permitidas.

§ 5º Durante o período de vacância que anteceder à nomeação de novo Superintendente-Geral, assumirá interinamente o cargo um dos superintendentes adjuntos, indicado pelo Presidente do Tribunal, o qual permanecerá no cargo até a posse do novo Superintendente-Geral, escolhido na forma do § 1º deste artigo.

§ 6º Se, no caso da vacância prevista no § 5º deste artigo, não houver nenhum Superintendente Adjunto nomeado na Superintendência do Cade, o Presidente do Tribunal indicará servidor em exercício no Cade, com conhecimento jurídico ou econômico na área de defesa da concorrência e reputação ilibada, para assumir interinamente o cargo, permanecendo neste até a posse do novo Superintendente-Geral, escolhido na forma do § 1º deste artigo.

§ 7º Os Superintendentes-Adjuntos serão indicados pelo Superintendente-Geral.

Art. 13. Compete à Superintendência-Geral:

I - zelar pelo cumprimento desta Lei, monitorando e acompanhando as práticas de mercado;

II - acompanhar, permanentemente, as atividades e práticas comerciais de pessoas físicas ou jurídicas que detiverem posição dominante em mercado relevante de bens ou serviços, para prevenir infrações da ordem econômica, podendo, para tanto, requisitar as informações e documentos necessários, mantendo o sigilo legal, quando for o caso;

III - promover, em face de indícios de infração da ordem econômica, procedimento preparatório de inquérito administrativo e inquérito administrativo para apuração de infrações à ordem econômica;

IV - decidir pela insubsistência dos indícios, arquivando os autos do inquérito administrativo ou de seu procedimento preparatório;

V - instaurar e instruir processo administrativo para imposição de sanções administrativas por infrações à ordem econômica, procedimento para apuração de ato de concentração, processo administrativo para análise de ato de concentração econômica e processo administrativo para imposição de sanções processuais incidentais instaurados para prevenção, apuração ou repressão de infrações à ordem econômica;

VI - no interesse da instrução dos tipos processuais referidos nesta Lei:

a) requisitar informações e documentos de quaisquer pessoas, físicas ou jurídicas, órgãos, autoridades e entidades, públicas ou privadas, mantendo o sigilo legal, quando for o caso, bem como determinar as diligências que se fizerem necessárias ao exercício de suas funções;

b) requisitar esclarecimentos orais de quaisquer pessoas, físicas ou jurídicas, órgãos, autoridades e entidades, públicas ou privadas, na forma desta Lei;

c) realizar inspeção na sede social, estabelecimento, escritório, filial ou sucursal de empresa investigada, de estoques, objetos, papéis de qualquer natureza, assim como livros comerciais, computadores e arquivos eletrônicos, podendo-se extrair ou requisitar cópias de quaisquer documentos ou dados eletrônicos;

d) requerer ao Poder Judiciário, por meio da Procuradoria Federal junto ao Cade, mandado de busca e apreensão de objetos, papéis de qualquer natureza, assim como de livros comerciais, computadores e arquivos magnéticos de empresa ou pessoa física, no interesse de inquérito administrativo ou de processo administrativo para imposição de sanções administrativas por infrações à ordem econômica, aplicando-se, no que couber, o disposto no art. 839 e seguintes da Lei nº 5.869, de 11 de janeiro de 1973 - Código de Processo Civil, sendo inexigível a propositura de ação principal;

e) requisitar vista e cópia de documentos e objetos constantes de inquéritos e processos administrativos instaurados por órgãos ou entidades da administração pública federal;

f) requerer vista e cópia de inquéritos policiais, ações judiciais de qualquer natureza, bem como de inquéritos e processos administrativos instaurados por outros entes da federação, devendo o Conselho observar as mesmas restrições de sigilo eventualmente estabelecidas nos procedimentos de origem;

VII - recorrer de ofício ao Tribunal quando decidir pelo arquivamento de processo administrativo para imposição de sanções administrativas por infrações à ordem econômica;

VIII - remeter ao Tribunal, para julgamento, os processos administrativos que instaurar, quando entender configurada infração da ordem econômica;

IX - propor termo de compromisso de cessação de prática por infração à ordem econômica, submetendo-o à aprovação do Tribunal, e fiscalizar o seu cumprimento;

X - sugerir ao Tribunal condições para a celebração de acordo em controle de concentrações e fiscalizar o seu cumprimento;

XI - adotar medidas preventivas que conduzam à cessação de prática que constitua infração da ordem econômica, fixando prazo para seu cumprimento e o valor da multa diária a ser aplicada, no caso de descumprimento;

XII - receber, instruir e aprovar ou impugnar perante o Tribunal os processos administrativos para análise de ato de concentração econômica;

XIII - orientar os órgãos e entidades da administração pública quanto à adoção de medidas necessárias ao cumprimento desta Lei;

XIV - desenvolver estudos e pesquisas objetivando orientar a política de prevenção de infrações da ordem econômica;

XV - instruir o público sobre as diversas formas de infração da ordem econômica e os modos de sua prevenção e repressão;

XVI - exercer outras atribuições previstas em lei;

XVII - prestar ao Poder Judiciário, sempre que solicitado, todas as informações sobre andamento das investigações, podendo, inclusive, fornecer cópias dos autos para instruir ações judiciais; e

XVIII - adotar as medidas administrativas necessárias à execução e ao cumprimento das decisões do Plenário.

Art. 14. São atribuições do Superintendente-Geral:

I - participar, quando entender necessário, sem direito a voto, das reuniões do Tribunal e proferir sustentação oral, na forma do regimento interno;

II - cumprir e fazer cumprir as decisões do Tribunal na forma determinada pelo seu Presidente;

III - requerer à Procuradoria Federal junto ao Cade as providências judiciais relativas ao exercício das competências da Superintendência-Geral;

IV - determinar ao Economista-Chefe a elaboração de estudos e pareceres;

V - ordenar despesas referentes à unidade gestora da Superintendência-Geral; e

VI - exercer outras atribuições previstas em lei.

#### Seção IV

##### Da Procuradoria Federal junto ao Cade

Art. 15. Funcionará junto ao Cade Procuradoria Federal Especializada, competindo-lhe:

I - prestar consultoria e assessoramento jurídico ao Cade;

II - representar o Cade judicial e extrajudicialmente;

III - promover a execução judicial das decisões e julgados do Cade;

IV - proceder à apuração da liquidez dos créditos do Cade, inscrevendo-os em dívida ativa para fins de cobrança administrativa ou judicial;

V - tomar as medidas judiciais solicitadas pelo Tribunal ou pela Superintendência-Geral, necessárias à cessação de infrações da ordem econômica ou à obtenção de documentos para a instrução de processos administrativos de qualquer natureza;

VI - promover acordos judiciais nos processos relativos a infrações contra a ordem econômica, mediante autorização do Tribunal;

VII - emitir, sempre que solicitado expressamente por Conselheiro ou pelo Superintendente-Geral, parecer nos processos de competência do Cade, sem que tal determinação implique a suspensão do prazo de análise ou prejuízo à tramitação normal do processo;

VIII - zelar pelo cumprimento desta Lei; e

IX - desincumbir-se das demais tarefas que lhe sejam atribuídas pelo regimento interno.

Parágrafo único. Compete à Procuradoria Federal junto ao Cade, ao dar execução judicial às decisões da Superintendência-Geral e do Tribunal, manter o Presidente do

Tribunal, os Conselheiros e o Superintendente-Geral informados sobre o andamento das ações e medidas judiciais.

Art. 16. O Procurador-Chefe será nomeado pelo Presidente da República, depois de aprovado pelo Senado Federal, dentre cidadãos brasileiros com mais de 30 (trinta) anos de idade, de notório conhecimento jurídico e reputação ilibada.

§ 1º O Procurador-Chefe terá mandato de 2 (dois) anos, permitida sua recondução para um único período.

§ 2º O Procurador-Chefe poderá participar, sem direito a voto, das reuniões do Tribunal, prestando assistência e esclarecimentos, quando requisitado pelos Conselheiros, na forma do Regimento Interno do Tribunal.

§ 3º Aplicam-se ao Procurador-Chefe as mesmas normas de impedimento aplicáveis aos Conselheiros do Tribunal, exceto quanto ao comparecimento às sessões.

§ 4º Nos casos de faltas, afastamento temporário ou impedimento do Procurador-Chefe, o Plenário indicará e o Presidente do Tribunal designará o substituto eventual dentre os integrantes da Procuradoria Federal Especializada.

## Seção V

### Do Departamento de Estudos Econômicos

Art. 17. O Cade terá um Departamento de Estudos Econômicos, dirigido por um Economista-Chefe, a quem incumbirá elaborar estudos e pareceres econômicos, de ofício ou por solicitação do Plenário, do Presidente, do Conselheiro-Relator ou do Superintendente-Geral, zelando pelo rigor e atualização técnica e científica das decisões do órgão.

Art. 18. O Economista-Chefe será nomeado, conjuntamente, pelo Superintendente-Geral e pelo Presidente do Tribunal, dentre brasileiros de ilibada reputação e notório conhecimento econômico.

§ 1º O Economista-Chefe poderá participar das reuniões do Tribunal, sem direito a voto.

§ 2º Aplicam-se ao Economista-Chefe as mesmas normas de impedimento aplicáveis aos Conselheiros do Tribunal, exceto quanto ao comparecimento às sessões.

## CAPÍTULO III

### DA SECRETARIA DE ACOMPANHAMENTO ECONÔMICO

Art. 19. Compete à Secretaria de Acompanhamento Econômico promover a concorrência em órgãos de governo e perante a sociedade cabendo-lhe, especialmente, o seguinte:

I - opinar, nos aspectos referentes à promoção da concorrência, sobre propostas de alterações de atos normativos de interesse geral dos agentes econômicos, de consumidores ou usuários dos serviços prestados submetidos a consulta pública pelas agências reguladoras e, quando entender pertinente, sobre os pedidos de revisão de tarifas e as minutas;

II - opinar, quando considerar pertinente, sobre minutas de atos normativos elaborados por qualquer entidade pública ou privada submetidos à consulta pública, nos aspectos referentes à promoção da concorrência;

III - opinar, quando considerar pertinente, sobre proposições legislativas em tramitação no Congresso Nacional, nos aspectos referentes à promoção da concorrência;

IV - elaborar estudos avaliando a situação concorrencial de setores específicos da atividade econômica nacional, de ofício ou quando solicitada pelo Cade, pela Câmara de Comércio Exterior ou pelo Departamento de Proteção e Defesa do Consumidor do Ministério da Justiça ou órgão que vier a sucedê-lo;

V - elaborar estudos setoriais que sirvam de insumo para a participação do Ministério da Fazenda na formulação de políticas públicas setoriais nos fóruns em que este Ministério tem assento;

VI - propor a revisão de leis, regulamentos e outros atos normativos da administração pública federal, estadual, municipal e do Distrito Federal que afetem ou possam afetar a concorrência nos diversos setores econômicos do País;

VII - manifestar-se, de ofício ou quando solicitada, a respeito do impacto concorrencial de medidas em discussão no âmbito de fóruns negociadores relativos às atividades de alteração tarifária, ao acesso a mercados e à defesa comercial, ressalvadas as competências dos órgãos envolvidos;

VIII - encaminhar ao órgão competente representação para que este, a seu critério, adote as medidas legais cabíveis, sempre que for identificado ato normativo que tenha caráter anticompetitivo.

§ 1º Para o cumprimento de suas atribuições, a Secretaria de Acompanhamento Econômico poderá:

I - requisitar informações e documentos de quaisquer pessoas, órgãos, autoridades e entidades, públicas ou privadas, mantendo o sigilo legal quando for o caso;

II - celebrar acordos e convênios com órgãos ou entidades públicas ou privadas, federais, estaduais, municipais, do Distrito Federal e dos Territórios para avaliar e/ou sugerir medidas relacionadas à promoção da concorrência.

§ 2º A Secretaria de Acompanhamento Econômico divulgará anualmente relatório de suas ações voltadas para a promoção da concorrência.

### TÍTULO III

#### DO MINISTÉRIO PÚBLICO FEDERAL PERANTE O CADE

Art. 20. O Procurador-Geral da República, ouvido o Conselho Superior, designará membro do Ministério Público Federal para, nesta qualidade, emitir parecer, nos processos administrativos para imposição de sanções administrativas por infrações à ordem econômica, de ofício ou a requerimento do Conselheiro-Relator.

### TÍTULO IV

#### DO PATRIMÔNIO, DAS RECEITAS E DA GESTÃO ADMINISTRATIVA, ORÇAMENTÁRIA E FINANCEIRA

Art. 21. Compete ao Presidente do Tribunal orientar, coordenar e supervisionar as atividades administrativas do Cade, respeitadas as atribuições dos dirigentes dos demais órgãos previstos no art. 5º desta Lei.

§ 1º A Superintendência-Geral constituirá unidade gestora, para fins administrativos e financeiros, competindo ao seu Superintendente-Geral ordenar as despesas pertinentes às respectivas ações orçamentárias.

§ 2º Para fins administrativos e financeiros, o Departamento de Estudos Econômicos estará ligado ao Tribunal.

Art. 22. Anualmente, o Presidente do Tribunal, ouvido o Superintendente-Geral, encaminhará ao Poder Executivo a proposta de orçamento do Cade e a lotação ideal do pessoal que prestará serviço àquela autarquia.

Art. 23. Ficam instituídas as taxas processuais sobre os processos de competência do Cade, no valor de R\$ 45.000,00 (quarenta e cinco mil reais), que têm como fato gerador a apresentação dos atos previstos no art. 88 desta Lei e no valor de R\$ 15.000,00 (quinze mil reais) para processos que têm como fato gerador a apresentação de consultas de que trata o § 4º do art. 9º desta Lei.

Parágrafo único. A taxa processual de que trata o caput deste artigo poderá ser atualizada por ato do Poder Executivo, após autorização do Congresso Nacional.

Art. 24. São contribuintes da taxa processual que tem como fato gerador a apresentação dos atos previstos no art. 88 desta Lei qualquer das requerentes.

Art. 25. O recolhimento da taxa processual que tem como fato gerador a apresentação dos atos previstos no art. 88 desta Lei deverá ser comprovado no momento da protocolização do ato.

§ 1º A taxa processual não recolhida no momento fixado no caput deste artigo será cobrada com os seguintes acréscimos:

I - juros de mora, contados do mês seguinte ao do vencimento, à razão de 1% (um por cento), calculados na forma da legislação aplicável aos tributos federais;

II - multa de mora de 20% (vinte por cento).

§ 2º Os juros de mora não incidem sobre o valor da multa de mora.

Art. 26. (VETADO).

Art. 27. As taxas de que tratam os arts. 23 e 26 desta Lei serão recolhidas ao Tesouro Nacional na forma regulamentada pelo Poder Executivo.

Art. 28. Constituem receitas próprias do Cade:

I - o produto resultante da arrecadação das taxas previstas nos arts. 23 e 26 desta Lei;

II - a retribuição por serviços de qualquer natureza prestados a terceiros;

III - as dotações consignadas no Orçamento Geral da União, créditos especiais, créditos adicionais, transferências e repasses que lhe forem conferidos;

IV - os recursos provenientes de convênios, acordos ou contratos celebrados com entidades ou organismos nacionais e internacionais;

V - as doações, legados, subvenções e outros recursos que lhe forem destinados;



VI - os valores apurados na venda ou aluguel de bens móveis e imóveis de sua propriedade;

VII - o produto da venda de publicações, material técnico, dados e informações;

VIII - os valores apurados em aplicações no mercado financeiro das receitas previstas neste artigo, na forma definida pelo Poder Executivo; e

IX - quaisquer outras receitas, afetas às suas atividades, não especificadas nos incisos I a VIII do caput deste artigo.

§ 1º (VETADO).

§ 2º (VETADO).

§ 3º O produto da arrecadação das multas aplicadas pelo Cade, inscritas ou não em dívida ativa, será destinado ao Fundo de Defesa de Direitos Difusos de que trata o art. 13 da Lei nº 7.347, de 24 de julho de 1985, e a Lei nº 9.008, de 21 de março de 1995.

§ 4º As multas arrecadadas na forma desta Lei serão recolhidas ao Tesouro Nacional na forma regulamentada pelo Poder Executivo.

Art. 29. O Cade submeterá anualmente ao Ministério da Justiça a sua proposta de orçamento, que será encaminhada ao Ministério do Planejamento, Orçamento e Gestão para inclusão na lei orçamentária anual, a que se refere o § 5º do art. 165 da Constituição Federal.

§ 1º O Cade fará acompanhar as propostas orçamentárias de quadro demonstrativo do planejamento plurianual das receitas e despesas, visando ao seu equilíbrio orçamentário e financeiro nos 5 (cinco) exercícios subsequentes.

§ 2º A lei orçamentária anual consignará as dotações para as despesas de custeio e capital do Cade, relativas ao exercício a que ela se referir.

Art. 30. Somam-se ao atual patrimônio do Cade os bens e direitos pertencentes ao Ministério da Justiça atualmente afetados às atividades do Departamento de Proteção e Defesa Econômica da Secretaria de Direito Econômico.

## TÍTULO V

### DAS INFRAÇÕES DA ORDEM ECONÔMICA

#### CAPÍTULO I

#### DISPOSIÇÕES GERAIS

Art. 31. Esta Lei aplica-se às pessoas físicas ou jurídicas de direito público ou privado, bem como a quaisquer associações de entidades ou pessoas, constituídas de fato ou de direito, ainda que temporariamente, com ou sem personalidade jurídica, mesmo que exerçam atividade sob regime de monopólio legal.

Art. 32. As diversas formas de infração da ordem econômica implicam a responsabilidade da empresa e a responsabilidade individual de seus dirigentes ou administradores, solidariamente.

Art. 33. Serão solidariamente responsáveis as empresas ou entidades integrantes de grupo econômico, de fato ou de direito, quando pelo menos uma delas praticar infração à ordem econômica.

Art. 34. A personalidade jurídica do responsável por infração da ordem econômica poderá ser desconsiderada quando houver da parte deste abuso de direito, excesso de poder, infração da lei, fato ou ato ilícito ou violação dos estatutos ou contrato social.

Parágrafo único. A desconsideração também será efetivada quando houver falência, estado de insolvência, encerramento ou inatividade da pessoa jurídica provocados por má administração.

Art. 35. A repressão das infrações da ordem econômica não exclui a punição de outros ilícitos previstos em lei.

## CAPÍTULO II

### DAS INFRAÇÕES

Art. 36. Constituem infração da ordem econômica, independentemente de culpa, os atos sob qualquer forma manifestados, que tenham por objeto ou possam produzir os seguintes efeitos, ainda que não sejam alcançados:

I - limitar, falsear ou de qualquer forma prejudicar a livre concorrência ou a livre iniciativa;

II - dominar mercado relevante de bens ou serviços;

III - aumentar arbitrariamente os lucros; e

IV - exercer de forma abusiva posição dominante.

§ 1º A conquista de mercado resultante de processo natural fundado na maior eficiência de agente econômico em relação a seus competidores não caracteriza o ilícito previsto no inciso II do caput deste artigo.

§ 2º Presume-se posição dominante sempre que uma empresa ou grupo de empresas for capaz de alterar unilateral ou coordenadamente as condições de mercado ou quando controlar 20% (vinte por cento) ou mais do mercado relevante, podendo este percentual ser alterado pelo Cade para setores específicos da economia.

§ 3º As seguintes condutas, além de outras, na medida em que configurem hipótese prevista no caput deste artigo e seus incisos, caracterizam infração da ordem econômica:

I - acordar, combinar, manipular ou ajustar com concorrente, sob qualquer forma:

a) os preços de bens ou serviços ofertados individualmente;

b) a produção ou a comercialização de uma quantidade restrita ou limitada de bens ou a prestação de um número, volume ou frequência restrita ou limitada de serviços;

c) a divisão de partes ou segmentos de um mercado atual ou potencial de bens ou serviços, mediante, dentre outros, a distribuição de clientes, fornecedores, regiões ou períodos;

d) preços, condições, vantagens ou abstenção em licitação pública;

II - promover, obter ou influenciar a adoção de conduta comercial uniforme ou concertada entre concorrentes;

III - limitar ou impedir o acesso de novas empresas ao mercado;

IV - criar dificuldades à constituição, ao funcionamento ou ao desenvolvimento de empresa concorrente ou de fornecedor, adquirente ou financiador de bens ou serviços;

V - impedir o acesso de concorrente às fontes de insumo, matérias-primas, equipamentos ou tecnologia, bem como aos canais de distribuição;

VI - exigir ou conceder exclusividade para divulgação de publicidade nos meios de comunicação de massa;

VII - utilizar meios enganosos para provocar a oscilação de preços de terceiros;

VIII - regular mercados de bens ou serviços, estabelecendo acordos para limitar ou controlar a pesquisa e o desenvolvimento tecnológico, a produção de bens ou prestação de serviços, ou para dificultar investimentos destinados à produção de bens ou serviços ou à sua distribuição;

IX - impor, no comércio de bens ou serviços, a distribuidores, varejistas e representantes preços de revenda, descontos, condições de pagamento, quantidades mínimas ou máximas, margem de lucro ou quaisquer outras condições de comercialização relativos a negócios destes com terceiros;

X - discriminar adquirentes ou fornecedores de bens ou serviços por meio da fixação diferenciada de preços, ou de condições operacionais de venda ou prestação de serviços;

XI - recusar a venda de bens ou a prestação de serviços, dentro das condições de pagamento normais aos usos e costumes comerciais;

XII - dificultar ou romper a continuidade ou desenvolvimento de relações comerciais de prazo indeterminado em razão de recusa da outra parte em submeter-se a cláusulas e condições comerciais injustificáveis ou anticoncorrenciais;

XIII - destruir, inutilizar ou açambarcar matérias-primas, produtos intermediários ou acabados, assim como destruir, inutilizar ou dificultar a operação de equipamentos destinados a produzi-los, distribuí-los ou transportá-los;

XIV - açambarcar ou impedir a exploração de direitos de propriedade industrial ou intelectual ou de tecnologia;

XV - vender mercadoria ou prestar serviços injustificadamente abaixo do preço de custo;

XVI - reter bens de produção ou de consumo, exceto para garantir a cobertura dos custos de produção;

XVII - cessar parcial ou totalmente as atividades da empresa sem justa causa comprovada;

XVIII - subordinar a venda de um bem à aquisição de outro ou à utilização de um serviço, ou subordinar a prestação de um serviço à utilização de outro ou à aquisição de um bem; e

XIX - exercer ou explorar abusivamente direitos de propriedade industrial, intelectual, tecnologia ou marca.

### CAPÍTULO III

#### DAS PENAS

Art. 37. A prática de infração da ordem econômica sujeita os responsáveis às seguintes penas:

I - no caso de empresa, multa de 0,1% (um décimo por cento) a 20% (vinte por cento) do valor do faturamento bruto da empresa, grupo ou conglomerado obtido, no último exercício anterior à instauração do processo administrativo, no ramo de atividade empresarial em que ocorreu a infração, a qual nunca será inferior à vantagem auferida, quando for possível sua estimação;

II - no caso das demais pessoas físicas ou jurídicas de direito público ou privado, bem como quaisquer associações de entidades ou pessoas constituídas de fato ou de direito, ainda que temporariamente, com ou sem personalidade jurídica, que não exerçam atividade empresarial, não sendo possível utilizar-se o critério do valor do faturamento bruto, a multa será entre R\$ 50.000,00 (cinquenta mil reais) e R\$ 2.000.000.000,00 (dois bilhões de reais);

III - no caso de administrador, direta ou indiretamente responsável pela infração cometida, quando comprovada a sua culpa ou dolo, multa de 1% (um por cento) a 20% (vinte por cento) daquela aplicada à empresa, no caso previsto no inciso I do caput deste artigo, ou às pessoas jurídicas ou entidades, nos casos previstos no inciso II do caput deste artigo.

§ 1º Em caso de reincidência, as multas cominadas serão aplicadas em dobro.

§ 2º No cálculo do valor da multa de que trata o inciso I do caput deste artigo, o Cade poderá considerar o faturamento total da empresa ou grupo de empresas, quando não dispuser do valor do faturamento no ramo de atividade empresarial em que ocorreu a infração, definido pelo Cade, ou quando este for apresentado de forma incompleta e/ou não demonstrado de forma inequívoca e idônea.

Art. 38. Sem prejuízo das penas cominadas no art. 37 desta Lei, quando assim exigir a gravidade dos fatos ou o interesse público geral, poderão ser impostas as seguintes penas, isolada ou cumulativamente:

I - a publicação, em meia página e a expensas do infrator, em jornal indicado na decisão, de extrato da decisão condenatória, por 2 (dois) dias seguidos, de 1 (uma) a 3 (três) semanas consecutivas;

II - a proibição de contratar com instituições financeiras oficiais e participar de licitação tendo por objeto aquisições, alienações, realização de obras e serviços, concessão de serviços públicos, na administração pública federal, estadual, municipal e do Distrito Federal, bem como em entidades da administração indireta, por prazo não inferior a 5 (cinco) anos;

III - a inscrição do infrator no Cadastro Nacional de Defesa do Consumidor;

IV - a recomendação aos órgãos públicos competentes para que:

a) seja concedida licença compulsória de direito de propriedade intelectual de titularidade do infrator, quando a infração estiver relacionada ao uso desse direito;

b) não seja concedido ao infrator parcelamento de tributos federais por ele devidos ou para que sejam cancelados, no todo ou em parte, incentivos fiscais ou subsídios públicos;

V - a cisão de sociedade, transferência de controle societário, venda de ativos ou cessação parcial de atividade;

VI - a proibição de exercer o comércio em nome próprio ou como representante de pessoa jurídica, pelo prazo de até 5 (cinco) anos; e

VII - qualquer outro ato ou providência necessários para a eliminação dos efeitos nocivos à ordem econômica.

Art. 39. Pela continuidade de atos ou situações que configurem infração da ordem econômica, após decisão do Tribunal determinando sua cessação, bem como pelo não cumprimento de obrigações de fazer ou não fazer impostas, ou pelo descumprimento de medida preventiva ou termo de compromisso de cessação previstos nesta Lei, o responsável fica sujeito a multa diária fixada em valor de R\$ 5.000,00 (cinco mil reais), podendo ser aumentada em até 50 (cinquenta) vezes, se assim recomendar a situação econômica do infrator e a gravidade da infração.

Art. 40. A recusa, omissão ou retardamento injustificado de informação ou documentos solicitados pelo Cade ou pela Secretaria de Acompanhamento Econômico constitui infração punível com multa diária de R\$ 5.000,00 (cinco mil reais), podendo ser aumentada em até 20 (vinte) vezes, se necessário para garantir sua eficácia, em razão da situação econômica do infrator.

§ 1º O montante fixado para a multa diária de que trata o caput deste artigo constará do documento que contiver a requisição da autoridade competente.

§ 2º Compete à autoridade requisitante a aplicação da multa prevista no caput deste artigo.

§ 3º Tratando-se de empresa estrangeira, responde solidariamente pelo pagamento da multa de que trata o caput sua filial, sucursal, escritório ou estabelecimento situado no País.

Art. 41. A falta injustificada do representado ou de terceiros, quando intimados para prestar esclarecimentos, no curso de inquérito ou processo administrativo, sujeitará o faltante à multa de R\$ 500,00 (quinhentos reais) a R\$ 15.000,00 (quinze mil reais) para cada falta, aplicada conforme sua situação econômica.

Parágrafo único. A multa a que se refere o caput deste artigo será aplicada mediante auto de infração pela autoridade competente.

Art. 42. Impedir, obstruir ou de qualquer outra forma dificultar a realização de inspeção autorizada pelo Plenário do Tribunal, pelo Conselheiro-Relator ou pela Superintendência-Geral no curso de procedimento preparatório, inquérito administrativo, processo administrativo ou qualquer outro procedimento sujeitará o inspecionado ao pagamento de multa de R\$ 20.000,00 (vinte mil reais) a R\$ 400.000,00 (quatrocentos mil reais), conforme a situação econômica do infrator, mediante a lavratura de auto de infração pelo órgão competente.

Art. 43. A enganosidade ou a falsidade de informações, de documentos ou de declarações prestadas por qualquer pessoa ao Cade ou à Secretaria de Acompanhamento Econômico será punível com multa pecuniária no valor de R\$ 5.000,00 (cinco mil reais) a R\$ 5.000.000,00 (cinco milhões de reais), de acordo com a gravidade dos fatos e a situação econômica do infrator, sem prejuízo das demais cominações legais cabíveis.

Art. 44. Aquele que prestar serviços ao Cade ou a Seae, a qualquer título, e que der causa, mesmo que por mera culpa, à disseminação indevida de informação acerca de empresa, coberta por sigilo, será punível com multa pecuniária de R\$ 1.000,00 (mil reais) a R\$ 20.000,00 (vinte mil reais), sem prejuízo de abertura de outros procedimentos cabíveis.

§ 1º Se o autor da disseminação indevida estiver servindo o Cade em virtude de mandato, ou na qualidade de Procurador Federal ou Economista-Chefe, a multa será em dobro.

§ 2º O Regulamento definirá o procedimento para que uma informação seja tida como sigilosa, no âmbito do Cade e da Seae.

Art. 45. Na aplicação das penas estabelecidas nesta Lei, levar-se-á em consideração:

I - a gravidade da infração;

II - a boa-fé do infrator;

III - a vantagem auferida ou pretendida pelo infrator;

IV - a consumação ou não da infração;

V - o grau de lesão, ou perigo de lesão, à livre concorrência, à economia nacional, aos consumidores, ou a terceiros;

VI - os efeitos econômicos negativos produzidos no mercado;

VII - a situação econômica do infrator; e

VIII - a reincidência.

## CAPÍTULO IV

### DA PRESCRIÇÃO

Art. 46. Prescrevem em 5 (cinco) anos as ações punitivas da administração pública federal, direta e indireta, objetivando apurar infrações da ordem econômica, contados da data da prática do ilícito ou, no caso de infração permanente ou continuada, do dia em que tiver cessada a prática do ilícito.

§ 1º Interrompe a prescrição qualquer ato administrativo ou judicial que tenha por objeto a apuração da infração contra a ordem econômica mencionada no caput deste artigo, bem como a notificação ou a intimação da investigada.

§ 2º Suspende-se a prescrição durante a vigência do compromisso de cessação ou do acordo em controle de concentrações.

§ 3º Incide a prescrição no procedimento administrativo paralisado por mais de 3 (três) anos, pendente de julgamento ou despacho, cujos autos serão arquivados de ofício ou mediante requerimento da parte interessada, sem prejuízo da apuração da responsabilidade funcional decorrente da paralisação, se for o caso.

§ 4º Quando o fato objeto da ação punitiva da administração também constituir crime, a prescrição reger-se-á pelo prazo previsto na lei penal.

CAPÍTULO V  
DO DIREITO DE AÇÃO

Art. 47. Os prejudicados, por si ou pelos legitimados referidos no art. 82 da Lei nº 8.078, de 11 de setembro de 1990, poderão ingressar em juízo para, em defesa de seus interesses individuais ou individuais homogêneos, obter a cessação de práticas que constituam infração da ordem econômica, bem como o recebimento de indenização por perdas e danos sofridos, independentemente do inquérito ou processo administrativo, que não será suspenso em virtude do ajuizamento de ação.

TÍTULO VI  
DAS DIVERSAS ESPÉCIES DE PROCESSO ADMINISTRATIVO

CAPÍTULO I  
DISPOSIÇÕES GERAIS

Art. 48. Esta Lei regula os seguintes procedimentos administrativos instaurados para prevenção, apuração e repressão de infrações à ordem econômica:

I - procedimento preparatório de inquérito administrativo para apuração de infrações à ordem econômica;

II - inquérito administrativo para apuração de infrações à ordem econômica;

III - processo administrativo para imposição de sanções administrativas por infrações à ordem econômica;

IV - processo administrativo para análise de ato de concentração econômica;

V - procedimento administrativo para apuração de ato de concentração econômica; e

VI - processo administrativo para imposição de sanções processuais incidentais.

Art. 49. O Tribunal e a Superintendência-Geral assegurarão nos procedimentos previstos nos incisos II, III, IV e VI do caput do art. 48 desta Lei o tratamento sigiloso de documentos, informações e atos processuais necessários à elucidação dos fatos ou exigidos pelo interesse da sociedade.

Parágrafo único. As partes poderão requerer tratamento sigiloso de documentos ou informações, no tempo e modo definidos no regimento interno.

Art. 50. A Superintendência-Geral ou o Conselheiro-Relator poderá admitir a intervenção no processo administrativo de:

I - terceiros titulares de direitos ou interesses que possam ser afetados pela decisão a ser adotada; ou

II - legitimados à propositura de ação civil pública pelos incisos III e IV do art. 82 da Lei nº 8.078, de 11 de setembro de 1990.

Art. 51. Na tramitação dos processos no Cade, serão observadas as seguintes disposições, além daquelas previstas no regimento interno:

I - os atos de concentração terão prioridade sobre o julgamento de outras matérias;

II - a sessão de julgamento do Tribunal é pública, salvo nos casos em que for determinado tratamento sigiloso ao processo, ocasião em que as sessões serão reservadas;

III - nas sessões de julgamento do Tribunal, poderão o Superintendente-Geral, o Economista-Chefe, o Procurador-Chefe e as partes do processo requerer a palavra, que lhes será concedida, nessa ordem, nas condições e no prazo definido pelo regimento interno, a fim de sustentarem oralmente suas razões perante o Tribunal;

IV - a pauta das sessões de julgamento será definida pelo Presidente, que determinará sua publicação, com pelo menos 120 (cento e vinte) horas de antecedência; e

V - os atos e termos a serem praticados nos autos dos procedimentos enumerados no art. 48 desta Lei poderão ser encaminhados de forma eletrônica ou apresentados em meio magnético ou equivalente, nos termos das normas do Cade.

Art. 52. O cumprimento das decisões do Tribunal e de compromissos e acordos firmados nos termos desta Lei poderá, a critério do Tribunal, ser fiscalizado pela Superintendência-Geral, com o respectivo encaminhamento dos autos, após a decisão final do Tribunal.

§ 1º Na fase de fiscalização da execução das decisões do Tribunal, bem como do cumprimento de compromissos e acordos firmados nos termos desta Lei, poderá a Superintendência-Geral valer-se de todos os poderes instrutórios que lhe são assegurados nesta Lei.

§ 2º Cumprida integralmente a decisão do Tribunal ou os acordos em controle de concentrações e compromissos de cessação, a Superintendência-Geral, de ofício ou por provocação do interessado, manifestar-se-á sobre seu cumprimento.

## CAPÍTULO II

### DO PROCESSO ADMINISTRATIVO NO CONTROLE DE ATOS DE CONCENTRAÇÃO ECONÔMICA

#### Seção I

##### Do Processo Administrativo na Superintendência-Geral

Art. 53. O pedido de aprovação dos atos de concentração econômica a que se refere o art. 88 desta Lei deverá ser endereçado ao Cade e instruído com as informações e documentos indispensáveis à instauração do processo administrativo, definidos em resolução do Cade, além do comprovante de recolhimento da taxa respectiva.

§ 1º Ao verificar que a petição não preenche os requisitos exigidos no caput deste artigo ou apresenta defeitos e irregularidades capazes de dificultar o julgamento de mérito, a Superintendência-Geral determinará, uma única vez, que os requerentes a emendem, sob pena de arquivamento.

§ 2º Após o protocolo da apresentação do ato de concentração, ou de sua emenda, a Superintendência-Geral fará publicar edital, indicando o nome dos requerentes, a natureza da operação e os setores econômicos envolvidos.



Art. 54. Após cumpridas as providências indicadas no art. 53, a Superintendência-Geral:

I - conhecerá diretamente do pedido, proferindo decisão terminativa, quando o processo dispensar novas diligências ou nos casos de menor potencial ofensivo à concorrência, assim definidos em resolução do Cade; ou

II - determinará a realização da instrução complementar, especificando as diligências a serem produzidas.

Art. 55. Concluída a instrução complementar determinada na forma do inciso II do caput do art. 54 desta Lei, a Superintendência-Geral deverá manifestar-se sobre seu satisfatório cumprimento, recebendo-a como adequada ao exame de mérito ou determinando que seja refeita, por estar incompleta.

Art. 56. A Superintendência-Geral poderá, por meio de decisão fundamentada, declarar a operação como complexa e determinar a realização de nova instrução complementar, especificando as diligências a serem produzidas.

Parágrafo único. Declarada a operação como complexa, poderá a Superintendência-Geral requerer ao Tribunal a prorrogação do prazo de que trata o § 2º do art. 88 desta Lei.

Art. 57. Concluídas as instruções complementares de que tratam o inciso II do art. 54 e o art. 56 desta Lei, a Superintendência-Geral:

I - proferirá decisão aprovando o ato sem restrições;

II - oferecerá impugnação perante o Tribunal, caso entenda que o ato deva ser rejeitado, aprovado com restrições ou que não existam elementos conclusivos quanto aos seus efeitos no mercado.

Parágrafo único. Na impugnação do ato perante o Tribunal, deverão ser demonstrados, de forma circunstanciada, o potencial lesivo do ato à concorrência e as razões pelas quais não deve ser aprovado integralmente ou rejeitado.

## Seção II

### Do Processo Administrativo no Tribunal

Art. 58. O requerente poderá oferecer, no prazo de 30 (trinta) dias da data de impugnação da Superintendência-Geral, em petição escrita, dirigida ao Presidente do Tribunal, manifestação expondo as razões de fato e de direito com que se opõe à impugnação do ato de concentração da Superintendência-Geral e juntando todas as provas, estudos e pareceres que corroboram seu pedido.

Parágrafo único. Em até 48 (quarenta e oito) horas da decisão de que trata a impugnação pela Superintendência-Geral, disposta no inciso II do caput do art. 57 desta Lei e na hipótese do inciso I do art. 65 desta Lei, o processo será distribuído, por sorteio, a um Conselheiro-Relator.

Art. 59. Após a manifestação do requerente, o Conselheiro-Relator:

I - proferirá decisão determinando a inclusão do processo em pauta para julgamento, caso entenda que se encontre suficientemente instruído;

II - determinará a realização de instrução complementar, se necessário, podendo, a seu critério, solicitar que a Superintendência-Geral a realize, declarando os pontos controversos e especificando as diligências a serem produzidas.

§ 1º O Conselheiro-Relator poderá autorizar, conforme o caso, precária e liminarmente, a realização do ato de concentração econômica, impondo as condições que visem à preservação da reversibilidade da operação, quando assim recomendarem as condições do caso concreto.

§ 2º O Conselheiro-Relator poderá acompanhar a realização das diligências referidas no inciso II do caput deste artigo.

Art. 60. Após a conclusão da instrução, o Conselheiro-Relator determinará a inclusão do processo em pauta para julgamento.

Art. 61. No julgamento do pedido de aprovação do ato de concentração econômica, o Tribunal poderá aprová-lo integralmente, rejeitá-lo ou aprová-lo parcialmente, caso em que determinará as restrições que deverão ser observadas como condição para a validade e eficácia do ato.

§ 1º O Tribunal determinará as restrições cabíveis no sentido de mitigar os eventuais efeitos nocivos do ato de concentração sobre os mercados relevantes afetados.

§ 2º As restrições mencionadas no § 1º deste artigo incluem:

I - a venda de ativos ou de um conjunto de ativos que constitua uma atividade empresarial;

II - a cisão de sociedade;

III - a alienação de controle societário;

IV - a separação contábil ou jurídica de atividades;

V - o licenciamento compulsório de direitos de propriedade intelectual; e

VI - qualquer outro ato ou providência necessários para a eliminação dos efeitos nocivos à ordem econômica.

§ 3º Julgado o processo no mérito, o ato não poderá ser novamente apresentado nem revisto no âmbito do Poder Executivo.

Art. 62. Em caso de recusa, omissão, enganiosidade, falsidade ou retardamento injustificado, por parte dos requerentes, de informações ou documentos cuja apresentação for determinada pelo Cade, sem prejuízo das demais sanções cabíveis, poderá o pedido de aprovação do ato de concentração ser rejeitado por falta de provas, caso em que o requerente somente poderá realizar o ato mediante apresentação de novo pedido, nos termos do art. 53 desta Lei.

Art. 63. Os prazos previstos neste Capítulo não se suspendem ou interrompem por qualquer motivo, ressalvado o disposto no § 5º do art. 6º desta Lei, quando for o caso.

Art. 64. (VETADO).

### Seção III

#### Do Recurso contra Decisão de Aprovação do Ato pela Superintendência-Geral

Art. 65. No prazo de 15 (quinze) dias contado a partir da publicação da decisão da Superintendência-Geral que aprovar o ato de concentração, na forma do inciso I do caput do art. 54 e do inciso I do caput do art. 57 desta Lei:

I - caberá recurso da decisão ao Tribunal, que poderá ser interposto por terceiros interessados ou, em se tratando de mercado regulado, pela respectiva agência reguladora;

II - o Tribunal poderá, mediante provocação de um de seus Conselheiros e em decisão fundamentada, avocar o processo para julgamento ficando prevento o Conselheiro que encaminhou a provocação.

§ 1º Em até 5 (cinco) dias úteis a partir do recebimento do recurso, o Conselheiro-Relator:

I - conhecerá do recurso e determinará a sua inclusão em pauta para julgamento;

II - conhecerá do recurso e determinará a realização de instrução complementar, podendo, a seu critério, solicitar que a Superintendência-Geral a realize, declarando os pontos controversos e especificando as diligências a serem produzidas; ou

III - não conhecerá do recurso, determinando o seu arquivamento.

§ 2º As requerentes poderão manifestar-se acerca do recurso interposto, em até 5 (cinco) dias úteis do conhecimento do recurso no Tribunal ou da data do recebimento do relatório com a conclusão da instrução complementar elaborada pela Superintendência-Geral, o que ocorrer por último.

§ 3º O litigante de má-fé arcará com multa, em favor do Fundo de Defesa de Direitos Difusos, a ser arbitrada pelo Tribunal entre R\$ 5.000,00 (cinco mil reais) e R\$ 5.000.000,00 (cinco milhões de reais), levando-se em consideração sua condição econômica, sua atuação no processo e o retardamento injustificado causado à aprovação do ato.

§ 4º A interposição do recurso a que se refere o caput deste artigo ou a decisão de avocar suspende a execução do ato de concentração econômica até decisão final do Tribunal.

§ 5º O Conselheiro-Relator poderá acompanhar a realização das diligências referidas no inciso II do § 1º deste artigo.

### CAPÍTULO III

#### DO INQUÉRITO ADMINISTRATIVO PARA APURAÇÃO DE INFRAÇÕES À ORDEM ECONÔMICA E DO PROCEDIMENTO PREPARATÓRIO

Art. 66. O inquérito administrativo, procedimento investigatório de natureza inquisitorial, será instaurado pela Superintendência-Geral para apuração de infrações à ordem econômica.

§ 1º O inquérito administrativo será instaurado de ofício ou em face de representação fundamentada de qualquer interessado, ou em decorrência de peças de informação, quando os

indícios de infração à ordem econômica não forem suficientes para a instauração de processo administrativo.

§ 2º A Superintendência-Geral poderá instaurar procedimento preparatório de inquérito administrativo para apuração de infrações à ordem econômica para apurar se a conduta sob análise trata de matéria de competência do Sistema Brasileiro de Defesa da Concorrência, nos termos desta Lei.

§ 3º As diligências tomadas no âmbito do procedimento preparatório de inquérito administrativo para apuração de infrações à ordem econômica deverão ser realizadas no prazo máximo de 30 (trinta) dias.

§ 4º Do despacho que ordenar o arquivamento de procedimento preparatório, indeferir o requerimento de abertura de inquérito administrativo, ou seu arquivamento, caberá recurso de qualquer interessado ao Superintendente-Geral, na forma determinada em regulamento, que decidirá em última instância.

§ 5º (VETADO).

§ 6º A representação de Comissão do Congresso Nacional, ou de qualquer de suas Casas, bem como da Secretaria de Acompanhamento Econômico, das agências reguladoras e da Procuradoria Federal junto ao Cade, independe de procedimento preparatório, instaurando-se desde logo o inquérito administrativo ou processo administrativo.

§ 7º O representante e o indiciado poderão requerer qualquer diligência, que será realizada ou não, a juízo da Superintendência-Geral.

§ 8º A Superintendência-Geral poderá solicitar o concurso da autoridade policial ou do Ministério Público nas investigações.

§ 9º O inquérito administrativo deverá ser encerrado no prazo de 180 (cento e oitenta) dias, contado da data de sua instauração, prorrogáveis por até 60 (sessenta) dias, por meio de despacho fundamentado e quando o fato for de difícil elucidação e o justificarem as circunstâncias do caso concreto.

§ 10. Ao procedimento preparatório, assim como ao inquérito administrativo, poderá ser dado tratamento sigiloso, no interesse das investigações, a critério da Superintendência-Geral.

Art. 67. Até 10 (dez) dias úteis a partir da data de encerramento do inquérito administrativo, a Superintendência-Geral decidirá pela instauração do processo administrativo ou pelo seu arquivamento.

§ 1º O Tribunal poderá, mediante provocação de um Conselheiro e em decisão fundamentada, avocar o inquérito administrativo ou procedimento preparatório de inquérito administrativo arquivado pela Superintendência-Geral, ficando prevento o Conselheiro que encaminhou a provocação.

§ 2º Avocado o inquérito administrativo, o Conselheiro-Relator terá o prazo de 30 (trinta) dias úteis para:

I - confirmar a decisão de arquivamento da Superintendência-Geral, podendo, se entender necessário, fundamentar sua decisão;

II - transformar o inquérito administrativo em processo administrativo, determinando a realização de instrução complementar, podendo, a seu critério, solicitar que a

Superintendência-Geral a realize, declarando os pontos controversos e especificando as diligências a serem produzidas.

§ 3º Ao inquérito administrativo poderá ser dado tratamento sigiloso, no interesse das investigações, a critério do Plenário do Tribunal.

Art. 68. O descumprimento dos prazos fixados neste Capítulo pela Superintendência-Geral, assim como por seus servidores, sem justificativa devidamente comprovada nos autos, poderá resultar na apuração da respectiva responsabilidade administrativa, civil e criminal.

## CAPÍTULO IV

### DO PROCESSO ADMINISTRATIVO PARA IMPOSIÇÃO DE SANÇÕES

#### ADMINISTRATIVAS POR INFRAÇÕES À ORDEM ECONÔMICA

Art. 69. O processo administrativo, procedimento em contraditório, visa a garantir ao acusado a ampla defesa a respeito das conclusões do inquérito administrativo, cuja nota técnica final, aprovada nos termos das normas do Cade, constituirá peça inaugural.

Art. 70. Na decisão que instaurar o processo administrativo, será determinada a notificação do representado para, no prazo de 30 (trinta) dias, apresentar defesa e especificar as provas que pretende sejam produzidas, declinando a qualificação completa de até 3 (três) testemunhas.

§ 1º A notificação inicial conterá o inteiro teor da decisão de instauração do processo administrativo e da representação, se for o caso.

§ 2º A notificação inicial do representado será feita pelo correio, com aviso de recebimento em nome próprio, ou outro meio que assegure a certeza da ciência do interessado ou, não tendo êxito a notificação postal, por edital publicado no Diário Oficial da União e em jornal de grande circulação no Estado em que resida ou tenha sede, contando-se os prazos da juntada do aviso de recebimento, ou da publicação, conforme o caso.

§ 3º A intimação dos demais atos processuais será feita mediante publicação no Diário Oficial da União, da qual deverá constar o nome do representado e de seu procurador, se houver.

§ 4º O representado poderá acompanhar o processo administrativo por seu titular e seus diretores ou gerentes, ou por seu procurador, assegurando-se-lhes amplo acesso aos autos no Tribunal.

§ 5º O prazo de 30 (trinta) dias mencionado no caput deste artigo poderá ser dilatado por até 10 (dez) dias, improrrogáveis, mediante requisição do representado.

Art. 71. Considerar-se-á revel o representado que, notificado, não apresentar defesa no prazo legal, incorrendo em confissão quanto à matéria de fato, contra ele correndo os demais prazos, independentemente de notificação.

Parágrafo único. Qualquer que seja a fase do processo, nele poderá intervir o revel, sem direito à repetição de qualquer ato já praticado.

Art. 72. Em até 30 (trinta) dias úteis após o decurso do prazo previsto no art. 70 desta Lei, a Superintendência-Geral, em despacho fundamentado, determinará a produção de provas que julgar pertinentes, sendo-lhe facultado exercer os poderes de instrução previstos nesta Lei, mantendo-se o sigilo legal, quando for o caso.

Art. 73. Em até 5 (cinco) dias úteis da data de conclusão da instrução processual determinada na forma do art. 72 desta Lei, a Superintendência-Geral notificará o representado para apresentar novas alegações, no prazo de 5 (cinco) dias úteis.

Art. 74. Em até 15 (quinze) dias úteis contados do decurso do prazo previsto no art. 73 desta Lei, a Superintendência-Geral remeterá os autos do processo ao Presidente do Tribunal, opinando, em relatório circunstanciado, pelo seu arquivamento ou pela configuração da infração.

Art. 75. Recebido o processo, o Presidente do Tribunal o distribuirá, por sorteio, ao Conselheiro-Relator, que poderá, caso entenda necessário, solicitar à Procuradoria Federal junto ao Cade que se manifeste no prazo de 20 (vinte) dias.

Art. 76. O Conselheiro-Relator poderá determinar diligências, em despacho fundamentado, podendo, a seu critério, solicitar que a Superintendência-Geral as realize, no prazo assinado.

Parágrafo único. Após a conclusão das diligências determinadas na forma deste artigo, o Conselheiro-Relator notificará o representado para, no prazo de 15 (quinze) dias úteis, apresentar alegações finais.

Art. 77. No prazo de 15 (quinze) dias úteis contado da data de recebimento das alegações finais, o Conselheiro-Relator solicitará a inclusão do processo em pauta para julgamento.

Art. 78. A convite do Presidente, por indicação do Conselheiro-Relator, qualquer pessoa poderá apresentar esclarecimentos ao Tribunal, a propósito de assuntos que estejam em pauta.

Art. 79. A decisão do Tribunal, que em qualquer hipótese será fundamentada, quando for pela existência de infração da ordem econômica, conterá:

I - especificação dos fatos que constituam a infração apurada e a indicação das providências a serem tomadas pelos responsáveis para fazê-la cessar;

II - prazo dentro do qual devam ser iniciadas e concluídas as providências referidas no inciso I do caput deste artigo;

III - multa estipulada;

IV - multa diária em caso de continuidade da infração; e

V - multa em caso de descumprimento das providências estipuladas.

Parágrafo único. A decisão do Tribunal será publicada dentro de 5 (cinco) dias úteis no Diário Oficial da União.

Art. 80. Aplicam-se às decisões do Tribunal o disposto na Lei nº 8.437, de 30 de junho de 1992.

Art. 81. Descumprida a decisão, no todo ou em parte, será o fato comunicado ao Presidente do Tribunal, que determinará à Procuradoria Federal junto ao Cade que providencie sua execução judicial.

Art. 82. O descumprimento dos prazos fixados neste Capítulo pelos membros do Cade, assim como por seus servidores, sem justificativa devidamente comprovada nos autos, poderá resultar na apuração da respectiva responsabilidade administrativa, civil e criminal.

Art. 83. O Cade disporá de forma complementar sobre o inquérito e o processo administrativo.

## CAPÍTULO V

### DA MEDIDA PREVENTIVA

Art. 84. Em qualquer fase do inquérito administrativo para apuração de infrações ou do processo administrativo para imposição de sanções por infrações à ordem econômica, poderá o Conselheiro-Relator ou o Superintendente-Geral, por iniciativa própria ou mediante provocação do Procurador-Chefe do Cade, adotar medida preventiva, quando houver indício ou fundado receio de que o representado, direta ou indiretamente, cause ou possa causar ao mercado lesão irreparável ou de difícil reparação, ou torne ineficaz o resultado final do processo.

§ 1º Na medida preventiva, determinar-se-á a imediata cessação da prática e será ordenada, quando materialmente possível, a reversão à situação anterior, fixando multa diária nos termos do art. 39 desta Lei.

§ 2º Da decisão que adotar medida preventiva caberá recurso voluntário ao Plenário do Tribunal, em 5 (cinco) dias, sem efeito suspensivo.

## CAPÍTULO VI

### DO COMPROMISSO DE CESSAÇÃO

Art. 85. Nos procedimentos administrativos mencionados nos incisos I, II e III do art. 48 desta Lei, o Cade poderá tomar do representado compromisso de cessação da prática sob investigação ou dos seus efeitos lesivos, sempre que, em juízo de conveniência e oportunidade, devidamente fundamentado, entender que atende aos interesses protegidos por lei.

§ 1º Do termo de compromisso deverão constar os seguintes elementos:

I - a especificação das obrigações do representado no sentido de não praticar a conduta investigada ou seus efeitos lesivos, bem como obrigações que julgar cabíveis;

II - a fixação do valor da multa para o caso de descumprimento, total ou parcial, das obrigações compromissadas;

III - a fixação do valor da contribuição pecuniária ao Fundo de Defesa de Direitos Difusos quando cabível.

§ 2º Tratando-se da investigação da prática de infração relacionada ou decorrente das condutas previstas nos incisos I e II do § 3º do art. 36 desta Lei, entre as obrigações a que se refere o inciso I do § 1º deste artigo figurará, necessariamente, a obrigação de recolher ao Fundo de Defesa de Direitos Difusos um valor pecuniário que não poderá ser inferior ao mínimo previsto no art. 37 desta Lei.

§ 3º (VETADO).

§ 4º A proposta de termo de compromisso de cessação de prática somente poderá ser apresentada uma única vez.

§ 5º A proposta de termo de compromisso de cessação de prática poderá ter caráter confidencial.

§ 6º A apresentação de proposta de termo de compromisso de cessação de prática não suspende o andamento do processo administrativo.

§ 7º O termo de compromisso de cessação de prática terá caráter público, devendo o acordo ser publicado no sítio do Cade em 5 (cinco) dias após a sua celebração.

§ 8º O termo de compromisso de cessação de prática constitui título executivo extrajudicial.

§ 9º O processo administrativo ficará suspenso enquanto estiver sendo cumprido o compromisso e será arquivado ao término do prazo fixado, se atendidas todas as condições estabelecidas no termo.

§ 10. A suspensão do processo administrativo a que se refere o § 9º deste artigo dar-se-á somente em relação ao representado que firmou o compromisso, seguindo o processo seu curso regular para os demais representados.

§ 11. Declarado o descumprimento do compromisso, o Cade aplicará as sanções nele previstas e determinará o prosseguimento do processo administrativo e as demais medidas administrativas e judiciais cabíveis para sua execução.

§ 12. As condições do termo de compromisso poderão ser alteradas pelo Cade se se comprovar sua excessiva onerosidade para o representado, desde que a alteração não acarrete prejuízo para terceiros ou para a coletividade.

§ 13. A proposta de celebração do compromisso de cessação de prática será indeferida quando a autoridade não chegar a um acordo com os representados quanto aos seus termos.

§ 14. O Cade definirá, em resolução, normas complementares sobre o termo de compromisso de cessação.

§ 15. Aplica-se o disposto no art. 50 desta Lei ao Compromisso de Cessação da Prática.

## CAPÍTULO VII

### DO PROGRAMA DE LENIÊNCIA

Art. 86. O Cade, por intermédio da Superintendência-Geral, poderá celebrar acordo de leniência, com a extinção da ação punitiva da administração pública ou a redução de 1 (um) a 2/3 (dois terços) da penalidade aplicável, nos termos deste artigo, com pessoas físicas e jurídicas que forem autoras de infração à ordem econômica, desde que colaborem efetivamente com as investigações e o processo administrativo e que dessa colaboração resulte:

I - a identificação dos demais envolvidos na infração; e

II - a obtenção de informações e documentos que comprovem a infração noticiada ou sob investigação.



§ 1º O acordo de que trata o caput deste artigo somente poderá ser celebrado se preenchidos, cumulativamente, os seguintes requisitos:

I - a empresa seja a primeira a se qualificar com respeito à infração noticiada ou sob investigação;

II - a empresa cesse completamente seu envolvimento na infração noticiada ou sob investigação a partir da data de propositura do acordo;

III - a Superintendência-Geral não disponha de provas suficientes para assegurar a condenação da empresa ou pessoa física por ocasião da propositura do acordo; e

IV - a empresa confesse sua participação no ilícito e coopere plena e permanentemente com as investigações e o processo administrativo, comparecendo, sob suas expensas, sempre que solicitada, a todos os atos processuais, até seu encerramento.

§ 2º Com relação às pessoas físicas, elas poderão celebrar acordos de leniência desde que cumpridos os requisitos II, III e IV do § 1º deste artigo.

§ 3º O acordo de leniência firmado com o Cade, por intermédio da Superintendência-Geral, estipulará as condições necessárias para assegurar a efetividade da colaboração e o resultado útil do processo.

§ 4º Compete ao Tribunal, por ocasião do julgamento do processo administrativo, verificado o cumprimento do acordo:

I - decretar a extinção da ação punitiva da administração pública em favor do infrator, nas hipóteses em que a proposta de acordo tiver sido apresentada à Superintendência-Geral sem que essa tivesse conhecimento prévio da infração noticiada; ou

II - nas demais hipóteses, reduzir de 1 (um) a 2/3 (dois terços) as penas aplicáveis, observado o disposto no art. 45 desta Lei, devendo ainda considerar na gradação da pena a efetividade da colaboração prestada e a boa-fé do infrator no cumprimento do acordo de leniência.

§ 5º Na hipótese do inciso II do § 4º deste artigo, a pena sobre a qual incidirá o fator redutor não será superior à menor das penas aplicadas aos demais coautores da infração, relativamente aos percentuais fixados para a aplicação das multas de que trata o inciso I do art. 37 desta Lei.

§ 6º Serão estendidos às empresas do mesmo grupo, de fato ou de direito, e aos seus dirigentes, administradores e empregados envolvidos na infração os efeitos do acordo de leniência, desde que o firmem em conjunto, respeitadas as condições impostas.

§ 7º A empresa ou pessoa física que não obtiver, no curso de inquérito ou processo administrativo, habilitação para a celebração do acordo de que trata este artigo, poderá celebrar com a Superintendência-Geral, até a remessa do processo para julgamento, acordo de leniência relacionado a uma outra infração, da qual o Cade não tenha qualquer conhecimento prévio.

§ 8º Na hipótese do § 7º deste artigo, o infrator se beneficiará da redução de 1/3 (um terço) da pena que lhe for aplicável naquele processo, sem prejuízo da obtenção dos benefícios de que trata o inciso I do § 4º deste artigo em relação à nova infração denunciada.

§ 9º Considera-se sigilosa a proposta de acordo de que trata este artigo, salvo no interesse das investigações e do processo administrativo.

§ 10. Não importará em confissão quanto à matéria de fato, nem reconhecimento de ilicitude da conduta analisada, a proposta de acordo de leniência rejeitada, da qual não se fará qualquer divulgação.

§ 11. A aplicação do disposto neste artigo observará as normas a serem editadas pelo Tribunal.

§ 12. Em caso de descumprimento do acordo de leniência, o beneficiário ficará impedido de celebrar novo acordo de leniência pelo prazo de 3 (três) anos, contado da data de seu julgamento.

Art. 87. Nos crimes contra a ordem econômica, tipificados na Lei nº 8.137, de 27 de dezembro de 1990, e nos demais crimes diretamente relacionados à prática de cartel, tais como os tipificados na Lei nº 8.666, de 21 de junho de 1993, e os tipificados no art. 288 do Decreto-Lei nº 2.848, de 7 de dezembro de 1940 - Código Penal, a celebração de acordo de leniência, nos termos desta Lei, determina a suspensão do curso do prazo prescricional e impede o oferecimento da denúncia com relação ao agente beneficiário da leniência.

Parágrafo único. Cumprido o acordo de leniência pelo agente, extingue-se automaticamente a punibilidade dos crimes a que se refere o caput deste artigo.

## TÍTULO VII

### DO CONTROLE DE CONCENTRAÇÕES

#### CAPÍTULO I

#### DOS ATOS DE CONCENTRAÇÃO

Art. 88. Serão submetidos ao Cade pelas partes envolvidas na operação os atos de concentração econômica em que, cumulativamente:

I - pelo menos um dos grupos envolvidos na operação tenha registrado, no último balanço, faturamento bruto anual ou volume de negócios total no País, no ano anterior à operação, equivalente ou superior a R\$ 400.000.000,00 (quatrocentos milhões de reais); e

II - pelo menos um outro grupo envolvido na operação tenha registrado, no último balanço, faturamento bruto anual ou volume de negócios total no País, no ano anterior à operação, equivalente ou superior a R\$ 30.000.000,00 (trinta milhões de reais).

§ 1º Os valores mencionados nos incisos I e II do caput deste artigo poderão ser adequados, simultânea ou independentemente, por indicação do Plenário do Cade, por portaria interministerial dos Ministros de Estado da Fazenda e da Justiça.

§ 2º O controle dos atos de concentração de que trata o caput deste artigo será prévio e realizado em, no máximo, 240 (duzentos e quarenta) dias, a contar do protocolo de petição ou de sua emenda.

§ 3º Os atos que se subsumirem ao disposto no caput deste artigo não podem ser consumados antes de apreciados, nos termos deste artigo e do procedimento previsto no Capítulo II do Título VI desta Lei, sob pena de nulidade, sendo ainda imposta multa pecuniária, de valor não inferior a R\$ 60.000,00 (sessenta mil reais) nem superior a R\$ 60.000.000,00 (sessenta milhões de reais), a ser aplicada nos termos da regulamentação, sem prejuízo da abertura de processo administrativo, nos termos do art. 69 desta Lei.

§ 4º Até a decisão final sobre a operação, deverão ser preservadas as condições de concorrência entre as empresas envolvidas, sob pena de aplicação das sanções previstas no § 3º deste artigo.

§ 5º Serão proibidos os atos de concentração que impliquem eliminação da concorrência em parte substancial de mercado relevante, que possam criar ou reforçar uma posição dominante ou que possam resultar na dominação de mercado relevante de bens ou serviços, ressalvado o disposto no § 6º deste artigo.

§ 6º Os atos a que se refere o § 5º deste artigo poderão ser autorizados, desde que sejam observados os limites estritamente necessários para atingir os seguintes objetivos:

I - cumulada ou alternativamente:

a) aumentar a produtividade ou a competitividade;

b) melhorar a qualidade de bens ou serviços; ou

c) propiciar a eficiência e o desenvolvimento tecnológico ou econômico; e

II - sejam repassados aos consumidores parte relevante dos benefícios decorrentes.

§ 7º É facultado ao Cade, no prazo de 1 (um) ano a contar da respectiva data de consumação, requerer a submissão dos atos de concentração que não se enquadrem no disposto neste artigo.

§ 8º As mudanças de controle acionário de companhias abertas e os registros de fusão, sem prejuízo da obrigação das partes envolvidas, devem ser comunicados ao Cade pela Comissão de Valores Mobiliários - CVM e pelo Departamento Nacional do Registro do Comércio do Ministério do Desenvolvimento, Indústria e Comércio Exterior, respectivamente, no prazo de 5 (cinco) dias úteis para, se for o caso, ser examinados.

§ 9º O prazo mencionado no § 2º deste artigo somente poderá ser dilatado:

I - por até 60 (sessenta) dias, improrrogáveis, mediante requisição das partes envolvidas na operação; ou

II - por até 90 (noventa) dias, mediante decisão fundamentada do Tribunal, em que sejam especificados as razões para a extensão, o prazo da prorrogação, que será não renovável, e as providências cuja realização seja necessária para o julgamento do processo.

Art. 89. Para fins de análise do ato de concentração apresentado, serão obedecidos os procedimentos estabelecidos no Capítulo II do Título VI desta Lei.

Parágrafo único. O Cade regulamentará, por meio de Resolução, a análise prévia de atos de concentração realizados com o propósito específico de participação em leilões, licitações e operações de aquisição de ações por meio de oferta pública.

Art. 90. Para os efeitos do art. 88 desta Lei, realiza-se um ato de concentração quando:

I - 2 (duas) ou mais empresas anteriormente independentes se fundem;

II - 1 (uma) ou mais empresas adquirem, direta ou indiretamente, por compra ou permuta de ações, quotas, títulos ou valores mobiliários conversíveis em ações, ou ativos, tangíveis ou intangíveis, por via contratual ou por qualquer outro meio ou forma, o controle ou partes de uma ou outras empresas;

III - 1 (uma) ou mais empresas incorporam outra ou outras empresas; ou

IV - 2 (duas) ou mais empresas celebram contrato associativo, consórcio ou joint venture.

Parágrafo único. Não serão considerados atos de concentração, para os efeitos do disposto no art. 88 desta Lei, os descritos no inciso IV do caput, quando destinados às licitações promovidas pela administração pública direta e indireta e aos contratos delas decorrentes.

Art. 91. A aprovação de que trata o art. 88 desta Lei poderá ser revista pelo Tribunal, de ofício ou mediante provocação da Superintendência-Geral, se a decisão for baseada em informações falsas ou enganosas prestadas pelo interessado, se ocorrer o descumprimento de quaisquer das obrigações assumidas ou não forem alcançados os benefícios visados.

Parágrafo único. Na hipótese referida no caput deste artigo, a falsidade ou enganosidade será punida com multa pecuniária, de valor não inferior a R\$ 60.000,00 (sessenta mil reais) nem superior a R\$ 6.000.000,00 (seis milhões de reais), a ser aplicada na forma das normas do Cade, sem prejuízo da abertura de processo administrativo, nos termos do art. 67 desta Lei, e da adoção das demais medidas cabíveis.

## CAPÍTULO II

### DO ACORDO EM CONTROLE DE CONCENTRAÇÕES

Art. 92. (VETADO).

## TÍTULO VIII

### DA EXECUÇÃO JUDICIAL DAS DECISÕES DO CADE

#### CAPÍTULO I

#### DO PROCESSO

Art. 93. A decisão do Plenário do Tribunal, cominando multa ou impondo obrigação de fazer ou não fazer, constitui título executivo extrajudicial.

Art. 94. A execução que tenha por objeto exclusivamente a cobrança de multa pecuniária será feita de acordo com o disposto na Lei nº 6.830, de 22 de setembro de 1980.

Art. 95. Na execução que tenha por objeto, além da cobrança de multa, o cumprimento de obrigação de fazer ou não fazer, o Juiz concederá a tutela específica da obrigação, ou determinará providências que assegurem o resultado prático equivalente ao do adimplemento.

§ 1º A conversão da obrigação de fazer ou não fazer em perdas e danos somente será admissível se impossível a tutela específica ou a obtenção do resultado prático correspondente.

§ 2º A indenização por perdas e danos far-se-á sem prejuízo das multas.

Art. 96. A execução será feita por todos os meios, inclusive mediante intervenção na empresa, quando necessária.

Art. 97. A execução das decisões do Cade será promovida na Justiça Federal do Distrito Federal ou da sede ou domicílio do executado, à escolha do Cade.

Art. 98. O oferecimento de embargos ou o ajuizamento de qualquer outra ação que vise à desconstituição do título executivo não suspenderá a execução, se não for garantido o juízo no valor das multas aplicadas, para que se garanta o cumprimento da decisão final proferida nos autos, inclusive no que tange a multas diárias.

§ 1º Para garantir o cumprimento das obrigações de fazer, deverá o juiz fixar caução idônea.

§ 2º Revogada a liminar, o depósito do valor da multa converter-se-á em renda do Fundo de Defesa de Direitos Difusos.

§ 3º O depósito em dinheiro não suspenderá a incidência de juros de mora e atualização monetária, podendo o Cade, na hipótese do § 2º deste artigo, promover a execução para cobrança da diferença entre o valor revertido ao Fundo de Defesa de Direitos Difusos e o valor da multa atualizado, com os acréscimos legais, como se sua exigibilidade do crédito jamais tivesse sido suspensa.

§ 4º Na ação que tenha por objeto decisão do Cade, o autor deverá deduzir todas as questões de fato e de direito, sob pena de preclusão consumativa, reputando-se deduzidas todas as alegações que poderia deduzir em favor do acolhimento do pedido, não podendo o mesmo pedido ser deduzido sob diferentes causas de pedir em ações distintas, salvo em relação a fatos supervenientes.

Art. 99. Em razão da gravidade da infração da ordem econômica, e havendo fundado receio de dano irreparável ou de difícil reparação, ainda que tenha havido o depósito das multas e prestação de caução, poderá o Juiz determinar a adoção imediata, no todo ou em parte, das providências contidas no título executivo.

Art. 100. No cálculo do valor da multa diária pela continuidade da infração, tomar-se-á como termo inicial a data final fixada pelo Cade para a adoção voluntária das providências contidas em sua decisão, e como termo final o dia do seu efetivo cumprimento.

Art. 101. O processo de execução em juízo das decisões do Cade terá preferência sobre as demais espécies de ação, exceto habeas corpus e mandado de segurança.

## CAPÍTULO II

### DA INTERVENÇÃO JUDICIAL

Art. 102. O Juiz decretará a intervenção na empresa quando necessária para permitir a execução específica, nomeando o interventor.

Parágrafo único. A decisão que determinar a intervenção deverá ser fundamentada e indicará, clara e precisamente, as providências a serem tomadas pelo interventor nomeado.

Art. 103. Se, dentro de 48 (quarenta e oito) horas, o executado impugnar o interventor por motivo de inaptidão ou inidoneidade, feita a prova da alegação em 3 (três) dias, o juiz decidirá em igual prazo.

Art. 104. Sendo a impugnação julgada procedente, o juiz nomeará novo interventor no prazo de 5 (cinco) dias.

Art. 105. A intervenção poderá ser revogada antes do prazo estabelecido, desde que comprovado o cumprimento integral da obrigação que a determinou.

Art. 106. A intervenção judicial deverá restringir-se aos atos necessários ao cumprimento da decisão judicial que a determinar e terá duração máxima de 180 (cento e oitenta) dias, ficando o interventor responsável por suas ações e omissões, especialmente em caso de abuso de poder e desvio de finalidade.

§ 1º Aplica-se ao interventor, no que couber, o disposto nos arts. 153 a 159 da Lei nº 6.404, de 15 de dezembro de 1976.

§ 2º A remuneração do interventor será arbitrada pelo Juiz, que poderá substituí-lo a qualquer tempo, sendo obrigatória a substituição quando incorrer em insolvência civil, quando for sujeito passivo ou ativo de qualquer forma de corrupção ou prevaricação, ou infringir quaisquer de seus deveres.

Art. 107. O juiz poderá afastar de suas funções os responsáveis pela administração da empresa que, comprovadamente, obstarem o cumprimento de atos de competência do interventor, devendo eventual substituição dar-se na forma estabelecida no contrato social da empresa.

§ 1º Se, apesar das providências previstas no caput deste artigo, um ou mais responsáveis pela administração da empresa persistirem em obstar a ação do interventor, o juiz procederá na forma do disposto no § 2º deste artigo.

§ 2º Se a maioria dos responsáveis pela administração da empresa recusar colaboração ao interventor, o juiz determinará que este assuma a administração total da empresa.

Art. 108. Compete ao interventor:

I - praticar ou ordenar que sejam praticados os atos necessários à execução;

II - denunciar ao Juiz quaisquer irregularidades praticadas pelos responsáveis pela empresa e das quais venha a ter conhecimento; e

III - apresentar ao Juiz relatório mensal de suas atividades.

Art. 109. As despesas resultantes da intervenção correrão por conta do executado contra quem ela tiver sido decretada.

Art. 110. Decorrido o prazo da intervenção, o interventor apresentará ao juiz relatório circunstanciado de sua gestão, propondo a extinção e o arquivamento do processo ou pedindo a prorrogação do prazo na hipótese de não ter sido possível cumprir integralmente a decisão exequenda.

Art. 111. Todo aquele que se opuser ou obstaculizar a intervenção ou, cessada esta, praticar quaisquer atos que direta ou indiretamente anulem seus efeitos, no todo ou em parte, ou desobedecer a ordens legais do interventor será, conforme o caso, responsabilizado criminalmente por resistência, desobediência ou coação no curso do processo, na forma dos arts. 329, 330 e 344 do Decreto-Lei nº 2.848, de 7 de dezembro de 1940 - Código Penal.

## TÍTULO IX

### DISPOSIÇÕES FINAIS E TRANSITÓRIAS

Art. 112. (VETADO).

Art. 113. Visando a implementar a transição para o sistema de mandatos não coincidentes, as nomeações dos Conselheiros observarão os seguintes critérios de duração dos mandatos, nessa ordem:

I - 2 (dois) anos para os primeiros 2 (dois) mandatos vagos; e

II - 3 (três) anos para o terceiro e o quarto mandatos vagos.

§ 1º Os mandatos dos membros do Cade e do Procurador-Chefe em vigor na data de promulgação desta Lei serão mantidos e exercidos até o seu término original, devendo as nomeações subsequentes à extinção desses mandatos observar o disposto neste artigo.

§ 2º Na hipótese do § 1º deste artigo, o Conselheiro que estiver exercendo o seu primeiro mandato no Cade, após o término de seu mandato original, poderá ser novamente nomeado no mesmo cargo, observado o disposto nos incisos I e II do caput deste artigo.

§ 3º O Conselheiro que estiver exercendo o seu segundo mandato no Cade, após o término de seu mandato original, não poderá ser novamente nomeado para o período subsequente.

§ 4º Não haverá recondução para o Procurador-Chefe que estiver exercendo mandato no Cade, após o término de seu mandato original, podendo ele ser indicado para permanecer no cargo na forma do art. 16 desta Lei.

Art. 114. (VETADO).

Art. 115. Aplicam-se subsidiariamente aos processos administrativo e judicial previstos nesta Lei as disposições das Leis nºs 5.869, de 11 de janeiro de 1973 - Código de Processo Civil, 7.347, de 24 de julho de 1985, 8.078, de 11 de setembro de 1990, e 9.784, de 29 de janeiro de 1999.

Art. 116. O art. 4º da Lei nº 8.137, de 27 de dezembro de 1990, passa a vigorar com a seguinte redação:

"Art.

4º .....

I - abusar do poder econômico, dominando o mercado ou eliminando, total ou parcialmente, a concorrência mediante qualquer forma de ajuste ou acordo de empresas;

a) (revogada);

b) (revogada);

c) (revogada);

d) (revogada);

e) (revogada);

f) (revogada);

II - formar acordo, convênio, ajuste ou aliança entre ofertantes, visando:

a) à fixação artificial de preços ou quantidades vendidas ou produzidas;

b) ao controle regionalizado do mercado por empresa ou grupo de empresas;

c) ao controle, em detrimento da concorrência, de rede de distribuição ou de fornecedores.

Pena - reclusão, de 2 (dois) a 5 (cinco) anos e multa.

III - (revogado);

IV - (revogado);

V - (revogado);

VI - (revogado);

VII - (revogado)." (NR)

Art. 117. O caput e o inciso V do art. 1º da Lei nº 7.347, de 24 de julho de 1985, passam a vigorar com a seguinte redação:

"Art. 1º Regem-se pelas disposições desta Lei, sem prejuízo da ação popular, as ações de responsabilidade por danos morais e patrimoniais causados:

.....

V - por infração da ordem econômica;

....." (NR)

Art. 118. Nos processos judiciais em que se discuta a aplicação desta Lei, o Cade deverá ser intimado para, querendo, intervir no feito na qualidade de assistente.

Art. 119. O disposto nesta Lei não se aplica aos casos de dumping e subsídios de que tratam os Acordos Relativos à Implementação do Artigo VI do Acordo Geral sobre Tarifas Aduaneiras e Comércio, promulgados pelos Decretos nºs 93.941 e 93.962, de 16 e 22 de janeiro de 1987, respectivamente.

Art. 120. (VETADO).

Art. 121. Ficam criados, para exercício na Secretaria de Acompanhamento Econômico e, prioritariamente, no Cade, observadas as diretrizes e quantitativos estabelecidos pelo Órgão Supervisor da Carreira, 200 (duzentos) cargos de Especialistas em Políticas Públicas e Gestão Governamental, integrantes da Carreira de Especialista em Políticas Públicas e Gestão Governamental, para o exercício das atribuições referidas no art. 1º da Lei nº 7.834, de 6 de outubro de 1989, a serem providos gradualmente, observados os limites e a autorização específica da lei de diretrizes orçamentárias, nos termos do inciso II do § 1º do art. 169 da Constituição Federal.



Parágrafo único. Ficam transferidos para o Cade os cargos pertencentes ao Ministério da Justiça atualmente alocados no Departamento de Proteção e Defesa Econômica da Secretaria de Direito Econômico, bem como o DAS-6 do Secretário de Direito Econômico.

Art. 122. Os órgãos do SBDC poderão requisitar servidores da administração pública federal direta, autárquica ou fundacional para neles ter exercício, independentemente do exercício de cargo em comissão ou função de confiança.

Parágrafo único. Ao servidor requisitado na forma deste artigo são assegurados todos os direitos e vantagens a que façam jus no órgão ou entidade de origem, considerando-se o período de requisição para todos os efeitos da vida funcional, como efetivo exercício no cargo que ocupe no órgão ou entidade de origem.

Art. 123. Ato do Ministro de Estado do Planejamento, Orçamento e Gestão fixará o quantitativo ideal de cargos efetivos, ocupados, a serem mantidos, mediante lotação, requisição ou exercício, no âmbito do Cade e da Secretaria de Acompanhamento Econômico, bem como fixará cronograma para que sejam atingidos os seus quantitativos, observadas as dotações consignadas nos Orçamentos da União.

Art. 124. Ficam criados, no âmbito do Poder Executivo Federal, para alocação ao Cade, os seguintes cargos em comissão do Grupo-Direção e Assessoramento Superiores - DAS: 2 (dois) cargos de natureza especial NES de Presidente do Cade e Superintendente-Geral do Cade, 7 (sete) DAS-6, 16 (dezesseis) DAS-4, 8 (oito) DAS-3, 11 (onze) DAS-2 e 21 (vinte e um) DAS-1.

Art. 125. O Poder Executivo disporá sobre a estrutura regimental do Cade, sobre as competências e atribuições, denominação das unidades e especificações dos cargos, promovendo a alocação, nas unidades internas da autarquia, dos cargos em comissão e das funções gratificadas.

Art. 126. Ficam extintos, no âmbito do Poder Executivo Federal, os seguintes cargos em comissão do Grupo-Direção e Assessoramento Superiores - DAS e Funções Gratificadas - FG: 3 (três) DAS-5, 2 (duas) FG-1 e 16 (dezesseis) FG-3.

Art. 127. Ficam revogados a Lei nº 9.781, de 19 de janeiro de 1999, os arts. 5º e 6º da Lei nº 8.137, de 27 de dezembro de 1990, e os arts. 1º a 85 e 88 a 93 da Lei nº 8.884, de 11 de junho de 1994.

Art. 128. Esta Lei entra em vigor após decorridos 180 (cento e oitenta) dias de sua publicação oficial.

Brasília, 30 de novembro de 2011; 190º da Independência e 123º da República.

DILMAROUSSEFF

*José Eduardo Cardozo*

*Guido Mantega*

*Eva Maria Cella Dal Chiavon*

*Luís Inácio Lucena Adams*

Este texto não substitui o publicado no DOU de 1º.11.2011 e retificado em 2.12.2011

## CHILE

### Chilean Competition Act

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This text has been drafted by the FNE of Chile (*Fiscalía Nacional Económica* or the National Economic Prosecutor's Office) regarding the single article of DFL N°1 of 2005, of the Ministry of Economy, Development and Reconstruction, which sets the revised, coordinated and systemized text of the DL N° 211 of 1973, as amended by Law N° 20.361, published in the Official Gazette on July 13, 2009.

#### SECTION I GENERAL

##### PROVISIONS

**Article 1.-** The objective of this law is to promote and defend free competition in the markets.

Infringements against free competition in economic activities shall be corrected, prohibited, and punished in the manner and with the penalties stipulated herein.

**Article 2.-** The Competition Tribunal and the National Economic Prosecutor's Office are responsible for enforcing this law for the safeguard of free competition in the markets, within their respective areas of jurisdiction.

**Article 3.-** Whoever executes or enters into any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects, shall be penalized with the measures indicated in Article 26 hereof, notwithstanding any preventive, corrective or restrictive measures that could be ordered in each case, with regard to said acts, agreements or conventions.

Among others, the following shall be considered as acts, agreements or conventions that hinder, restrict or impede free competition, or which tend to produce said effects:

Express or tacit agreements between competitors, or concerted practices between them, which confer to them market power and which consist of fixing sale prices, purchase prices, or other commercial terms and conditions, restricting output, allocating territories or market quotas, excluding competitors, or affecting the results of tender processes (bid rigging).

Abusive exploitation by an economic agent or a group of economic agents, of a dominant position in the market, fixing sale or purchase prices, tying a sale to

the purchase of another product, allocating territories or market quotas or imposing other similar abuses.

Predatory practices, or unfair competition practices, carried out with the purpose of attaining, maintaining or increasing a dominant position.

**Article 4.-** No concessions, authorizations or acts that imply the awarding of monopolies for exercising economic activities may be granted, except where the law so permits.

## **SECTION II**

### **COMPETITION TRIBUNAL<sup>1</sup>**

#### **1. Organization and Functioning**

**Article 5.-** The Competition Tribunal is a specialized, independent jurisdictional entity, under the directional and correctional supervision of the Supreme Court, and whose purpose is to prevent, correct and penalize infringements to free competition.

**Article 6.-** The Competition Tribunal is composed of the following members:

- a) A lawyer, who shall preside over the Tribunal, appointed by the President of the Republic from a list of five candidates designated by the Supreme Court after a public contest. Only candidates with a distinguished professional or academic career in the area of competition, or in commercial or economic law, and with at least 10 years of professional experience, may participate in the contest.
- b) Four professionals, experts in competition matters, two of whom shall be lawyers and two shall have graduate or post graduate studies in economics. Two of these members, one from each professional area, shall be appointed by the Council of the Central Bank, after a public contest. The other two members, also one from each professional area, shall be appointed by the President of the Republic, from two lists of three applicants, one list for each appointment, elaborated by the Council of the Central Bank, also after a public contest process.

There shall be alternate members for the Tribunal; one lawyer and one graduate or post graduate in economics.

No person who has filled the post of National Economic Prosecutor or any other executive post with the National Economic Prosecutor's Office in the year prior to the beginning of the public contest opened for the purpose of the respective

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<sup>1</sup> Tribunal de Defensa de la Libre Competencia (TDLC)

appointment may be designated as principal or alternate member of the Tribunal.

The President of the Republic shall appoint the alternate lawyer and the Central Bank Council shall appoint the alternate graduate or post graduate in economics, in accordance with the procedure indicated in sub-section b) above, for which the same lists and contests provided for the appointment of the principal members may be used.

The public contest process mentioned in sub-sections a) and b) above shall be based on objective conditions, shall be public, transparent and non-discriminatory, and shall be established through a Supreme Court instruction, and a directive of the Central Bank Council, respectively.

In the event of absence or impairment of the President, the Tribunal shall be presided over by one of the other principal members, following the order of precedence established by a Tribunal instruction.

The appointment of the members of the Competition Tribunal shall be made by the President of the Republic by means of a supreme decree of the Ministry of Economy, Development and Reconstruction, also signed by the Minister of Finance.

The office of member of the Tribunal is incompatible with being:

- a) A public servant;
- b) An administrator, manager, or employee of a public corporation, or subject to the regulations of such corporations, as well as their parent companies, affiliates, controlling companies, and related companies; and
- c) A consultant or provider of professional services, in areas related to competition, for private individuals and legal entities that are subject to the jurisdiction of the Tribunal. It shall also be considered that an individual is a consultant or a provider of professional services if he receives any type of remuneration, fee or payment from private individuals and legal entities that provide professional services in areas related to these matters.

Alternate members shall only be affected by the incompatibility indicated in sub-section c) above.

Anyone who, at the time of his appointment, or during his term in office, incurs in any of the situations specified in paragraph 7 of this article shall resign to them.

Notwithstanding the provisions above, being a member of the Tribunal shall be compatible with holding teaching positions.

**Article 7.-** Prior to assuming their duties, the members of the Competition Tribunal shall take an oath or promise to safeguard the Constitution and the laws of the Republic, before the President of the Tribunal, and the Secretary of the Tribunal shall act as commissioner for oaths. In turn, the President shall do likewise before the most senior member, according to the order of their appointments, and the Secretary of the Tribunal shall act as the commissioner for oaths. Finally, the Secretary and the court clerks shall be sworn in before the President.

The principal and the alternate members of the Competition Tribunal shall remain in their posts for six years, and may be re-appointed for one successive term only, in accordance with the procedure indicated in the previous article. Notwithstanding, the Tribunal shall be partially renewed every two years.

The Competition Tribunal shall be addressed to as “Honourable”, and each of its members shall be addressed to as “Judge”.

**Article 8.-** The Competition Tribunal shall be located in Santiago.

**Article 9.-** The Tribunal shall function permanently, and shall determine the days and time for holding its sessions. In any event, it shall meet to decide cases in legally constituted sessions at least three times per week.

The quorum for sessions shall be of three members, and agreements shall be adopted by simple majority, with the deciding vote of the President in the event of a tie. Every other aspect shall be governed by Paragraph 2, Section V, of the Organic Code for Courts, as applicable.

**Article 9bis.-** The principal and alternate members of the Competition Tribunal shall make a sworn statement of their assets, under the same terms stipulated in articles 60 B, 60 C and 60 D of law N° 18,575, Fundamental Organic Law on General Bases for State Administration.

The statement of assets shall be made before the Secretary of the Tribunal, who shall keep it available for public review.

Failure to present the statement of assets in a timely manner shall be penalized with a fine ranging from ten to thirty UTM<sup>2</sup>. After sixty days have elapsed following the date on which the submission of the statement is due, the non-compliance of this duty shall be presumed.

Failure to comply with the obligation to update the statement of assets shall be penalized with a fine ranging from five to fifteen UTM. The fines referred to in the above paragraphs shall be imposed by the Competition Tribunal.

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<sup>2</sup> The UTM is a currency legally defined for tax purposes, indexed monthly by the Consumer Price Index. The value of one UTM is approximately US\$72 as at December 2009.

The procedure can be initiated *ex-officio* by the Tribunal or following a complaint made by one of its members. The affected Judge will have a ten working days period to respond to the charges. If necessary, there will be an eight day period for the presentation of evidence. All forms of evidence may be presented, and its weighing shall be done according the Tribunal's own good judgement. The Tribunal shall issue a ruling within ten days following the day on which the final proceedings are completed.

Notwithstanding the above, the offender shall have a period of ten days, as of the date of notification of the fine, in order to present the omitted statement, or to correct it. If the offender does so, the fine shall be reduced by half.

**Article 10.-** The monthly remuneration for the principal members of the Tribunal shall be an amount equivalent to the gross monthly remuneration of permanent nature for the post of National Economic Prosecutor. The alternate members, in turn, shall receive each month the amount of thirty UTM, plus ten UTM per session they attend where the corresponding principal member is not present, and up to a maximum of sixty UTM, regardless of the number of sessions which they attend.

In the event of unjustified absence, qualified as such by the majority of the remaining members of the Tribunal, the absent principal Judge shall have a reduction of 50% of the amount received by the alternate who replaced him.

**Article 11.-** Members of the Tribunal may lose their jurisdiction to hear certain cases due to a declared disqualification (after recusal or following the challenge of a party), by virtue of the causes specified in articles 195 and 196 of the Organic Code for Courts.

In any case, it shall be presumed *de jure* that the principal or alternate Judge, as applicable, shall also be disqualified when:

- a) The interest in the case is that of his/her spouse or his/her relatives by consanguinity up to the third degree, or up to the second degree by kinship; or of persons who are related to him/her by adoption, or that of companies or corporations of which these same people are legal representatives, agents, directors, managers, or incumbents in other executive positions, or hold, either directly or through other private individuals or legal entities, a share of the capital stock greater than 10% or that otherwise allows them to elect or prompt the election of one or more of the administrators, or where they exercise decisive influence over the administration or management of the corporation, as stipulated in article 99 of law N° 18.045 on the Stock Market; and
- b) He/She provides advisory or professional services to private individuals or legal entities that are party to the case, or he/she has done so in the two years prior to the date of initiation of the case

before the Tribunal, or has done so during the investigation by the National Economic Prosecutor which originated it.

Notwithstanding the provisions in paragraphs eight, nine and ten of Article 6, the following shall be cause for challenge of the principal or alternate members: having been a consultant to, or having provided services to, any of the parties during the year preceding that of the serving of the lawsuit or the publication of the decree that ordered the initiation of the procedure of article 31; the existence of relationships of employment, business, partnership or as a result of associations of a professional nature, with the attorneys or consultants of any of the parties, or the performance of professional services in the same premises, offices or dwellings with the latter, even when this does not imply participation in revenues or the performance of common or coordinated professional activities.

Likewise, it shall be a cause for challenge that the Judge advises or provides professional services to private individuals or legal entities who have or had been, during the two years prior to the date of the filing of the case in question, a counterpart of those referred to in sub-section b) of the second paragraph of this article, in any judicial procedure or commercial negotiation, that could affect the impartiality of the Judge.

The cause invoked may be accepted by the affected member. Otherwise, it shall be ruled forthwith by the Tribunal, with the exclusion of such member, applying a fine for fiscal benefit of up to twenty UTM to the party presenting the challenge, should the motion for disqualification be rejected unanimously.

In absence or disqualification of any of the principal members, he shall be replaced by the alternate Judge of the same area of expertise, unless this rule hinders the Tribunal from holding session with the minimum quorum established in Article 9.

If, due to any impediment, the Tribunal lacks sufficient principal or alternate Judge to form a quorum, these shall be subrogated by Judges of the Court of Appeals of Santiago, as stipulated in the Organic Code for Courts.

Articles 319 through 331 of the Organic Code for Courts shall be applicable to the members of the Tribunal, with the exception of article 322.

**Article 11bis.-** Notwithstanding the conflicts of interest established in Article 6, principal or alternate members of the Tribunal may neither be administrators, managers, or dependent workers, nor may advise or provide professional services to private individuals or legal entities who have been a party to any case heard by the respective Judge, for a period of one year as of the date on which said Judge left his position, unless the Tribunal's decision on a case that the Judge would have heard is pending, in which case the term of one year shall be as of the notification of the ruling.

Violation of this prohibition shall be punished by an absolute ban on holding any public office for the period of five years, and a fine for fiscal benefit equivalent to

the last year of remunerations received in the post. These penalties shall be imposed by the Supreme Court upon request by any interested party.

The complaint referred to in the previous paragraphs shall state clearly and precisely the facts which constitute the violation and shall be accompanied by the elements of proof on which they are founded, or by an offer to submit such proof, as the case may be. If the complaint does not meet these requirements, the Plenary of the Supreme Court, convened for this purpose, shall declare it inadmissible, without further proceedings.

Once the proceedings are initiated, the President of the Supreme Court shall notify the defendant, who shall respond within a period of eight days following the date of reception of the relevant notification document, which shall be sent together with its background information by the channel deemed to be the quickest.

Once the notified party has responded or the period stipulated in the preceding paragraph has expired, the President of the Tribunal shall summon the parties to a hearing in which he shall receive the evidence offered, and shall designate the Judge to whom such evidence must be submitted. Once the proceedings have been conducted or the terms have expired without their performance, the Judge shall order that the relevant court records be brought before the Plenary of the Supreme Court especially summoned for that purpose. The Supreme Court may only decree measures for better resolving the case once the hearing has ended.

Any of the parties may appear before the Supreme Court up until the hearing of the case.

A decision that imposes the sanction to which this article refers, shall give the right to whomever deems himself affected to file an extraordinary motion for reversal before the Supreme Court of the ruling in which the defendant has participated, when the affected party considers that his acts and decision were damaging to his interests.

**Article 12.-** Members of the Competition Tribunal shall cease to hold office for the following causes:

- a) End of the legal period of their appointment;
- b) Voluntary resignation;
- c) Destitution due to noticeable abandonment of duties;
- d) Supervening incapacity: namely, that which prevents the member from performing his duties for a period of three consecutive months, or for six months in any giving year.



- e) When any of the circumstances listed in paragraphs eight and following of article 6 arises.

The measures of sub-sections c), d) and e) above shall be made effective by the Supreme Court, upon request by the President of the Tribunal or by two of its members, without prejudice to the disciplinary authority of the Supreme Court.

The resolution that makes the destitution effective must indicate the facts on which it is based and the background information that was considered to prove such facts.

Once a judge has ceased to hold office, if the remaining time of the appointment is greater than a hundred and eighty days, a substitute shall be appointed in accordance with the rules established in article 6 hereof. In the case of sub-sections b), c), and d) above, the substitute shall last in the post for the remaining time of the original appointment.

**Article 13.-** The staff of the Competition Tribunal shall be as follows:

<b>Position</b>	<b>Rank</b>	<b>Number</b>
Secretary	4	1
Court Clerk	5	1
Court Clerk	6	1
University graduate in economics	5	1
University graduate in economics	6	1
Head of the Budget Office	14	1
First Officer	16	1
Hall Official	17	1
Assistant	20	1
<b>Total Staff</b>		<b>9</b>

In addition, temporary staff may be hired when the needs of the Tribunal so require, after approval by the Government Budget Office.

The staff of the Tribunal shall be subject to the general labour law. In all, they shall be subject to the same regime of remuneration, dedication and incompatibilities as the staff of the National Economic Prosecutor's Office.

The above notwithstanding, personnel who provide services to the Tribunal shall be regarded as public servants, for the purposes of administrative accountability and criminal liability.

The Secretary of the Tribunal shall be in charge of the administration and shall have direct authority over the staff, without prejudice to the specific functions and attributions that are assigned or delegated to him by the Tribunal.

The Tribunal shall dictate rules of procedure based on which the Secretary shall evaluate the staff annually. An appeal against such evaluation may be brought before the Tribunal within a five working days period as of the notification of the evaluation.

**Article 14.-** Appointment of the officers shall be carried out by the Tribunal, on the basis of credentials or competitive examination.

The President of the Tribunal shall issue the appointments by a resolution addressed to the Office of the Comptroller General of the Republic only for the purpose of its records. The same procedure will be followed with regard to all of the resolutions related to the staff.

**Article 15.-** Notwithstanding the rules provided for in general labour law regulations, officers who fall into non-compliance of their duties and obligations may be sanctioned by the Tribunal with any of the following disciplinary measures: reprimand, censure in writing, a fine of up to one month's salary, or suspension of employment for up to one month without remuneration.

Sanctions shall be agreed upon by majority vote of the Judges attending the session.

**Article 16.-** In the event of absence or impediment, the Secretary of the Tribunal shall be substituted by the most senior court clerk or, if not possible, by the Court clerk who holds the position immediately under him. The substitute shall take the same oath taken by the Secretary for the performance of this post, before the President of the Tribunal.

**Article 17.-** The Public Sector Budget Law shall consult annually, in a comprehensive manner, the resources necessary for the functioning of the Competition Tribunal. For these purposes, the President of the Tribunal shall communicate his budgetary needs to the Minister of Finance within the periods and in the manner established for the public sector.

The Tribunal shall maintain a bank account in its name against which the President and the Secretary may withdraw jointly.

Within the first fifteen days of January each year, the President and the Secretary of the Competition Tribunal shall render account of the expenses incurred before the Tribunal.

In issues of financial, budgetary and accounting information, the Tribunal shall be governed by the provisions of State Financial Administration Law.

The Fiscal budget allocated to the Tribunal shall be approved by means of a resolution by the Government Budget Office.

## **2. Attributions and procedures**

**Article 18.-** The Competition Tribunal shall have the following powers and duties:

1. To hear, upon request by any party or the National Economic Prosecutor's Office, situations that could constitute violations of this law;
2. To hear, upon request by whoever has a legitimate interest, or by the National Economic Prosecutor, issues of a non-contentious nature that could violate the provisions of this law, regarding existing acts or contracts or those pending completion, for which purpose the Tribunal may set the conditions to be met by said acts or contracts;
3. To issue general instructions in accordance with the law, which shall be observed by individuals executing or entering into acts or contracts that are related to or that could infringe free competition;
4. To propose to the President of the Republic, through the relevant State Minister, the modification or derogation of any legal and regulatory precept that the Tribunal deems contrary to free competition, as well as the dictation of legal and regulatory precepts necessary for promoting competition or regulating the exercise of certain economic activities that are provided in non-competitive conditions; and
5. Any others provided by law.

**Article 19.-** The hearing and the ruling on cases referred to in subsection 1) of the above article shall be subject to the procedure regulated in the following articles.

**Article 20.-** The procedure shall be in writing, except for the hearing of the case, of a public nature and shall be conducted by the Tribunal up to the final decision. The parties shall appear before the Tribunal and be represented in the manner provided for in article 1 of law N.º 18.120, regarding court appearances.

The procedure may be initiated at the request of the National Economic Prosecutor or by a lawsuit filed by a private individual, which shall immediately be conveyed to the National Economic Prosecutor's Office. The complaint or lawsuit shall contain a clear and precise account of the facts, acts or conventions that would infringe this law and indicate the market or markets that would be affected by the presumed violation. In the event that the complaint or

lawsuit does not contain the above-mentioned requisites or any other of those required by article 254 of the Civil Procedure Code and other applicable regulations, the Tribunal shall grant the plaintiff or petitioner a term of three working days to rectify said omissions. Once this term has expired without the omissions being rectified, the Tribunal, by means of a grounded decision, may reject the lawsuit or request for proceedings. Once the Tribunal has decided to entertain the complaint or request, it shall notify so to the affected party, which may respond within a fifteen working days period or the longer term that the Tribunal establishes, which may not exceed thirty days.

Legal actions contemplated in this law are not enforceable after a period of three years has elapsed since the occurrence of the conduct on which they are based.

This statute of limitations is interrupted at the request of the National Economic Prosecutor or by private lawsuit, brought before the Tribunal.

The above notwithstanding, the statute of limitations to prosecute the conduct described in sub-section a) of article 3, shall be of five years, which shall not start running while the effects ascribed to such conduct persist in the market.

Likewise, measures imposed for preventing, correcting or penalizing a infringement to free competition will not be enforceable after a period of two years has expired since the final ruling. This statute of limitations is interrupted by precautionary or compulsive actions of the Tribunal, the National Economic Prosecutor or private plaintiff.

The statute of limitations on actions and measures that are imposed for preventing, correcting or penalizing an infringement of free competition, are not tolled in favour of any person.

Notwithstanding the general provisions, civil actions derived from a free competition infringement, cannot be initiated after a period of four years has elapsed since the Tribunal rendered its final decision.

**Article 21.-** The notice of a complaint or a lawsuit, with its respective resolution, shall be served on the defendant personally by a commissioner for oaths, together with a complete copy of the resolution and its basis. The Tribunal may instruct that only an excerpt of these documents be delivered.

The resolution that initiates the submission of evidence period shall be notified by substituted service. After 30 working days have elapsed since the issuance of the resolution without it having been served, the Tribunal shall proceed to notify it in accordance with paragraph four.

Final judgments must be served upon the parties personally or by substituted service.

All other resolutions shall be notified by any secure method that the parties agree upon, and alternatively by the Tribunal's daily docket. In the event that

they opt for electronic means, the notifications shall be signed by advanced electronic signature.

For the purpose of performing the proceedings set forth under this section, besides the Secretary of the Tribunal, the persons whom the President designates shall act as of commissioners for oaths.

**Article 22.-** After the term established in article 20 has expired, and whether or not the service of the procedure upon the interested parties was effected, the Tribunal may summon the parties to a conciliation hearing. If it is not considered pertinent to do so, or if said procedure has failed, the Tribunal shall set a twenty working days period for the submission of evidence. In the event that the conciliation has been reached, the Tribunal shall give its approval, provided that it does not infringe free competition. The appeal referred to in article 27 can be brought against the resolution that approves conciliation, by people who are allowed to litigate and who were not parties to such conciliation.

The type of evidence indicated in article 341 of the Civil Procedure Code shall be admissible, as shall any indication or background information that, in the opinion of the Tribunal, is suitable for establishing the pertinent facts. The Tribunal may instruct, at any stage of the case, even after the hearing when it turns out to be indispensable for clarifying those facts that still appear to be obscure and doubtful, the practice of the evidentiary proceedings that are deemed necessary.

Parties who desire to render testimony shall present a list of witnesses within five working days counted from the issuance of the resolution that sets the evidence submission period. In any case, for controversial facts, declarations by only three witnesses from each party shall be admitted, unless the Tribunal, upon justified request made when submitting the list of witnesses, increases said number. The provisions in articles 358, 360 sub-section 2, 373, 374, 376, 377 and 378 of the Civil Procedure Code shall not be applicable to the witnesses.

Proceedings that arise from personal inspection by the Tribunal, declarations of a party, and testimony of witness, shall be performed before the member appointed by the Tribunal in each case, who may ask any questions he deems suitable, prevent declarations and questions of the parties that deviate to irrelevant or inadmissible matters, and outright resolve the objections.

Probatory proceedings that must be performed outside the territory of the Metropolitan Region of Santiago may be conducted through the relevant local judge, guaranteeing his faithfulness and rapid performance by any suitable mean. Other proceedings shall be practiced through the staff officer of the Tribunal who is designated for that purpose.

The Tribunal shall keep a complete record of all hearings that have taken place, by any method that ensures their reliability.

Instrumental proof may be presented up to ten days prior to the date set for the hearing of the case. Upon request by a party, the Tribunal may decree that access to those instruments that contain formulas, strategies or trade secrets or any other element which dissemination could significantly affect the competitive performance of the titleholder be restricted from third parties who are foreign to the process, or that they be kept confidential from the other party. Instruments of a restricted or confidential nature by virtue of the provision in the second paragraph of subsection a) of article 39, shall always be submitted as such by the National Economic Prosecutor's Office, and the Tribunal shall keep them restricted and confidential.

Without prejudice to the above, at any stage of the process and even as a means for better resolving the case, the Tribunal may order the relevant party, *ex officio* or upon request of the party, to prepare a public version of the document so that other parties may exercise their right to object to it or to observe it.

If the above-mentioned public version is insufficient as valid information for ruling on the case, the Tribunal may decree, *ex-officio* and by a justified resolution, the declassification of the document, and shall instruct that it be disclosed to the other parties.

The Tribunal shall assess the evidence according to the rules of logic and acquired knowledge of the Tribunal.

**Article 23.-** Once the probatory term expires, the Tribunal shall declare so, and shall set the date and time for the hearing. The Tribunal shall hear pleadings from the parties' attorneys when requested by any of them.

**Article 24.-** Subordinate issues to the main matter, except for that which is stipulated in the following Article, shall be resolved outright by the Tribunal, although it may decide on them at the time of issuing its final ruling.

**Article 25.-** The Tribunal may, at any stage of the trial or prior its commencement, decree all precautionary measures needed to avoid the negative effects of the conduct subject of the complaint and to safeguard the common interest, for the time deemed necessary. The adoption of these measures shall be notified to the parties, who may challenge them, and if so, this incident will be dealt with in accordance to the general rules and in a separate file.

The measures decreed shall be provisional and may be modified or set aside at any stage of the case. In order to resolve them, the petitioner shall attach background information that at least constitutes a serious presumption of the right claimed or of the facts reported. The Tribunal, when it deems it necessary, may require collateral from the particular actor to respond for the damages caused.

The resolution that grants or denies a precautionary measure shall be served by mail by a certified letter, unless the Tribunal orders, for justified reasons that it be served by substituted service. Should the measure be granted pre-judicially, the prosecutor or the petitioner shall file the formal complaint or the demand within a period of twenty working days or a greater term set by the Tribunal, counted from the notification of the measure. Otherwise, the measure shall cease to have effect.

However, the measures may be enforced without prior service on the person against whom they are directed, provided that there are serious reasons for doing so, and that the Tribunal so decrees. In this case, if five days have elapsed without the service being performed, the proceedings carried out will be void. The Tribunal may extend this time limit for justified reasons.

Without prejudice to the above paragraphs, Sections IV and V of Book II of the Civil Procedure Code shall not apply with regard to prejudicial and precautionary measures dictated by the Tribunal, except for the provisions in articles 273, 274, 275, 276, 277, 278, 284, 285, 286, 294, 296 and 297 of said body of law, in as much as they may be applicable.

**Article 26.-** The final ruling shall be grounded, and shall state the fact, law, and economic fundamentals on which is based. Express mention shall be made of the bases of the minority votes, if there are any. This decision shall be pronounced within the period of forty-five days as of the moment no further procedures are pending before the Tribunal.

In its judgment, the Tribunal may adopt the following measures:

- a) Modify or terminate acts, contracts, agreements, systems or pacts that are contrary to the provisions of this law;
- b) Order the modification or dissolution of companies, corporations and other private entities that were involved in the acts, contracts, agreements, systems or pacts referred to in letter a) of this paragraph. ;
- c) Impose fines up to an amount equivalent to twenty thousand annual tax units and, in the case of sanctioning the conduct mentioned in sub-section a) of Article 3, up to an amount equivalent to thirty thousand UTA<sup>3</sup>. The fines may be imposed on the relevant legal entity, its directors, administrators, and on any person who was involved in the execution of the relevant conduct. Fines applied to private individuals may not be paid by the legal entity wherein he/she carried out his/her duties, nor by the shareholders or partners thereof. Also, they may not be paid by any other entity that belongs to the same company group in the terms indicated in Article 96 of the Securities Market Law, nor by their shareholders or

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<sup>3</sup> The UTA is a currency legally defined for tax purposes. It corresponds to the UTM's value in the last month of the commercial year, multiplied by 12. The value of one UTA is approximately US\$867 as at December 2009

partners. In the case of fines applied to legal entities, the directors, administrators and those persons who benefited from the relevant conduct shall be jointly and severally liable for the payment, provided they participated in such conduct.

The following circumstances, among others, shall be considered in determining the fines: the economic benefit obtained from the violation, the seriousness of the behaviour, the violator's condition of being recidivist, and for the purposes of decreasing the fine, the collaboration that he/she provided to the National Economic Prosecutor's Office before or during the investigation.

**Article 27.-** Decisions pronounced by the Competition Tribunal, except for the final ruling, shall be susceptible to challenge before the same Tribunal. Such dispute may be heard in an incidental proceeding or be decided immediately.

The final ruling that imposes some of the measures contemplated in Article 26 shall be subject to appeal for reversal before the Supreme Court, and also that which dismisses such measures. Said appeal shall be grounded and may be filed by the National Economic Prosecutor's Office or by any of the parties, before the Competition Tribunal within a period of ten working days following the relevant notification. This term shall be extended with the respective increase afforded when the place where the affected parties have their domicile is different from the Tribunal's head office, in accordance with the table referred to in Article 259 of the Civil Procedure Code.

In order to proceed with the appeal, the appearance of the parties will not be necessary. The appeal will be heard with preference to other issues, and suspension of the hearing of the case shall not proceed due to the reason provided in sub-section 5 of Article 165 of the Civil Procedure Code.

The filing of an appeal shall not suspend the execution of the ruling, except in relation to the payment of fines. However, upon petition of a party and by means of a grounded resolution, the Court Chamber that hears the appeal may suspend the effects of the ruling, totally or partially.

**Article 28.-** Execution of the resolutions pronounced by virtue of this procedure shall correspond directly to the Competition Tribunal, which shall, for these purposes, have the authority of a Court of Justice.

Fines imposed by the Competition Tribunal shall be paid within the first ten working days following the date on which the relevant resolution is final.



If the period expires and the affected party does not prove the payment of the fine, the Tribunal shall *ex-officio* or at the request of a party, compel the payment in the manner provided for in Article 543 of the Civil Procedure Code<sup>4</sup>.

**Article 29.-** The regulations contained in Books I and II of the Civil Procedure Code shall be supplementary to the procedure mentioned in the preceding articles, in everything that is not incompatible with it.

**Article 30.-** The damage claim that may result from the anticompetitive conduct judged as such by a final ruling of the Competition Tribunal, shall be filed in the competent civil court according to the general rules, and shall be handled according to the summary proceedings established in Book III Title XI of the Civil Procedure Code.

The competent civil court, when ruling on the damage claim, shall base its ruling on the conduct, actions and legal classification thereof, as established by the decision of the Competition Tribunal.

**Article 31.-** The exercise of the attributions referred to in sub-sections 2) and 3) of Article 18, as well as the issuance of the reports entrusted to the Tribunal by virtue of special legal provisions, shall be subject to the following procedure:

1) The decree that opens the procedure shall be published in the Official Gazette and on the Internet website of the Tribunal, and shall be notified, by a written official communication, to the National Economic Prosecutor's Office, to authorities who are directly affected and economic agents who, in the Tribunal's sole judgment, are related to the matter, in order that they, and those who have a legitimate interest, within a period of not less than fifteen working days, may contribute relevant information.

When the issue concerns specific geographic areas, the Tribunal may order that the notification also be done by means of a publication in the relevant local newspapers.

The Tribunal shall always provide the necessary conditions such that all intervening parties may examine the file.

2) Once the above period expires, those who executed or entered into, or intend to execute or enter into such acts or contracts, may evaluate the recommendations the National Economic Prosecutor's Office made during the contribution of information period and communicate in writing their agreement with them to the Tribunal.

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<sup>4</sup> The Tribunal may order that the offender be arrested for up to 15 days or impose the payment of a proportional fine. The Tribunal may re-impose these measures to compel the offender to comply with the original measure.

3) After the term indicated in sub-section 1 expires, the Tribunal shall call a public hearing, which will take place within a period of not less than fifteen days nor greater than thirty days as of the notification, which shall be made by means of a publication in the Official Gazette and on the Tribunal's Internet website, so that those who contributed information may express their opinion.

In the event that the communications indicated in sub-section 2 are received, the Tribunal shall have a period of fifteen days, as of the reception of said communication, to call a public hearing, which shall be carried out in accordance with the preceding paragraph.

4) If the authorities, entities or people referred to in the above sub-sections do not supply information within the time limits set by the Tribunal, the latter may forgo such information.

5) *Ex-officio* or upon petition by the interested party, the Tribunal may obtain and receive the information it deems pertinent.

Resolutions or reports issued by the Tribunal on matters referred to in this article shall be subject to challenge before the same Tribunal. The final resolutions, regardless of whether or not they set conditions, may only be subject to the appeal referred to in Article 27. Such appeal shall be grounded and may be filed by the petitioner(s), the National Economic Prosecutor's Office, or any of the third parties that have contributed information in accordance with sub-section 1.

**Article 32.-** Acts or contracts executed or entered into in accordance with the decisions of the Competition Tribunal, shall not bear liability, except in the event that they were later deemed as contrary to free competition by the same Tribunal, based on new information, and only after the resolution stating this fact is notified or published as the case may be.

In any case, the Judges that concurred in the decision shall not be considered as being disqualified for the new proceedings.

### **SECTION III**

#### **THE NATIONAL ECONOMIC PROSECUTOR'S OFFICE**

**Article 33.-** The National Economic Prosecutor's Office shall be a decentralized public service, with legal personality and assets of its own, independent from any other entity or service, and subject to the surveillance of

the President of the Republic, through the Ministry of the Economy, Development and Reconstruction.

The National Economic Prosecutor's Office shall have its head office in the city of Santiago. It shall be headed by an officer designated as National Economic Prosecutor, who shall be appointed by the President of the Republic following a selection process for senior public officers, as provided for in paragraph 3 of Section VI of law 19,882. He will remain in this post for four years, and his appointment may be renewed only once.

The National Economic Prosecutor shall cease to hold office for the following reasons:

- a) End of his legal appointment period;
- b) Voluntary resignation accepted by the President of the Republic;
- c) Destitution for manifest negligence in the performance of his duties.
- d) Disability.

Removal due to the causes indicated in subsections c) and d) shall be ordered by the President of the Republic, with the approval of the Supreme Court, upon request by the Ministry of the Economy, Development and Reconstruction. The approval shall be granted by the Plenary of the Supreme Court, especially summoned for that purpose, with the concurrence of the majority of its members.

The National Economic Prosecutor shall perform the chief management of the service as well as its judicial and extrajudicial representation.

Notwithstanding the general requirements for entering the Public Administration, the Prosecutor shall be a lawyer, and have ten years of professional practice or three years in the Service.

**Article 34.-** The National Economic Prosecutor may appoint Assistant Prosecutors in order to act in any territorial area when the specialization and complexity or urgency of an investigation so require.

The Assistant Prosecutors shall have the attributions delegated by the National Prosecutor.

**Article 35.-** As of the first day of the month following the publication of this law, the staff of the National Economic Prosecutor's Office shall be as follows:

<b>Exclusive Confidence Executive Officers</b>	<b>Rank</b>	<b>Nº Positions</b>

National Economic Prosecutor	1	1
Deputy National Prosecutor	3	1
Head of Department	3	4
Head of Department	4	4
Subtotal		10
<b>Career positions</b>		
Head of Section	10	1
Head of Section	11	2
Subtotal		3
<b>Professionals</b>		
Professional	4	4
Professional	5	4
Professional	6	4
Professional	7	3
Professional	8	2
Subtotal		17
<b>Assistant Officers</b>		
Assistant Officer	9	1
Assistant Officer	10	2
Assistant Officer	11	1
Assistant Officer	12	1
Assistant Officer	13	2
Subtotal		7
<b>Technicians</b>		
Technician	14	1
Technician	15	1
Subtotal		2
<b>Administrative clerks</b>		
Administrative clerk	16	1
Administrative clerk	17	1
Administrative clerk	18	2
Administrative clerk	19	2
Subtotal		6
<b>Assistants</b>		
Assistant	19	1
Assistant	20	2
Assistant	21	2

Subtotal	5
<b>Total Staff</b>	<b>50</b>

In addition to the general requirements stipulated by law N° 18,834 for entering the State Administration, the following requisites shall be fulfilled for the positions indicated in each case:

Executive Officers: Deputy National Prosecutor: Lawyer and a minimum professional experience of 5 years or 3 years of experience or specialization in areas similar to the functions of the National Economic Prosecutor's Office.

Head of Departments: Law, Civil Engineer, Business, Public Accountant/Auditor or Public Administrator Degree, granted by a University or State Professional institution or duly recognized by the State, and a minimum professional experience of 3 years.

Head of Section: Career degree of at least 8 semesters granted by a University or State Professional Institute or recognized by the State, and at least 3 years experience in State Administration.

Professionals: Law, Engineer, Public Accountant/Auditor or Public Administrator degree, granted by a University or State Professional Institute or recognized by the State or other university professionals with postgraduate studies in economic sciences, of at least two semesters, granted by State Universities or recognized by it, including Universities abroad. In any case, a minimum professional experience of 3 years will be required.

Assistant Officers: Public Administrator, Public Accountant/Auditor degree or other studies of at least 8 semesters granted by a University or State Professional Institute or recognized by the State.

Technicians: Technical degree or equivalent in the economic, financial, informatics or statistics field, granted by a State Professional Institute or recognized by the State; or a Public Accountant degree granted by any of the above institutions or by a State Technical-Professional Secondary Education Institution or recognized by it.

Administrative clerks: Secondary Education degree or equivalent.

Assistants: Must have approved Primary Education.

**Article 36.-** The permanent staff of the National Economic Prosecutor's Office and those hired as contract staff, shall be subject to the provisions of this law, and subserviently, to those of Section I of decree law N° 3,551, of 1981, and those of the Administrative Statute approved by law N° 18,834 and its amendments.

The Qualification Board for staff of the National Economic Prosecutor's Office shall be formed by the Deputy Prosecutor, who will chair it, by the two most senior Heads of Department, and a representative of the staff, chosen by it.

**Article 37.-** The remunerations regime for the National Economic Prosecutor's Office's personnel shall be that of the Regulators and Law Enforcement Institutions.

The allowance established in Article 17 of law N° 18,091, replaced by Article 10° of law N° 19,301, shall also be applied to the personnel with permanent and fixed term contracts at the National Economic Prosecutor's Office, and shall be determined in the manner indicated in said provision. For these purposes, the National Economic Prosecutor shall inform the Ministry of Finance about this matter on an annual basis.

Charged to this allowance, the permanently and the yearly hired personnel of the National Economic Prosecutor's Office may receive a performance bonus, which shall be governed by the following provisions:

- a) The bonus will be paid to 25% of the highest performing staff members during the previous year, and who belong to the rank of Executive Officers, Professionals and Inspectors;
- b) For these purposes, qualifications obtained by the staff members will be taken into account, in accordance with the regulations that govern this matter;
- c) The amounts paid for this bonus shall not exceed one fourth of the percentages set annually in compliance with paragraph two of Article 17 of Law 18,091, and shall be determined in said administrative act. The same decree shall set the percentage to be received by workers who were not subject to qualification due to their participation in the qualifying process, which will not be considered for the purposes of the limit established in subsection a) of this paragraph;
- d) The amounts set according to the above paragraph, plus those due in accordance with the allowance of Article 17 of law N° 18,091, shall not, in any case, exceed the maximum percentage or proportion stipulated in paragraph two of said provision;
- e) Employees who obtain the bonus shall have the right to receive it only during the twelve months following the end of the relevant qualification process;
- f) The bonus shall be paid to the workers who are in service at the date of the payment, in four quarterly instalments. The amount to be paid in each instalment shall be the value accrued in the corresponding quarter, and

- g) For tax purposes, it shall be understood that the amount paid in each instalment was accrued in equal parts in each month of the relevant calendar quarter.

**Article 38.-** Personnel with permanent and fixed term contracts at the National Economic Prosecutor's Office shall have exclusive dedication to performing their duties in the Service. These posts shall be incompatible with any other function of the State Administration, except for those referred to in sub-section a) of Article 81 of law N° 18,834. This staff shall not render services as dependent workers or carry out activities inherent to their degree of professional or technical quality for individuals or legal entities that could be subject to action by the Service.

**Article 39.-** In exercising his functions, the National Economic Prosecutor shall be independent from all authorities and tribunals before whom he acts. He may, therefore, defend the interests entrusted to him in the manner he deems abided by law, according to his own appreciations.

The National Economic Prosecutor shall have the following powers:

- a) To open any investigations that he deems necessary to prove violations of this law, notifying this to the affected party. With the knowledge of the President of the Competition Tribunal, the General Directorate of the Chilean Investigation Police shall provide to the National Economic Prosecutor the staff he requires for complying with the task indicated in this subsection or execute the specific proceedings requested with the same purpose.

The National Economic Prosecutor, with the knowledge of the President of the Competition Tribunal, may instruct that investigations that are initiated *ex-officio* or by virtue of complaints be restricted..

Also, the National Economic Prosecutor may order, *ex-officio* or at the request of the interested party, that certain parts of the file be restricted or kept confidential, provided that the objective is to protect the identity of those who made the statements or contributed information according to Article 39bis, or that contain formulas, strategies or commercial secrets or any other element the disclosure of which could significantly affect the competitive development of its holder, or to protect the effectiveness of the investigations conducted by the National Economic Prosecutor's Office.

The above notwithstanding the fact that the provisions in paragraph eight of Article 22 be applied in an ongoing process, after the respective notification has been made, or that the Tribunal instructs the handing of copies of the file's parts that have not been added to the process, eliminating from them all references that could reveal the identities or protected data, as mentioned above.

The National Economic Prosecutor may instruct that the affected party not be notified of the commencement of an investigation, with the authorization of the Competition Tribunal;

- b) To act as a party, representing the general interest of the economic community before the Competition Tribunal and the courts of justice, with all the powers and obligations inherent to that position, with the exception of criminal investigations and cases.

The National Economic Prosecutor may, himself or through a representative, defend or dispute the rulings of the Competition Tribunal before the Supreme Court.

In relation to investigations carried out by Assistant Prosecutors and the charges made by them, the National Economic Prosecutor may make them his own, filing the charges before the Competition Tribunal, or he may dismiss them, presenting a founded report to the Tribunal for this purpose ;

- c) To require from the Competition Tribunal the exercise of any of its attributions and the adoption of preventive measures with the occasion of the investigations that the National Economic Prosecutor's Office is executing.
- d) To oversee compliance with decisions, rulings and instructions made by the Competition Tribunal or the courts of justice, on those matters to which this law refers;
- e) To issue reports requested by the Competition Tribunal in those cases where the National Economic Prosecutor is not acting as a party;
- f) To ask for the collaboration of any officer from public entities and services, from municipalities or companies, entities or corporations in which the State or its companies, entities or corporations, or the municipalities, have any contribution, representation or participation, who are obliged to render it, as well as to provide the information that they have on file and that the National Economic Prosecutor requires from them, even when said information is classified as secret or restricted, according to current legislation, in which case previous authorization from the Tribunal will be required;
- g) To ask any office, service or entity referred to in the above subsection, to make available the information deemed necessary for the investigations, accusations or lawsuits in which it is involved or in which it should be involved. The National Economic Prosecutor may also obtain and review all the documentation, accounting elements and others that are deemed necessary;
- h) To request from individuals the information and documents deemed necessary in relation to the investigations being conducted. Individuals and the representatives of the legal entities from which the National Economic Prosecutor needs information whose delivery may cause damage to their interests or those of third parties may request the Competition Tribunal to



dismiss the requirement totally or partially. This request must be justified and shall be submitted to the National Economic Prosecutor's Office within five days following the request made by this authority, whose effects will be suspended from the moment the relevant presentation is carried out. The Competition Tribunal shall hear and resolve said request at its next meeting, with a verbal or written report from the National Economic Prosecutor, and its ruling shall not be susceptible to any kind of appeal;

- i) To execute and enter into all kind of acts and contracts regarding assets, which form the Service's resources, even those that allow encumbering and transferring ownership and reaching settlements regarding rights, actions and obligations. The transactions referred to herein must be approved by resolution of the Ministry of Finance in case their amounts exceed two thousand UF<sup>5</sup>;
- j) To call to testify, or request written testimony, of representatives, administrators, advisors and dependents of the entities or individuals who could have knowledge about acts or agreements that are the object of investigations, and any other person who could have executed and entered into acts or pacts of any kind with them in relation to any fact, knowledge of which is deemed necessary for fulfilling his duties;
- k) To require reports from State technical entities as deemed necessary and hire the services of experts or technicians;
- l) To enter into agreements or memoranda of understanding with other public services and universities, on subjects of mutual cooperation. Also, enter into agreements with foreign agencies or other entities whose objective is to promote or defend free competition in economic activities.
- m) To agree with other public services and State entities the electronic transfer of information that is not secret or reserved according to law, to facilitate fulfilment of his duties. Also, and prior founded resolution of the National Economic Prosecutor, he may agree the electronic interconnection with private entities or institutions. Likewise, he may agree this interconnection with foreign public entities or international organizations, with which he has entered into agreements or memoranda of understanding.
- n) In serious and qualified cases in investigations aimed at proving the behaviour described in sub-section a) of Article 3, with prior approval of the Competition Tribunal, to request authorization from the relevant Magistrate of the Court of Appeals, through a grounded petition, that the police or the investigations police, under the guidance of an officer of the National Economic Prosecutor's Office, proceed to:
  - n.1) Enter public or private premises, and if necessary, force entry and break into;

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<sup>5</sup> The UF (*Unidad de Fomento*) is Chile's inflation-indexed currency unit.

- n.2) Search and seize all kinds of objects and documents that permit proving the existence of the violation;
- n.3) Authorize interception of all types of communications, and
- n.4) Order any company that supplies communication services to provide copies and records of communications transmitted or received by them.

The fact of having resorted to the approval mentioned above shall not constitute grounds for disqualifying the Competition Tribunal Judges from hearing the case.

In order to grant the authorization referred to in the first paragraph, the Magistrate of the Court of Appeals shall verify the existence of precise and serious background information regarding the existence of collusion, gathered by the National Economic Prosecutor's Office prior to the request for authorization to make use of the powers set forth in this sub-section. In the authorization, the specific measures must be specified in detail as must the time during which they will be exercised and the people whom those measures could affect.

The exercise of the powers granted in paragraph one shall be subject to the requirements and formalities stipulated in articles 205; 207; 208; 209, paragraphs one, two and three, remission of information to the national prosecutor not being applicable for the purposes foreseen in this last paragraph; 210; 212 to 214, 216 through 225, except for paragraph three of Article 222, of the Criminal Procedure Code. Without prejudice to the above, the National Economic Prosecutor's Office shall not intercept communications between the individual being investigated and those people who, due to their status, profession or legal function, such as the lawyer, doctor or confessor, have the duty to keep the secret which has been entrusted to them.

For the purposes of this law, the terms "prosecutor" or "Public Prosecutor's Office" referred to in the Criminal Procedure Code provisions, shall be understood as referring to the "National Economic Prosecutor". References made to "judge" or "supervisory judge" shall be understood as referring to the "Magistrate of the Court of Appeals" indicated in paragraph one of this subsection; references made to "oral trial" shall be understood as the "procedure", and those made to "charged or accused person" shall be understood as referring to the "affected party".

In the event that the Office of the Prosecutor does not comply with any of the requirements or formalities indicated in paragraph four, the affected parties may file a complaint with the Magistrate of the Court of Appeals referred to in paragraph one, who shall immediately deliver a verdict in a single hearing and summoning the parties for that purpose.

The evidence obtained as a result of the actions established in paragraph one, may not be used as proof in the procedure before the Tribunal in the

event that the performance or exercise of such actions were carried out in cases not stipulated by law, or when the requisites foreseen for the exercise of such actions were not complied with, and would have been so declared, in the manner indicated in the preceding paragraph, by the Magistrate of the Court of Appeals referred to therein.

Background information that is obtained by exercising the faculties contained in this subsection may not be used by the National Economic Prosecutor's Office in any other investigation, unless there is a new court authorization.

- ñ) To sign extrajudicial agreements with economic agents involved in his investigations, in order to protect free competition in the markets.

The Tribunal shall review the agreement in a single hearing summoning the parties for that purpose, within five working days after receiving the information. During this proceeding, the Tribunal may hear pleadings by the parties. The Tribunal shall approve or reject the agreement within fifteen working days, counted from the date of the hearing. Once rendered, these resolutions shall be binding on the parties that appeared for the agreement, and only an objection before the same Tribunal may be brought against them, and

- o) Any others provided by law;

**Article 39 bis.-** Whoever has been involved in the conduct described in subsection a) of Article 3 may be granted a reduction or exemption of the fine when he/she provides information to the National Economic Prosecutor's Office that leads to proving the existence of such conduct and identifying those responsible for it.

In order to qualify for these benefits, applicant must meet the following requirements:

1. Provide precise, veracious and verifiable information that represents an effective contribution that amounts to sufficient grounds to file an action before the Tribunal;
2. Abstain from disclosing the fact of the application for these benefits until the Office of the Prosecutor has either filed an action or ordered the closing of the case related to the application.
3. Terminate his/her participation in the conduct immediately after submitting his application.

In order to benefit from a fine exemption, in addition to meeting the requirements indicated in the previous paragraph, the applicant shall be the first, among the group of those responsible for the imputed conduct, to provide information to the Office of the Prosecutor.

In order to benefit from a fine reduction, in addition to fulfilling the requirements indicated in paragraph two, the applicant shall provide additional evidence to that submitted by the first person that supplied information to the National Economic Prosecutor's Office. In any case, the reduction of the fine requested by the Prosecutor in his submission of charges shall not be greater than 50% of the highest fine requested for the other perpetrators of the conduct who cannot avail themselves of the benefits of this article.

In his submission of charges, the Prosecutor shall individualize each perpetrator of the conduct that fulfilled the requirements for benefiting from the fine reduction or exemption. If the Tribunal determines the existence of the conduct, it may not impose a fine to a person that has been identified as beneficiary of an exemption, nor impose a fine greater than that requested by the Prosecutor to a person identified as beneficiary of a fine reduction, unless it is demonstrated during the process that said beneficiary was the organizer of the illegal conduct coercing on others to participate in it.

Whoever alleges the existence of the conduct described in subsection a) of Article 3 on the basis of false or fraudulent information, knowingly doing so with the purpose of damaging other economic agents, availing himself of the benefits of this article, shall be penalized in accordance with Article 210 of the Criminal Code.

**Article 40.-** When he deems it necessary, the National Economic Prosecutor may, himself or by designating a representative, represent the Office of the Prosecutor in any process and, likewise intervene in any instance, proceeding or act before the courts of justice or administrative or municipal authorities.

The documents submitted and presentations made by the National Economic Prosecutor's Office before the Competition Tribunal and the courts of justice, shall be exempt from the taxes stipulated by law, and the attorneys who represent it may appear personally in the Superior Courts.

**Article 41.-** The Office of the Prosecutor shall receive and investigate, as applicable, accusations brought by private individuals with regard to acts that could imply a violation of the provisions of this law, without prejudice to sending those that, due to their nature, must be reviewed by other entities, to the relevant authorities. In order to determine if the accusations should be investigated or dismissed, the Office of the Prosecutor may, within the period of 60 days after having received the accusation, request information from private individuals, as well as summon to testify any person who could have knowledge of the denounced fact. The providing of information and the declaration mentioned above shall always be voluntary, and the National Economic Prosecutor's Office may not exercise the power established in the first paragraph of Article 42 if no formal investigation has been initiated.

**Article 42.-** People who obstruct investigations opened by the National Economic Prosecutor's Office in the scope of its functions may be arrested for up to 15 days.

The arrest warrant shall be issued by the competent criminal court judge, upon request by the National Economic Prosecutor, prior authorization by the Competition Tribunal.

Officers of the National Economic Prosecutor's Office and other people that provide services thereto shall be obligated to keep confidential all information, data and background information that they may become aware of in the execution of their duties, and especially that which is obtained by virtue of the faculties indicated in subsections a), g), h), and n) of Article 39, and in Article

41. The above notwithstanding, said information may be used in the fulfilment of functions of the National Economic Prosecutor's Office and when filing actions before the Competition Tribunal or the courts of justice.

Violation to this prohibition shall be punished by the sanctions indicated in articles 246, 247 and 247bis of the Criminal Code, and with disciplinary sanctions that may be applied administratively for that same offence. In addition, the civil servants and State accountability provisions contemplated in law N° 19,880, in the decree with force of law N° 29 of 2005 of the Ministry of Finance shall be applicable, which sets forth the consolidated, coordinated and systematized text of law N° 18,834 on Administrative bylaws, and in law N°

18,575 on General Conditions of State Administration.

**Article 43.-** Advisors or consultants who provide fee-based services to the National Economic Prosecutor's Office, or to the Competition Tribunal, shall be considered as being included in the provisions of Article 260 of the Criminal Code.

**Article 44.-** The National Economic Prosecutor's Office shall be financed by the following resources, which shall be incorporated into its assets and shall be managed according to the Law on State Financial Administration, approved by decree law N° 1,263 of 1975, as amended:

- a) The contribution which is consulted annually in the National Budget Law;
- b) Court fees and other amounts that it could receive in the processes in which it intervenes;
- c) Revenue stipulated in consulting agreements, investigation agreements, or agreements of another nature that could be entered into with universities and other educational or research entities, public or private, either national or foreign;
- d) Fees received from the issuance of certificates and copies, and

e) Goods and incomes of any other nature which it receives under any title.

**Article 45.-** Presentations by private individuals to the National Economic Prosecutor's Office may be submitted through the corresponding Regional or Provincial Governments when the domicile of the petitioner is located outside the city where this entity's headquarters are located. In case these presentations must be carried out within a set time frame, they shall be understood as having been performed on the date of their submission to the relevant Regional or Provincial Government.

Within twenty four hours of having received said communications, the Intendant or Governor, as the case may be, shall appoint a regional ministerial secretary, head of service, or lawyer under his supervision to receive and send said communications to the National Economic Prosecutor's Office.

## **TRANSITORY PROVISIONS**

**Transitory Article One.-** This law shall take effect ninety days after its publication in the Official Gazette, except for the modifications added in articles 9, 10, 26 and 30, of decree with force of law N° 1, of 2005, of the Ministry of the Economy, Development and Reconstruction, which set the consolidated, coordinated and systematized text of decree law N° 211 of 1973, and its modifications added by law N° 20,088, which shall take effect as of the publication of this law.

**Transitory Article Two.-** Alternate members of the Tribunal who were already incumbent in their positions when this law came into effect, shall remain therein until the day their term expires according to the appointment decree, and they shall not be subject to the remunerations schedule incorporated under this law, until the number of alternates has been reduced in accordance with the following paragraph.

The appointment of two alternate members in accordance with Article 6 of decree with force of law N° 1, of 2005, of the Ministry of Economy, Development and Reconstruction, that sets the consolidated, coordinated and systematized text of decree law N° 211, of 1973, and its modifications introduced by means of law N° 20,088, with the modifications established in number 2) of Article 1 of this law, shall only be made with the occasion of the respective new appointments to fill the vacancies of those members whose term of office expires in the year 2014.

**Transitory Article Three.-** The modifications introduced by subsection 3) of Article 1 of this law, shall be applicable to the full members of the Competition Tribunal as of May 12, 2010.

**Transitory Article Four.-** The new rules for appointing and removing the National Economic Prosecutor established by this law shall be applicable as of the date when said post becomes vacant.

**Transitory Article Five.-** The expenses incurred in applying this law during the year 2009 shall be financed by charging them to Public Treasury item 50-01-03-24-03.104 of the Budget Law for said year.”.

## CHINA

### Law of the People's Republic of China for Countering Unfair Competition People's Republic of China

(Adopted at the Third Session of the Standing Committee of the Eighth National People's Congress and Promulgated on September 2, 1993)

#### **Chapter 1 General Provisions**

##### **Article 1**

With a view to safeguarding the healthy development of the socialist market economy, encouraging and protecting fair competition, stopping acts of unfair competition, and defending the lawful rights and interests of operators and consumers, this Law is enacted.

##### **Article 2**

In carrying on transactions in the market, operators shall follow the principle of voluntariness, equality, fairness, honesty and credibility, and observe generally recognized business ethics. Unfair competition in this Law refers to acts of operators which contravene the provisions of this Law, with a result of damaging the lawful rights and interests of other operators, and disturbing the socio-economic order.

Operators in this Law refer to legal persons, other economic organizations and individuals engaging in the trading of goods or profit-making services. (Goods mentioned below include services.)

##### **Article 3**

The people's governments at various levels shall adopt measures to stop acts of unfair competition, and create a salutary environment and conditions for fair competition. The administrative authorities for industry and commerce in the people's governments above the county-level shall monitor and investigate acts of unfair competition. In respect of those acts which, according to the provisions of various laws and administrative regulations, shall be monitored and investigated by other departments, these provisions shall be abided by.

##### **Article 4**

The State encourages, supports and protects all organizations and individuals in carrying out social monitoring of acts of unfair competition. staff members of state organs shall not support or cover up acts of unfair competition.

#### **Chapter 2 Acts of Unfair Competition**

##### **Article 5**

Operators shall not adopt any of the following unfair means to carry on transactions in the market and cause damage to competitors:

1. Passing off the registered trademarks of others;
1. using, without authorization, the names, packaging or decoration peculiar to well-known goods or using names, packaging or decoration similar to those of well-known goods so that their goods are confused with the well-known goods of others, causing buyers to mistake them for the well-known goods of others;



1. Using, without authorization, the enterprise names or personal names of others on their own goods, leading purchasers to mistake them for the goods of others;
1. Forging or falsely using, on their goods, symbols of quality such as symbols of authentication and symbols of famous and high-quality goods, falsifying the origin of their goods, and making false representations which are misleading as to the quality of the goods.

#### **Article 6**

Public utility enterprises or other operators having monopolistic status according to law shall not force others to buy the goods of the operators designated by them so as to exclude other operators from competing fairly.

#### **Article 7**

A local government and its subordinate departments shall not abuse their administrative power to force others to buy the goods of the operators designated by them so as to restrict the lawful business activities of other operators.

A local government and its subordinate departments shall not abuse their administrative power to restrict the entry of goods from other parts of the country into the local market or the flow of local goods to markets in other parts of the country.

#### **Article 8**

An operator shall not practice bribery by using money, valuables or other means to sell or buy goods. Where an operator secretly pays a kickback to the other party, be it an entity or individual, off the book, it or he shall be punished for offering a bribe; where the other party, be it an entity or individual, secretly accepts a kickback off the book, it or he shall be punished for taking a bribe. In the selling or buying of goods, any operator may express clearly its or his intention to offer a discount to the other party and pay a commission to the middlemen. Where an operator gains a discount to the other party as pays a commission to the middlemen, it or he must enter the items in the book factually. An operator accepting a discount or commission must enter it in the book factually.

#### **Article 9**

An operator shall not use advertisement or other means to give false, misleading information on the quality, composition, performance, use, manufacturer, useful life, origin, etc. of the goods.

An advertisement operator shall not act as an agent for designing, producing and releasing false advertisements where they clearly know, or should know, that the information in the advertisements is false.

#### **Article 10**

An operator shall not adopt any of the following means to infringe on the business secrets of others:

1. obtaining business secrets from the owner of the right by stealing, promising of gain, resorting to coercion or other illegitimate means;
1. disclosing, using or allowing others to use the business secrets of the owner of the right obtained by the means mentioned in the preceding item;
1. disclosing, using or allowing others to use the business secrets that it has obtained by breaking an engagement or disregarding the requirements of the owner of the right to preserve the business secrets.

Where a third party obtains, uses or discloses the business secrets of others when it or he has or should have full knowledge of the illegal acts mentioned in the preceding section, it or he shall be deemed to have infringed on the business secrets of others.

Business secrets in this **Article** refer to the technical information and operational information which

is not known to the public, which is capable of bringing economic benefits to the owners

of the rights, which has practical applicability and which the owners of the rights have taken measures to keep secret.

#### **Article 11**

An operator shall not sell its or his goods at a price that is below the cost for the purpose of excluding its or his competitors.

In any of the following events, such sales do not come under acts of unfair competition:

1. selling fresh goods;
1. disposing of goods the useful life of which is about to expire, or of other overstocked good;
1. seasonal lowering of prices;
1. selling goods at lowered prices for paying off debts, changing the line of production or closing the business.

#### **Article 12**

In selling its or his goods, an operator shall not make a tie-in sale against the wish of the buyer or attach other unreasonable conditions.

#### **Article 13**

An operator shall not make any of the following kinds of sales with prizes attached:

1. making sales with prizes attached by the fraudulent method of falsely claiming the existence of prizes or intentionally causing previously chosen people win the prizes;
1. promoting the sale of inferior but high-priced goods by offering prizes;
1. making sales with prizes attached in the form of a lottery where the amount for the highest prize exceeds RMB 5,000 Yuan.

#### **Article 14**

An operator shall not utter or disseminate falsehoods to damage the goodwill of a competitor or the reputation of its or his goods.

#### **Article 15**

Tenderers shall not submit tenders in collusion with one another to force the tender price up or down.

A tenderer shall not collaborate with the party inviting tenders to exclude competitors from fair competition.

### **Chapter 3 Control and Inspection**

#### **Article 16**

The control and inspection authorities above the county level may exercise control over and carry out inspection of acts of unfair competition.

#### **Article 17**

In monitoring and investigating acts of unfair competition, the control and inspection authorities are

entitled to exercise the following functions and powers:

1. questioning the operators under investigation, interested parties and witnesses in accordance with the prescribed procedures and requiring them to provide evidential material or other information related to acts of unfair competition;
1. consulting and copying written agreements, account books, receipts, bills, vouchers, invoices, documents, records, business correspondence and other materials related to acts of unfair competition; and
1. inspecting property related to acts of unfair competition as stipulated in **Article 5** of this

Law, and, where necessary, requesting other operators under investigation to explain the source and quantity of the goods, to temporarily stop selling them pending inspection, and not to remove, conceal or destroy them.

### **Article 18**

When monitoring and investigating acts of unfair competition, members of the control and inspection authorities shall produce warrants of inspection.

### **Article 19**

When the control and inspection authorities are monitoring and investigating acts of unfair competition, the operators under investigation, interested parties and witnesses shall truthfully provide them with relevant data or information.

## **Chapter 4 legal Responsibility**

### **Article 20**

Where an operator, in contravention of the provisions of this Law, causes damage to another operator, i. e., the injured operator are difficult to calculate, the amount of damages shall be the profit gained by the infringer during the period of infringement through the infringing act . The infringer shall also bear all reasonable costs paid by the injured operator in investigating the acts of unfair competition committed by the operator suspected of infringing its or his lawful rights and interests.

When the lawful rights and interests of the injured operator are damaged by the acts of unfair competition, it or he may institute proceedings in a people's court.

### **Article 21**

Where an operator passes off the registered trademark of another person, uses the enterprise name or personal name of another person without authorization, counterfeits or fraudulently uses symbols of quality such as symbols of authentication and symbols of famous and high-quality goods, falsifies the origin of the goods and makes false representations which are misleading as to the quality of the goods , it or he shall be punished in accordance with the provisions of the Trademark Law of the People's Republic of China and the Product Quality Law of the People's Republic of China.

Where an operator uses, without authorization, the names, packaging or decoration peculiar to well-known goods or uses names, packaging or decoration similar to those of well-known goods so that its or his goods are confused with the well-known goods of others, causing buyers to mistake them for the well-known goods, the relevant control and inspection authorities shall order it or him to stop the offense, confiscate the illegal income, and may impose, according to circumstances, a fine of more than twice and less than three times the amount of illegal income; where the circumstances are serious, the said authorities may revoke its or his business license; Where an operator

sells goods counterfeited or of inferior quality, which constitutes a crime, it or he shall be prosecuted according to law for its or his criminal responsibility.

#### **Article 22**

Where an operator practices bribery by using money, valuables or other means to sell or purchase goods, which constitutes a crime, he shall be prosecuted according to law for his criminal responsibility; Where the act does not constitute a crime, the relevant control and inspection department may, according to circumstances, impose a fine of more than RMB 10,000 yuan and less than RMB 200,000 yuan. Its or his illegal income, if any, shall be confiscated.

#### **Article 23**

Where an operator uses advertisement or other means to give false, misleading information on its goods, the relevant control and inspection authority shall order it or him to desist from the illegal income and may, according to circumstances, impose fines of more than twice and less than three times the illegal income.

#### **Article 24**

Where an operator uses advertisement or other means to give false, misleading information on its goods, the relevant control and inspection authority shall order it or him to desist from the illegal act, dispel the bad influence, and may, according to circumstances, impose a fine of more than RMB 10,000 yuan and less than RMB 200,000 yuan.

Where an advertisement operator acts as an agent in designing, producing and releasing false advertisements when it or he clearly knows, or should know, that they are false, the relevant control and inspection authority shall order it or him to desist from the illegal act, confiscate its or his illegal income, and impose a fine on it or him according to law.

#### **Article 25**

Where any party infringes on business secrets in contravention of the provisions of **Article 10** of this Law, the relevant control and inspection authority shall order it or him to desist from the illegal act and may, according to circumstances, impose on it or him a fine of more than RMB 10,000 yuan but less than RMB 200,000 yuan.

#### **Article 26**

Where an operator makes sales with prizes attached in contravention of the provisions of **Article 13** of this Law, the relevant control and inspection authority shall order it or him to desist from the illegal act and may, according to circumstances, impose on it or him a fine of more than RMB 10,000 yuan and less than RMB 100,000 yuan.

#### **Article 27**

Where tenderers submit tenders in collusion with one another to force the tender price up or down, or where a tenderer collaborates with the party inviting tenders to prevent competitors from competing fairly, its or his successful bid is null and void. The control and inspection authority may, according to circumstances, impose on it or him a fine of more than RMB 10,000 yuan and less than RMB 200,000 yuan.

**Article 28**

Where an operator commits an act in contravention of an order to temporarily stop selling, and not to remove, conceal or destroy, property related to acts of unfair competition, the relevant control and inspection authority may, according to circumstances, impose on it or him a fine of more than twice and less than three times the price of the property which has been sold, removed, concealed or destroyed.

**Article 29**

Where a party is not satisfied with the decision on punishment made by the relevant control and inspection authority, it or he may, within fifteen days from the date of receipt of the decision on punishment, apply to the competent authority at the next higher levels for reconsideration; where the party is not satisfied with the decision made after reconsideration, it or he may, within fifteen days from the date of receipt of the written decision made after reconsideration, institute proceedings in the people's court; the party may also directly institute proceedings in the people's court upon receipt of the decision on punishment.

**Article 30**

Where a local government and its subordinate departments, in contravention to the provisions of **Article 7** of this Law, force others to buy the goods of the operators designated by them, restrict the legitimate business activities of other operators, or restrict the normal flow of goods between regions, the higher authorities shall order them to rectify the situation; Where the circumstances are serious, the competent authorities at the same level or the next higher level shall take disciplinary sanctions against the persons directly responsible. Where the designated operators, taking advantage of this illegal arrangement, foist inferior but high-priced goods on buyers or make exorbitant charge, the control and inspection authorities shall confiscate the illegal income and may, according to circumstances, impose a fine of more than twice and less than three times the illegal income.

**Article 31**

Where a staff member of the state organ monitoring and investigating acts of unfair competition abuses his powers as neglects his duty, which constitutes a crime, he shall be prosecuted for his criminal responsibility according to law; where the act does not constitute a crime, he shall be disciplined administratively.

**Article 32**

Where a staff member of the State organ monitoring and investigating acts of unfair competition acts irregularly out of personal considerations and intentionally screens an operator from prosecution, fully knowing that he has contravened the provisions of this Law, which constitutes a crime, the said staff member shall be prosecuted for his criminal responsibility according to law.

**Chapter 5 supplementary Provision****Article 33**

This Law shall enter into force on December 1, 1993.

## COLOMBIA

Artículo TITULO I CAPITULO I 1 2 3 CAPITULO II 4 5 CAPITULO III 6 7 8 TITULO II 9 10  
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LEY 1340 DE 2009

(julio 24)

Diario Oficial No. 47.420 de 24 de julio de 2009

CONGRESO DE LA REPÚBLICA

Por medio de la cual se dictan normas en materia de protección de la competencia.

<Resumen de Notas de Vigencia>

EL CONGRESO DE COLOMBIA

DECRETA:

TITULO I.

DISPOSICIONES GENERALES.

CAPITULO 1.

ARTÍCULO 1o. OBJETO. La presente ley tiene por objeto actualizar la normatividad en materia de protección de la competencia para adecuarla a las condiciones actuales de los mercados, facilitar a los usuarios su adecuado seguimiento y optimizar las herramientas con que cuentan las autoridades nacionales para el cumplimiento del deber constitucional de proteger la libre competencia económica en el territorio nacional.

ARTÍCULO 2o. AMBITO DE LA LEY. Adiciónase el artículo 46 del Decreto 2153 de 1992 con un segundo inciso del siguiente tenor:

Las disposiciones sobre protección de la competencia abarcan lo relativo a prácticas comerciales restrictivas, esto es acuerdos, actos y abusos de posición de dominio, y el régimen de integraciones empresariales. Lo dispuesto en las normas sobre protección de la competencia se aplicará respecto de todo aquel que desarrolle una actividad económica o afecte o pueda afectar ese desarrollo, independientemente de su forma o naturaleza jurídica y en relación con las conductas que tengan o puedan tener efectos total o parcialmente en los mercados nacionales, cualquiera sea la actividad o sector económico.

ARTÍCULO 3o. PROPÓSITOS DE LAS ACTUACIONES ADMINISTRATIVAS. <El artículo 2o. del Decreto 2153 de 1992 fue derogado expresamente por el artículo 19 del Decreto 3523 de 2009> Modifícase el número 1 del artículo 2o del Decreto 2153 de 1992 que en adelante será del siguiente tenor:

Velar por la observancia de las disposiciones sobre protección de la competencia; atender las reclamaciones o quejas por hechos que pudieren implicar su contravención y dar trámite a aquellas que sean significativas para alcanzar en particular los siguientes propósitos: la libre participación de las empresas en el mercado, el bienestar de los consumidores y la eficiencia económica.

PARÁGRAFO. La Superintendencia de Industria y Comercio tendrá en cuenta los propósitos de que trata el presente artículo al momento de resolver sobre la significatividad de la práctica e iniciar o no una investigación, sin que por este solo hecho se afecte el juicio de ilicitud de la conducta.

<Notas de Vigencia>

## CAPITULO II.

### RÉGIMEN DE PROTECCIÓN DE LA COMPETENCIA.

ARTÍCULO 4o. NORMATIVIDAD APLICABLE. La Ley 155 de 1959, el Decreto 2153 de 1992, la presente ley y las demás disposiciones que las modifiquen o adicionen, constituyen el régimen general de protección de la competencia, aplicables a todos los sectores y todas las actividades económicas. En caso que existan normas particulares para algunos sectores o actividades, estas prevalecerán exclusivamente en el tema específico.

ARTÍCULO 5o. APLICACIÓN DEL RÉGIMEN GENERAL DE COMPETENCIA EN EL SECTOR AGRÍCOLA. Para los efectos del párrafo del artículo 1o de la Ley 155 de 1959, considérese como sector básico de interés para la economía general, el sector agropecuario. En tal virtud, el Ministerio de Agricultura y Desarrollo Rural deberá emitir concepto previo, vinculante y motivado, en relación con la autorización de acuerdos y convenios que tengan por objeto estabilizar ese sector de la economía.

### CAPITULO III.

#### AUTORIDAD NACIONAL EN MATERIA DE PROTECCIÓN DE LA COMPETENCIA.

ARTÍCULO 6o. AUTORIDAD NACIONAL DE PROTECCIÓN DE LA COMPETENCIA. La Superintendencia de Industria y Comercio conocerá en forma privativa de las investigaciones administrativas, impondrá las multas y adoptará las demás decisiones administrativas por infracción a las disposiciones sobre protección de la competencia, así como en relación con la vigilancia administrativa del cumplimiento de las disposiciones sobre competencia desleal.

PARÁGRAFO. Para el cumplimiento de este objetivo las entidades gubernamentales encargadas de la regulación y del control y vigilancia sobre todos los sectores y actividades económicas prestarán el apoyo técnico que les sea requerido por la Superintendencia de Industria y Comercio.

ARTÍCULO 7o. ABOGACÍA DE LA COMPETENCIA. <El artículo 2o. del Decreto 2153 de 1992 fue derogado expresamente por el artículo 19 del Decreto 3523 de 2009> Además de las disposiciones consagradas en el artículo 2o del Decreto 2153 de 1992, la Superintendencia de Industria y Comercio podrá rendir concepto previo sobre los proyectos de regulación estatal que puedan tener incidencia sobre la libre competencia en los mercados. Para estos efectos las autoridades de regulación informarán a la Superintendencia de Industria y Comercio de los actos administrativos que se pretendan expedir. El concepto emitido por la Superintendencia de Industria y Comercio en este sentido no será vinculante. Sin embargo, si la autoridad respectiva se apartara de dicho concepto, la misma deberá manifestar de manera expresa dentro de las consideraciones de la decisión los motivos por los cuales se aparta.

<Notas de Vigencia>

ARTÍCULO 8o. AVISO A OTRAS AUTORIDADES. En la oportunidad prevista en el numeral 4 del artículo 10 de esta ley, o, tratándose de una investigación, dentro de los diez (10) días siguientes a su inicio, la Superintendencia de Industria y Comercio deberá comunicar tales hechos a las entidades de regulación y de control y vigilancia competentes según el sector o los sectores involucrados. Estas últimas podrán, si así lo consideran, emitir su concepto técnico en relación con el asunto puesto en su conocimiento, dentro de los diez (10) días siguientes al recibo de la



comunicación y sin perjuicio de la posibilidad de intervenir, de oficio o a solicitud de la Superintendencia de Industria y Comercio, en cualquier momento de la respectiva actuación. Los conceptos emitidos por las referidas autoridades deberán darse en el marco de las disposiciones legales aplicables a las situaciones que se ventilan y no serán vinculantes para la Superintendencia de Industria y Comercio. Sin embargo, si la Superintendencia de Industria y Comercio se apartara de dicho concepto, la misma deberá manifestar, de manera expresa dentro de las consideraciones de la decisión los motivos jurídicos o económicos que justifiquen su decisión.

PARÁGRAFO. La Unidad Administrativa Especial Aeronáutica Civil conservará su competencia para la autorización de todas las operaciones comerciales entre los explotadores de aeronaves consistentes en contratos de código compartido, explotación conjunta, utilización de aeronaves en fletamento, intercambio y bloqueo de espacio en aeronaves.

<Jurisprudencia Vigencia>

TITULO II.

INTEGRACIONES EMPRESARIALES.

ARTÍCULO 9o. CONTROL DE INTEGRACIONES EMPRESARIALES. El artículo 4o de la Ley 155 de 1959 quedará así:

Las empresas que se dediquen a la misma actividad económica o participen en la misma cadena de valor, y que cumplan con las siguientes condiciones, estarán obligadas a informar a la Superintendencia de Industria y Comercio sobre las operaciones que proyecten llevar a cabo para efectos de fusionarse, consolidarse, adquirir el control o integrarse cualquiera sea la forma jurídica de la operación proyectada:

1. Cuando, en conjunto o individualmente consideradas, hayan tenido durante el año fiscal anterior a la operación proyectada ingresos operacionales superiores al monto que, en salarios mínimos legales mensuales vigentes, haya establecido la Superintendencia de Industria y Comercio, o
2. Cuando al finalizar el año fiscal anterior a la operación proyectada tuviesen, en conjunto o individualmente consideradas, activos totales superiores al monto que, en salarios mínimos legales mensuales vigentes, haya establecido la Superintendencia de Industria y Comercio.

En los eventos en que los interesados cumplan con alguna de las dos condiciones anteriores pero en conjunto cuenten con menos del 20% mercado relevante, se entenderá autorizada la operación. Para este último caso se deberá únicamente notificar a la Superintendencia de Industria y Comercio de esta operación.

En los procesos de integración o reorganización empresarial en los que participen exclusivamente las entidades vigiladas por la Superintendencia Financiera de Colombia, esta conocerá y decidirá sobre la procedencia de dichas operaciones. En estos casos, la Superintendencia Financiera de Colombia tendrá la obligación de requerir previamente a la adopción de la decisión, el análisis de la Superintendencia de Industria y Comercio sobre el efecto de dichas operaciones en la libre competencia. Esta última podrá sugerir, de ser el caso, condicionamientos tendientes a asegurar la preservación de la competencia efectiva en el mercado.

PARÁGRAFO 1o. La Superintendencia de Industria y Comercio deberá establecer los ingresos operacionales y los activos que se tendrán en cuenta según lo previsto en este artículo durante el año inmediatamente anterior a aquel en que la previsión se deba tener en cuenta y no podrá modificar esos valores durante el año en que se deberán aplicar.

PARÁGRAFO 2o. Cuando el Superintendente se abstenga de objetar una integración pero señale condicionamientos, estos deberán cumplir los siguientes requisitos: Identificar y aislar o eliminar el efecto anticompetitivo que produciría la integración, e implementar los remedios de carácter estructural con respecto a dicha integración.

PARÁGRAFO 3o. Las operaciones de integración en las que las intervinientes acrediten que se encuentran en situación de Grupo Empresarial en los términos del artículo 28 de la Ley 222 de 1995, cualquiera sea la forma jurídica que adopten, se encuentran exentas del deber de notificación previa ante la Superintendencia de Industria y Comercio.

<Jurisprudencia Vigencia>

**ARTÍCULO 10. PROCEDIMIENTO ADMINISTRATIVO EN CASO DE INTEGRACIONES EMPRESARIALES.** Para efectos de obtener el pronunciamiento previo de la Superintendencia de Industria y Comercio en relación con una operación de integración proyectada, se seguirá el siguiente procedimiento:

1. Los interesados presentarán ante la Superintendencia de Industria y Comercio una solicitud de preevaluación, acompañada de un informe sucinto en el que manifiesten su intención de llevar a cabo la operación de integración empresarial y las condiciones básicas de la misma, de conformidad con las instrucciones expedidas por la autoridad única de competencia.

2. Dentro de los tres (3) días siguientes a la presentación del informe anterior y salvo que cuente con elementos suficientes para establecer que no existe la obligación de informar la operación, la Superintendencia de Industria y Comercio ordenará la publicación de un anuncio en un diario de amplia circulación nacional, para que dentro de los diez (10) días siguientes a la publicación se suministre a esa entidad la información que pueda aportar elementos de utilidad para el análisis de la operación proyectada. La Superintendencia de Industria y Comercio no ordenará la publicación del anuncio cuando cuente con elementos suficientes para establecer que no existe obligación de informar la operación, cuando los intervinientes de la operación, por razones de orden público, mediante escrito motivado soliciten que la misma permanezca en reserva y esta solicitud sea aceptada por la Superintendencia de Industria y Comercio.

3. Dentro de los treinta (30) días siguientes a la presentación de la información a que se refiere el numeral 1 de este artículo, la autoridad de competencia determinará la procedencia de continuar con el procedimiento de autorización o, si encontrase que no existen riesgos sustanciales para la competencia que puedan derivarse de la operación, de darlo por terminado y dar vía libre a esta.

4. Si el procedimiento continúa, la autoridad de competencia lo comunicará a las autoridades a que se refiere el artículo 8o de esta ley y a los interesados, quienes deberán allegar, dentro de los quince (15) días siguientes, la totalidad de la información requerida en las guías expedidas para el efecto por la autoridad de competencia, en forma completa y fidedigna. La Superintendencia de Industria y Comercio podrá solicitar que se complemente, aclare o explique la información allegada. De la misma manera, podrán los interesados proponer acciones o comportamientos a seguir para neutralizar los posibles efectos anticompetitivos de la operación. Dentro del mismo término los interesados podrán conocer la información aportada por terceros y controvertirla.

5. Si transcurridos tres (3) meses desde el momento en que los interesados han allegado la totalidad de la información la operación no se hubiere objetado o condicionado por la autoridad de competencia, se entenderá que esta ha sido autorizada.

6. La inactividad de los interesados por más de (2) dos meses en cualquier etapa del procedimiento, será considerada como desistimiento de la solicitud de autorización.

ARTÍCULO 11. APROBACIÓN CONDICIONADA Y OBJECCIÓN DE INTEGRACIONES. El Superintendente de Industria y Comercio deberá objetar la operación cuando encuentre que esta tiende a producir una indebida restricción a la libre competencia. Sin embargo, podrá autorizarla sujetándola al cumplimiento de condiciones u obligaciones cuando, a su juicio, existan elementos suficientes para considerar que tales condiciones son idóneas para asegurar la preservación efectiva de la competencia. En el evento en que una operación de integración sea aprobada bajo condiciones la autoridad única de competencia deberá supervisar periódicamente el cumplimiento de las mismas. El incumplimiento de las condiciones a que se somete la operación dará lugar a las sanciones previstas en la presente ley, previa solicitud de los descargos correspondientes. La reincidencia en dicho comportamiento será causal para que el Superintendente ordene la reversión de la operación.

<Jurisprudencia Vigencia>

ARTÍCULO 12. EXCEPCIÓN DE EFICIENCIA. Modifíquese el artículo 51 del Decreto 2153 de 1992, el cual quedará así:

La autoridad nacional de competencia podrá no objetar una integración empresarial si los interesados demuestran dentro del proceso respectivo, con estudios fundamentados en metodologías de reconocido valor técnico que los efectos benéficos de la operación para los consumidores exceden el posible impacto negativo sobre la competencia y que tales efectos no pueden alcanzarse por otros medios.

En este evento deberá acompañarse el compromiso de que los efectos benéficos serán trasladados a los consumidores.

La Superintendencia de Industria y Comercio podrá abstenerse objetar una integración cuando independiente de la participación en el mercado nacional de la empresa integrada, las condiciones del mercado externo garanticen la libre competencia en el territorio nacional.

PARÁGRAFO 1o. Cuando quiera que la autoridad de competencia se abstenga de objetar una operación de integración empresarial con sustento en la aplicación de la excepción de eficiencia, la autorización se considerará condicionada al comportamiento de los interesados, el cual debe ser consistente con los argumentos, estudios, pruebas y compromisos presentados para solicitar la

aplicación de la excepción de eficiencia. La autoridad podrá exigir el otorgamiento de garantías que respalden la seriedad y el cumplimiento de los compromisos así adquiridos.

PARÁGRAFO 2o. En desarrollo de la función prevista en el número 21 del artículo 2o del Decreto 2153 de 1992, la autoridad de competencia podrá expedir las instrucciones que especifiquen los elementos que tendrá en cuenta para el análisis y la valoración de los estudios presentados por los interesados.

<Jurisprudencia Vigencia>

ARTÍCULO 13. ORDEN DE REVERSIÓN DE UNA OPERACIÓN DE INTEGRACIÓN EMPRESARIAL. Sin perjuicio de la imposición de las sanciones procedentes por violación de las normas sobre protección de la competencia, la autoridad de protección de la competencia podrá, previa la correspondiente investigación, determinar la procedencia de ordenar la reversión de una operación de integración empresarial cuando esta no fue informada o se realizó antes de cumplido el término que tenía la Superintendencia de Industria y Comercio para pronunciarse, si se determina que la operación así realizada comportaba una indebida restricción a la libre competencia, o cuando la operación había sido objetada o cuando se incumplan las condiciones bajo las cuales se autorizó.

En tal virtud, si de la investigación administrativa adelantada por la Superintendencia de Industria y Comercio se desprende la procedencia de ordenar la reversión de la operación, se procederá a su correspondiente reversión.

<Jurisprudencia Vigencia>

### TITULO III.

#### PRACTICAS RESTRICTIVAS DE LA COMPETENCIA.

ARTÍCULO 14. BENEFICIOS POR COLABORACIÓN CON LA AUTORIDAD. La Superintendencia de Industria y Comercio podrá conceder beneficios a las personas naturales o jurídicas que hubieren participado en una conducta que viole las normas de protección a la competencia, en caso de que informen a la autoridad de competencia acerca de la existencia de dicha conducta y/o colaboren con la entrega de información y de pruebas, incluida la identificación de los demás participantes, aun cuando la autoridad de competencia ya se encuentre adelantando la correspondiente actuación. Lo anterior, de conformidad con las siguientes reglas:

1. Los beneficios podrán incluir la exoneración total o parcial de la multa que le sería impuesta. No podrán acceder a los beneficios el instigador o promotor de la conducta.

2. La Superintendencia de Industria y Comercio establecerá si hay lugar a la obtención de beneficios y los determinará en función de la calidad y utilidad de la información que se suministre, teniendo en cuenta los siguientes factores:

a) La eficacia de la colaboración en el esclarecimiento de los hechos y en la represión de las conductas, entendiéndose por colaboración con las autoridades el suministro de información y de pruebas que permitan establecer la existencia, modalidad, duración y efectos de la conducta, así como la identidad de los responsables, su grado de participación y el beneficio obtenido con la conducta ilegal.

b) La oportunidad en que las autoridades reciban la colaboración.

ARTÍCULO 15. RESERVA DE DOCUMENTOS. Los investigados por la presunta realización de una práctica restrictiva de la competencia podrán pedir que la información relativa a secretos empresariales u otro respecto de la cual exista norma legal de reserva o confidencialidad que deban suministrar dentro de la investigación, tenga carácter reservado. Para ello, deberán presentar, junto con el documento contentivo de la información sobre la que solicitan la reserva, un resumen no confidencial del mismo. La autoridad de competencia deberá en estos casos incluir los resúmenes en el expediente público y abrir otro expediente, de carácter reservado, en el que se incluirán los documentos completos.

PARÁGRAFO 1o. La revelación en todo o en parte del contenido de los expedientes reservados constituirá falta disciplinaria gravísima para el funcionario responsable, sin perjuicio de las demás sanciones establecidas en la ley.

PARÁGRAFO 2o. <Parágrafo modificado por el artículo 159 del Decreto 19 de 2012. El nuevo texto es el siguiente:> La Superintendencia de Industria y Comercio podrá por solicitud del denunciante o del solicitante de beneficios por colaboración guardar en reserva la identidad de quienes denuncien prácticas restrictivas de la competencia, cuando en criterio de la Autoridad Única de Competencia existan riesgos para el denunciante de sufrir represalias comerciales a causa de las denuncias realizadas.

<Notas de Vigencia>

<Legislación Anterior>

**ARTÍCULO 16. OFRECIMIENTO DE GARANTÍAS SUFICIENTES PARA LA TERMINACIÓN ANTICIPADA DE UNA INVESTIGACIÓN.** Adiciónase el artículo 52 del Decreto 2153 de 1992 con un párrafo 1o del siguiente tenor:

Para que una investigación por violación a las normas sobre prácticas comerciales restrictivas pueda terminarse anticipadamente por otorgamiento de garantías, se requerirá que el investigado presente su ofrecimiento antes del vencimiento del término concedido por la Superintendencia de Industria y Comercio para solicitar o aportar pruebas. Si se aceptaren las garantías, en el mismo acto administrativo por el que se ordene la clausura de la investigación la Superintendencia de Industria y Comercio señalará las condiciones en que verificará la continuidad del cumplimiento de las obligaciones adquiridas por los investigados.

El incumplimiento de las obligaciones derivadas de la aceptación de las garantías de que trata este artículo se considera una infracción a las normas de protección de la competencia y dará lugar a las sanciones previstas en la ley previa solicitud de las explicaciones requeridas por la Superintendencia de Industria y Comercio.

**PARÁGRAFO.** La autoridad de competencia expedirá las guías en que se establezcan los criterios con base en los cuales analizará la suficiencia de las obligaciones que adquirirían los investigados, así como la forma en que estas pueden ser garantizadas.

**TITULO IV.**

**DISPOSICIONES PROCEDIMENTALES.**

**ARTÍCULO 17. PUBLICACIÓN DE ACTUACIONES ADMINISTRATIVAS.** <Artículo modificado por el artículo 156 del Decreto 19 de 2012. El nuevo texto es el siguiente:> La Superintendencia de Industria y Comercio publicará en su página web las actuaciones administrativas que a continuación se enuncian y además ordenará la publicación de un aviso en un diario de circulación regional o nacional, dependiendo las circunstancias, y a costa de los investigados o de los interesados, según corresponda, en el que se informe acerca de:

1. El inicio de un procedimiento de autorización de una operación de integración, así como el condicionamiento impuesto a un proceso de integración empresarial. En el último caso, una vez en firme el acto administrativo correspondiente.

2. La apertura de una investigación por infracciones a las normas sobre protección de la competencia, así como la decisión de imponer una sanción, una vez en firme los actos administrativos correspondientes.

3. Las garantías aceptadas, cuando su publicación sea considerada por la autoridad como necesaria para respaldar el cumplimiento de los compromisos adquiridos por los interesados.

<Notas de Vigencia>

<Legislación Anterior>

**ARTÍCULO 18. MEDIDAS CAUTELARES.** Modifíquese el número 11 del artículo 4o del Decreto 2153 de 1992 que quedará del siguiente tenor:

La autoridad de competencia podrá ordenar, como medida cautelar, la suspensión inmediata de conductas que puedan resultar contrarias a las disposiciones señaladas en las normas sobre protección de la competencia, siempre que se considere que de no adoptarse tales medidas se pone en riesgo la efectividad de una eventual decisión sancionatoria.

**ARTÍCULO 19. INTERVENCIÓN DE TERCEROS.**

<Inciso modificado por el artículo 157 del Decreto 19 de 2012. El nuevo texto es el siguiente:>  
Los competidores, consumidores o, en general, aquel que acredite un interés directo e individual en investigaciones por prácticas comerciales restrictivas de la competencia, tendrán el carácter de terceros interesados y además, podrán, dentro de los quince (15) días hábiles posteriores a la publicación de la apertura de la investigación en la página web de la Superintendencia de Industria y Comercio, intervenir aportando las consideraciones y pruebas que pretendan hacer valer para que la Superintendencia de Industria y Comercio se pronuncie en uno u otro sentido.

<Notas de Vigencia>



<Legislación Anterior>

Las ligas y asociaciones de consumidores acreditadas se entenderán como terceros interesados.

La Superintendencia de Industria y Comercio dará traslado a los investigados, de lo aportado por los terceros mediante acto administrativo en el que también fijará un término para que los investigados se pronuncien sobre ellos. Ningún tercero tendrá acceso a los documentos del expediente que se encuentren bajo reserva.

De la solicitud de terminación de la investigación por ofrecimiento de garantías se correrá traslado a los terceros reconocidos por el término que la Superintendencia considere adecuado.

PARÁGRAFO. Adiciónese el tercer inciso del artículo 52 del Decreto 2153 de 1992 que en adelante será del siguiente tenor: “Instruida la investigación se presentará al Superintendente un informe motivado respecto de si ha habido una infracción. De dicho informe se correrá traslado al investigado y a los terceros interesados, en caso de haberlos”.

ARTÍCULO 20. ACTOS DE TRÁMITE. Para efectos de lo establecido en el artículo 49 del Código Contencioso Administrativo todos los actos que se expidan en el curso de las actuaciones administrativas de protección de la competencia son de trámite, con excepción del acto que niegue pruebas.

ARTÍCULO 21. VICIOS Y OTRAS IRREGULARIDADES DEL PROCESO. Los vicios y otras irregularidades que pudiesen presentarse dentro de una investigación por prácticas restrictivas de la competencia, se tendrán por saneados si no se alegan antes del inicio del traslado al investigado del informe al que se refiere el inciso 3o del artículo 52 del Decreto 2153 de 1992. Si ocurriesen con posterioridad a este traslado, deberán alegarse dentro del término establecido para interponer recurso de reposición contra el acto administrativo que ponga fin a la actuación administrativa.

Cuando se aleguen vicios u otras irregularidades del proceso, la autoridad podrá resolver sobre ellas en cualquier etapa del mismo, o en el mismo acto que ponga fin a la actuación administrativa.

<Notas del Editor>

ARTÍCULO 22. CONTRIBUCIÓN DE SEGUIMIENTO. Las actividades de seguimiento que realiza la autoridad de competencia con motivo de la aceptación de garantías para el cierre de la

investigación por presuntas prácticas restrictivas de la competencia y de la autorización de una operación de integración empresarial condicionada al cumplimiento de obligaciones particulares por parte de los interesados serán objeto del pago de una contribución anual de seguimiento a favor de la entidad.

Anualmente, la Superintendencia de Industria y Comercio determinará, mediante resolución, las tarifas de las contribuciones, que podrán ser diferentes según se trate del seguimiento de compromisos derivados de la terminación de investigaciones por el ofrecimiento de garantías o del seguimiento de obligaciones por integraciones condicionadas. Las tarifas se determinarán mediante la ponderación de la sumatoria de los activos corrientes del año fiscal anterior de las empresas sometidas a seguimiento durante ese período frente a los gastos de funcionamiento de la entidad destinados al desarrollo de la labor de seguimiento durante el mismo período y no podrán superar el uno por mil de los activos corrientes de cada empresa sometida a seguimiento. Dicha contribución se liquidará de conformidad con las siguientes reglas:

1. Se utilizará el valor de los activos corrientes del año fiscal anterior de la empresa sometida a seguimiento.
2. La contribución se calculará multiplicando la tarifa por el total de los activos corrientes del año fiscal anterior.
3. Las contribuciones se liquidarán anualmente, o proporcionalmente si es del caso, para cada empresa sometida a seguimiento.

<Jurisprudencia Vigencia>

**ARTÍCULO 23. NOTIFICACIONES Y COMUNICACIONES.** <Artículo modificado por el artículo 158 del Decreto 19 de 2012. El nuevo texto es el siguiente:> Las resoluciones de apertura de investigación, la que pone fin a la actuación y la que decide los recursos de la vía gubernativa, deberán notificarse personalmente.

Si no pudiese hacerse la notificación personal al cabo de los cinco (5) días del envío de la citación, esta se hará por medio de aviso que se remitirá a la dirección, al número de fax o al correo electrónico que figuren en el expediente o puedan obtenerse del registro mercantil, acompañado de copia íntegra del acto administrativo. El aviso deberá indicar la fecha y la del acto que se

notifica, la autoridad que lo expidió, los recursos que legalmente proceden, las autoridades ante quienes deben interponerse, los plazos respectivos y la advertencia de que la notificación se considerará surtida al finalizar el día siguiente al de la entrega del aviso en el lugar de destino.

Cuando se desconozca la información sobre el destinatario, el aviso, con copia íntegra del acto administrativo, se publicará en la página electrónica y en todo caso en un lugar de acceso al público de la Superintendencia de Industria y Comercio por el término de cinco (5) días, con la advertencia de que la notificación se considerará surtida al finalizar el día siguiente al retiro del aviso.

En el expediente se dejará constancia de la remisión o publicación del aviso y de la fecha en que por este medio quedará surtida la notificación personal.

Los demás actos administrativos que se expidan en desarrollo de los procedimientos previstos en el régimen de protección de la competencia, se comunicarán a la dirección que para estos propósitos suministre el investigado o apoderado y, en ausencia de ella, a la dirección física o de correo electrónico que aparezca en el registro mercantil del investigado.

Las notificaciones electrónicas estarán sujetas a las disposiciones del Código de Procedimiento Administrativo y de lo Contencioso Administrativo.

<Notas de Vigencia>

<Legislación Anterior>

**ARTÍCULO 24. DOCTRINA PROBABLE Y LEGÍTIMA CONFIANZA.** <Artículo CONDICIONALMENTE exequible> La Superintendencia de Industria y Comercio deberá compilar y actualizar periódicamente las decisiones ejecutoriadas que se adopten en las actuaciones de protección de la competencia. Tres decisiones ejecutoriadas uniformes frente al mismo asunto, constituyen doctrina probable.

<Jurisprudencia Vigencia>

## TITULO V.

### REGIMEN SANCIONATORIO.

ARTÍCULO 25. MONTO DE LAS MULTAS A PERSONAS JURÍDICAS. El numeral 15 del artículo 4o del Decreto 2153 de 1992 quedará así:

Por violación de cualquiera de las disposiciones sobre protección de la competencia, incluidas la omisión en acatar en debida forma las solicitudes de información, órdenes e instrucciones que imparta, la obstrucción de las investigaciones, el incumplimiento de las obligaciones de informar una operación de integración empresarial o las derivadas de su aprobación bajo condiciones o de la terminación de una investigación por aceptación de garantías, imponer, por cada violación y a cada infractor, multas a favor de la Superintendencia de Industria y Comercio hasta por la suma de 100.000 salarios mínimos mensuales vigentes o, si resulta ser mayor, hasta por el 150% de la utilidad derivada de la conducta por parte del infractor.

Para efectos de graduar la multa, se tendrán en cuenta los siguientes criterios:

1. El impacto que la conducta tenga sobre el mercado.
2. La dimensión del mercado afectado.
3. El beneficio obtenido por el infractor con la conducta.
4. El grado de participación del implicado.
5. La conducta procesal de los investigados.
6. La cuota de mercado de la empresa infractora, así como la parte de sus activos y/o de sus ventas involucrados en la infracción.

## 7. El Patrimonio del infractor.

PARÁGRAFO. Serán circunstancias de agravación para efectos de la graduación de la sanción. La persistencia en la conducta infractora; la existencia de antecedentes en relación con infracciones al régimen de protección de la competencia o con incumplimiento de compromisos adquiridos o de órdenes de las autoridades de competencia; el haber actuado como líder, instigador o en cualquier forma promotor de la conducta. La colaboración con las autoridades en el conocimiento o en la investigación de la conducta será circunstancia de atenuación de la sanción.

<Jurisprudencia Vigencia>

ARTÍCULO 26. MONTO DE LAS MULTAS A PERSONAS NATURALES. El numeral 16 del artículo 4o del Decreto 2153 de 1992 quedará así:

“Imponer a cualquier persona que colabore, facilite, autorice, ejecute o tolere conductas violatorias de las normas sobre protección de la competencia a que se refiere la Ley 155 de 1959, el Decreto 2153 de 1992 y normas que la complementen o modifiquen, multas hasta por el equivalente de dos mil (2.000) salarios mínimos mensuales legales vigentes al momento de la imposición de la sanción, a favor de la Superintendencia de Industria y Comercio.

Para efectos de graduar la multa, la Superintendencia de Industria y Comercio tendrá en cuenta los siguientes criterios:

1. La persistencia en la conducta infractora.
2. El impacto que la conducta tenga sobre el mercado.
3. La reiteración de la conducta prohibida.
4. La conducta procesal del investigado, y

5. El grado de participación de la persona implicada.

PARÁGRAFO. Los pagos de las multas que la Superintendencia de Industria y Comercio imponga conforme a este artículo, no podrán ser cubiertos ni asegurados o en general garantizados, directamente o por interpuesta persona, por la persona jurídica a la cual estaba vinculada la persona natural cuando incurrió en la conducta; ni por la matriz o empresas subordinadas de esta; ni por las empresas que pertenezcan al mismo grupo empresarial o estén sujetas al mismo control de aquella.

ARTÍCULO 27. CADUCIDAD DE LA FACULTAD SANCIONATORIA. La facultad que tiene la autoridad de protección de la competencia para imponer una sanción por la violación del régimen de protección de la competencia caducará transcurridos cinco (5) años de haberse ejecutado la conducta violatoria o del último hecho constitutivo de la misma en los casos de conductas de tracto sucesivo, sin que el acto administrativo sancionatorio haya sido notificado.

TITULO VI.

DISPOSICIONES COMPLEMENTARIAS.

ARTÍCULO 28. PROTECCIÓN DE LA COMPETENCIA Y PROMOCIÓN DE LA COMPETENCIA. Las competencias asignadas, mediante la presente ley, a la Superintendencia de Industria y Comercio se refieren exclusivamente a las funciones de protección o defensa de la competencia en todos los sectores de la economía.

Las normas sobre prácticas restrictivas de la competencia, y en particular, las relativas al control de operaciones de integración empresarial no se aplican a los institutos de salvamento y protección de la confianza pública ordenados por la Superintendencia Financiera de Colombia ni a las decisiones para su ejecución y cumplimiento.

ARTÍCULO 29. CON DESTINO A LA SUPERINTENDENCIA DE INDUSTRIA Y COMERCIO, SE ESTABLECERÁN LAS FUENTES DE FINANCIACIÓN QUE REQUIERE LA AUTORIDAD DE COMPETENCIA PARA CUBRIR SU OPERACIÓN Y DESARROLLAR SUS METAS MISIONALES. El Gobierno Nacional reglamentará la materia.

ARTÍCULO 30. Facúltese al Gobierno Nacional para que dentro de los seis (6) meses siguientes a la vigencia de esta ley, adecue la estructura administrativa de la Superintendencia de Industria y Comercio a las nuevas responsabilidades como autoridad única de competencia, así como su régimen presupuestal a las disposiciones que sobre derechos de seguimiento y multas se encuentran contenidas en esta ley.

ARTÍCULO 31. INTERVENCIÓN DEL ESTADO. El ejercicio de los mecanismos de intervención del Estado en la economía, siguiendo el mandato previsto en los artículos 333 y 334 de la Constitución Política, constituye restricción del derecho a la competencia en los términos de la intervención. Son mecanismos de intervención del Estado que restringen la aplicación de las disposiciones de la presente ley, los Fondos de estabilización de precios, los Fondos Parafiscales para el Fomento Agropecuario, el Establecimiento de precios mínimos de garantía, la regulación de los mercados internos de productos agropecuarios prevista en el Decreto 2478 de 1999, los acuerdos de cadena en el sector agropecuario, el Régimen de Salvaguardias, y los demás mecanismos previstos en las Leyes 101 de 1993 y 81 de 1988.

ARTÍCULO 32. SITUACIONES EXTERNAS. El Estado podrá intervenir cuando se presenten situaciones externas o ajenas a los productores Nacionales, que afecten o distorsionen las condiciones de competencia en los mercados de productos nacionales. De hacerse, tal intervención se llevará a cabo a través del Ministerio del ramo competente, mediante la implementación de medidas que compensen o regulen las condiciones de los mercados garantizando la equidad y la competitividad de la producción nacional.

ARTÍCULO 33. TRANSITORIO. RÉGIMEN DE TRANSICIÓN. Las autoridades de vigilancia y control a las que excepcionalmente la ley haya atribuido facultades específicas en materia de prácticas restrictivas de la competencia y/o control previo de integraciones empresariales, continuarán ejerciendo tales facultades durante los seis (6) meses siguientes a la vigencia de esta ley, de conformidad con los incisos siguientes.

Las investigaciones que al finalizar el término establecido en el inciso anterior se encuentren en curso en materia de prácticas restrictivas de la competencia continuarán siendo tramitadas por dichas autoridades. Las demás quejas e investigaciones preliminares en materia de prácticas restrictivas de la competencia deberán ser trasladadas a la Superintendencia de Industria y Comercio.

Las informaciones sobre proyectos de integración empresarial presentadas ante otras autoridades antes de finalizar el mismo término, serán tramitadas por la autoridad ante la que se radicó la solicitud. Con todo, antes de proferir la decisión, la autoridad respectiva oirá el concepto del Superintendente de Industria y Comercio.

ARTÍCULO 34. VIGENCIA. Esta ley rige a partir de su publicación y deroga las demás disposiciones que le sean contrarias.

El Presidente del honorable Senado de la República,  
HERNÁN FRANCISCO ANDRADE SERRANO.

El Secretario General del honorable Senado de la República,  
EMILIO RAMÓN OTERO DAJUD.

El Presidente de la honorable Cámara de Representantes,  
GERMÁN VARÓN COTRINO.

El Secretario General de la honorable Cámara de Representantes,  
JESÚS ALFONSO RODRÍGUEZ CAMARGO.

REPUBLICA DE COLOMBIA - GOBIERNO NACIONAL

Publíquese y cúmplase.

Dada en Bogotá, D. C., a 24 de julio de 2009.

ÁLVARO URIBE VÉLEZ



El Ministro del Comercio, Industria y Turismo,

LUIS GUILLERMO PLATA PÁEZ.

El Ministro de Agricultura y Desarrollo Rural,

ANDRÉS DARÍO FERNÁNDEZ ACOSTA.

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| [Antecedentes Legislativos](#) | [Antecedentes de Proyectos](#)

[Gaceta del Congreso](#) | [Diario Oficial](#) | [Opinión - Consulta](#)

[Senado de la República de Colombia](#) | [Información legislativa](#) [www.secretariasenado.gov.co](http://www.secretariasenado.gov.co)

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La información contenida en este medio fue trabajada sobre transcripciones realizadas a partir del Diario Oficial; los fallos de constitucionalidad fueron suministrados por la Corte Constitucional. Cuando fue posible se tomaron los textos del Diario Oficial publicados por la Imprenta Nacional en Internet.

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## ECUADOR

EL PLENO

CONSIDERANDO:

Que, el artículo 52 de la Constitución de la República garantiza a las personas el derecho a disponer de bienes y servicios de óptima calidad y a elegirlos con libertad;

Que, el artículo 66 de la Constitución de la República, numerales 15, 25 Y 26, garantiza el derecho a desarrollar actividades económicas conforme los principios de solidaridad, responsabilidad social y ambiental; el derecho a acceder a bienes y servicios públicos y privados de calidad, con eficiencia, eficacia y buen trato; el derecho a la propiedad en todas sus formas, con función y responsabilidad social y ambiental;

Que, de acuerdo a lo dispuesto por el artículo 85. numerales 1 y 2 de la Carta Suprema, la formulación, ejecución, evaluación y control de las políticas públicas y servicios debe orientarse a la realización y garantía del buen Vivir y de los derechos reconocidos constitucionalmente en el marco del principio de solidaridad, consagrándose la prevalencia del interés general sobre el interés particular;

Que, el artículo 278 de la Constitución de la República, numeral 2, establece que para la consecución del Buen Vivir, a las personas y colectividades, y sus diversas formas organizativas, les corresponde producir, intercambiar y consumir bienes y servicios con responsabilidad y ambiental;

Que, el artículo 283 de la Constitución de la República establece que el sistema económico es social y solidario; reconoce al ser humano como sujeto y fin; propende a una relación dinámica y equilibrada entre sociedad, estado y mercado, en armonía con la naturaleza; y tiene por objetivo garantizar la producción y reproducción de las condiciones materiales e inmateriales que posibiliten el buen vivir;

Que, el artículo 284 de la Constitución de la República establece los objetivos de la política económica, entre los que se encuentran: el asegurar una adecuada distribución del ingreso y de la riqueza nacional; incentivar la producción nacional, la productividad y competitividad sistémicas, la acumulación del conocimiento científico y tecnológico, la inserción estratégica en la economía mundial y las actividades productivas complementarias en la

integración regional; y, mantener la estabilidad económica, entendida como el máximo nivel de producción y empleo sostenibles en el tiempo;

Que, el artículo 304 numeral 6 de la Carta Fundamental establece que la política comercial tendrá como objetivo evitar las prácticas monopólicas y oligopólicas, particularmente en el sector privado, y otras que afecten el funcionamiento de los mercados;

Que, el artículo 334, numeral 1, de la Constitución de la República dictamina que corresponde al Estado promover el acceso equitativo a los factores de producción, evitando la concentración

o acaparamiento de factores y recursos productivos, la redistribución y supresión de privilegios o desigualdades en el acceso a ellos;

Que, el artículo 335 de la Constitución de la República, impone al Estado las obligaciones de regular, controlar e intervenir, cuando sea necesario, en los intercambios y transacciones económicas, definir una política de precios orientada a proteger la producción nacional y establecer los mecanismos de sanción para evitar cualquier práctica de monopolio u oligopolio privado o de abuso de posición de dominio en el mercado, así como otras prácticas de competencia desleal;

Que, el artículo 336 de la Carta Fundamental impone al Estado el deber de impulsar y velar por un comercio justo como medio de acceso a bienes y servicios de calidad, promoviendo la reducción de las distorsiones de la intermediación y promoción de su sustentabilidad, asegurando de esta manera la transparencia y eficiencia en los mercados, mediante el fomento de la competencia en igualdad de condiciones y oportunidades, lo que se definirá mediante Ley;

Que, en el Registro Oficial Suplemento 306 de 22 de Octubre de 2010, se promulgó el Código Orgánico de Planificación y Finanzas Públicas, el mismo que prevé que es uno de los lineamientos para el desarrollo el aportar a la construcción de un sistema económico social, solidario y sostenible, que reconozca las distintas formas de producción y de trabajo, y promueva la transformación de la estructura económica primario-exportadora, las formas de acumulación de riqueza y la distribución equitativa de los beneficios del desarrollo;

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Que, el Ministro de Finanzas de conformidad con el artículo 74 numeral 15 del Código Orgánico de Planificación y Finanzas Públicas, mediante oficio No. MINFIN-DM-2011-1246 de 5 de agosto de 2011, emite dictamen favorable del proyecto de Ley Orgánica de Regulación y Control del Poder de Mercado;

Que, el artículo 132 de la Constitución de la República establece que la Asamblea Nacional aprobará como leyes las normas generales de interés común, y que se requerirá de ley en los siguientes casos:

1. Regular el ejercicio de los derechos y garantías constitucionales. 2. Tipificar infracciones y establecer las sanciones correspondientes. 3. Crear, modificar o suprimir tributos, sin menoscabo de las atribuciones que la Constitución confiere a los gobiernos autónomos descentralizados. 4. Atribuir deberes, responsabilidades y competencias a los gobiernos autónomos descentralizados. 5. Modificar la división políticoadministrativa del país, excepto en lo relativo a las parroquias. 6. Otorgar a los organismos públicos de control y regulación la facultad de expedir normas de carácter general en las materias propias de su competencia, sin que puedan alterar o innovar las disposiciones legales; y,

En ejercicio de sus facultades constitucionales y legales, expide la siguiente:

## LEY ORGÁNICA DE REGULACIÓN Y CONTROL DEL PODER DE

### MERCADO

#### CAPÍTULO I

##### DEL OBJETO Y AMBITO

Artículo 1.-Objeto.-El objeto de la presente Leyes evitar, prevenir, corregir, eliminar y sancionar el abuso de operadores económicos con poder de mercado; la prevención, prohibición y sanción de acuerdos colusorios y otras prácticas restrictivas; el control y regulación de las operaciones de concentración económica; y la prevención, prohibición y sanción de las prácticas desleales, buscando la eficiencia en los mercados, el comercio justo y el bienestar general y de los consumidores y usuarios, para el establecimiento de un sistema económico social, solidario y sostenible.

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Artículo 2.-Ámbito.-Están sometidos a las disposiciones de la presente Ley todos los operadores económicos, sean personas naturales

o jurídicas, públicas o privadas, nacionales y extranjeras, con o sin fines de lucro, que actual o potencialmente realicen actividades económicas en todo o en parte del territorio nacional, así como los gremios que las agrupen, y las que realicen actividades económicas fuera del país, en la medida en que sus actos, actividades o acuerdos produzcan o puedan producir efectos perjudiciales en el mercado nacional.

Las conductas o actuaciones en que incurriere un operador económico serán imputables a él y al operador que lo controla, cuando el comportamiento del primero ha sido determinado por el segundo.

La presente ley incluye la regulación de las distorsiones de mercado originadas en restricciones geográficas y logísticas, así como también aquellas que resultan de las asimetrías productivas entre los operadores económicos.

Artículo 3.-Primacía de la realidad.-Para la aplicación de esta Ley la autoridad administrativa determinará la naturaleza de las conductas investigadas, atendiendo a su realidad y efecto económico. La forma de los actos jurídicos utilizados por los operadores económicos no enerva el análisis que la autoridad efectúe sobre la verdadera naturaleza de las conductas subyacentes a dichos actos.

La costumbre o la costumbre mercantil no podrán ser invocadas o aplicadas para exonerar o eximir las conductas contrarias a esta Ley o la responsabilidad del operador económico.

Artículo 4.-Lineamientos para la regulación y principios para la aplicación.-En concordancia con la Constitución de la República y el ordenamiento jurídico vigente, los siguientes lineamientos se aplicarán para la regulación y formulación de política pública en la materia de esta Ley:

1. El reconocimiento del ser humano como sujeto y fin del sistema económico.
2. La defensa del interés general de la sociedad, que prevalece sobre el interés particular.
3. El reconocimiento de la heterogeneidad estructural de la economía ecuatoriana y de las diferentes formas de organización económica, incluyendo las organizaciones populares y solidarias.

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4. El fomento de la desconcentración económica, a efecto de evitar prácticas monopólicas y oligopólicas privadas contrarias al interés general, buscando la eficiencia en los mercados.
5. El derecho a desarrollar actividades económicas y la libre concurrencia de los operadores económicos al mercado.
6. El establecimiento de un marco normativo que permita el ejercicio del derecho a desarrollar actividades económicas, en un sistema de libre concurrencia.
7. El impulso y fortalecimiento del comercio justo para reducir las distorsiones de la intermediación.
8. El desarrollo de mecanismos que garanticen que las personas, pueblos y nacionalidades alcancen la autosuficiencia de alimentos sanos a través de la redistribución de los recursos como la tierra y el agua.
9. La distribución equitativa de los beneficios de desarrollo, incentivar la producción, la productividad, la competitividad, desarrollar el conocimiento científico y tecnológico; y,
10. La necesidad de contar con mercados transparentes y eficientes.

Para la aplicación de la presente Ley se observarán los principios de no discriminación, transparencia, proporcionalidad y debido proceso.

## CAPÍTULO 11

### RÉGIMEN DE REGULACION y CONTROL

#### Sección 1

##### Mercado relevante y volumen de negocios

Artículo 5.-Mercado relevante.-A efecto de aplicar esta Ley la Superintendencia de Control del Poder de Mercado determinará para cada caso el mercado relevante. Para ello, considerará, al menos, el mercado del producto o servicio, el mercado geográfico y las características relevantes de los grupos específicos de vendedores y compradores que participan en dicho mercado.

El mercado del producto o servicio comprende, al menos, el bien o servicio materia de la conducta investigada y sus sustitutos. Para el análisis de sustitución, la Superintendencia de Control del Poder de Mercado evaluará, entre otros factores, las preferencias de los clientes o consumidores; las características, usos y precios de los posibles sustitutos; los costos de la sustitución; así como las posibilidades tecnológicas y el tiempo requerido para la sustitución.

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El mercado geográfico comprende el conjunto de zonas geográficas donde están ubicadas las fuentes alternativas de aprovisionamiento del producto relevante. Para determinar las alternativas de aprovisionamiento, la Superintendencia de Control del Poder de Mercado evaluará, entre otros factores, los costos de transporte, las modalidades de venta y las barreras al comercio existentes.

La determinación del mercado relevante considerará las características particulares de los vendedores y compradores que participan en dicho mercado. Los competidores de un mercado relevante deberán ser equiparables, para lo cual se considerará las características de la superficie de venta, el conjunto de bienes que se oferta, el tipo de intermediación y la diferenciación con otros canales de distribución o venta del mismo producto.

Artículo 6.-Volumen de negocios.-A efectos de la presente Ley, se entiende por volumen de negocios total de uno o varios operadores económicos, la cuantía resultante de la venta de productos y de la prestación de servicios realizados por los mismos, durante el último ejercicio que corresponda a sus actividades ordinarias, previa deducción del impuesto sobre el valor agregado y de otros impuestos al consumidor final directamente relacionados con el negocio.

#### Sección 2

##### Del poder de mercado

Artículo 7.-Poder de mercado.-Es la capacidad de los operadores económicos para influir significativamente en el mercado. Dicha capacidad se puede alcanzar de manera individual o colectiva. Tienen poder de mercado u ostentan posición de dominio los operadores económicos que, por cualquier medio, sean capaces de actuar de modo independiente con prescindencia de sus competidores, compradores, clientes, proveedores, consumidores, usuarios, distribuidores u otros sujetos que participen en el mercado.

La obtención o el reforzamiento del poder de mercado no atentan contra la competencia, la eficiencia económica o el bienestar general. Sin embargo, el obtener o reforzar el poder de mercado, de manera que impida, restrinja, falsee o distorsione la competencia, atente contra la eficiencia económica o el bienestar general o los derechos de los consumidores o usuarios, constituirá una conducta sujeta a control, regulación y, de ser el caso, a las sanciones establecidas en esta Ley.

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Artículo 8.-Determinación del Poder de Mercado.-Para determinar si un operador económico tiene poder de mercado en un mercado relevante, debe considerarse, entre otros, uno o varios de los siguientes criterios:

- a. Su participación en ese mercado, de forma directa o a través de personas naturales o jurídicas vinculadas, y su posibilidad de fijar precios unilateralmente o de restringir, en forma sustancial, el abastecimiento en el mercado relevante, sin que los demás agentes económicos puedan, en la actualidad o en el futuro, contrarrestar ese poder.
- b. La existencia de barreras a la entrada y salida, de tipo legal, contractual, económico o estratégico; y, los elementos que, previsiblemente, puedan alterar tanto esas barreras como la oferta de otros competidores.
- c. La existencia de competidores, clientes o proveedores respectiva capacidad de ejercer poder de mercado; y,
- d. Las posibilidades de acceso del operador económico y sus competidores a las fuentes de insumos, información, redes de distribución, crédito o tecnología.
- e. Su comportamiento reciente.
- f. La disputabilidad del mercado.
- g. Las características de la oferta y la demanda de los bienes o servicios; y,
- h. El grado en que el bien o el servicio de que se trate sea sustituible, por otro de origen nacional o extranjero, considerando las posibilidades tecnológicas y el grado en que los consumidores cuenten con sustitutos y el tiempo requerido para efectuar tal sustitución.

Artículo 9.-Abuso de Poder de Mercado.-Constituye infracción a la presente Ley y está prohibido el abuso de poder de mercado. Se entenderá que se produce abuso de poder de mercado cuando uno o varios operadores económicos, sobre la base de su poder de mercado, por cualquier medio, impidan, restrinjan, falseen o distorsionen la competencia, o afecten negativamente a la eficiencia económica o al bienestar general.

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## REPÚBLICA DEL ECUADOR

En particular, las conductas que constituyen abuso de poder de mercado son:

- 1.-Las conductas de uno o varios operadores económicos que les permitan afectar, efectiva o potencialmente, la participación de otros competidores y la capacidad de entrada o expansión de estos últimos en un mercado relevante, a través de cualquier medio ajeno a su propia competitividad o eficiencia.
- 2.-Las conductas de uno o varios operadores económicos con poder de mercado, que les permitan aumentar sus márgenes de ganancia mediante la extracción injustificada del excedente del consumidor.
- 3.-Las conductas de uno o varios operadores económicos con poder de mercado, en condiciones en que debido a la concentración de los medios de producción o comercialización, dichas conductas afecten o puedan afectar, limitar o impedir la participación de sus competidores o perjudicar a los productores directos, los consumidores y los usuarios.
- 4.-La fijación de precios predatorios o explotativos.
- 5.-La alteración injustificada de los niveles de producción, del mercado o del desarrollo técnico o tecnológico que afecten negativamente a los operadores económicos o a los consumidores.
- 6.-La discriminación injustificada de precios, condiciones o modalidades de fijación de precios.
- 7.-La aplicación, en las relaciones comerciales o de servicio, de condiciones desiguales para prestaciones equivalentes que coloquen de manera injustificada a unos competidores en situación de desventaja frente a otros.
- 8.-La venta condicionada y la venta atada, injustificadas.
- 9.-La negativa injustificada a satisfacer las demandas de compra o adquisición, o a aceptar ofertas de venta o prestación de bienes o servicios.
- 10.-La incitación, persuasión o coacción a terceros a no aceptar, limitar o impedir la compra, venta, movilización o entrega de bienes o la prestación de servicios a otros.

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11.-La fijación, imposición, limitación o establecimiento injustificado de condiciones para la compra, venta y distribución exclusiva de bienes o serVICIOS.

12.-El establecimiento de subsidios cruzados, injustificados, particularmente agravado cuando estos subsidios sean de carácter regresIvo.

13.-La subordinación de actos, acuerdos o contratos a la aceptación de obligaciones, prestaciones suplementarias o condicionadas que, por su naturaleza o arreglo al uso comercial, no guarden relación con el objeto de los mismos.

14.-La negativa injustificada del acceso para otro operador económico a redes u otra infraestructura a cambio de una remuneración razonable; siempre y cuando dichas redes o infraestructura constituyan una facilidad esencial.

15.-La implementación de prácticas exclusorias o prácticas explotativas.

16.-Los descuentos condicionados, tales como aquellos conferidos a través de la venta de tarjetas de afiliación, fidelización u otro tipo de condicionamientos, que impliquen cualquier pago para acceder a los mencionados descuentos.

17.-El abuso de un derecho de propiedad intelectual, según las disposiciones contenidas en instrumentos internacionales, convenios y tratados celebrados y ratificados por el Ecuador y en la ley que rige la materia.

18.-La implementación injustificada de acciones legales que tenga por resultado la restricción del acceso o de la permanencia en el mercado de competidores actuales o potenciales.

19.-Establecer, imponer o sugerir contratos de distribución o venta exclusiva, cláusulas de no competencia o similares, que resulten injustificados.

20.-La fijación injustificada de precios de reventa.

21.-Sujetar la compra o venta a la condición de no usar, adquirir, vender o abastecer bienes o servicios producidos, procesados, distribuidos o comercializados por un tercero;

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22.-Aquellas conductas que impidan o dificulten el acceso o permanencia de competidores actuales o potenciales en el mercado por razones diferentes a la eficiencia económica.

23.-La imposición de condiciones injustificadas a proveedores o compradores, como el establecimiento de plazos excesivos e injustificados de pago, devolución de productos, especialmente cuando fueren perecibles, o la exigencia de contribuciones o prestaciones suplementarias de cualquier tipo que no estén relacionados con la prestación principal o relacionadas con la efectiva prestación de un servicio al proveedor.

La prohibición prevista en el presente artículo se aplicará también en los casos en los que el poder de mercado de uno o varios operadores económicos haya sido establecido por disposición legal.

No será admitida como defensa o eximente de responsabilidad de conductas contrarias a esta Ley la valoración del acto jurídico que pueda contenerlas.

Artículo. 10.-Abuso de Poder de Mercado en Situación de Dependencia Económica.-Se prohíbe la explotación, por uno o varios operadores económicos, de la situación de dependencia económica en la que puedan encontrarse sus clientes o proveedores, que no dispongan de alternativa equivalente para el ejercicio de su actividad. Esta situación se presumirá cuando un proveedor, además de los descuentos habituales, debe conceder a su cliente de forma regular otras ventajas adicionales que no se conceden a compradores similares.

El abuso consistirá, en particular, en:

- 1.-La ruptura, aunque sea de forma parcial, de una relación comercial establecida sin que haya existido preaviso escrito y preciso con una antelación mínima de 30 días, salvo que se deba a incumplimientos graves, por parte del proveedor o comprador, de las condiciones pactadas o en caso de fuerza mayor.
- 2.-Obtener o intentar obtener, bajo la amenaza de ruptura de las relaciones comerciales o cualquier otro tipo de amenaza, precios, condiciones de pago, modalidades de venta, pago de cargos adicionales y otras condiciones de cooperación comercial no recogidas en las condiciones generales de venta que se tengan pactadas.
- 3.-La utilización del poder de mercado para generar o mantener la posición de dependencia económica, de uno o varios operadores, tendiente a obtener ventajas adicionales que no se conceden o concederían a compradores o proveedores similares.

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- 4.-La imposición, de forma directa o indirecta, de precios u otras condiciones comerciales o de servicios no equitativos.

Las entidades públicas encargadas de la regulación de la producción en cada uno de los sectores productivos vigilarán la estricta observancia de esta prohibición, especialmente en los intercambios de los pequeños y medianos productores agroalimentarios y de la economía popular y solidaria con las redes de intermediación del sector privado, y, en caso de identificar incumplimientos, tomarán las medidas correspondientes en el ámbito de su competencia, además de informar obligatoriamente a la Superintendencia de Control del Poder de Mercado para la investigación y sanción respectivas.

Sección 3

## Acuerdos y prácticas restrictivas

Artículo 11.-Acuerdos y prácticas prohibidas.-Están prohibidos y serán sancionados de conformidad con las normas de la presente ley todo acuerdo, decisión o recomendación colectiva, o práctica concertada

o conscientemente paralela, y en general todos los actos o conductas realizados por dos o más operadores económicos, de cualquier forma manifestados, relacionados con la producción e intercambio de bienes o servicios, cuyo objeto o efecto sea o pueda ser impedir, restringir, falsear o distorsionar la competencia, o afecten negativamente a la eficiencia económica o el bienestar general.

En particular, las siguientes conductas, constituyen acuerdos y prácticas prohibidas:

1. Fijar de manera concertada o manipular precios, tasas de interés, tarifas, descuentos, u otras condiciones comerciales o de transacción, o intercambiar información con el mismo objeto o efecto.
2. Repartir, restringir, limitar, paralizar, establecer obligaciones o controlar concertadamente la producción, distribución o comercialización de bienes o servicios.
3. El reparto concertado de clientes, proveedores o zonas geográficas.
4. Repartir o restringir las fuentes de abastecimiento.

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5. Restringir el desarrollo tecnológico o las inversiones.
6. Los actos u omisiones, acuerdos o prácticas concertadas y en general todas las conductas de proveedores u oferentes, cualquiera sea la forma que adopten, cuyo objeto o efecto sea impedir, restringir, falsear o distorsionar la competencia, ya sea en la presentación de ofertas y posturas o buscando asegurar el resultado en beneficio propio o de otro proveedor u oferente, en una licitación, concursos, remates, ventas al martillo, subastas públicas u otros establecidos en las normas que regulen la contratación pública, o en procesos de contratación privados abiertos al público.
7. Discriminar injustificadamente precios, condiciones o modalidades de negociación de bienes o servicios.
8. La aplicación concertada, en las relaciones comerciales o de servicio, de condiciones desiguales para prestaciones equivalentes, que coloquen de manera injustificada a unos competidores en situación desventajosa frente a otros.
9. Concertar con el propósito de disuadir a un operador económico de una determinada conducta, aplicarle represalias u obligarlo a actuar en un sentido determinado.

10. La concertación de la calidad de los productos cuando no corresponda a normas técnicas nacionales o internacionales.
11. Concertar la subordinación de la celebración de contratos a la aceptación de prestaciones adicionales que, por su naturaleza o arreglo al uso comercial, no guarden relación con el objeto de tales contratos.
12. La venta condicionada y la venta atada, injustificadas.
13. Denegarse de modo concertado e injustificado a satisfacer las demandas de compra o adquisición o las ofertas de venta y prestación de productos o servicios, o a negociar con actuales o potenciales proveedores, distribuidores, intermediarios, adquirentes o usuarios.
14. Denegar de modo injustificado la admisión de operadores económicos a una asociación, gremio o ente similar.

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15. El boicot dirigido a limitar el acceso al mercado o el ejercicio de la competencia por otras empresas.
16. Suspender concertadamente y de manera vertical la provisión de un servicio monopólico en el mercado a un proveedor de bienes o servicios público o privado.
17. La fijación concertada e injustificada de precios de reventa.
18. Levantar barreras de entrada y/o salida en un mercado relevante.
19. Establecer, imponer o sugerir contratos de distribución o venta exclusiva, cláusulas de no competencia o similares, que resulten injustificados.
20. Aquellas conductas que impidan o dificulten el acceso o permanencia de competidores actuales o potenciales en el mercado por razones diferentes a la eficiencia económica.
21. Los acuerdos entre proveedores y compradores, al margen de lo que establece la ley, que se puedan dar en las compras públicas que direccionen y concentren la contratación con el afán de favorecer injustificadamente a uno o varios operadores económicos.

Son nulos de pleno derecho los acuerdos, prácticas, decisiones y recomendaciones que, estando prohibidos en virtud de lo dispuesto en este artículo, no estén amparados por las exenciones previstas en la presente Ley.

Artículo 12.-Exenciones a la prohibición.-Están exentos de la prohibición contenida en el artículo anterior los acuerdos que contribuyan a mejorar la producción o la comercialización y distribución de bienes y servicios o a promover el progreso técnico o económico, sin que sea necesaria autorización previa, siempre y cuando se cumplan todas las siguientes condiciones:

- a. Permitan a los consumidores o usuarios participar de forma equitativa de sus ventajas.

- b. No impongan restricciones que no sean indispensables para la consecución de aquellos objetivos; y,
- c. No otorguen a los operadores económicos la posibilidad de eliminar la competencia respecto de una parte sustancial de los productos o servicios contemplados.

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La Superintendencia de Control del Poder de Mercado examinará permanentemente los actos y las conductas de operadores económicos que se acojan a la exención establecida en este artículo, y evaluará que cumplan con las condiciones que justifican su implementación. Si, de oficio o previa denuncia, la Superintendencia comprobare que uno o varios actos o conductas implementadas con arreglo a la exención establecida en virtud de este artículo no cumple con cualquiera de las condiciones establecidas en el inciso anterior, o se aplican de manera abusiva o son contrarios al objeto de esta Ley, mediante resolución, dispondrá la cesación correspondiente, sin perjuicio de la aplicación de medidas preventivas, correctivas y sanciones de conformidad con la presente Ley.

Artículo 13.-Regla de mIDImis.-Las prohibiciones establecidas en el artículo 11 no se aplicarán a aquellas conductas de operadores económicos que por su pequeña escala de operación y / o por su escasa significación, no sean capaces de afectar de manera significativa a la competencia. La Junta de Regulación determinará los criterios para la aplicación de la regla de mínimis.

#### Sección 4

##### De la concentración económica

Artículo 14.-Operaciones de concentración económica.-A los efectos de esta ley se entiende por concentración económica al cambio o toma de control de una o varias empresas u operadores económicos, a través de la realización de actos tales como:

- a) La fusión entre empresas u operadores económicos.
- b) La transferencia de la totalidad de los efectos de un comerciante.
- c) La adquisición, directa o indirectamente, de la propiedad o cualquier derecho sobre acciones o participaciones de capital o títulos de deuda que den cualquier tipo de derecho a ser convertidos en acciones o participaciones de capital o a tener cualquier tipo de influencia en las decisiones de la persona que los emita, cuando tal adquisición otorgue al adquirente el control de, o la influencia sustancial sobre la misma.
- d) La vinculación mediante administración común.
- e) Cualquier otro acuerdo o acto que transfiera en forma fáctica o jurídica a una persona o grupo económico los activos de un

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operador económico o le otorgue el control o influencia determinante en la adopción de decisiones de administración ordinaria o extraordinaria de un operador económico.

Artículo 15.-Control y regulación de concentración económica.Las

operaciones de concentración económica que estén obligadas a cumplir con el procedimiento de notificación previsto en esta sección serán examinadas, reguladas, controladas y, de ser el caso, intervenidas o sancionadas por la Superintendencia de Control del Poder de Mercado.

En caso de que una operación de concentración económica cree, modifique o refuerce el poder de mercado, la Superintendencia de Control del Poder de Mercado podrá denegar la operación de concentración o determinar medidas o condiciones para que la operación se lleve a cabo. Habiéndose concretado sin previa notificación, o mientras no se haya expedido la correspondiente autorización, la Superintendencia podrá ordenar las medidas de desconcentración, o medidas correctivas o el cese del control por un operador económico sobre otro u otros, cuando el caso lo amerite, sin perjuicio de las sanciones a que hubiere lugar de conformidad con los artículos 78 y 79 de esta Ley.

Artículo 16.-Notificación de concentración.-Están obligados a cumplir con el procedimiento de notificación previa establecido en esta Ley, los operadores económicos involucrados en operaciones de concentración, horizontales o verticales, que se realicen en cualquier ámbito de la actividad económica, siempre que se cumpla una de las siguientes condiciones:

- a) Que el volumen de negocios total en el Ecuador del conjunto de los partícipes supere, en el ejercicio contable anterior a la operación, el monto que en Remuneraciones Básicas Unificadas vigentes haya establecido la Junta de Regulación.
- b) En el caso de concentraciones que involucren operadores económicos que se dediquen a la misma actividad económica, y que como consecuencia de la concentración se adquiera o se incremente una cuota igual o superior al 30 por ciento del mercado relevante del producto o servicio en el ámbito nacional o en un mercado geográfico definido dentro del mismo.

En los casos en los cuales las operaciones de concentración no cumplan cualquiera de las condiciones anteriores, no se requerirá autorización por parte de la Superintendencia de Control del Poder de Mercado. Sin embargo, la Superintendencia de Control del Poder de Mercado podrá solicitar de oficio o a petición de parte que los operadores económicos involucrados en una operación de concentración la notifiquen, en los términos de esta sección.

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Las operaciones de concentración que requieran de autorización previa según los incisos precedentes, deberán ser notificadas para su examen previo, en el plazo de 8 días contados a partir de la fecha de la conclusión del acuerdo, bajo cualquiera de las modalidades descritas en el artículo 14 de esta Ley, ante la Superintendencia de Control del Poder de Mercado. La

notificación deberá constar por escrito, acompañada del proyecto del acto jurídico de que se trate, que incluya los nombres o denominaciones sociales de los operadores económicos o empresas involucradas, sus estados financieros del último ejercicio, su participación en el mercado y los demás datos que permitan conocer la transacción pretendida. Esta notificación debe ser realizada por el absorbente, el que adquiere el control de la compañía o los que pretendan llevar a cabo la concentración. Los actos sólo producirán efectos entre las partes o en relación a terceros una vez cumplidas las previsiones de los artículos 21 o 23 de la presente Ley, según corresponda.

Art.-17.-Cálculo del Volumen de Negocios.-Para el cálculo del volumen de negocios total del operador económico afectado, se sumarán los volúmenes de negocios de las empresas u operadores económicos siguientes:

- a) La empresa u operador económico en cuestión.
- b) Las empresas u operadores económicos en los que la empresa o el operador económico en cuestión disponga, directa o indirectamente:
  - 1. De más de la mitad del capital suscrito y pagado.
  - 2. Del poder de ejercer más de la mitad de los derechos de voto.
  - 3. Del poder de designar más de la mitad de los miembros de los órganos de administración, vigilancia o representación legal de la empresa u operador económico; o,
  - 4. Del derecho a dirigir las actividades de la empresa u operador económico.
- c) Aquellas empresas u operadores económicos que dispongan de los derechos o facultades enumerados en el literal b) con respecto a una empresa u operador económico involucrado.

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- d) Aquellas empresas u operadores económicos en los que una empresa u operador económico de los contemplados en el literal c) disponga de los derechos o facultades enumerados en el literal b).

el Las empresas u operadores económicos en cuestión en los que varias empresas u operadores económicos de los contemplados en los literales de la a) a la d) dispongan conjuntamente de los derechos o facultades enumerados en el literal b).

Artículo 18.-Sanción.-La falta de notificación y la ejecución no autorizada de las operaciones previstas en el artículo anterior, serán sancionadas de conformidad con los artículos 78 y 79 de esta Ley.

Artículo 19.-Operaciones Exentas.-Se encuentran exentas de la notificación obligatoria prevista en el artículo 16 las siguientes operaciones:

- a) Las adquisiciones de acciones sin derecho a voto, o de bonos, obligaciones o cualquier título convertible en acciones sin derecho a voto.
- b) Adquisiciones de empresas o de operadores económicos liquidados o aquellos que no hayan registrado actividad en el país en los últimos tres años.

Artículo 20.-De la información y su coordinación.-La Superintendencia de Control del Poder de Mercado podrá establecer los sistemas de información que considere necesarios para el efectivo cumplimiento de sus fines. Las demás entidades públicas tendrán el deber de colaborar, en el marco de la Constitución y la ley, con la Superintendencia de Control del Poder de Mercado, especialmente en cuanto a transferencia de información relevante que posean, sistematicen o generen sobre los operadores económicos, así como de facilitar la integración de sus sistemas de información con aquellos que la Superintendencia establezca. De la misma manera, la Superintendencia de Control del Poder de Mercado deberá intercambiar información que sea relevante para las demás entidades públicas, siempre que no sea reservada conforme a lo establecido en esta Ley.

Artículo 21.-Decisión de la Autoridad.-En todos los casos sometidos al procedimiento de notificación previa establecido en este capítulo, excepto los de carácter informativo establecidos en el segundo inciso del artículo 16 de la presente Ley, la Superintendencia, por resolución motivada, deberá decidir dentro del término de sesenta (60) días calendario de presentada la solicitud y documentación respectiva:

- a) Autorizar la operación;
- b) Subordinar el acto al cumplimiento de las condiciones que la misma Superintendencia establezca; o,
- c) Denegar la autorización.

El término establecido en este artículo podrá ser prorrogado por una sola vez, hasta por sesenta (60) días término adicionales, si las circunstancias del examen lo requieren.

Artículo 22.-Criterios de decisión.-A efectos de emitir la decisión correspondiente según el artículo anterior, se tendrán en cuenta los siguientes criterios:

- 1.-El estado de situación de la competencia en el mercado relevante;
- 2.-El grado de poder de mercado del operador económico en cuestión y el de sus principales competidores;
- 3.-La necesidad de desarrollar y/o mantener la libre concurrencia de los operadores económicos, en el mercado, considerada su estructura así como los actuales o potenciales competidores;
- 4.-La circunstancia de si a partir de la concentración, se generare o fortaleciere el poder de mercado o se produjere una sensible disminución, distorsión u obstaculización, claramente



previsible o comprobada, de la libre concurrencia de los operadores económicos y/o la competencia;

5.- La contribución que la concentración pudiere aportar a:

- a) La mejora de los sistemas de producción o comercialización;
- b) El fomento del avance tecnológico o económico del país;
- c) La competitividad de la industria nacional en el mercado internacional siempre y cuando no tenga una afectación significativa al bienestar económico de los consumidores nacionales;
- d) El bienestar de los consumidores nacionales;
- e) Si tal aporte resultare suficiente para compensar determinados y específicos efectos restrictivos sobre la competencia; y,

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- f) La diversificación del capital social y la participación de los trabajadores.

Artículo 23.-Autorización por silencio administrativo.Transcurrido

el término previsto en el artículo 21 sin que se haya emitido la resolución correspondiente, la operación se tendrá por autorizada tácitamente.

La autorización por silencio administrativo producirá en todos los casos los mismos efectos legales que la autorización expresa, sin que se requiera petición adicional alguna por el o los operadores económicos involucrados, quienes podrán continuar con la operación de concentración notificada.

Artículo 24.-Impugnación.-Las concentraciones que hayan sido notificadas y autorizadas podrán ser impugnadas posteriormente en sede administrativa en base a información y documentación verificada por la Superintendencia, por ella misma o quien tenga interés en ello, solamente cuando dicha resolución se hubiera obtenido en base a información falsa o incompleta proporcionada por el solicitante, sin perjuicio de las acciones civiles y penales correspondientes.

## Sección 5

### De las prácticas desleales

Artículo 25.-Definición.-Se considera desleal a todo hecho, acto o práctica contrarios a los usos o costumbres honestos en el desarrollo de actividades económicas, incluyendo aquellas conductas realizadas en o a través de la actividad publicitaria. La expresión actividades económicas se entenderá en sentido amplio, que abarque actividades de comercio, profesionales, de servicio y otras.

Para la definición de usos honestos se estará a los criterios del comercio nacional; no obstante, cuando se trate de actos o prácticas realizados en el contexto de operaciones internacionales, o que tengan puntos de conexión con más de un país, se atenderá a los criterios que sobre usos honestos prevalezcan en el comercio internacional.

La determinación de la existencia de una práctica desleal no requiere acreditar conciencia o voluntad sobre su realización sino que se asume como cuasidelito de conformidad con el Código Civil. Tampoco será necesario acreditar que dicho acto genere un daño efectivo en perjuicio de otro concurrente, los consumidores o el orden público económico, bastando constatar que la generación de dicho daño sea potencial, de acuerdo a lo establecido en esta Ley.

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Las sanciones impuestas a los infractores de la presente ley no obstan el derecho de los particulares de demandar la indemnización de daños y perjuicios que corresponda de conformidad con las normas del derecho común, así como la imposición de sanciones de índole penal, en caso de constituir delitos.

Se aplicará las sanciones previstas en esta ley, siempre que la práctica no esté tipificada como infracción administrativa con una sanción mayor en otra norma legal, sin perjuicio de otras medidas que se puedan tomar para prevenir o impedir que las prácticas afecten a la competencia.

La protesta social legítima, en el ámbito exclusivo de esta Ley, no será, en ningún caso considerada como boicot.

Artículo 26.-Prohibición.-Quedan prohibidos y serán sancionados en los términos de la presente Ley, los hechos, actos o prácticas desleales, cualquiera sea la forma que adopten y cualquiera sea la actividad económica en que se manifiesten, cuando impidan, restrinjan, falseen o distorsionen la competencia, atenten contra la eficiencia económica, o el bienestar general o los derechos de los consumidores o usuarios.

Los asuntos en que se discutan cuestiones relativas a la propiedad intelectual entre pares, públicos o privados, sin que exista afectación al interés general o al bienestar de los consumidores, serán conocidos y resueltos por la autoridad nacional competente en la materia.

Artículo 27.-Prácticas Desleales.-Entre otras, se consideran prácticas desleales, las siguientes:

1.-Actos de confusión.-Se considera desleal toda conducta que tenga por objeto o como efecto, real o potencial, crear confusión con la actividad, las prestaciones, los productos o el establecimiento ajenos.

En particular, se reputa desleal el empleo o imitación de signos distintivos ajenos, así como el empleo de etiquetas, envases, recipientes u otros medios de identificación que en el mercado se asocien a un tercero.

2.-Actos de engaño.-Se considera desleal toda conducta que tenga por objeto o como efecto, real o potencial, inducir a error al público, inclusive por omisión, sobre la naturaleza, modo de fabricación o distribución, características, aptitud para el uso, calidad y cantidad, precio, condiciones de venta, procedencia geográfica y en general, las ventajas, los atributos, beneficios o condiciones que corresponden a los productos, servicios, establecimientos o transacciones que el operador económico que desarrolla tales actos pone a disposición en el mercado; o, inducir a error sobre los atributos que posee dicho operador, incluido todo aquello que representa su actividad empresarial.

Configura acto de engaño la difusión en la publicidad de afirmaciones sobre productos o servicios que no fuesen veraces y exactos. La carga de acreditar la veracidad y exactitud de las afirmaciones en la publicidad corresponde a quien las haya comunicado en su calidad de anunciante. En particular, para la difusión de cualquier mensaje referido a características comprobables de un producto o servicio anunciado, el anunciante debe contar con las pruebas que sustenten la veracidad de dicho mensaje.

3.-Actos de Imitación.-Particularmente, se considerarán prácticas desleales:

- a) La imitación que infrinja o lesione un derecho de propiedad intelectual reconocido por la ley.
- b) La imitación de prestaciones o iniciativas empresariales de un tercero cuando resulte idónea para generar confusión por parte de los consumidores respecto a la procedencia empresarial de la prestación o comporte un aprovechamiento indebido de la reputación o el esfuerzo ajeno. Las iniciativas empresariales imitadas podrán consistir, entre otras, en el esquema general, el texto, el eslogan, la presentación visual, la música o efectos sonoros de un anuncio de un tercero.
- c) La imitación sistemática de las prestaciones o iniciativas empresariales de un tercero cuando dicha estrategia se halle directamente encaminada a impedir u obstaculizar su afirmación en el mercado y exceda de lo que, según sus características, pueda reputarse como una respuesta natural a aquél.

4.- Actos de denigración.-Se considera desleal la realización, utilización o difusión de aseveraciones, indicaciones o manifestaciones sobre la actividad, el producto, las prestaciones, el establecimiento o las relaciones mercantiles de un tercero o de sus gestores, que puedan menoscabar su crédito en el mercado, a no ser que sean exactas, verdaderas y pertinentes. Constituyen actos de denigración, entre otros:

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- a) Realizar, utilizar o difundir aseveraciones, indicaciones o manifestaciones incorrectas o falsas u omitir las verdaderas, con el objeto o que tengan por efecto, real o potencial, menoscabar el crédito en el mercado del afectado.

b) Realizar, utilizar o difundir aseveraciones, indicaciones o manifestaciones que refieran a la nacionalidad, las creencias o ideología, la intimidad, la vida privada o cualesquiera otras circunstancias estrictamente personales del afectado.

c) Realizar, utilizar o difundir aseveraciones, indicaciones o manifestaciones que, debido al tono de desprecio o ridículo, sean susceptibles de menoscabar el crédito del afectado en el mercado. Las conductas descritas en los literales b) y c) del presente artículo se presumen impertinentes, sin admitir prueba en contrario.

5.-Actos de comparación.-Se considera desleal la comparación de la actividad, las prestaciones, los productos o el establecimiento propios o ajenos con los de un tercero, inclusive en publicidad comparativa, cuando dicha comparación se refiera a extremos que no sean análogos, relevantes ni comprobables.

6.-Explotación de la reputación ajena.-Se considera desleal el aprovechamiento indebido, en beneficio propio o ajeno, de las ventajas de la reputación industrial, comercial o profesional adquirida por otro en el mercado. 7.-Violación de secretos empresariales.-Se considerará como secreto empresarial cualquier información no divulgada que una persona natural o jurídica legítimamente posea, que pueda usarse en alguna actividad productiva, industrial o comercial, y que sea susceptible de transmitirse a un tercero, en la medida que:

a) La información sea secreta en el entendido de que como conjunto

o en la configuración y composición precisas de sus elementos no sea conocida en general ni fácilmente accesible a las personas integrantes de los círculos que normalmente manejan el tipo de información de que se trate;

b) La información tenga un valor comercial, efectivo o potencial, por ser secreta; y,

c) En las circunstancias dadas, la persona que legalmente la tenga bajo control haya adoptado medidas razonables para mantenerla secreta.

Se considera desleal, en particular:

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a) La divulgación o explotación, sin autorización de su titular, de secretos a los que se haya tenido acceso legítimamente, pero con deber de reserva, o ilegítimamente, como resultado de alguna de las conductas previstas en el literal siguiente o en el numeral 8 de este artículo.

b) La adquisición de información no divulgada, cuando resultara, en

particular, de: 1) el espionaje industrial o comercial; 2) el incumplimiento de una obligación contractual o legal; 3) el abuso de confianza; 4) la inducción a cometer cualquiera de los actos mencionados en los numerales 1), 2) Y 3); y, 5) la adquisición por un tercero que supiera o debía saber que la adquisición implicaba uno de los actos mencionados en los numerales 1),2),3) Y 4).

A efectos de conocer y resolver sobre la violación de secretos

empresariales, se estará a las siguientes reglas: a) Quien guarde una información no divulgada podrá transmitirla o autorizar su uso a un tercero. El usuario autorizado tendrá la obligación de no divulgarla por ningún medio, salvo pacto en contrario con quien le transmitió o autorizó el uso de dicho secreto. b) Toda persona que con motivo de su trabajo, empleo, cargo, puesto, desempeño de su profesión o relación de negocios, tenga acceso a una información no divulgada, deberá abstenerse de usarla y de divulgarla, sin causa justificada, calificada por la autoridad competente, y sin consentimiento del titular, aún cuando su relación laboral, desempeño de su profesión o relación de negocios haya cesado. c) Si como condición para aprobar la comercialización de productos farmacéuticos o de productos químico-agrícolas que utilizan nuevas entidades químicas productoras de químicos, se exige la presentación de datos de pruebas u otra información no divulgada cuya elaboración suponga un esfuerzo considerable, las autoridades protegerán esos datos u otra información contra su uso comercial desleal. Además, protegerán esos datos u otra información contra su divulgación, excepto cuando sea necesario para proteger al público o que se adopten medidas para garantizar la protección de los datos contra su uso comercial desleal. d) La actividad relativa a la aprobación de comercialización de productos de cualquier naturaleza por una autoridad pública competente en ejecución de su mandato legal no implica un uso comercial desleal ni una divulgación de los datos u otra información que se le hubiesen presentado para ese efecto. La información no divulgada podrá ser objeto de depósito ante un

notario público en un sobre sellado y lacrado, quien notificará a la autoridad nacional competente en Propiedad Intelectual sobre su recepción. Dicho depósito no constituirá prueba contra el titular de la información no divulgada si ésta le fue sustraída, en cualquier forma, por quien realizó el depósito o dicha información le fue proporcionada por el titular bajo cualquier relación contractual.

La persecución del infractor, llcurso en las violaciones de secretos empresariales señalados en los literales anteriores, se efectuará independientemente de la realización por éste de actividades comerciales o de su participación en el tráfico económico.

8.-Inducción a la infracción contractual.-Se considera desleal la interferencia por un tercero en la relación contractual que un competidor mantiene con sus trabajadores, proveedores, clientes y demás obligados, y que tenga como propósito inducir a éstos a infringir las obligaciones que han contraído. Al tenor de lo dispuesto en este párrafo, no será necesario que la infracción se refiera a la integridad de las obligaciones contraídas mediante el contrato, sino que bastará que se vincule con algún aspecto esencial del mismo. Del mismo modo, para que se verifique la deslealtad, no será necesario que el tercero que interfiera se subrogue en la relación contractual que mantenía su competidor con quien infrinja sus obligaciones contractuales.

La inducción a la terminación regular de un contrato o el aprovechamiento en beneficio propio o de un tercero de una infracción contractual ajena sólo se reputará desleal cuando, siendo conocida, tenga por objeto la difusión o explotación de un secreto industrial o empresarial o vaya

acompañada de circunstancias tales como el engaño, la intención de eliminar a un competidor del mercado u otras análogas.

9.-Violación de normas.-Se considera desleal el prevalecer en el mercado mediante una ventaja significativa adquirida como resultado del abuso de procesos judiciales o administrativos o del incumplimiento de una norma jurídica, como sería una infracción de normas ambientales, publicitarias, tributarias, laborales, de seguridad social o de consumidores u otras; sin perjuicio de las disposiciones y sanciones que fuesen aplicables conforme a la norma infringida.

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## REPÚBLICA DEL ECUADOR

La concurrencia en el mercado sin las autorizaciones legales correspondientes configura una práctica desleal cuando la ventaja competitiva obtenida es significativa.

10.-Prácticas agresivas de acoso, coacción e influencia indebida contra los consumidores.-Se consideran prácticas desleales, entre otras:

a) El aprovechamiento de la debilidad o de! desconocimiento del

consumidor. b) El acoso por prácticas dirigidas al desgaste de! consumidor. c) Dificultar la terminación de! contrato por parte del usuario final

al obligarle a seguir largos y/o complicados procedimientos. d) Amenazar con acciones legales cuando no exista base para las mismas.

e) La suscripción de contratos de adhesión que perjudiquen los derechos de los usuarios y consumidores, conforme manda la ley.

## CAPITULO III

### ACCION DEL ESTADO Y AYUDAS PÚBLICAS

#### Sección 1

#### Acción del Estado

Artículo. 28.-Aplicación de restricciones.-Será admisible el establecimiento de restricciones a la competencia mediante resolución motivada de la Junta de Regulación, por razones de interés público, en cualquier sector de la economía nacional, en los siguientes casos:

1. Para el desarrollo de un monopolio estatal en favor del interés público;

2. Para el desarrollo de sectores estratégicos de conformidad con la Constitución de la República;

3. Para la prestación de servicios públicos de conformidad con la Constitución de la República;

4. Para el desarrollo tecnológico e industrial de la economía nacional; y,

5. Para la implementación de iniciativas de acción afirmativa a favor de la economía popular y solidaria.

Procederá el establecimiento de restricciones a la competencia cuando se generen beneficios específicos, concretos y significativos para la satisfacción del interés general, en el ámbito o industria en la que se establezcan, se incremente la eficiencia y se generen beneficios a favor de los consumidores o usuarios, que justifiquen la aplicación de las mismas.

Artículo 29... Ayudas Públicas... Se podrán otorgar ayudas por el Estado o mediante la utilización de recursos públicos, por el tiempo que fuere necesario, por razones de interés social o público, o en beneficio de los consumidores. Procederá el otorgamiento de ayudas públicas en los siguientes casos:

- a) Las ayudas de carácter social concedidas a un sector de consumidores, siempre que se otorguen sin discriminaciones basadas en quien provea los bienes y servicios que se puedan adquirir con dichas ayudas;
- b) Las ayudas destinadas a la garantía de derechos para personas o grupos de atención prioritaria, o que de acuerdo con la Constitución requieran de medidas de acción afirmativa.
- c) Las ayudas destinadas a reparar los perjuicios ocasionados por fenómenos naturales o por otros acontecimientos de carácter excepcional;
- d) Las ayudas concedidas con el objeto de favorecer la economía de determinadas regiones de la República, en la medida en que sean necesarias para compensar las desventajas económicas que las aquejen.
- e) Las ayudas destinadas a favorecer el desarrollo económico de regiones y grupos sociales en los que el nivel de vida sea anormalmente bajo o en las que exista una grave situación de desempleo o subempleo;
- f) Las ayudas para fomentar la realización de un proyecto estratégico de interés nacional o destinadas a poner remedio a una grave perturbación en la economía nacional;
- g) Las ayudas destinadas a facilitar el desarrollo de determinadas actividades o de determinadas regiones, siempre que no alteren las condiciones de los intercambios en forma contraria a lo previsto en esta Ley o al interés común;
- h) Las ayudas orientadas a impulsar la producción y transformación de alimentos, destinadas a garantizar la soberanía alimentaria y

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que se otorguen a pequeñas y medianas unidades de producción comunitaria y de la economía popular y solidaria;

i) Las ayudas destinadas a promover la cultura y la conservación del patrimonio, cuando no alteren las condiciones de los intercambios y el régimen de la competencia en contra del interés común; y,

j) Las demás categorías de ayudas que se establezcan mediante ley.

Artículo 30.-Notificación de Ayudas públicas.-Para efectos de control y evaluación, las ayudas públicas otorgadas en virtud del artículo precedente serán notificadas a la Superintendencia de Control del Poder de Mercado a más tardar después de quince días de haber sido otorgadas o establecidas.

Artículo 31.-Evaluación de las Ayudas públicas.-La Superintendencia de Control del Poder de Mercado examinará permanentemente las ayudas públicas conferidas en virtud de las disposiciones de este capítulo, y evaluará que cumplan con los fines que motivaron su implementación. Salvo en los casos en que no se trate de actividades o sectores económicos reservados exclusivamente al Estado, la Superintendencia de Control del Poder de Mercado propondrá las medidas apropiadas para el desarrollo progresivo del régimen de competencia en las actividades o los sectores beneficiarios.

Si la Superintendencia comprobare que una ayuda otorgada por el Estado o mediante recursos públicos no cumple con el fin para el cual se otorgó, o se aplica de manera abusiva o es contraria al objeto de esta Ley, mediante informe motivado, instará y promoverá su supresión o modificación dentro del plazo que determine.

Artículo 32.-Autorización excepcional reservada al Ejecutivo.Corresponde

a la Función Ejecutiva, de modo excepcional y temporal, mediante Decreto Ejecutivo, la definición de políticas de precios necesarias para beneficio del consumo popular, así como para la protección de la producción nacional y la sostenibilidad de la misma.

En el sector agroalimentario se podrá establecer mecanismos para la determinación de precios referenciales.

La Superintendencia de Control del Poder de Mercado examinará permanentemente los efectos de las políticas de precios autorizada bajo este artículo. De determinar que se ha aplicado de manera abusiva o que el efecto es pernicioso en términos agregados, procederá inmediatamente de conformidad con el inciso segundo del artículo 31 de esta Ley.

Artículo 33.-De los órganos, instituciones y empresas públicas. Los organismos, instituciones públicas, órganos de control, empresas públicas, de economía mixta, entidades públicas, gobiernos autónomos descentralizados, dentro de su potestad normativa, respecto de su contratación y de las prestaciones de servicios públicos realizadas en mercados relevantes de libre competencia, respetarán y aplicarán los principios, derechos y obligaciones consagrados en la presente Ley.



Artículo 34. Regla de mínimis.-Las condiciones y procedimiento establecidos en los artículos 29 y 31 precedentes no se aplicarán a las ayudas públicas inferiores al monto que establezca la Junta de Regulación.

## CAPÍTULO IV

### RECTORÍA, POLITICA PÚBLICA y APLICACION

#### Sección 1

Artículo 35.-Facultades de la Función Ejecutiva.-Corresponde a la Función Ejecutiva la rectoría, planificación, formulación de políticas públicas y regulación en el ámbito de esta Ley.

La regulación estará a cargo de la Junta de Regulación, cuyas atribuciones estarán establecidas en el Reglamento General de esta Ley, exclusivamente en el marco de los deberes, facultades y atribuciones establecidos para la Función Ejecutiva en la Constitución. La Junta de Regulación tendrá facultad para expedir normas con el carácter de generalmente obligatorias en las materias propias de su competencia, sin que puedan alterar o innovar las disposiciones legales.

El Superintendente de Control del Poder de Mercado o su delegado participará en las sesiones de la Junta de Regulación en calidad de invitado con voz informativa pero sin voto.

La Junta de Regulación estará integrada por las máximas autoridades de las carteras de estado, o sus delegados, a cargo de la Producción, la Política Económica, los Sectores Estratégicos y el Desarrollo Social.

#### Sección 2 Control, vigilancia y sanción

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## REPÚBLICA DEL ECUADOR.

Artículo 36.-Autoridad de Aplicación.-Créase la Superintendencia de Control del Poder de Mercado, misma que pertenece a la Función de Transparencia y Control Social, como un organismo técnico de control, con capacidad sancionatoria, de administración desconcentrada, con personalidad jurídica, patrimonio propio y autonomía administrativa, presupuestaria y organizativa; la que contará con amplias atribuciones para hacer cumplir a los operadores económicos de los sectores público, privado y de la economía popular y solidaria todo lo dispuesto en la presente Ley. Su domicilio será la ciudad de Quito, sin perjuicio de las oficinas que pueda establecer el Superintendente en otros lugares del país.

La Superintendencia de Control del Poder de Mercado en su estructura contará con las instancias, intendencias, unidades, divisiones técnicas, y órganos asesores que se establezcan en la normativa que para el efecto emita el Superintendente de Control del Poder de Mercado. Se crearán al menos dos órganos especializados, uno de investigación, y otro de sustanciación y resolutivo de primera instancia.

Artículo 37.-Facultad de la Superintendencia de Control del Poder de Mercado.-Corresponde a la Superintendencia de Control del Poder de Mercado asegurar la transparencia y eficiencia en los mercados y fomentar la competencia; la prevención, investigación, conocimiento, corrección, sanción y eliminación del abuso de poder de mercado, de los acuerdos y prácticas restrictivas, de las conductas desleales contrarias al régimen previsto en esta Ley; y el control, la autorización, y de ser el caso la sanción de la concentración económica.

La Superintendencia de Control del Poder de Mercado tendrá facultad para expedir normas con el carácter de generalmente obligatorias en las materias propias de su competencia, sin que puedan alterar o innovar las disposiciones legales y las regulaciones expedidas por la Junta de Regulación.

Artículo 38.-Atribuciones.-La Superintendencia de Control del Poder de Mercado, a través de sus órganos, ejercerá las siguientes atribuciones:

1. Realizar los estudios e investigaciones de mercado que considere pertinentes. Para ello podrá requerir a los particulares y autoridades públicas la documentación y colaboración que considere necesarias.

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## REPÚBLICA DEL ECUADOR

2. Sustanciar los procedimientos en sede administrativa para la imposición de medidas y sanciones por incumplimiento de esta Ley.

3. Determinar el volumen de negocios según lo estipulado en la presente Ley.

4. Celebrar audiencias con los presuntos responsables, denunciantes, perjudicados, testigos y peritos, recibirles declaración y ordenar careos, para lo cual podrá solicitar el auxilio de la fuerza pública.

5. Examinar y realizar los peritajes que estime necesarios sobre libros, documentos y demás elementos necesarios para la investigación, controlar existencias, comprobar orígenes y costos de materias primas u otros bienes, de conformidad con esta ley;

6. Realizar inspecciones, formular preguntas y requerir cualquier información que estime pertinente a la investigación.

7. Colocar precintos en aquellos lugares que estime pertinente con el objeto de precautelar la conservación de evidencia.

8. Aplicar las sanciones establecidas en la presente Ley.

9. Cuando lo considere pertinente, emitir opinión en materia de competencia respecto de leyes, reglamentos, circulares y actos administrativos, sin que tales opiniones tengan efecto vinculante.

10. Emitir los informes requeridos y conocer de las notificaciones previas de conformidad con esta Ley.

11. Emitir recomendaciones de carácter general o sectorial respecto a las modalidades de la competencia en los mercados.

12. Actuar en coordinación con las dependencias competentes en la negociación de tratados, acuerdos o convenios internacionales en materia de regulación o políticas de competencia y libre concurrencia.

13. Requerir a las instituciones públicas que considere necesario, la implementación de acciones adecuadas para garantizar la plena y efectiva aplicación de la presente Ley.

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14. Promover y formular acciones ante la Justicia; e informar y solicitar la intervención del Fiscal General del Estado, cuando el caso lo amerite.

15. Acceder a los lugares objeto de inspección con el consentimiento de los ocupantes o mediante orden judicial cuando se trate del domicilio de una persona natural, la que será solicitada ante el juez competente, quien deberá resolver en el plazo de 24 horas.

16. Suscribir convenios con gobiernos autónomos descentralizados para la habilitación de oficinas receptoras de denuncias.

17. Suscribir convenios con asociaciones de usuarios y consumidores para la promoción de la participación de la comunidad en el fomento de la competencia y la transparencia de los mercados.

18. Examinar e investigar las concentraciones económicas para confirmar su cumplimiento con la presente Ley; y, cuando sean prohibidas, dictar las medidas que legalmente correspondan.

19. Autorizar, denegar o condicionar las solicitudes de concentración económica de conformidad a esta Ley y su reglamento.

20. Atender las consultas y resolver los reclamos que se formulen respecto de operadores económicos cuya actuación pudiere atentar contra esta Ley.

21. Promover medidas de control tendientes a la eliminación de barreras a la libre concurrencia al mercado, de acuerdo con los lineamientos fijados por la ley.

22. Disponer la suspensión de las prácticas y conductas prohibidas por esta Ley.

23. Establecer y mantener un registro actualizado de los operadores económicos y su participación en los mercados.

24. Proponer la remoción de barreras, normativas o de hecho, de entrada a mercados, que excluyan o limiten la participación de operadores económicos.

25. Presentar propuestas técnicamente justificadas a los órganos competentes, para la regulación y el establecimiento de actos normativos aplicables a los distintos sectores económicos.

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26. Apoyar y asesorar a las autoridades de la administración pública en todos los niveles de gobierno, para que en el cumplimiento de sus atribuciones, promuevan y defiendan la competencia de los operadores económicos en los diferentes mercados.

27. Proponer y dar seguimiento, a la simplificación de trámites administrativos con la finalidad de promover la libre concurrencia de los operadores económicos en igual de condiciones a los diferentes mercados.

28. Promover el estudio y la investigación en materia de competencia y su divulgación.

29. Coordinar las acciones que fueren necesarias y suscribir convenios de cooperación con entidades públicas y privadas, a fin de promover la libre concurrencia de los operadores económicos a los diferentes mercados.

30. Elaborar y promulgar su reglamento interno; y,

31. Las demás contempladas en la ley.

Para el ejercicio de sus atribuciones, la Superintendencia actuará de oficio o a petición de parte y podrá requerir la documentación e información que estime pertinente en cualquier etapa procesal.

Artículo 39.-Información Requerida.-Además de la información requerida en el artículo 16 de esta ley, el Superintendente de Control del Poder de Mercado podrá establecer, con carácter general, la información y antecedentes que las personas deberán proveer a la Superintendencia y los plazos en que dicha información y antecedentes deben ser provistos.

El Superintendente de Control del Poder de Mercado establecerá la forma y contenido adicional de la notificación de los proyectos de concentración económica y operaciones de control de empresas u operadores económicos de modo que se garantice el carácter confidencial de la información presentada.

Artículo 40.-Informe sobre medidas correctivas.-En ejercicio de su facultad, la Superintendencia de Control del Poder de Mercado podrá dirigir informe motivado a la autoridad nacional o internacional respectiva, sugiriendo y recomendando la adopción de medidas correctivas, en relación con los actos u omisiones administrativas que afecten la libre concurrencia de los operadores económicos a los mercados nacionales o internacionales.

Artículo 41.-Resoluciones.-Las resoluciones que emita la Superintendencia de Control del Poder de Mercado a través de sus órganos serán motivadas y de cumplimiento obligatorio para las entidades públicas y los operadores económicos.

### Sección 3

#### Del Superintendente de Control del Poder de Mercado

Artículo 42.-Del Superintendente.-El Superintendente es la máxima autoridad administrativa, resolutive y sancionadora, y le corresponde la representación legal, judicial y extrajudicial de la Superintendencia.

Artículo 43.-Designación.-El Superintendente será nombrado por el Consejo de Participación Ciudadana y Control Social, de una terna enviada por el Presidente de la República para tal efecto, en la forma y con los requisitos previstos en la Constitución de la República y la ley.

El Superintendente desempeñará sus funciones por cinco años y podrá ser reelegido por una sola vez.

Para ser designado Superintendente de Control del Poder de Mercado, se requiere ser ecuatoriano, estar en ejercicio de los derechos de participación, tener título académico de cuarto nivel en materias afines a la competencia económica, y experiencia profesional de 10 años.

En caso de renuncia, ausencia definitiva o cualquier otro impedimento que le inhabilite para continuar desempeñando el cargo, el Consejo de Participación Ciudadana y Control Social procederá inmediatamente a la designación de su reemplazo, de conformidad con lo que establecen la Constitución y la ley, quien también durará cinco años en sus funciones. En caso de falta o ausencia temporal, será reemplazado por la autoridad de jerarquía inmediatamente inferior según lo establecido en el reglamento orgánico funcional de la Superintendencia.

Artículo 44.-Atribuciones del Superintendente.-Son atribuciones y deberes del Superintendente, además de los determinados en esta Ley:

1. Conocer y resolver de forma de motivada en última instancia sobre las infracciones establecidas en la ley y aplicar las sanciones pertinentes.

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2. Conocer y resolver de forma motivada los recursos que se interpusieren respecto de actos o resoluciones conforme lo previsto por esta Ley y su Reglamento.

3. Dirigir las acciones de control descritas en la Ley, Reglamento General, y su normativa de carácter técnico, así como ejecutar las medidas derivadas del ejercicio de sus potestades públicas.

4. Absolver consultas sobre la obligación de notificar operaciones de concentración económica, sobre sectores regulados y ayudas públicas.

5. Solicitar o practicar de oficio, según sea el caso, las pruebas y diligencias necesarias para el esclarecimiento de las denuncias y de los procesos bajo su conocimiento.

6. Elaborar y aprobar la normativa técnica general e instrucciones particulares en el ámbito de esta Ley.
7. Conservar y coordinar los registros que prevea esta Ley.
8. Nombrar al personal necesario, de acuerdo con la ley, para el desempeño de las funciones de la Superintendencia.
9. Presentar anualmente a la Asamblea Nacional un informe, en el que dará cuenta de sus labores y del cumplimiento del objeto de esta Ley.
10. Determinar y reformar la estructura orgánica y funcional de la Superintendencia de conformidad con esta Ley.
11. Dirigir y supervisar la gestión administrativa, de recursos humanos, presupuestaria y financiera de Superintendencia.
12. Elaborar, aprobar y ejecutar el presupuesto anual de la Superintendencia de Control del Poder de Mercado, de acuerdo con la ley.
13. Efectuar contrataciones de personal para la realización de trabajos específicos o extraordinarios que no puedan ser realizados por su planta permanente, de conformidad con las normas del Sistema Nacional de Contratación Pública y de la Ley Orgánica de Servicio Público

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## REPÚBLICA DEL ECUADOR

14. Rendir cuentas de su gestión y de la Superintendencia conforme la Constitución y la ley.
15. Conocer y absolver consultas sobre la aplicación de esta Ley, para casos particulares, las cuales tendrán carácter vinculante para el consultante.
16. Expedir resoluciones de carácter general, guías y normas internas para su correcto funcionamiento.
17. Delegar el ejercicio de sus atribuciones a los funcionarios de la Superintendencia, conforme lo establezca el respectivo Reglamento.
18. Ejercer y delegar la acción coactiva de acuerdo con el Código de Procedimiento Civil y la normativa vigente.
19. Ejercer las demás atribuciones establecidas para los Superintendentes en la ley que regule la Función de Transparencia y Control Social.
20. Cumplir y hacer cumplir las disposiciones de esta Ley y demás normativa vigente, así como los compromisos internacionales del país en esta materia; y,

21.

Ejercer las demás atribuciones y cumplir los deberes que le señalen las leyes.

Artículo 45.-Causas para el cese de funciones del Superintendente.-El Superintendente cesará de su cargo por una de las siguientes causales:

1. Sentencia condenatoria ejecutoriada.
2. Incompatibilidad superveniente.
3. Incapacidad mental o física, debidamente comprobada por la Asamblea Nacional, que impidiere el ejercicio del cargo durante más de ciento ochenta días calendario.
4. Por censura y destitución previo enjuiciamiento político conforme la Constitución de la República.
5. Por muerte.

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REFÚBLICA DEL ECUADOR

6. Por renuncia voluntaria.

Sección 4

De los servidores públicos de la Superintendencia de Control del

Poder de Mercado

Artículo 46.· Dedicación y diligencia.-Las y los servidores públicos y funcionarios de la Superintendencia de Control del Poder de Mercado deberán dedicarse en forma exclusiva y a tiempo completo a las labores inherentes a su función, salvo los casos de docencia en entidades de educación superior. Ejercerán sus funciones con diligencia y estarán sujetos a responsabilidad profesional. El referido personal está prohibido de ejercer libremente su profesión o especialidad técnica u otra actividad, con o sin relación de dependencia, así como ocupar cargos directivos, ejecutivos o administrativos en entidades u organizaciones con o sin fines de lucro.

No podrán ser nombrados servidores o funcionarios de la Superintendencia de Control del Poder de Mercado quienes no cumplieren con los requisitos establecidos para el respectivo cargo, de conformidad con la ley que regule el servicio público, o quienes tengan intereses en las áreas que vayan a ser controladas.

Les servidores y funcionarios de la Superintendencia de Control del Poder de Mercado estarán sujetos a evaluaciones periódicas y serán calificados permanentemente.

Quienes hayan sido servidores o funcionarios de la Superintendencia no podrán ejercer actividades profesionales en áreas afines a la materia regulada bajo esta ley durante el lapso de un año contado a partir de la fecha en que dichos servidores o funcionarios hubieren cesado en sus funciones; se exceptúa de esta disposición al personal administrativo que por la naturaleza de sus funciones no hubiere tenido acceso a la información ni a los expedientes correspondientes a los procesos administrativos sometidos a conocimiento de la Superintendencia.

Artículo 47.-Deber de secreto y reserva.-Quienes tomaren parte en la realización de investigaciones o en la tramitación de procedimientos o expedientes previstos en esta Ley o conocieren tales expedientes por razón de su cargo, labor o profesión, están obligados a guardar confidencialidad, reserva y secreto sobre los hechos de que hubieren tenido conocimiento a través de ellos, en aplicación de las normas de este capítulo.

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## REPÚBLICA DEL ECUADOR

La obligación de confidencialidad y secreto se extiende a toda persona que en razón del ejercicio de su profesión, especialidad u oficio, aun cuando no formare parte de la Superintendencia, llegare a conocer de información contenida en los expedientes, investigaciones y denuncias fundadas en las disposiciones de la presente Ley y en las leyes y reglamentos de la materia.

Sin perjuicio de las responsabilidades civiles y penales, que pudieren corresponder a los infractores del deber de sigilo, confidencialidad o secreto, la violación de este deber se considerará como causal de destitución. Sólo podrán informar sobre aquellos hechos o circunstancias a los Jueces, Tribunales y Órganos competentes de la Función Judicial y sólo por disposición expresa de juez o de los jueces que conocieren un caso específico, Función que mantendrá la confidencialidad de la información.

## CAPÍTULO V

### DE LOS PROCEDIMIENTOS

#### Sección 1

#### Facultades de Investigación

Artículo 48.-Normas generales.-La Superintendencia de Control del Poder de Mercado, antes de iniciar el expediente o en cualquier momento del procedimiento, podrá requerir a cualquier operador económico o institución u órgano del sector público o privado, los informes, información o documentos que estimare necesarios a efectos de realizar sus investigaciones, así como citar a declarar a quienes tengan relación con los casos de que se trate.

A esos efectos la Superintendencia podrá examinar, recuperar, buscar, utilizar y verificar tales documentos e información, obtener copias o realizar extractos de ellos. Esos informes o documentos deberán ser suministrados dentro del plazo que la Superintendencia determine.



No será obligación de la Superintendencia de Control del Poder de Mercado atenerse, contra su convicción, al contenido de esos informes

o información. Ningún procedimiento administrativo podrá suspenderse por falta de ellos.

No se requiere aviso previo al denunciado o a la persona para requerir la información o documentación, previa a la apertura del expediente.

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## REPÚBLICA DEL ECUADOR

La carga de la prueba corresponderá a la Superintendencia de Control del Poder de Mercado, sin perjuicio de las pruebas aportadas por el denunciante y el denunciado. Sin embargo, en el caso de los acuerdos y prácticas prohibidas de conformidad con el artículo 11 de la presente Ley, si un operador económico o persona negare, dificultare o impidiere el acceso a información; dañare ocultare u omitiere información o entregase información falsa, fraudulenta, engañosa, falaz, fingida, artificiosa, irreal o dolosa requerida o relacionada al operador económico o persona en una investigación de la Superintendencia de Control del Poder de Mercado, se invertirá la carga de la prueba a dicho operador económico o persona, sin perjuicio de las demás sanciones establecidas en la ley.

La Superintendencia de Control del Poder de Mercado tiene la potestad de acceder, revisar, archivar, procesar y utilizar cualquier dato, que de modo exclusivo corresponda a la información y documentos pertinentes al proceso administrativo, respetando el derecho constitucional a la protección de esta información, para las investigaciones, casos o resoluciones dentro de su competencia, de conformidad con la Constitución y la ley.

La forma de los actos jurídicos utilizados por los contratantes no enerva el análisis que la autoridad efectúa sobre los verdaderos propósitos de la conducta que subyacen al acto jurídico que la expresa.

Artículo 49.-Facultad de investigación de la Superintendencia de Control del Poder de Mercado.- La Superintendencia de Control del Poder de Mercado, a través de sus órganos internos, tendrá las siguientes facultades investigativas, las mismas que se ejercerán en el marco de la Constitución, la ley y el respeto a los derechos y garantías de los ciudadanos:

1. Exigir que se le presenten, para su examen, todos los valores, libros, comprobantes de contabilidad, correspondencia, registros magnéticos o informáticos, incluyendo sus medios de lectura, y cualquier otro documento relacionado con la conducta investigada o con las actividades inspeccionadas, sin que se pueda aducir reserva de ninguna naturaleza.
2. Notificar, examinar y receptar declaración o testimonio, a través de los funcionarios que se designen para el efecto, a las personas materia de investigación o a sus representantes, empleados, funcionarios, asesores, dependientes y a terceros, utilizando los medios técnicos que consideren necesarios para generar un registro completo y fidedigno de sus declaraciones, pudiendo para ello

utilizar grabaciones magnetofónicas, grabaciones en video u otras similares. Para ello, la declaración se efectuará con la presencia de un abogado particular o un defensor público provisto por el Estado.

3. Realizar inspecciones, con o sin previa notificación, en los establecimientos, locales o inmuebles de las personas naturales o jurídicas y examinar los libros, registros, y cualquier otro documento relacionado con la conducta investigada, correspondencia comercial y bienes, pudiendo comprobar el desarrollo de procesos productivos y podrá receptar las declaraciones voluntarias de las personas que en ellos se encuentren.

Cuando el lugar donde se realice la inspección sea el domicilio de una persona natural, se requerirá autorización judicial, en los términos previstos en esta ley.

En el acto de la inspección podrá tomarse y recuperarse copia de los archivos físicos, virtuales o magnéticos, así como de cualquier documento o información que se estime pertinente o tomar las fotografías o filmaciones que se estimen necesarias. De ser necesario el descerrajamiento en el caso de locales o establecimientos que estuvieran cerrados, se deberá contar con autorización judicial en los términos de esta Ley.

Cualquier otra información no relevante o ajena a la investigación, será mantenida hasta su devolución, con estricta reserva por parte de la Superintendencia de Control del Poder de Mercado y sus funcionarios, siendo por tanto responsables del sigilo en que debe mantenerse en observancia del derecho a la intimidad de las personas.

Artículo 50.-Obligación de colaborar con los órganos de la Superintendencia de Control del Poder de Mercado.-Toda persona natural o jurídica, pública o privada, así como las autoridades, funcionarios y agentes de la Administración Pública están obligados, sin necesidad de requerimiento judicial alguno, a suministrar los datos, la documentación, la información verdadera, veraz y oportuna, y toda su colaboración, que requiera la Superintendencia de Control del Poder de Mercado y sus servidores públicos, siempre que esto no violente los derechos ciudadanos.

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Las autoridades y servidores públicos a los que se refiere el inciso precedente están obligados a prestar su colaboración y ayuda, so pena de las sanciones previstas en la ley que regule el servicio público por el incumplimiento de sus deberes esenciales y la presente Ley. Tratándose de los particulares que no suministraren la información requerida, serán sancionados con las multas y sanciones previstas en esta Ley.

La Superintendencia de Control del Poder de Mercado tiene la potestad de solicitar y practicar de oficio todas las pruebas y diligencias administrativas necesarias para el esclarecimiento de los actos, denuncias y de los procedimientos que conociere e investigare.

Artículo 51.-Autorización judicial.-La Superintendencia de Control del Poder de Mercado deberá solicitar al juez la autorización e intervención para que él, o los funcionarios de la

Superintendencia, efectúen allanamientos, retenciones, así como para obtener y mantener copias de la correspondencia física y virtual, incluyendo cuentas bancarias y otra información de carácter confidencial, reservado o secreto.

La autorización señalada en este artículo deberá ser conferida por cualquier autoridad judicial de la jurisdicción en la cual se vayan a realizar las acciones indicadas en el inciso anterior, aun cuando no sea del domicilio del investigado o denunciado, dentro del término de 24 horas previsto en esta Ley.

Artículo 52.-Supervisión de las restricciones a la competencia.-La Superintendencia de Control del Poder de Mercado examinará permanentemente las restricciones a la competencia conferidas en virtud de las disposiciones de esta Ley, y evaluará que cumplan con los fines que motivaron su implementación. Salvo en los casos en que no se trate de actividades o sectores económicos reservados exclusivamente al Estado, la Superintendencia de Control del Poder de Mercado propondrá las medidas apropiadas para el desarrollo progresivo del régimen de competencia en las actividades o los sectores beneficiarios.

Si la Superintendencia comprobare que una restricción a la competencia otorgada por el Estado no cumple con el fin para el cual se otorgó, o se aplica de manera abusiva o es contraria al objeto de esta Ley, mediante informe motivado, instará y promoverá su supresión o modificación dentro del plazo que determine.

La Superintendencia de Control del Poder de Mercado podrá suspender

o dejar sin efecto las restricciones al régimen de competencia previstas en el artículo 28, de conformidad con lo previsto en esta Ley, previo el trámite del respectivo expediente en el que se tomará en cuenta a las partes involucradas.

Sin embargo, en ningún caso pondrá en nesgo o afectará las condiciones productivas que garantizan la soberanía alimentaria basada en las pequeñas y medianas unidades productivas y de la economía popular y solidaria, ni tampoco la soberanía energética.

Además de suspender o dejar sin efecto las referidas exenciones o restricciones, la Superintendencia de Control del Poder de Mercado aplicará las medidas correctivas y, de ser el caso, las sanciones previstas por esta Ley.

La Superintendencia de Control del Poder de Mercado podrá solicitar la revisión de los casos de ayudas públicas y de políticas de precios, en los términos de los artículos 29 y 32 de esta Ley.

## Sección 2

### Del Procedimiento de Investigación y Sanción

Artículo 53.-Inicio.-El procedimiento se iniciará de oficio, a solicitud de otro órgano de la Administración Pública, por denuncia formulada por el agraviado, o por cualquier persona natural o jurídica, pública o privada que demuestre un interés legítimo.

Artículo 54.-Contenido de la denuncia.-La denuncia deberá contener:

- a) El nombre y domicilio del denunciante;
- b) Identificación de los presuntos responsables;
- c) Una descripción detallada de la conducta denunciada, indicando el período aproximado de su duración o inminencia; d) La relación de los involucrados con la conducta denunciada; e) Los datos de identificación de los involucrados conocidos por el denunciante, incluyendo entre otros sus domicilios, números de teléfono y direcciones de correo electrónico, si las tuvieran y, de ser el caso, los datos de identificación de sus representantes legales; la falta de uno o más requisitos del presente literal no invalida la denuncia;
- f) Las características de los bienes o servicios objeto de la conducta denunciada, así como de los bienes o servicios afectados; y, g) Los elementos de prueba que razonablemente tenga a su alcance el denunciante.

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Artículo 55.-Calificación de la denuncia.-Una vez recibida la denuncia, el órgano de sustanciación verificará que la misma reúna los requisitos establecidos en el artículo anterior. Si la denuncia no cumpliera los requisitos de ley, se otorgará al denunciante el término de tres días para que la aclare o complete. Si no lo hiciera dentro del término señalado, sin más trámite se ordenará su archivo. Si la denuncia cumple los requisitos establecidos en el artículo anterior,

o si es aclarada o completada por el denunciante, en el término de tres días (3 días) el órgano de sustanciación correrá traslado al presunto o presuntos responsables con la denuncia para que presenten explicaciones en el término de quince (15) días.

Presentada la denuncia y con anterioridad a la resolución de inicio del procedimiento, el órgano de sustanciación podrá realizar actuaciones previas con el fin de reunir información o identificar indicios razonables de la existencia de infracciones a esta Ley.

Artículo 56.-Inicio de investigación.-Vencido el término señalado en el artículo anterior, el órgano de sustanciación deberá pronunciarse sobre el inicio de la investigación en el término de diez días. Si estimare que existen presunciones de la existencia de alguna de las infracciones previstas en esta ley, mediante resolución motivada ordenará el inicio de la investigación, señalando el plazo de duración de la misma, plazo que podrá ser ampliado si fuere necesario.

El procedimiento de investigación se regirá por las disposiciones constantes en la sección primera del presente capítulo.

El proceso previo a la investigación, así como la fase investigativa serán de carácter reservado, excepto para las partes directamente involucradas.

Artículo 57.-Archivo de la denuncia.-Si el órgano de sustanciación considera satisfactorias las explicaciones del denunciado, o si concluida la investigación no existiere mérito para la prosecución de la instrucción del procedimiento, mediante resolución motivada ordenará el archivo de la denuncia.

Artículo 58.-Término de excepciones.-Concluida la investigación, de haber mérito para proseguir el procedimiento, el órgano de sustanciación ordenará se notifique con la denuncia y formulación de cargos al denunciado, a fin de que la conteste y deduzca excepciones en el término de quince días. Si el denunciado no contestare la denuncia en el término previsto en este artículo, el procedimiento continuará en rebeldía. Durante el procedimiento el denunciado tendrá derecho a acceder y solicitar copias de todas las actuaciones del expediente.

Artículo 59.-Término de prueba.-El órgano de sustanciación ordenará la apertura del término probatorio de sesenta (60) días, prorrogables por hasta un término de treinta (30) días adicionales, a criterio de la autoridad. Una vez concluido el término de prueba, las partes podrán presentar alegatos en el término de diez (10) días.

Artículo 60.-El órgano de sustanciación de la Superintendencia de Control del Poder de Mercado, si lo estimare conveniente para la marcha de las investigaciones, ordenará la convocatoria a audiencia pública en la que se señalará el día y hora de la misma.

Los interesados, podrán alegar y presentar los documentos y justificaciones que estimen pertinentes.

Artículo 61.-Una vez efectuada la audiencia o concluido el término de prueba, el órgano de resolución de la Superintendencia de Control del Poder de Mercado dictará resolución debidamente motivada en un plazo máximo de noventa (90) días.

Artículo 62.-Medidas preventivas.-El órgano de sustanciación de la Superintendencia de Control del Poder de Mercado, antes o en cualquier estado del procedimiento de investigación, podrá, a sugerencia del órgano de investigación o pedido de quien hubiere presentado una denuncia, adoptar medidas preventivas, tales como la orden de cese de la conducta, la imposición de condiciones, la suspensión de los efectos de actos jurídicos relacionados a la conducta prohibida, la adopción de comportamientos positivos, y aquellas que considere pertinentes con la finalidad de preservar las condiciones de competencia afectadas y evitar el daño que pudieran causar las conductas a las que el procedimiento se refiere, o asegurar la eficacia de la resolución definitiva. Las medidas preventivas no podrán consistir en la privación de la libertad, la prohibición de salida del país o el arraigo. Las medidas preventivas deberán ajustarse a la intensidad, proporcionalidad y necesidades del daño que se pretenda evitar.

En igual sentido, podrá disponer, a sugerencia del órgano de investigación o a pedido de parte, la suspensión, modificación o revocación de las medidas dispuestas en virtud de circunstancias sobrevinientes o que no pudieron ser conocidas al momento de emitir la resolución.

Cuando la medida preventiva se adopte antes del inicio del procedimiento de investigación, dicha medida caducará si no se inicia el referido procedimiento en un plazo de 15 días contados a partir de la fecha de su notificación.

En caso de desacato, podrá ordenar la clausura de los establecimientos en los que se lleve a cabo la actividad objeto de la investigación hasta por noventa días.

Artículo 63.-Hasta antes de la emisión de la resolución por parte del órgano de resolución de la Superintendencia de Control del Poder de Mercado, el presunto o presuntos responsables podrán ofrecer un compromiso referido al cese inmediato o gradual de los hechos investigados o a la modificación de aspectos relacionados con ellos, de conformidad con esta Ley.

Transcurridos tres (3) años del cumplimiento del compromiso del presente Artículo, se ordenará el archivo del procedimiento.

Artículo 64.-Denuncias maliciosas o temerarias.-De haberse ordenado el archivo de la denuncia y existiere mérito para ello, el denunciado tendrá el derecho de demandar en la vía judicial el resarcimiento de los daños y perjuicios que le hubiere sido ocasionados.

### Sección 3 De los Recursos en Sede Administrativa y Jurisdiccional

Artículo 65.-Legitimidad, ejecutividad y ejecutoría.-Los actos administrativos emanados de las autoridades de la Superintendencia de Control del Poder de Mercado, sus órganos y funcionarios, se presumen legítimos y están llamados a cumplirse desde su notificación.

Los actos administrativos son impugnables según dispone el artículo 173 de la Constitución de la República y están revestidos del carácter de estabilidad administrativa.

Si alguna norma atribuye competencia a la Superintendencia de Control del Poder de Mercado, sus órganos y funcionarios, sin especificar el órgano que debe ejercerla, se entenderá que la facultad de tramitar y resolver las peticiones o impugnaciones corresponde a los órganos inferiores competentes, según el reglamento orgánico funcional o por procesos y las correspondientes atribuciones de competencia por razón de la materia y del territorio y, de existir varios de estos, al superior jerárquico común.

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## REPÚBLICA DEL ECUADOR

El Superintendente podrá revocar en cualquier momento sus actos o los actos emitidos por órganos inferiores, de gravamen o desfavorables, siempre que tal revocación no constituya dispensa o exención no permitida por las leyes, o sea contraria al principio de igualdad, al interés público o al ordenamiento jurídico.

Artículo 66.-Recurso de Reposición.-Los actos administrativos de los diferentes niveles administrativos de la Superintendencia de Control de Poder de Mercado podrán ser recurridos en sede administrativa mediante el recurso ordinario y horizontal de reposición.

El término para la interposición del recurso será de 20 días contados a partir del día siguiente al de su notificación.

Transcurrido el término de 20 días sin haberse interpuesto el recurso de reposición ni el de apelación, la resolución causará estado y se agotará la vía administrativa, quedando solo la vía judicial.

El recurso se concederá solo en el efecto devolutivo. El plazo máximo para tramitar, dictar y notificar la resolución será de 60 días calendario.

Artículo 67.-Recurso de Apelación o Jerárquico.-Los actos administrativos emitidos en virtud de la aplicación de esta Ley podrán ser, elevados al Superintendente de Control de Poder de Mercado mediante recurso de apelación, que se presentará ante éste. También serán susceptibles de recurso de apelación actos administrativos en los que se niegue el recurso ordinario y horizontal de reposición.

El término para la interposición del recurso será de 20 días contados a partir del día siguiente al de la notificación del acto administrativo recurrido. Transcurrido dicho término sin haberse interpuesto el recurso, el acto administrativo será firme para todos sus efectos.

El recurso se concederá solo en el efecto devolutivo. El plazo máximo para dictar y notificar la resolución será de 60 días calendario.

Contra el acto o resolución que conceda o niegue el recurso de apelación no cabrá ningún otro recurso en vía administrativa.

Artículo 68.-Recurso extraordinario de revisión.-El Superintendente, los consumidores o los agentes de mercado que tengan un interés legítimo, podrá interponer recurso extraordinario de revisión, con el objeto de que el Superintendente pueda revisar los errores materiales, de hecho o de derecho existentes en los actos administrativos, aparición de pruebas o elementos posteriores o vicios existentes en los actos administrativos o resoluciones de la Superintendencia de Control de Poder de Mercado. El plazo para interponer este recurso es de 3 años desde que el acto o resolución recurrida haya quedado en firme.

El recurso extraordinario de revisión se interpone sólo contra actos firmes.

El Superintendente podrá revocar en cualquier momento sus actos o los actos emitidos por órganos inferiores, de gravamen o desfavorables, siempre que tal revocación no constituya dispensa o exención no permitida por las leyes, o sea contraria al principio de igualdad, al interés público o al ordenamiento jurídico.

Artículo 69.-Acción contenciosa.-De conformidad con el artículo 173 de la Constitución y con el carácter impugnabile de los actos administrativos, los actos administrativos de la Superintendencia de Control del Poder de Mercado son susceptibles de impugnación, siempre que no se encuentren firmes, mediante acción o recurso contencioso de plena jurisdicción o subjetivo.

Para deducir la acción contenciosa no será necesario agotar la vía administrativa.

El término para interponer este recurso ante la Jurisdicción Contenciosa Administrativa es de noventa días contados a partir de la notificación del acto recurrido. El recurso contencioso de plena jurisdicción sólo tendrá efecto devolutivo.

Este recurso contencioso no es suspensivo respecto de las medidas preventivas y medidas correctivas en ningún caso, salvo la suspensión de la multa económica siempre que el perjudicado o sancionado rinda caución por el cincuenta por ciento de valor fijado por la autoridad de competencia, mediante póliza de seguro o garantía bancaria emitida a favor del Tribunal correspondiente.

El recurso contencioso de nulidad u objetivo se podrá proponer dentro del plazo de tres años desde la vigencia del acto recurrido. Este recurso sólo tendrá efecto devolutivo y no suspensivo.

La acción de protección sobre los actos emitidos por la Superintendencia de Control del Poder de Mercado no procede en los casos establecidos en el artículo 42 de la Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional.

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## REFÚBLICA DEL ECUADOR

La reclamación o recurso presentado no suspende la investigación iniciada por la Superintendencia de Control del Poder de Mercado,

Sección 4

De la Prescripción y la Responsabilidad Civil y Penal

Artículo 70.-Prescripción de las facultades administrativas y de las sanciones.-La facultad de iniciar el proceso administrativo de oficio o a petición de parte al que se refiere esta Ley, prescribe en el plazo de cuatro años, computados desde el día en que se hubiere tenido conocimiento de la infracción o, en el caso de infracciones continuadas, desde el que día en que hayan cesado,

Las sanciones impuestas por el cometimiento de infracciones prescribirán a los ocho años,

La prescripción se interrumpe por cualquier acto de la Administración con conocimiento formal del interesado tendiente al cumplimiento de la Ley y por los actos realizados por los interesados con el objeto de asegurar, cumplir o ejecutar las resoluciones correspondientes,



Artículo 71.-Responsabilidad civil.-Las personas naturales o jurídicas que hubieren sufrido perjuicio por la comisión de actos o conductas prohibidas por esta Ley, podrán ejercer la acción de resarcimiento de daños y perjuicios conforme las normas del derecho común, La acción de indemnización de daños y perjuicios será tramitada en vía verbal sumaria, ante el juez de 10 civil y de conformidad con las reglas generales y prescribirá en cinco años contados desde la ejecutoria de la resolución que impuso la respectiva sanción,

Artículo 72.-Responsabilidad penal.-Cuando la Superintendencia de Control del Poder de Mercado encontrare indicios de responsabilidad penal, notificará y enviará una copia del expediente a la Fiscalía General del Estado, para que se inicien las investigaciones y acciones correspondientes, sin perjuicio de las sanciones administrativas que puedan imponerse en virtud de esta Ley,

## CAPÍTULO VI

### De las Medidas Correctivas y de las Sanciones

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## REPÚBLICA DEL ECUADOR

### Sección 1

#### Medidas Correctivas

Artículo 73.-Objeto.-Además de la sanción que se imponga por infracción a la presente Ley, la Superintendencia podrá dictar medidas correctivas conducentes a restablecer el proceso competitivo, prevenir, impedir, suspender, corregir o revertir una conducta contraria a la presente Ley, y evitar que dicha conducta se produzca nuevamente. Las medidas correctivas podrán consistir, entre otras, en:

- a) El cese de la práctica anticompetitiva, inclusive bajo determinadas condiciones o plazos;
- b) La realización de actividades o la celebración de contratos, tendientes a restablecer el proceso competitivo, inclusive bajo determinadas condiciones o plazos; o,
- c) La inoponibilidad de las cláusulas o disposiciones anticompetitivas de actos jurídicos.

Artículo 74.-Desarrollo e implementación.-La Superintendencia de Control del Poder de Mercado, en el marco de esta Ley, implementará para cada caso las medidas correctivas, previo informe técnico del órgano de investigación, que permitan suspender, corregir, revertir o eliminar las conductas contrarias a la presente Ley.

La implementación de medidas correctivas no obstará la aplicación de las sanciones contempladas en esta Ley.

Artículo 75.-Procedimiento.-La Superintendencia de Control del Poder de Mercado notificará a los operadores económicos que hubieren incurrido, o pudieren incurrir, en conductas contrarias a la presente Ley, y señalará cuáles son dichas conductas e impondrá las medidas correctivas que juzgue pertinentes.

El o los operadores económicos tendrán un término de setenta y dos

(72) horas para presentar el descargo del que se creyeren asistidos, o acoger las medidas correctivas. Si el descargo fuere infundado o insuficiente, la Superintendencia de Control del Poder de Mercado ordenará la aplicación de las medidas correctivas, sin perjuicio de la continuación de los procedimientos que determina la presente Ley.

Artículo 76.-Del incumplimiento.-Si el o los operadores económicos a quienes se ha impuesto las medidas correctivas no las han cumplido o lo han hecho de manera tardía, parcial o defectuosa, la Superintendencia de Control del Poder de Mercado podrá:

- a) Ordenar medidas correctivas adicionales,
- b) Aplicar las sanciones previstas en la sección siguiente; y,
- c) En el caso del abuso de poder de mercado y acuerdos colusorios, designar un interventor temporal del operador u operadores económicos involucrados, con la finalidad de supervigilar el cumplimiento de las medidas correctivas. El Reglamento General a esta Ley establecerá los deberes y facultades de dicho interventor.

## Sección 2

### Sanciones

Artículo 77.-Sujetos infractores.-Serán sujetos infractores las personas naturales o jurídicas que incurran en las prohibiciones o ejecuten las acciones u omisiones tipificadas como infracciones en esta Ley.

A los efectos de la aplicación de esta Ley, la actuación de un operador económico es también imputable a los operadores o personas que la controlan, excepto cuando su comportamiento económico no venga determinado por alguna de ellas.

Cuando se imponga una multa a una asociación, unión o agrupación de empresas u operadores económicos y ésta no sea solvente, la asociación estará obligada a recabar las contribuciones de sus miembros hasta cubrir el importe de la multa.

En caso de que no se aporten dichas contribuciones a la asociación dentro del término fijado por la Superintendencia de Control del Poder de Mercado, se podrá exigir el pago de la multa a cualquiera de los operadores económicos cuyos representantes sean miembros de los órganos de gobierno de la asociación de que se trate.

Una vez que la Superintendencia de Control del Poder de Mercado haya requerido el pago con arreglo a lo dispuesto en el párrafo anterior, podrá exigir el pago del saldo a cualquier miembro de la asociación que opere en el mercado en que se hubiese producido la infracción cuando ello sea necesario para garantizar el pago íntegro de la multa.

No obstante, no se exigirá el pago contemplado en los párrafos segundo y tercero a las empresas u operadores económicos que demuestren que no han aplicado la decisión o recomendación de la asociación constitutiva de infracción y que o bien ignoraban su existencia o se distanciaron activamente investigación del caso de ella antes de que se iniciase.

Artículo 78.-Infracciones.presente Ley se clasifican en lev

1. Son infracciones leves:

a. Haber presentado a la Superintendencia de Control del Poder de Mercado la notificación de la concentración económica fuera de los plazos previstos en el artículo 16.

b. No haber notificado una concentración requerida de oficio por la Superintendencia de Control del Poder de Mercado según lo previsto en el artículo 16.

c. No haber cumplido con las medidas correctivas dispuestas en virtud de los artículos 73 y siguientes de esta Ley.

d. Incumplir o contravenir lo establecido en una resolución de la Superintendencia de Control del Poder de Mercado.

e. Incurrirán en infracción leve las autoridades administrativas o cualquier otro funcionario que hubiere admitido o concedido recursos administrativos, que se formulen con el ánimo de o que tengan como resultado el impedir, restringir, falsear, o distorsionar la competencia, o retrasar o impedir la aplicación de las normas previstas en esta Ley.

f. No haberse sometido a una inspección ordenada de acuerdo con lo establecido en esta Ley.

g. Incurrirá en infracción leve quien presentare una denuncia falsa, utilizando datos o documentos falsos, con el propósito de causar daño a la competencia, sin perjuicio de las demás acciones civiles y penales que correspondan.

h. La obstrucción por cualquier medio de la labor de inspección de la Superintendencia de Control del Poder de Mercado.

2. Son infracciones graves:

a. El desarrollo de conductas colusorias en los términos previstos en el artículo 11 de esta Ley, cuando las mismas consistan en carteles u otros acuerdos, decisiones o recomendaciones colectivas, prácticas concertadas o conscientemente paralelas entre empresas u operadores económicos que no sean competidores entre sí, reales o potenciales.

b. El abuso de poder de mercado tipificado en el artículo 9 que no tenga la consideración de muy grave.

c. El falseamiento del régimen de competencia mediante prácticas actos desleales en los términos establecidos en el artículo 27 de esta Ley.

d. La ejecución de una operación de concentración sujeta a control,

antes de haber sido notificada a la Superintendencia de Control del Poder de Mercado; o antes de que haya sido autorizada de conformidad con lo previsto en esta Ley.

e. La utilización infundada, deliberada y reincidente de incidentes legales o judiciales, o recursos administrativos, que impidan, restrinjan, falseen, o distorsionen la competencia, o retrasen o impidan la aplicación de las normas previstas en esta Ley.

f. No haber cumplido con las medidas correctivas dispuestas en virtud de esta Ley, tratándose de abuso de poder de mercado o acuerdos y prácticas restrictivas.

g. No haber cumplido con conformidad con esta Ley

h. . Los compromisos adquiridos de Suministrar a la Superintendencia de Control del Poder de Mercado información engañosa o falsa.

3. Son infracciones muy graves:

a. El desarrollo de conductas colusorias tipificadas en el artículo 11 de esta Ley que consistan en cárteles u otros acuerdos, decisiones o recomendaciones colectivas, prácticas concertadas o conscientemente paralelas entre empresas u operadores económicos competidores entre sí, reales o potenciales.

b. El abuso de poder de mercado tipificado en el artículo 9 de esta Ley cuando el mismo sea cometido por una o más empresas u operadores económicos que produzca efectos altamente nocivos para el mercado y los consumidores o que tengan una cuota de mercado próxima al monopolio o disfrute de derechos especiales o exclusivos.

c, La ejecución de actos o contratos efectuados por el operador económico resultante de una operación de concentración sujeta a control, antes de haber sido notificada a la Superintendencia de Control del Poder de Mercado; o antes de que haya sido autorizada de conformidad con lo previsto en esta ley.

d. Incumplir o contravenir lo establecido en una resolución de la Superintendencia de Control del Poder de Mercado, tanto en materia de abuso de poder de mercado, conductas anticompetitivas y de control de concentraciones.

Las infracciones graves y muy graves se juzgarán independientemente de que puedan constituir conductas tipificadas y sancionadas en la Ley Penal y ser objeto de la correspondiente acción por parte de la Función Judicial.

Artículo 79.-Sanciones.-La Superintendencia de Control del Poder de Mercado impondrá a las empresas u operadores económicos, asociaciones, uniones o agrupaciones de aquellos que, deliberadamente o por negligencia, infrinjan lo dispuesto en la presente Ley, las siguientes sanciones:

a. Las infracciones leves con multa de hasta el 8% del volumen de negocios total de la empresa u operador económico infractor en el ejercicio inmediatamente anterior al de la imposición de la multa.

b. Las infracciones graves con multa de hasta el 10% del volumen de negocios total de la empresa u operador económico infractor en el ejercicio inmediatamente anterior al de la imposición de la multa.

c. Las infracciones muy graves con multa de hasta el 12% del volumen de negocios total de la empresa u operador económico infractor en el ejercicio inmediatamente anterior al de imposición de la multa.

El volumen de negocios total de las asociaciones, uniones o agrupaciones de empresas u operador económico se determinará tomando en consideración el volumen de negocios de sus miembros.

Además de la sanción prevista en el apartado anterior, cuando el infractor sea una persona jurídica y haya incurrido en infracciones muy graves, se podrá imponer una multa de hasta 500

Remuneraciones Básicas Unificadas a cada uno de sus representantes legales o a las personas que integran los órganos directivos que hayan intervenido en el acuerdo o decisión, según el grado de intervención o participación de dichos representantes o directivos en la determinación o ejecución de la práctica o conducta infractora.

Quedan excluidas de la sanción aquellas personas que, formando parte de los órganos colegiados de administración, no hubieran asistido a las reuniones o hubieran votado en contra o salvado su voto.

En caso de que no sea posible delimitar el volumen de negocios a que se refieren los literales a), b) y c) del primer inciso del presente artículo, las infracciones tipificadas en la presente Ley serán sancionadas en los términos siguientes:

1. Las infracciones leves con multa entre 50 a 2.000 Remuneraciones Básicas Unificadas.
2. Las infracciones graves con multa entre 2001 a 40.000 Remuneraciones Básicas Unificadas.
3. Las infracciones muy graves con multa de más de 40.000 Remuneraciones Básicas Unificadas.

La reincidencia se considerará circunstancia agravante, por lo que la sanción aplicable no deberá ser menor que la sanción precedente. La Superintendencia de Control del Poder de Mercado podrá imponer las multas de manera sucesiva e ilimitadamente en caso de reincidencia. En ese caso los umbrales del 8%, 10% y 12% del volumen de negocios total del infractor, relativos a todas sus actividades económicas correspondientes al ejercicio inmediatamente anterior al de imposición de la multa, establecidos en los literales a, b y c precedentes, no serán aplicables.

De igual manera, si la Superintendencia determinare que los beneficios obtenidos como resultado de una conducta contraria a las disposiciones de la presente Ley son superiores a los umbrales del 8%, 10% y 12% del volumen de negocios total del infractor, o a los montos previstos en los números 1,2 y 3 de este artículo, sancionará al infractor con un monto idéntico al de dichos beneficios, sin perjuicio de su facultad para sancionar la reincidencia establecida en el inciso precedente.

Quien no suministrare a la Superintendencia de Control del Poder de Mercado la información requerida por ésta o hubiere suministrado información incompleta o incorrecta, será sancionado con una multa de hasta 500 Remuneraciones Básicas Unificadas.

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La Superintendencia de Control del Poder de Mercado podrá ordenar desinvertir, dividir o escindir en los casos en los que determine que es el único camino para restablecer la competencia.

Artículo 80.-Criterios para la determinación del importe de las sanciones.-El importe de las sanciones se fijará atendiendo, entre otros, a los siguientes criterios:

- a. La dimensión y características del mercado afectado por la infracción.
- b. La cuota de mercado del operador u operadores económicos responsables.
- c. El alcance de la infracción.
- d. La duración de la infracción.
- e. El efecto de la infracción sobre los derechos y legítimos intereses de los consumidores y usuarios o sobre otros operadores económicos.
- f. Los beneficios obtenidos como consecuencia de la infracción.

g. Las circunstancias agravantes y atenuantes que concurren en relación con cada una de las empresas u operadores económicos responsables.

Artículo 81.-Circunstancias Agravantes.-Para fijar el importe de las sanciones se tendrán en cuenta además, entre otras, las siguientes circunstancias agravantes:

- a. La comisión reiterada de infracciones tipificadas en la presente Ley.
- b. La posición de responsable o instigador de la infracción.
- c. La adopción de medidas para imponer o garantizar el cumplimiento de las conductas ilícitas.
- d. La falta de colaboración u obstrucción de la labor inspectora, sin perjuicio de la posible consideración como infracción independiente, según lo previsto en el artículo 78 numeral 1, literal.

Artículo 82.-Circunstancias Atenuantes.-Para fijar el importe de la sanción se tendrán en cuenta además, entre otras, las siguientes circunstancias atenuantes:

- a. La realización de actuaciones que pongan fin a la infracción.
- b. La no aplicación efectiva de las conductas prohibidas.
- c. La realización de actuaciones tendientes a reparar el daño causado.
- d. La colaboración activa y efectiva con la Superintendencia de Control del Poder de Mercado llevada a cabo fuera de los supuestos de exención y de reducción del importe de la multa regulados en los artículos 83 y 84 de esta Ley.

Artículo 83.-Exención del pago de la multa.-Sin perjuicio de lo establecido en los artículos anteriores, la Superintendencia de Control del Poder de Mercado eximirá a una persona natural o jurídica del pago de la multa que hubiera podido imponerle cuando:

- a. Sea la primera en aportar elementos de prueba que, a juicio de la Superintendencia de Control del Poder de Mercado, le permitan ordenar el desarrollo de una inspección en los términos establecidos en los artículos 48 y 49 en relación con una infracción del artículo 11, siempre y cuando en el momento de aportarse aquellos no se disponga de elementos suficientes para ordenar la misma; o,
- b. Sea la primera en aportar elementos de prueba que, a juicio de la Superintendencia de Control del Poder de Mercado, le permitan comprobar una infracción del artículo 11, siempre y cuando, en el momento de aportarse los elementos, la Superintendencia de Control del Poder de Mercado no disponga de elementos de prueba suficiente para establecer la existencia de la infracción y no se haya concedido una exención a una empresa u operador económico o persona física en virtud de lo establecido en la letra

c. Para que la Superintendencia de Control del Poder de Mercado conceda la exención prevista en el apartado anterior, la empresa u operador económico o, en su caso, la persona natural que haya presentado la correspondiente solicitud, deberá cumplir los siguientes requisitos:

1. Cooperar plena, continua y diligentemente con la Superintendencia de Control del Poder de Mercado, en los términos que se establezcan reglamentariamente, a lo largo de todo el procedimiento administrativo de investigación.
2. Poner fin a su participación en la presunta infracción en el momento en que facilite los elementos de prueba a que hace referencia este artículo, excepto en aquellos supuestos en los que la Superintendencia de Control del Poder de Mercado estime necesario que dicha participación continúe con el fin de preservar la eficacia de una inspección.
3. No haber destruido elementos de prueba relacionados con la solicitud de exención ni haber revelado, directa o indirectamente, a terceros distintos de la Superintendencia de Control del Poder de Mercado, su intención de presentar esta solicitud o su contenido.
4. No haber adoptado medidas para obligar a otras empresas u operadores económicos a participar en la infracción.

La exención del pago de la multa concedida a una empresa u operador económico beneficiará igualmente a sus representantes legales, o a las personas integrantes de los órganos directivos y que hayan intervenido en el acuerdo o decisión, siempre y cuando hayan colaborado con la Superintendencia de Control del Poder de Mercado.

Artículo 84.-Reducción del importe de la multa.-La

Superintendencia de Control del Poder de Mercado podrá reducir el importe de la multa correspondiente en relación con aquellas empresas u operadores económicos o personas naturales que, sin reunir los requisitos establecidos en el inciso primero del artículo anterior:

- a. Faciliten elementos de prueba de la presunta infracción que aporten un valor añadido significativo con respecto a aquéllos de los que ya disponga la Superintendencia de Control del Poder de Mercado; y,
- b. Cumplan los requisitos establecidos en los números 1,2,3 Y 4 del artículo anterior.

El nivel de reducción del importe de la multa se calculará atendiendo a las siguientes reglas:

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1. La primera empresa u operador económico o persona natural que cumpla lo establecido en el apartado anterior, podrá beneficiarse de una reducción de entre el 30 y el 50 %.



2. La segunda empresa u operador económico o persona natural podrá beneficiarse de una reducción de entre el 20 Y el 30 %.

3. Las sucesivas empresas u operadores económicos o personas naturales podrán beneficiarse de una reducción de hasta el 20 % del importe de la multa.

La aportación por parte de una empresa u operador económico o persona natural de elementos de prueba que permitan establecer hechos adicionales con repercusión directa en el importe de la multa será tenida en cuenta por la Superintendencia de Control del Poder de Mercado al determinar el importe de la multa correspondiente a dicha empresa u operador económico o persona natural.

La reducción del importe de la multa correspondiente a una empresa u operador económico será aplicable, en el mismo porcentaje, a la multa que pudiera imponerse a sus representantes o a las personas que integran los órganos directivos que hayan intervenido en el acuerdo o decisión, siempre que hayan colaborado con la Superintendencia de Control del Poder de Mercado.

Artículo 85.-Multas coercitivas.-La Superintendencia de Control del Poder de Mercado, independientemente de las multas sancionadoras y sin perjuicio de la adopción de otras medidas de ejecución forzosa previstas en el ordenamiento, podrá imponer, previo requerimiento del cumplimiento a las empresas u operadores económicos, asociaciones, uniones o agrupaciones de éstas, y agentes económicos en general, multas coercitivas de hasta 200 (doscientos) Remuneraciones Básicas Unificadas al día con el fin de obligarlas:

- a. A cesar en una conducta prohibida o que hubiere sido sancionada conforme a lo dispuesto en esta Ley.
- b. Al cumplimiento de los compromisos o condiciones adoptados en las resoluciones de la Superintendencia de Control del Poder de Mercado, según lo previsto en la presente Ley.
- c. Al cumplimiento de lo ordenado en una resolución, requerimiento o acuerdo de la Superintendencia de Control del Poder de Mercado.

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- d. Al cumplimiento del deber de colaboración establecido en el artículo 50.
- e. Al cumplimiento de las medidas preventivas y / o correctivas.

Artículo 86.-Recaudación y destino de las multas.-Las multas que se impusieren por las infracciones contempladas en esta Ley, serán recaudadas por la Superintendencia de Control del Poder de Mercado y se depositarán en la Cuenta Única del Tesoro Nacional.

La Superintendencia de Control y Regulación del Mercado podrá suscribir acuerdos de pago con los agentes económicos infractores, de acuerdo a lo establecido en el reglamento de esta Ley.

Artículo 87.-Publicidad de las sanciones.-Serán de conocimiento público y publicadas, en medios de amplia difusión, en la forma y condiciones que se prevea reglamentariamente, las sanciones en firme impuestas en aplicación de esta Ley, su cuantía, el nombre de los sujetos infractores y la infracción cometida.

Artículo 88.-Acción coactiva.-La Superintendencia de Control del Poder de Mercado, a través del Superintendente, ejercerá acción coactiva según la ley y podrá delegarla para cobrar las multas y hacer efectivas las sanciones establecidas en esta Ley.

## CAPÍTULO VII

### DE LOS COMPROMISOS DE CESE

Artículo 89.-Compromisos.-Hasta antes de la resolución de la Superintendencia de Control del Poder de Mercado, el o los operadores económicos investigados, relacionados o denunciados podrán presentar una propuesta de compromiso por medio del cual se comprometen en cesar la conducta objeto de la investigación y a subsanar, de ser el caso, los daños, perjuicios o efectos que hayan producido, que produzcan o que puedan producir en el mercado relevante y en los consumidores sus prácticas anticompetitivas.

La Superintendencia de Control del Poder de Mercado tiene la facultad de suspender los términos y plazos del trámite hasta por ciento veinte días término para llegar a un compromiso, suspendiéndose los demás plazos previstos.

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La propuesta de compromiso será aprobada, modificada o rechazada hasta en el término de cuarenta y cinco días, que decurren desde la fecha de presentación de la propuesta.

Artículo 90.-Evaluación de la solicitud de compromiso.-Para evaluar la solicitud de compromiso de cese, y en ejercicio de una facultad discrecional, la Superintendencia de Control del Poder de Mercado tomará en consideración el cumplimiento concurrente de las siguientes condiciones:

1. Que la totalidad o una parte de los operadores económicos investigados efectúe un reconocimiento de todos o algunos hechos de la denuncia o de los cargos imputados. Dicho reconocimiento debe resultar verosímil a la luz de los medios de prueba que obren en el expediente principal o que hayan sido aportados por las partes en el marco del procedimiento de aprobación del compromiso de cese;
2. Que los operadores económicos investigados ofrezcan medidas correctivas que permitan verificar el cese de la práctica anticompetitiva denunciada y que garanticen que no serán reincidentes. Adicionalmente, podrán ofrecerse medidas complementarias que evidencien el propósito de enmienda de los infractores.

Artículo 91.-Resolución sobre compromisos.-La Superintendencia de Control del Poder de Mercado se pronunciará mediante resolución motivada, aceptando, modificando o desestimando la propuesta de compromiso, considerando para ello si la misma cumple debidamente con los alcances previstos en el artículo anterior. En caso de aceptarse el compromiso se tendrá por concluida la investigación o denuncia.

De no aceptarse el compromiso, se continuará con la investigación o denuncia. El hecho de que la Superintendencia de Control del Poder de Mercado conozca o resuelva sobre un compromiso no constituye luego causal de recusación.

La resolución de la Superintendencia de Control del Poder de Mercado sobre el compromiso contendrá:

1. La identificación del compromiso;
2. Las partes intervinientes;
3. Los plazos de cumplimiento;
4. Las demás condiciones acordadas.

Adicionalmente, esta resolución establecerá el compromiso de las partes involucradas de suministrar la información relativa al cumplimiento del compromiso y de la resolución con el fin de verificar su cabal cumplimiento en el plazo fijado por la Superintendencia de Control del Poder de Mercado.

Artículo 92.-Incumplimiento del Compromiso.-En caso de incumplimiento del compromiso acordado, la Superintendencia de Control del Poder de Mercado iniciará el proceso de ejecución y aplicación de las sanciones previstas en esta Ley y, de ser el caso, adoptará las medidas correctivas a que hubiere lugar.

Artículo 93.-De la modificación de condiciones de un compromiso.-En caso de que las condiciones en el mercado relevante se modifiquen sustancialmente, el operador económico que asumió un compromiso conforme a este capítulo podrá solicitar a la Superintendencia de Control del Poder de Mercado la revisión del compromiso acordado.

## DISPOSICIONES GENERALES

Primera.-Jerarquía.-La presente Ley tiene el carácter de orgánica y prevalecerá sobre las normas de inferior jerarquía. De conformidad con la Constitución de la República, se aplicará sistemáticamente con las demás normas del ordenamiento jurídico, en el orden jerárquico previsto en su artículo 425.

Sin perjuicio de la facultad exclusiva del control constitucional, que le corresponde a la Corte Constitucional, en caso de contradicción entre normas inferiores y superiores, prevalecerán las normas superiores. Le corresponde a la autoridad administrativa o judicial la aplicación directa e

inmediata de la norma superior, siempre que se trate de conflictos entre normas inferiores a la Constitución.

En lo no previsto en esta Ley se estará a lo dispuesto en el Código de Procedimiento Civil, Código de Procedimiento Penal, Código de Comercio, Código Civil, Código Penal, Ley Orgánica de Servicio Público y las demás leyes y regulaciones aplicables.

Segunda.-Financiamiento y Patrimonio.-El patrimonio de la Superintendencia se integra por:

a) Las asignaciones que constarán en el Presupuesto General del Estado; b) Todos los bienes muebles e inmuebles que adquiera a cualquier título; c) Los legados o donaciones que perciba de personas naturales o jurídicas; y, d) Otros ingresos de autogestión.

Tercera.-Publicaciones.-Todas las resoluciones en firme de la Superintendencia de Control del Poder de Mercado se publicarán en el Registro Oficial, en su página electrónica y en la Gaceta Oficial de la Superintendencia.

Las resoluciones de la Superintendencia de Control del Poder de Mercado entrarán en vigencia desde su notificación a las partes.

Los actos normativos de la Superintendencia de Control del Poder de Mercado entrarán en vigencia desde su publicación en el Registro Oficial. En situaciones excepcionales y en casos de urgencia justificada, se podrá disponer que surtan efecto desde la fecha de su expedición.

La Superintendencia de Control del Poder de Mercado podrá, cuando el interés público lo justificare, ordenar la publicación de un extracto de esas resoluciones en uno de los diarios de mayor circulación a nivel nacional, cuyo costo será asumido por el infractor.

Cuarta.-Regulación Sectorial.-En el ámbito de su competencia, las entidades públicas a cargo de la regulación observarán y aplicarán los preceptos y principios establecidos en la presente Ley y coadyuvarán en el fomento, promoción y preservación de las condiciones de competencia en los mercados correspondientes.

Quinta.-Adecuación.-Los operadores económicos adecuarán su comportamiento, operaciones, contratos y en general todas sus actividades económicas al régimen previsto en esta Ley de manera inmediata.

Sexta.-Derechos de los consumidores.-Sin perjuicio de los derechos del consumidor previstos en la Ley de la materia, los consumidores y usuarios podrán ejercer los derechos establecidos en la ley que regula la participación ciudadana y en la presente ley para garantizar la protección efectiva de los mismos.

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DISPOSICIONES REFORMATARIAS Y DEROGATORIAS

Primera.-Deróguese todas las disposiciones contrarias a esta Ley que se encuentren vigentes, así como toda atribución de autoridad nacional en materia de competencia entregada a otros organismos y entes públicos para juzgar y sancionar los asuntos regulados bajo esta Ley.

Segunda.-En el inciso segundo del artículo 439 de la Ley de Compañías Codificada, a continuación de la palabra: "financieros", agréguese: ", las decisiones o resoluciones de la Superintendencia de Control del Poder de Mercado en los casos de su competencia de conformidad con la Ley Orgánica de Regulación y Control del Poder de Mercado".

Tercera.-Al final del artículo 440 de la Ley de Compañías Codificada, luego de la palabra: "competencia" agréguese: "Esta limitación no se aplicará a las labores que deba cumplir el Superintendente de Control del Poder de Mercado y el personal a su cargo, en cumplimiento de la Ley Orgánica de Regulación y Control del Poder de Mercado."

Cuarta.-Sustitúyase el artículo 155 de la Ley de Propiedad Intelectual por el siguiente: "A petición de parte, la Dirección Nacional de Propiedad Industrial podrá otorgar licencias obligatorias cuando se presenten prácticas que hayan sido declaradas mediante resolución de la Superintendencia de Control del Poder de Mercado, como contrarias a la libre competencia, en particular cuando constituyan un abuso de poder de mercado por parte del titular de la patente."

Quinta.-Deróguese el literal g) del artículo 35 de la Ley Especial de Telecomunicaciones, publicada en el Registro Oficial 996, 10-VIII-1992, sus reformas y toda atribución de autoridades de regulación y control de telecomunicaciones en materia de competencia.

Sexta.-Sustitúyase el literal m) del artículo 88 del Reglamento General a la Ley Especial de Telecomunicaciones reformada por el siguiente: "m)

Dictar recomendaciones para las políticas y normas de promoción, protección y regulación de la libre competencia entre prestadores de servicios de telecomunicaciones;"

Séptima.-Deróguese la Resolución No. 415-15-CONATEL-2005, Resolución en materia de Competencia en Telecomunicaciones, publicada en el Registro Oficial 142, de 10 de noviembre de 2005.

Octava.-Sustitúyase en el artículo 31 del Reglamento para la Prestación de Servicios de Valor Agregado "Superintendencia de

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Telecomunicaciones" por "Superintendencia de Control del Poder de Mercado".

Novena.-Deróguese el Reglamento para el trámite de denuncias previo al juzgamiento administrativo de los actos contrarios a la libre competencia en servicios de telecomunicaciones, Resolución ST-20010643, publicado en el Registro Oficial 468, de 5 de diciembre de 2001.

Décima.-Deróguese el artículo 38 de la Ley de Régimen del Sector Eléctrico, publicada en el Suplemento del Registro Oficial 43, 10-X1996.

Décimo Primera.-Deróguese el literal a) del artículo 39 de la Ley de Comercio Electrónico, firmas electrónicas y mensajes de datos, publicada en el Suplemento del Registro Oficial 557, 17-IV-2002.

Décimo Segunda.-Deróguese los artículos 183 al 193 y 284 al 287 de la Ley de Propiedad Intelectual, codificación 2006-13, publicada en el suplemento del Registro Oficial 426 de 28 de diciembre de 2006.

Décimo Tercera.-Refórmase los siguientes artículos de la Ley de Propiedad Intelectual, publicada en el suplemento del Registro Oficial 426 de 28 de diciembre de 2006:

1. Artículo 280: Inclúyase al final del primer inciso la frase "(.. .) Caso contrario se estará a 10 dispuesto en la Ley Orgánica de Regulación y Control del Poder de Mercado y se aplicarán las sanciones previstas en la misma".

2. Artículo 339: Sustitúyese el artículo 339 por el siguiente: "Art. 339. Concluido el proceso investigativo, el IEPI dictará resolución motivada. Si se determinare que existió violación de los derechos de propiedad intelectual, se sancionará al infractor con la clausura del establecimiento de 3 a 7 días y o con una multa de entre quinientos (500) dólares de los Estados Unidos de América y cien mil (100.000) dólares de los Estados Unidos de América y, podrá disponerse la adopción de cualquiera de las medidas cautelares previstas en esta Ley o confirmarse las que se hubieren expedido con carácter provisional. La autoridad nacional en materia de propiedad intelectual aplicará las sanciones establecidas en esta Ley cuando conozca y resuelva sobre asuntos de competencia desleal. Si existiere la presunción de haberse cometido un delito, se enviará copia del proceso administrativo a la Fiscalía."

Décimo Cuarta.-Elimínese en el literal c) del artículo 346 de la Ley de Propiedad Intelectual la frase" ( .. .) y la libre competencia".

Décimo Quinta.-Deróguese el Decreto Ejecutivo No. 1614 de 14 de marzo de 2009, publicado en el Registro Oficial No. 558 de 27 de marzo de 2009.

Décimo Sexta.-Deróguese el literal a) del numeral 2 del artículo 13 del Reglamento Orgánico de Gestión Organizacional por procesos de la Agencia Nacional Postal, Resolución No. AGNP-003-2008 publicada en el Registro Oficial 479 de 2 de diciembre de 2008.

Décimo Séptima.-Sustitúyase el artículo 160 de la Ley Orgánica de Salud por el siguiente: "En ningún caso los gastos de promoción y publicidad se podrán considerar como parte de la estructura de costos para el análisis de fijación de precios".

Décimo Octava.-Deróguese el artículo 4 de la Ley de Producción, Importación, Comercialización y Expendio de Medicamentos Genéricos de Uso Humano.

Décimo Novena.-Deróguese el artículo 54 de la Ley Orgánica de Defensa del Consumidor publicada en el Registro Oficial Suplemento No. 16 de 10 de julio de 2000.

Vigésima.-Al final del artículo 41 de la Ley Orgánica de Empresas Públicas, publicada en el Registro Oficial Suplemento No. 48 de 16 de octubre de 2009, agréguese el siguiente inciso: "Las disposiciones de este artículo se aplicarán en observancia del objeto de la Ley Orgánica de Regulación y Control del Poder de Mercado".

Vigésimo Primera.-Deróguese el Acuerdo Ministerial No. 0188, publicado en Registro Oficial 569, de 14 de abril de 2009, reformativo del Reglamento de Control y Funcionamiento de los Establecimientos Farmacéuticos, aprobado mediante Acuerdo Ministerial No. 00813, emitido por el Ministerio de Salud el 18 de diciembre de 2008, publicado en el Registro Oficial 513 de 23 de enero de 2009.

Vigésimo Segunda.-Reformas a la Ley General de Instituciones del Sistema Financiero:

1. El quinto inciso del artículo 1 dirá:

"La sociedad controladora y las instituciones financieras integrantes de un grupo financiero serán controladas por la Superintendencia de Bancos. Formarán parte de un grupo financiero únicamente las instituciones financieras privadas, incluyendo las subsidiarias o afiliadas del exterior, las de servicios financieros, de servicios auxiliares del sistema financiero que regula esta Ley"

2. Deróguense las letras e) y f) del artículo 44.

3. Sustitúyase el artículo 57 por el siguiente:

"Art. 57.-Para efectos de esta Ley, se entenderá por grupo financiero al integrado por:

a) Una sociedad controladora que posea un banco o una sociedad financiera privada o corporación de inversión y desarrollo, sociedades de servicios financieros o auxiliares previstas en esta Ley, así como las subsidiarias del país o del exterior de cualesquiera de las mencionadas; y,

b) Un banco o sociedad financiera o corporación de inversión y desarrollo que posea sociedades de servicios financieros o auxiliares previstas en esta Ley, así como las subsidiarias del país o del exterior de cualesquiera de éstas.

Salvo lo previsto en el inciso cuarto del artículo 17 y en el artículo 145 de esta Ley, un grupo financiero, cualquiera que sea su conformación, no podrá estar integrado por más de un banco, ni por un banco y una sociedad financiera o corporación de inversión y desarrollo, ni por más de una sociedad financiera o corporación de inversión y desarrollo al mismo tiempo, ni poseer más de una sociedad de servicios financieros o auxiliares dedicada a la misma actividad.

Se entenderá conformado un grupo financiero desde el momento en el que la sociedad controladora, el banco o la sociedad financiera o corporación de inversión y desarrollo posean una o más de las instituciones señaladas en las letras que anteceden."

4. Sustitúyase el artículo 62 por el siguiente:

"Art. 62.-Todas y cada una de las instituciones integrantes del grupo, estarán sujetas a la inspección y vigilancia de la Superintendencia de Bancos

Adicionalmente, la Superintendencia de Compañías para su labor de control podrá solicitar en cualquier momento información sobre grupos financieros, sin que se le oponga el sigilo bancario. Para este fin las

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## REPÚBLICA DEL ECUADOR

Superintendencias mantendrán vigentes convenios de cooperación mutua.

Todas las instituciones integrantes del grupo, en forma individual y consolidada, estarán sujetas a todas las normas de solvencia y prudencia financiera y de control previstas en esta Ley. "

5. A continuación del artículo 141 de la Ley General de Instituciones del Sistema Financiero, insértese un artículo innumerado del tenor siguiente:

"Art....-No podrán ser titulares, ni directa ni indirectamente, de acciones o participaciones de empresas, compañías o sociedades mercantiles ajenas a la actividad financiera los accionistas de una institución del sistema financiero privado, que posean el 6% o más del paquete accionaría con derecho a voto, aun cuando individualmente considerados no posean el 6% o más del paquete accionaría con derecho a voto y a criterio del organismo de control mantengan nexos económicos, societarios de negocios y/o familiares y en conjunto superen dicho porcentaje, o que conformen una unidad de interés económico, de conformidad con la ley. Tampoco podrán serlo los miembros principales y suplentes de los directorios ni sus administradores.

Se entenderá que son titulares indirectos cuando ejerzan su derecho de propiedad sobre el 6% o más de los títulos representativos del capital suscrito de empresas, compañías, o sociedades mercantiles ajenas a la actividad financiera a través de fideicomisos o a través de este mismo mecanismo por medio de sus cónyuges o convivientes en unión de hecho.

Sin perjuicio de lo señalado, la Junta Bancaria podrá en determinados casos, establecer otros tipos de propiedad indirecta que pudieren derivarse de investigaciones realizadas por la



Superintendencia de Bancos y Seguros, la Superintendencia de Compañías o la Superintendencia de Telecomunicaciones.

Los propietarios de participaciones, acciones u otros que incumplan con la prohibición establecida en este artículo serán sancionados con la suspensión de sus derechos como socios o accionistas de la respectiva institución financiera y los directivos y administradores con la remoción de sus cargos; y la Superintendencia de Bancos dispondrá la incautación de sus acciones o participaciones de la respectiva institución financiera y su venta en pública subasta.

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## REPÚBLICA DEL ECUADOR

Los valores que se obtengan en la venta en pública subasta serán entregados a cada uno de los accionistas de las instituciones del sistema financiero privado, sus cónyuges o convivientes en unión de hecho, incurso en la prohibición."

6. Sustituir el segundo inciso del artículo 195 por el siguiente:

"Podrán también invertir en el capital de empresas a las que se refieren las letras p) y q) del artículo 51 de esta Ley. En estos casos les serán aplicables todas las normas relacionadas al funcionamiento de los grupos financieros."

Vigésimo Tercera.-A continuación del artículo 74 c de la Ley de Radiodifusión y Televisión, insértese un artículo innumerado del tenor siguiente:

"Art. ...-No podrán ser titulares, ni directa ni indirectamente, de acciones o participaciones de empresas, compañías o sociedades mercantiles ajenas a la actividad comunicacionallos accionistas de una empresa privada de comunicación de carácter nacional, que posean el 6% o más del paquete accionario con derecho a voto, aun cuando individualmente considerados no posean el 6% o más del paquete accionario con derecho a voto y a criterio del organismo de control mantengan nexos económicos, societarios de negocios y/o familiares y en conjunto superen dicho porcentaje, o que conformen una unidad de interés económico, de conformidad con la ley. Tampoco podrán serlo los miembros principales y suplentes de los directorios nI sus administradores.

Se entenderá que son titulares indirectos cuando ejerzan su derecho de propiedad sobre el 6% o más de los títulos representativos del capital suscrito de empresas, compañías, o sociedades mercantiles ajenas a la actividad comunicacional a través de fideicomisos o a través de este mismo mecanismo por medio de sus cónyuges o convivientes en unión de hecho.

Sin perjuicio de lo señalado, el Consejo Nacional de Radiodifusión y Televisión, podrá en determinados casos, establecer otros tipos de propiedad indirecta que pudieren derivarse de investigaciones realizadas por la Superintendencia de Bancos y Seguros, la Superintendencia de Compañías o la Superintendencia de Telecomunicaciones.

Los propietarios de participaciones, acciones u otros que incumplan con la prohibición establecida en este artículo serán sancionados con la suspensión de sus derechos como socios o accionistas de la respectiva empresa de comunicación y los directivos y administradores con la remoción de sus cargos; y la Superintendencia de Telecomunicaciones dispondrá la incautación de sus acciones o participaciones de la respectiva empresa de comunicación y su venta en pública subasta.

Los valores que se obtengan en la venta en pública subasta serán entregados a cada uno de los accionistas de las empresas de comunicación, sus cónyuges o convivientes en unión de hecho, incurso en la prohibición."

## DISPOSICIONES TRANSITORIAS

PRIMERA.-Las personas naturales o jurídicas que a la fecha de entrada en vigencia de la prohibición establecida en el número 5 de la Disposición Reformatoria y Derogatoria Vigésimo Segunda de esta Ley, posean directa o indirectamente acciones o participaciones del capital suscrito de empresas, compañías o sociedades mercantiles ajenas a la actividad financiera, deberán enajenarlas hasta el 13 de julio del 2012. Las instituciones del sistema financiero tendrán el mismo plazo para enajenar sus acciones o participaciones en empresas reguladas por la Ley del Mercado de Valores y la Ley General de Seguros.

La enajenación obligatoria prevista en esta disposición no podrá realizarse a favor de personas jurídicas vinculadas ni a favor de parientes hasta dentro del cuarto grado de consanguinidad y segundo de afinidad.

El incumplimiento por parte de los directivos y administradores de una institución financiera privada a esta disposición será sancionado por parte de la Superintendencia de Bancos, de conformidad con la ley.

La obligación de desinvertir en compañías o sociedades mercantiles ajenas al sector financiero incluye a las reguladas por la Ley de Mercado de Valores y la Ley General de Seguros.

SEGUNDA.-Las personas naturales o jurídicas que a la fecha de entrada en vigencia de la prohibición establecida en la Disposición Reformatoria y Derogatoria Vigésimo Tercera de esta Ley, posean directa

o indirectamente acciones o participaciones del capital suscrito de empresas, compañías o sociedades mercantiles ajenas a la actividad comunicacional, deberán enajenarlas hasta el 13 de julio del 2012.

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Las instituciones del sector de comunicaciones tendrán el mismo plazo para enajenar sus acciones o participaciones en empresas ajenas a la actividad comunicacional.

La enajenación obligatoria prevista en esta disposición no podrá realizarse a favor de personas jurídicas vinculadas ni a favor de parientes hasta dentro del cuarto grado de consanguinidad y segundo de afinidad.

El incumplimiento por parte de los directivos y administradores de una empresa privada de comunicación de carácter nacional, a esta disposición será sancionado por parte de la Superintendencia de Telecomunicaciones, de conformidad con la ley.

TERCERA.-Los procesos que se hubieren iniciado por las autoridades de la Subsecretaría de Competencia del Ministerio de Industrias y Productividad, por el Consejo Nacional de Telecomunicaciones, la Superintendencia de Telecomunicaciones, la Secretaría Nacional de Telecomunicaciones, el Instituto Ecuatoriano de Propiedad Intelectual o cualquier otra autoridad pública, antes o a partir de la vigencia de esta Ley, seguirán tramitándose de conformidad con las siguientes reglas:

- a. Ley Sustantiva. Dichos procesos se tramitarán de conformidad con las normas sustantivas vigentes al tiempo del cometimiento de las presuntas infracciones sujetas a investigación.
- b. Ley Adjetiva. Las normas procesales administrativas para las nuevas diligencias serán las previstas en esta ley y su reglamento. Los procedimientos, recursos e impugnaciones en curso se tramitarán bajo las normas procedimentales vigentes al inicio de dicho recurso o impugnación hasta la conclusión del mismo.
- c. Autoridad. Todos los procedimientos y sus correspondientes expedientes iniciados por autoridades tales como la Subsecretaría de Competencia del Ministerio de Industrias y Productividad, por el Consejo Nacional de Telecomunicaciones, la Superintendencia de Telecomunicaciones, la Secretaría Nacional de Telecomunicaciones, el Instituto Ecuatoriano de Propiedad Intelectual y cualquier otra autoridad pública continuarán siendo conocidos por las referidas autoridades. Una vez que el Superintendente de Control de Poder de Mercado haya asumido legalmente posesión de su cargo, determinará el plazo para que todos los procedimientos en curso y sus respectivos expedientes sean remitidos a la Superintendencia de Control del Poder de Mercado, la que continuará con su tramitación bajo los criterios

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sustantivos y adjetivos de aplicación de la ley en el tiempo antes indicado.

Cuando se designe al Superintendente de Regulación y Control de Mercado, el señor Ministro de Relaciones Exteriores, Comercio e Integración remitirá la correspondiente nota diplomática al señor Secretario General de la Comunidad Andina sobre su designación como representante de la Autoridad Ecuatoriana de Competencia para que conforme el Comité Andino.

CUARTA.-Los servidores que vienen prestando sus servicios, con nombramiento o contrato en la Subsecretaría de Competencia del Ministerio de Industria y Competitividad podrán pasar a formar parte de la Superintendencia de Control del Poder de Mercado, previa evaluación y selección por

parte de la Superintendencia de Control del Poder de Mercado, de acuerdo a los requerimientos de esta institución.

En el caso de existir cargos innecesarios, el Superintendente de Control del Poder de Mercado podrá aplicar un proceso de supresión de puestos para lo cual observará las normas contenidas en la ley.

El presupuesto, los bienes muebles e inmuebles, equipamiento, mobiliario, y demás activos de propiedad de la Subsecretaría de Competencia del Ministerio de Industrias y Productividad pasan a formar parte del patrimonio institucional de la Superintendencia de Control del Poder de Mercado. Los derechos y obligaciones, constantes en convenios, contratos u otros instrumentos jurídicos, nacionales o internacionales, suscritos por el Ministerio de Industrias y Competitividad referidos a la Subsecretaría de Competencia serán asumidos por la Superintendencia de Control del Poder de Mercado.

Se excluyen de la presente disposición, los servidores, presupuestos, bienes e inmuebles, equipamiento, mobiliario y demás activos, así como derechos y obligaciones, constantes en convenios, contratos u otros instrumentos jurídicos, nacionales o internacionales, destinados por el Ministerio de Industrias y Productividad a la Subsecretaría de Competencia para la materia de defensa del consumidor.

QUINTA.-El Presidente de la República dictará el Reglamento de la presente Ley en el plazo de máximo de ciento ochenta días.

SEXTA.-El Presidente de la República reformará el Reglamento para la fijación y revisión de precios de medicamentos de uso humano en el término máximo de 60 días, contados a partir de la vigencia de la presente Ley, término dentro del cual el Consejo Nacional de Fijación y

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REPÚBLICA DEL ECUADOR

Revisión de Precios, mediante resolución, deberá definir los mecanismos para la fijación de precios.

DISPOSICIÓN FINAL.-La presente Ley entrará en vigencia a partir de su promulgación en el Registro Oficial.

Dado y suscrito en la sede de la Asamblea Nacional, ubicada en el Distrito Metropolitano de Quito, provincia de Pichincha, a los veintinueve días del mes de septiembre de dos mil once. /~ ~

**Superintendente: Pedro Páez**

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**ETHIOPIA**

**FEDERAL NEGARIT GAZETTE  
OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA**

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**PROCLAMATION No. 813/2013**

**A PROCLAMATION ON TRADE COMPETITION**

**AND CONSUMERS PROTECTION**

WHEREAS, commercial activities must be conducted in accordance with the appropriate practice based on the free market economy policy of the country;

WHEREAS, it has been found necessary to have a system, that enables to protect the business community from anti-competitive and unfair market practices, and also consumers from misleading market conducts, and which is conducive for the promotion of competitive free market;

WHEREAS, it is necessary to prevent the proliferation of goods and services that endanger the health and well being of consumers, following the expansion of commercial activities, and to ensure their safeness and suitability to human health in a sustainable manner, and to create conducive environment by which consumers get goods and services equivalent to the price they pay;

WHEREAS, in order to ensure the implementation of the system of trade competition and consumers protection it has been found necessary to determine the powers and duties of the concerned organs particularly, the organs in charge of investigation, prosecution and judicial responsibilities;

NOW, THEREFORE, in accordance with Article 55(1) of the Constitution of the Federal Democratic Republic of Ethiopia it is hereby proclaimed as follows:

## **PART ONE**

### **GENERAL**

#### **1. Short Title**

This Proclamation may be cited as the “Trade Competition and Consumers Protection Proclamation No. 813/2013”.

#### **2. Definitions**

In this Proclamation unless the context otherwise requires:

1/ “goods” means movable commodities that are being purchased or sold or leased or by which any commercial activity is conducted between persons except monies in any form and securities;

2/ “service” means any commercial dispensing of service for consideration other than salary or wages;

3/ “basic goods or services” means goods or services related to the daily needs of consumers, the shortage of which in the market may lead to unfair trade practice;

4/ “consumer” means a natural person who buys goods and services for his personal or family consumption, whether the price is being paid by him or another person and not for manufacturing activity or resale;

5/ “business person” means any person who professionally and for gain carries on any of the activities specified under Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by law;

6/ “commercial activity” means any activity carried on by a business person as defined under sub-article (5) of this Article;

7/ “manufacturing activity” includes any formulation, alteration, assembling and prefabrication activity carried on by an industry;

8/ “essential facility” means an infrastructure or resource that cannot be easily found or not much often available, and which is very important to competitors in order to supply their goods and services to their customers;

9/ “unfair trade practice” means any act in violation of provisions of trade related laws;

10/ “wholesaler” means any person who sells goods to a retailer after buying them from a manufacturer or an importer; when a manufacturer or an importer sells goods to a retailer or to a wholesaler, he shall be considered to have been engaged in wholesale business;

11/ “retailer” means any person who sells goods to consumers or users after buying them from a wholesaler or a manufacturer or an importer; when a wholesaler or a manufacturer or an importer sells goods to consumers or users, he shall be considered to have been engaged in retail business;

12/ “Ministry” or “Minister” means the Ministry or Minister of Trade, respectively;

13/ “annual turnover” means the total annual income derived from the sell of goods or services before the year the decision is rendered; in case of beginner traders with less than one budget year of existence it is the total income with in that period;

14/ “region” means any state referred to in Article 47(1) of the Constitution of the Federal Democratic Republic of Ethiopia;

15/ “bureau” means the trade and industry bureau or another appropriate organ of a region or the Addis Ababa or the Dire Dawa city administration;

16/ “person” means any natural or juridical person;

17/ any expression in the masculine gender includes the feminine.

### **3. Objective**

This Proclamation shall have the following objectives:

1/ to protect the business community from anti-competitive and unfair market practices, and also consumers from misleading market conducts, and to establish a system that is conducive for the promotion of competitive free market;

2/ to ensure that consumers get goods and services safe and suitable to their health and equivalent to the price they pay; and

3/ to accelerate economic development.

#### **4. Scope of Application**

1/ This Proclamation shall apply to any commercial activity or transaction in goods or services conducted or having effect within the Federal Democratic Republic of Ethiopia.

2/ Notwithstanding the provision of sub-article (1) of this Article the Council of Ministers may specify by regulation those trade activities it deems vital in facilitating economic development to be exempted from the application of the provisions of Part Two of this Proclamation.

3/ The provisions of this Proclamation may not affect the applicability of regulatory functions and administrative measures to be undertaken in accordance with other laws.

### **PART TWO**

## **PROHIBITION OF ANTI-COMPETITIVE TRADE PRACTICES AND REGULATION**

### **OF MERGER**

### **SECTION ONE**

## **PROHIBITION OF ANTI-COMPETITIVE TRADE PRACTICES**

#### **5. Abuse of Market Dominance**

1/ No business person, either by himself or acting together with others, may carry on commercial activity by openly or dubiously abusing the dominant position he has in the market.

2/ For the purpose of sub-article (1) of this Article the following shall be deemed acts of abuse of market dominance:

a) limiting production, hoarding or diverting, preventing or withholding goods from being sold in the regular channels of trade;

b) doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor or preempting inputs or distribution channels;



- c) directly or indirectly imposing unfair selling price or unfair purchase price;
- d) refusing, contrary to the clearly prevalent trade practice, to deal with others on terms the dominant business person customarily or possibly could employ as though the terms are not economically feasible to him;
- e) without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person;
- f) without justifiable economic reasons, discriminating customers in prices and other conditions in the supply and purchase of goods and services;
- g) without justifiable economic reasons making the supply of particular goods or services dependent on the acceptance of competitive or non-competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependent on the purchase of other goods or services having no connection with the goods or services sought by the customer;
- h) without justifiable economic reasons and in connection with the supply of goods or services, imposing such restrictions as to where or to whom or in what conditions or quantities or at what prices the goods or services shall be resold or exported;
- i) other similar acts specified by regulation to be issued for the implementation of this Proclamation.

3/ The following shall be deemed justifiable economic reasons for the purpose of applying the provisions of paragraphs (e), (f), (g) and (h) of sub-article (2) of this Article:

- a) maintenance of quality and safety of goods and services;
- b) leveling with prices or benefits offered by a competitor;
- c) achieving efficiency and competitiveness;
- d) other similar reasons specified by regulation to be issued for the implementation of this Proclamation.

## **6. Assessment of Dominance**

1/ A business person either by himself or acting together with others in a relevant market, is deemed to have a dominant market position, if he has the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition in the relevant market.

2/ A dominant position in a certain market may be assessed by taking into account the business person's share in the market or his capacity to set barriers against the entry of others into the market or other factors as may be appropriate or a combination of these factors.

3/ The market relevant for the assessment of a dominant position is the market that comprises goods or services that actually compete with each other or goods or services that can be replaced by one another.

4/ The geographic area of such market is the area in which the conditions of competition are sufficiently homogeneous and can be distinguished from the conditions of competition in neighboring markets.

5/ The Council of Ministers may determine by regulation the numerical expression of the degree of market dominance.

## **7. Anti-Competitive Agreements, Concerted Practices and Decisions**

1/ An agreement between, or concerted practice by, business persons or a decision by association of business persons in a horizontal relationship shall be prohibited if:

a) it has the effect of preventing or significantly lessening competition, 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

b) it involves, directly or indirectly, fixing a purchase or selling price or any other trading condition, collusive tendering, or dividing markets by allocating customers, suppliers, territories or specific types of goods or services.

2/ An agreement between business persons in a vertical relationship shall be prohibited if:

a) it has the effect of preventing or significantly lessening competition, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

b) it involves the setting of minimum resale price.

3/ For the purpose of applying sub-article (1) and (2) of this Article:

- a) the term “agreement” includes mutual understanding, written or oral contract and operational procedures, whether or not legally enforceable;
- b) “concerted practice” means a unified or cooperative conduct of business persons depicted in a way that does not look like an agreement and done to substitute individual activity;
- c) horizontal relationship is deemed to exist between competing business persons in a certain market, whereas vertical relationship is deemed to exist between business persons and their customers or suppliers or both.

## **8. Unfair Competition**

1/ No business person may, in the course of trade, carry out any act which is dishonest, misleading or deceptive, and harms or is likely to harm the business interest of a competitor.

2/ The following shall be deemed acts of unfair competition:

- a) any act that causes or is likely to cause confusion with respect to another business person or its activities, in particular, the goods or services offered by such business person;
- b) any act of disclosure, possession or use of information of another business person, without the consent of the rightful owner, in a manner contrary to honest commercial practice;
- c) any false or unjustifiable allegation that discredits, or is likely to discredit another business person or its activities, in particular the goods or services offered by such business person;
- d) comparing goods or services falsely or equivocally in the course of commercial advertisement;
- e) disseminating to consumers or users, false or equivocal information including information the source of which is not known, in connection with the price or nature or system of manufacturing or manufacturing place or content or suitability for use or quality of goods or services;

- f) obtaining or attempting to obtain confidential business information of another business person through his current or former employees or obtaining the information to pirate his customers or to use for purposes that minimize his competitiveness;
- g) other similar acts specified by regulation to be issued for the implementation of this Proclamation.

## **SECTION TWO**

### **REGULATION OF MERGER**

#### **9. Prohibitions**

- 1/ No business person may enter into an agreement or arrangement of merger that causes or is likely to cause a significant adverse effect on trade competition.
- 2/ No agreement or arrangement of merger may come into effect before obtaining approval from the Authority pursuant to Article 11 of this Proclamation.
- 3/ For the purpose of applying the provisions of this Article merger shall be deemed to have occurred:
  - a) when two or more business organizations previously having independent existence amalgamate or when such business organizations pool the whole or part of their resources for the purpose of carrying on a certain commercial activity; or
  - b) by directly or indirectly acquiring shares, securities or assets of a business organization or taking control of the management of the business of another person by a person or group of persons through purchase or any other means.

#### **10. Notification of Merger**

- 1/ Any business person who proposes to enter into an agreement or arrangement of merger shall give notice to the Authority by disclosing the details of the proposed merger.
- 2/ The Authority shall, upon receipt of the notification of merger pursuant to sub-article (1) of this Article, investigate the possible adverse effect of the proposed merger on trade competition.
- 3/ In the course of investigating the possible effect of a proposed merger, the Authority may:

- a) where deemed necessary, require the parties to the merger to submit additional information or document within a specified period of time; and
- b) invite, by a notice published on a newspaper having wide circulation, any business person who is likely to be affected by the said merger, to submit his written objections, if any, within 15 days from the date of publication of the notice.

## **11. Approval of Merger**

1/ The Authority, after having investigated the proposed merger, shall:

- a) approve the merger, if it is of the opinion that the merger is not likely to have any significant adverse effect on trade competition;
- b) prohibit the merger, if it is of the opinion that the merger is likely to have a significant adverse effect on trade competition; or
- c) approve the merger subject to certain conditions, if it is of the opinion that the likely significant adverse effect of the merger on trade competition can be eliminated by complying with the conditions attached thereto.

2/ Notwithstanding the provision of paragraph (b) of sub-article (1) of this Article, the Authority may approve a merger proposal where the merger is likely to result in technological, efficiency or other pro-competitive gain that outweigh the significant adverse effects of the merger on competition, and such gain may not otherwise be obtained if the merger is prohibited.

## **12. Registration of Merger**

The concerned government office shall require the presentation of approval of the Authority issued in accordance with Article 11 of this Proclamation before registering a merger in the commercial register.

## **13. Revocation of Merger Approval**

1/ The Authority may revoke a merger approval where:

- a) it discovers that the approval was obtained based on the presentation of false or fraudulent evidence; or
- b) the conditions on the basis of which the approval has been obtained are not fulfilled.

2/ The Authority shall, following the revocation of a merger approval pursuant to sub-article (1) of this Article, inform the concerned government office to cancel the merger from the commercial register.

### **PART THREE**

## **PROTECTION OF CONSUMERS AND DISTRIBUTION OF GOODS AND SERVICES**

### **SECTION ONE**

#### **PROTECTION OF CONSUMERS**

##### **14. Rights of Consumers**

Every consumer shall have the right to:

1/ get sufficient and accurate information or explanation as to the quality and type of goods or services he purchases;

2/ buy goods and services on the basis of his own choice;

3/ not to be obliged to buy for the reasons that he looked into quality or options of goods and services or he made price bargain;

4/ be received humbly and respectfully by any business person and to be protected from such acts of the business person as insult, threat, frustration and defamation; and

5/ claim compensation or related either jointly or severally from persons who have participated in the supply of goods or services as manufacturer, importer, wholesaler, retailer or in any other way for damages he has suffered because of purchase or use of the goods or services.

## **15. Display of Price of Goods and Services**

- 1/ Any business person shall, display price of his goods and services by posting such list in a conspicuous place in his business premises or by affixing price tags on the goods.
- 2/ The price of goods and services shall be inclusive of taxes and other lawful fees.

## **16. Labels of Goods**

- 1/ Any business person shall, affix labels on the goods he sells or provide them to the consumer on a separate paper.
- 2/ Labels affixed on goods shall indicate the following particulars as may be appropriate:
  - a) the name of the goods;
  - b) country of manufacturing or export of the goods;
  - c) the gross and net weight, volume, and quantity of the goods;
  - d) quality of the goods;
  - e) description of materials used to manufacture the goods;
  - f) technical specification of the goods and their operational or utilization methods;
  - g) safety measures to be considered during the use of the goods;
  - h) a warranty of the service of the goods to be provided by the business person;
  - i) the names and addresses of the manufacturer, packer and importer;
  - j) expiry date of the goods;
  - k) manufacturing date of the goods;
  - l) indication that the goods have fulfilled requirements set in the Ethiopian standards; and
  - m) other details published in a public notice by the Ministry when deemed necessary to safeguard public interest.

3/ Labels to be posted on goods shall be posted or printed on the goods or the package, not be easily detachable and be written at least in the Amharic or English language.

### **17. Issuing Receipts and Keeping their Pads**

1/ Any business person shall have the obligation to issue receipts immediately to the consumer in respect of goods or services sold.

2/ The business person shall keep pads of receipts issued in respects of goods and services sold pursuant to sub article (1) of this Article or receipts obtained in respect goods and services he bought for re-sale, for 10 years.

### **18. Self Disclosure**

1/ Any business person shall display his trade name at an overt place.

2/ Any business person shall, upon request by a consumer relating to goods or services he sells, satisfactorily disclose himself and let the consumer take the information he wants.

### **19. Commercial Advertisements**

Commercial advertisements about goods and services announced by any means may not be false or misleading in any manner particularly on:

1/ the nature, components and quantity of the goods;

2/ the source, weight, volume, method of manufacturing, date of manufacturing and expiry date of the goods and how it is used;

3/ the manufacturer of the goods or the supplier of the service;

4/ the place of delivery of the service, its basic nature and use and how to use it;

5/ conditions of purchase of the goods or the service, after sales services, warranty, price and conditions of payment;

6/ quality marks;

7/ trade mark and emblem; and



8/ results expected by using the goods or services.

## **20. Defects in Goods and Services**

1/ Any consumer may report defects in goods and services purchased and the damage the defects may cause, to the Ministry or the relevant bureau.

2/ A consumer may, without prejudice to warranties or legal or contractual provisions more advantageous to him, demand the seller, within 15 days from the date of purchase:

- a) in the case of defective goods, to replace the goods or refund the price paid; or
- b) in the case of defective service, to re-deliver the service free of charge or to refund the fee paid.

3/ Any consumer shall have the right to claim, in accordance with the relevant laws, payment of compensation for any damage resulting from the use of the defective goods or service or from the failure of the seller to meet his demand presented pursuant to sub article (2) of this Article.

## **21. Contractual Waiver of Rights**

The provisions of a contract made between a consumer and a business person that provide for the waiver of rights vested in the consumer under this Proclamation shall be of no effect.

## **22. Prohibited Acts**

It shall be prohibited for any business person to commit the following acts:

- 1/ furnishing false information on the quality, quantity, volume, acceptance, source, nature, component or use of goods and services;
- 2/ failing to disclose correctly the model of goods, whether they are brand new, modified, rebuilt as new or second hand or they are recalled by the manufacturer;
- 3/ describing the goods and services of another business person in a misleading way;
- 4/ failing to sell goods and services as advertised or in the quantity consumers demand, unless the advertisement discloses a limitation of quantity;
- 5/ making false or misleading statements of price reduction;
- 6/ applying or attempting to apply a pyramid scheme of sale, based on the numbers of consumers, by announcing the granting of a reward, in cash or in kind, to a consumer who

purchases goods or service or makes financial contribution and where other consumers through his salesmanship purchase the goods or the service or make financial contribution or enter into the sales scheme;

- 7/ failing to meet a warranty obligation entered in connection with the sale of goods or service;
- 8/ misrepresenting the need for repair or replacement of parts of goods as though not needed;
- 9/ delivering a service below the standard recognized in the business or with deficiency;
- 10/ making available for sale or selling goods which is dangerous to human health and safety, the source of which is not known, or which is substandard, poisoned, expired or adulterated;
- 11/ committing any fraudulent or confusing act in any transaction of goods or service;
- 12/ refusing to sell goods or service unless for the purpose of protecting the rights of the consumer;
- 13/ making available for sale or selling goods or services without using standard marks while the use of such standard marks is a requirement;
- 14/ selling goods or service at a price above the price affixed to the goods or the price posted in the business premises;
- 15/ falsifying the country of origin of goods;
- 16/ unduly favoring one consumer over the other;
- 17/ subjecting a consumer to purchase goods or service not desired in order to sell another goods or service; 18/ using any unlawful instrument of measurement.

## **SECTION TWO**

### **DISTRIBUTION OF GOODS AND SERVICES**

#### **23. Regulating the Distribution of Goods and Services**

- 1/ The Ministry and bureaus in collaboration with other appropriate bodies shall ban the distribution of goods and services that do not fulfill the standards of health and safety.
- 2/ The Ministry in collaboration with other appropriate bodies may conduct quality inspection of locally manufactured or imported goods.
- 3/ The Ministry and the bureaus shall inspect any acts of hoarding or diverting of goods.

4/ The Ministry or the bureaus shall in consultation with other appropriate bodies cause the disposal of goods that are spoiled and are dangerous to human health and safety.

5/ The Ministry and the bureaus shall have the powers to implement the provisions of this Part other than those falling under the jurisdiction of the Authority.

## **24. Hoarding and Diverting of Goods**

1/ The hoarding or diverting of goods that have been declared by a public notice issued by the Ministry as scarce in the market shall be prohibited:

- a) in the case of a business person, contrary to regular commercial practices; or
- b) in the case of a person other than a business person, in the quantity beyond that of personal or family consumption.

2/ Goods are presumed to have been hoarded or diverted contrary to regular commercial practices, where the value of the goods is not less than twenty five per cent of the capital of the business person and where:

- a) in the case of imported goods, other than those being used as raw materials or inputs for further processing by the importer himself, the goods have not been made available for sale within three months from the date of completion of customs formalities;
- b) in the case of locally produced goods, other than those being used as raw materials or inputs for further processing by the producer himself, have not been made available for sale within two months from the date of production; or
- c) in the case of goods bought by a wholesaler or a retailer, the goods have not been made available for sale within one month from the date of purchase.

3/ Notwithstanding the non fulfillment of the conditions stipulated under sub-article (2) of this Article, goods found while being transported by any means of transportation outside the authorized distribution route shall be presumed to have been hoarded or diverted.

4/ Any person other than a business person may not transport or cause the transportation of goods, declared by a public notice issued by the Ministry as scarce in the market and the quantity of which is beyond that of personal or family consumption, outside the authorized distribution route.

5/ For the application of this Article, an acceptable amount of personal or family consumption of goods and allowable storage time shall be determined by a public notice to be issued by the Ministry.

6/ The provisions of this Article may not be applicable with respect to the storage of agricultural products by peasant farmers.

## 25. Regulating Prices of Basic Goods and Services

1/ The Ministry, when deemed necessary, shall submit to the Council of Ministers its study on basic goods and services that shall be subject to price regulation and upon approval announce their list and prices by a public notice.

2/ It shall be prohibited to sell or attempt to sell basic goods or services beyond the price fixed by the government and announced by a public notice.

## 26. Distribution of Basic Goods

The Ministry in consultation with other concerned government organs may determine the conditions of distribution, sale and movement of basic goods and services and, as may be necessary, order business persons to replenish stocks of same.

## **PART FOUR**

### **TRADE COMPETITION AND CONSUMERS PROTECTION AUTHORITY, FEDERAL TRADE COMPETITION AND CONSUMERS PROTECTION APPELLATE**

### **TRIBUNAL AND REGIONAL CONSUMERS PROTECTION JUDICIAL ORGANS AND APPELLATE TRIBUNALS**

## 27. Establishment of the Authority

1/ Trade Competition and Consumers Protection Authority (hereinafter referred to the “Authority”) is hereby established as an autonomous federal government body having its own legal personality.

2/ The Authority shall be accountable to the Ministry.

3/ The Authority shall be governed by this Proclamation.

## 28. Organization of the Authority

The Authority shall have:

1/ a Director General and, as may be necessary, Deputy Director Generals to be appointed by the Prime Minister up on the recommendation of the Minister;

- 2/ judges to be appointed in accordance with Article 35(1) of this Proclamation;
- 3/ investigative officers conducting investigation and prosecutors instituting an action in accordance with this Proclamation; and
- 4/ the necessary staff.

## **29. Head Office**

The Authority shall have its head office in Addis Ababa and may have branch offices elsewhere, as may be necessary.

## **30. Powers and Duties of the Authority**

Without prejudice to other provisions of this Proclamation, the Authority shall have the powers and duties to:

- 1/ take appropriate measures to increase market transparency;
- 2/ take appropriate measures to develop public awareness on the provisions of this Proclamation and its implementation;
- 3/ receive, and decide on, merger notifications in accordance with the provisions of this Proclamation;
- 4/ undertake study and research in connection with trade competition and consumer protection, and initiate policy proposals;
- 5/ regularly announce to consumers goods banned by the government or at the international level from being consumed or sold;
- 6/ organize various education and training forums and provide education and training in order to enhance the awareness of consumers;
- 7/ ban advertisements of goods and services which are inconsistent with health and safety requirements or with this Proclamation when it is aware of them by itself or when it is reported to it by any person, and order the issuance of announcements of corrections for such advertisements, in the methods the advertisements were made at the expense of the person in whose interest they were made;
- 8/ protect consumers from unfair practices of business persons;

- 9/ organize judicial organs with jurisdiction on issues of trade competition and consumers protection in accordance with the provisions of this Proclamation;
- 10/ establish procedure enable to resolve disputes arised between traders or consumers and traders by mutual agreement and negotiation;
- 11/ provide support to industrial self-regulation in order to enable various industrial sectors regulate anti-competitive and unfair trade practices;
- 12/ provide secretarial and other services to the Federal Trade Competition and Consumers Protection Appellate Tribunal established under Article 33 of this Proclamation;
- 13/ give necessary advice and support to the concerned regional organs with respect to consumer protection;
- 14/ establish relationship and cooperation with domestic and foreign institutions having similar objectives,
- 15/ own property, enter into contracts, sue and be sued in its own name;
- 16/ perform such other related activities conducive for the attainment of its objectives.

### **31. Powers and Duties of the Director General**

- 1/ The Director General of the Authority shall be the chief executive officer of the Authority and shall direct and administer the activities of the Authority.
- 2/ Without prejudice to the generality of sub-article (1) of this Article the Director General shall have the powers and duties to:
  - a) ascertain the proper implementation of the powers and duties of the Authority provided under Article 30 and Article 32 of this Proclamation;
  - b) employ and administer employees of the Authority based on the principles of the federal civil service laws;
  - c) represent the Authority in its dealings with third parties.
- 3/ The Director General may delegate part of his powers and duties to other officers and employees of the Authority to the extent necessary for the efficient performance of the activities of the Authority.

### **32. Powers and Duties of the Adjudicative Benches of the Authority**

1/ The adjudicative benches of the Authority shall have judicial power:

- a) to take administrative measures and impose fines in accordance with Article 42 of this Proclamation on a business person or any person other than a business person who violates prohibitions provided under Part Two of this Proclamation;
- b) to order payment of compensation in accordance with the relevant laws to business persons victimized by acts of unfair competition committed in violation of the provisions of Part Two of this Proclamation; and
- c) to order compensation in accordance with the relevant laws to consumers victimized by transactions conducted in the Addis Ababa or the Dire Dawa city administrations in violation of consumers protection provisions stipulated under Part Three of this Proclamation.

2/ The administrative measures to be taken pursuant to sub-article (1) (a) of this Article may include ordering:

- a) the discontinuation of the act pronounced unfair;
- b) the taking of any other appropriate measure that enables to reinstate the victims competitive position; or
- c) the suspension or revocation of the business license of the offender.

### **33. Federal Trade Competition and Consumer Protection Appellate Tribunal**

1/ The Federal Trade Competition and Consumer Protection Appellate Tribunal (hereinafter the “Federal Appellate Tribunal”) is hereby established.

2/ The Federal Appellate Tribunal shall have the power to hear and decide on appeals against:

- a) decisions of the Authority to prohibit and revoke merger approvals and to ban commercial advertisements; and
- b) decisions of the adjudicative benches of the Authority.

3/ The Federal Appellate Tribunal may, upon examining an appeal submitted to it pursuant to sub-article (2) of this Article, confirm, reverse or vary the decision, or remand the case, with necessary instructions, to the Authority or the adjudicative bench of the Authority, as the case may be.

### **34. Regional Consumers Protection Judicial Organs**

Each region may, when necessary, establish consumers protection judicial organ and appellate tribunal.

### **35. Appointment and Independent of Judges**

1/ Each adjudicative bench of the Authority as well as the Federal Appellate Tribunal shall have one presiding judge and two judges to be appointed by the Prime Minister.

2/ Judges to be appointed pursuant to sub-article (1) of this Article shall have the necessary professional qualification, educational background and experience needed for the post.

3/ Judges appointed pursuant to sub-article (1) of this Article shall be independent of any interference or instructions by any person with regard to cases they adjudicate.

## **PART FIVE**

### **CONDUCTING INVESTIGATION, INSTITUTION OF ACTION AND ADJUDICATION**

### **36. Conducting Investigation**

1/ The Authority shall conduct investigations where there is sufficient ground to suspect, based on its own information or information given to it by any person, that an offence has been committed:

a) anywhere, entailing administrative measures and administrative penalty pursuant to Article 32 and Article 42 or criminal penalty pursuant to sub-article (1) or (7) of Article 43 of this Proclamation; or

b) in the Addis Ababa or the Dire Dawa city administrations, entailing criminal penalty pursuant to sub-article (2),(3), (4),(5) or (6) of Article 43 of this Proclamation.



2/ If the Authority finds it necessary, in conducting its investigation activities, it may order the police forces under the Federal Police Commission, the Addis Ababa City Administration Police Commission or the Dire Dawa City Administration Police Commission.

3/ A search or seizure order requested by an investigation officer of the Authority shall be granted by an adjudicative bench of the Authority in accordance with the relevant provisions of the Criminal Procedure Code.

4/ An investigation officer of the Authority may, while conducting investigation:

- a) enter into the business premises of the suspect or any other place where goods are stored or stop a vehicle loaded with goods and conduct search;
- b) take samples of goods necessary for the investigation;
- c) examine and take copies of records and documents kept in any form;
- d) seize goods illegally stored or being transported or seal their storage or container.

5/ Any investigation officer of the Authority shall show the authorization issued to him to conduct investigation to the owner or representative of the business establishment, storage or vehicle subjected to the investigation.

6/ The owners, officials and employees of business establishments shall have the obligation to cooperate in the conduct of investigations in accordance with this Article.

### **37. Institution of Action**

1/ An action:

- a) for taking administrative measures and imposing administrative penalty by the adjudicative bench of the Authority; or
- b) for imposing criminal penalty by the competent federal court;

shall be instituted by a prosecutor of the Authority based on the findings of an investigation conducted pursuant to Article 36 of this Proclamation.

2/ Any business person who has sustained damages arising from an act of unfair competition and claims payment of compensation may institute an action before the adjudicative bench of the Authority.

3/ Any consumer who claims payment of compensation pursuant to Article 14 of this Proclamation may institute an action before an adjudicative bench of the Authority in the case of a transaction conducted in the Addis Ababa or the Dire Dawa city administrations or before the regional consumer protection judicial organ in the case of a transaction conducted in a region.

4/ The provisions of the Criminal Code on discontinuance and extinction of prosecution and penalty shall also apply to the institution of an action pursuant to sub-article (1) (a) of this Article.

### **38. Adjudication**

1/ The adjudicative benches of the Authority, the Federal Appellate Tribunal, regional consumers protection judicial organs and regional appellate tribunals shall have the powers, in discharging their judicial functions:

- a) to order any person to furnish information and submit documents that may be required;
- b) to summon any witness to appear and testify;
- c) to execute their decisions and orders;
- d) to order the police or any other appropriate organ; and
- e) to order the attachment, seizure and sale of goods.

2/ An adjudicative bench of the Authority shall consider the following factors in determining administrative penalty or administrative measure:

- a) the nature, duration, gravity and extent of the offence;
- b) the damage suffered as a result of the offence;
- c) the market circumstances in which commission of the offence took place;
- d) the benefit derived from the offence;
- e) the economic status of the offender;
- f) the degree to which the offender cooperated with the Authority during the investigation;  
and
- g) the previous behavior and criminal records of the offender.

### **39. Appeal**

1/ Any person aggrieved by the decision of the Authority to prohibit merger or to revoke merger approval or to ban a commercial advertisement or by any decision of an adjudicative bench of the Authority may appeal to the Federal Appellate Tribunal within 30 days from the date of the decision.

2/ The decision of the Federal Appellate Tribunal on an appeal submitted to it pursuant to sub-article (1) of this Article shall be final; provided, however, that a party that claims the existence of mistake on question of law regarding a decision passed pursuant to Article 33(3) of this Proclamation may lodge his appeal to the Federal Supreme Court within 30 days from the date of the decision.

### **40. Adjudication Fees**

1/ Any person other than government organ shall pay adjudication fee to institute an action before the adjudicative bench of the Authority or to lodge an appeal before the Federal Appellate Tribunal.

2/ The adjudication tariff shall be determined by the Council of Ministers.

### **41. Applicability of Procedural Laws**

The provisions of the Civil Procedure or the Criminal Procedure Codes shall, as may be appropriate, be applicable in conducting adjudication pursuant to this Proclamation.

## **PART SIX**

### **MISCELLANEOUS PROVISIONS**

### **42. Administrative Penalties**

1/ Any business person who violates the provision of Article 5 of this Proclamation shall be punished with a fine from 5% up to 10% of his annual turnover.

2/ Any business person who violates the provisions of sub-article (1) or (2) of Article 7 of this Proclamation shall be punished with a fine of 10% of his annual turnover.

3/ Any business person who violates the provisions of Article 8 of this Proclamation shall be punished with a fine from 5% up to 10% of his annual turnover.

4/ Any business person who participates in a merger in violation of the provisions from Article 9 to Article 13 of this Proclamation shall be punished with a fine from 5% up to 10% of his annual turnover.

5/ Where the direct or indirect participation of a person other than a business person in the offences mentioned from sub-article (1) to (4) of this Article has been ascertained, he shall be punished with a fine from Birr 10,000 to Birr 100,000.

6/ If a person who participated in the commission of an offence provided for under sub-article (2) of this Article gives adequate information, that may not otherwise be obtained, on the commission of the offence and the role of the major participants, the Authority may exempt the person from prosecution pursuant to this Proclamation.

### **43. Criminal Penalties**

1/ Any business person or any person other than a business person who fails to observe, administrative measure ordered by the adjudicative bench of the Authority pursuant to Article 32(1)(a) of this Proclamation or, penalty imposed by the Federal Appellate Tribunal pursuant to Article 33(3) of this Proclamation or, decision or order of the Federal Supreme Court in its appellate jurisdiction pursuant to Article 39(2) of this Proclamation, shall be guilty of a criminal offence and punishable with rigorous imprisonment from 1 year to 5 years.

2/ Any business person who violates Article 22(6) or (10) of this Proclamation shall be punished with a fine from 7% up to 10% of his annual turnover and with rigorous imprisonment from 3 years to 7 years.

3/ Any business person who violates any of the provisions of Article 22 of this Proclamation other than sub-article (6) and (10) shall be punished with a fine from 5% up to 10% of his annual turnover and with rigorous imprisonment from 1 year to 5 years.

4) Any business person who has been found hoarding or diverting or transporting goods in violation of Article 24 of this Proclamation shall, in addition to confiscation of the goods, be punished with a fine from 5% up to 10% of his annual turnover and with rigorous imprisonment from 1 year to 5 years.

5) Any driver of a vehicle who participated in hoarding or diverting or illegally transporting goods in violation of Article 24 of this Proclamation shall be punished with a fine from Birr 10,000 to Birr 50,000. The vehicle shall be confiscated with the goods if it is constructed, adopted or fitted with a compartment to conceal goods or the owner of the means of transport, being aware of the illegal transportation, fails to take appropriate measure to prevent or stop the commission of the act.

6) Any business person or any person other than a business person who violates the provisions of this Proclamation other than those provided from sub-article (1) to (5) of this Article or the provisions of regulations, directives or public notice issued to implement this Proclamation shall be punished with a fine from Birr 5,000 to Birr 50,000 and with simple imprisonment.

7/ Any person who opposes, obstructs or unduly influences an investigation process of the Authority shall be guilty of a criminal offence and be punished with simple imprisonment.

8/ The federal court hearing a criminal action regarding an offence committed in violation of sub-article (1) of this Article may not have the power to examine the merit of the decision of the adjudicative bench of the Authority other than examining the observance or non-observance of the administrative measure or penalty imposed by the bench.

9/ The criminal penalty imposed pursuant to sub-article (1) and (8) of this Article may not affect the execution of the administrative measures taken, and the penalty imposed, by the adjudicative bench of the Authority.

#### **44. Budget**

The budget of the Authority shall be allocated by the government.

#### **45. Books of Accounts**

1/ The Authority shall be keep complete and accurate books of accounts.

2/ The books of accounts and financial documents of the Authority shall be audited annually by the Federal Auditor General or by an auditor designated by him.

#### **46. Power to Issue Regulations and Directives**

1/ The Council of Ministers may issue regulations necessary for the implementation of this Proclamation.

2/ The Ministry may issue directives and public notices necessary for the implementation of this Proclamation and regulations issued pursuant to sub-article (1) of this Article.

#### **47. Repealed Laws**

1/ The Trade Practice and Consumers Protection Proclamation No. 685/2010 is hereby repealed.

2/ No law or customary practice may, in so far as it is inconsistent with this Proclamation, be applicable with respect to matters provided for by this Proclamation.

#### **48. Transitory Provisions**

1/ Directives and public notices issued pursuant to the Trade Practice Proclamation No. 329/2003 and the Trade Practice and Consumers Protection Proclamation No. 685/2010 shall remain in force until they are replaced by directives and public notices to be issued pursuant to this Proclamation.

2/ Cases pending before the Trade Practice and Consumers Protection Authority pursuant to the Trade Practice Proclamation No.329/2003 and the Trade Practice and Consumers Protection Proclamation No.685/2010 shall be handled by the Authority in accordance with this Proclamation.

#### **49. Effective Date**

This Proclamation shall enter into force on the date of publication in the Federal Negarit Gazette.

Done at Addis Ababa, this 21 st day of March , 2014.

MULATU TESHOME (DR.)

PRESIDENT OF THE FEDERAL

DEMOCRATIC REPUBLIC OF ETHIOPIA

# **FIJI**

## **COMMERCE ACT 1998**

### **ARRANGEMENT OF SECTIONS**

#### **SECTION**

#### **Part 1-PRELIMINARY**

- 1 Short title
- 2 Commencement
- 3 Interpretation
- 4 Regulated industries - declarations

#### **Part 2-COMMERCE COMMISSION**

- 5 Establishment of Commission
- 6 Membership of Commission
- 7 Associate members
- 8 Procedure of Commission
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**ACT NO. 50 OF 1998**

I assent.

K. K. T. MARA  
President

[9 November 1998]

**AN ACT  
TO PROMOTE COMPETITION IN MARKETS IN THE FIJI ISLANDS**

**ENACTED** by the Parliament of the Fiji Islands

**Part 1-PRELIMINARY**

*Short title*

1. This Act may be cited as the Commerce Act 1998.

*Commencement*

2. This Act commences on a date appointed by the Minister and published in the *Gazette*.

*Interpretation*

- 3.-(1) In this Act, unless the contrary intention appears-

"access agreement" means an agreement under an access regime for the granting of access to infrastructure facilities, or to services provided by means of infrastructure facilities;

"access regime" means a scheme (whether of a legislative or administrative nature, or any other nature) set up to permit third-party access to infrastructure facilities, or to a service provided by means of infrastructure facilities, that are wholly or substantially owned, controlled or operated by a single person;

"Chairperson" means the Chairperson of the Commission;

"Commission" means the Commerce Commission established by Section 5;

"Deputy Chairperson" means the Deputy Chairperson of the Commission;

"determination" means an arbitration determination under section 28;

"document" means a document in any form whether signed or initialled or otherwise authenticated by its maker or not, and includes-

material on which there is writing or printing;

information recorded or stored by means of any tape-recorder, computer or other device and material subsequently derived from information so recorded or stored;

(a) a label, marking or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;

(b) a book, map, plan, graph or drawing; and

(c) a photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of other equipment) of being reproduced;

"Fair Trading Decree" means the Fair Trading Decree 1992;

"financial year" in relation to the Commission, means a period of 12 months commencing on 1 January;

"government agency" means a government entity, within the meaning of the Public Enterprise Act 1996, that supplies services to the public or any part of the public;

"member" means a member of the Commission;

"referring authority" in relation to a regulated industry, means the Minister having responsibility for that industry;

"regulated industry" means-

(a) an industry engaged in the supply of electricity, water, sewerage, post, broadcasting, telecommunications, ports or civil aviation services; or

(b) any other industry that is declared under Section 4 to be a regulated industry.

(2) Unless the contrary intention appears, a word or phrase used in this Act that is defined in the Fair Trading Decree has the same meaning as it has in that Decree.

(3) For the purposes of the definition of "access regime" in subsection (1) a service includes-

(a) the use of an infrastructure facility (such as a road or railway);

(b) the handling or transporting of things (such as goods or people); and

(e) a communications service or similar service; but does not include-

(d) the supply of goods; or

(e) the use of intellectual property or a production process, except to the extent that supply or use is an integral but subsidiary part of the service.

(4) If two or more persons jointly own, control or operate infrastructure facilities-

(a) a reference in this Act to the ownership, control or operation of infrastructure facilities includes a reference to the jointly owned, controlled or operated infrastructure facilities; and

(b) a reference in this Act to a person who owns, controls or operates infrastructure facilities includes a reference to each joint owner, controller or operator.

(5) If two or more persons jointly provide services-

(a) a reference in this Act to the provision of services includes a reference to the jointly provided services; and

(b) a reference in this Act to a person who provides services includes a reference to each joint provider.

#### *Regulated industries- declarations*

4.-(1) Any Minister may, by instrument, declare an industry to be a regulated industry for the purposes of this Act.

(2) A Minister may make a declaration under subsection (1) if he or she is satisfied that-

(a) the industry infrastructure facilities are in whole or in part owned, controlled or operated by the State or by a government agency;

(b) the industry involves the provision of services in whole or in part by or on behalf of the State or a government agency;

(c) the industry infrastructure facilities are wholly or substantially owned, controlled or operated by a single person; or

(d) the industry involves the provision of services wholly or substantially by or on behalf of a single person.

(3) A declaration under subsection (1) must be made by order published in the *Gazette*.

## **Part 2-THE COMMERCE COMMISSION**

### *Establishment of Commission*

5.-(1) This section establishes the Commerce Commission.

(2) The Commission-

(a) is a body corporate, with perpetual succession;

(b) must have a common seal;

(c) may acquire, hold and dispose of real and personal property; and

(d) may sue and be sued in its corporate name.

(3) The common seal of the Commission is to be kept in such custody as the Commission directs and must not be used except as authorised by the Commission.

(4) All courts, judges and persons acting judicially must take judicial notice of the common seal of the Commission affixed to a document and must presume that it was duly affixed.

#### *Membership of Commission*

6.-(1) The Commission consists of not less than 3 nor more than 5 members.

(2) The members are appointed by the Minister.

(3) One member is to be appointed as Chairperson and another is to be appointed as Deputy Chairperson.

(4) A person must not be appointed as a member unless, in the opinion of the Minister, he or she is qualified for appointment, having regard to the functions of the Commission, by virtue of his or her knowledge of or experience in industry, commerce, economics, law, accountancy, public administration, or consumer affairs.

(5) A member holds office for such term, not exceeding 5 years, as the Minister specifies in the member's instrument of appointment but is eligible for reappointment.

(6) A member is entitled to be paid such remuneration by way of fees, salary or allowances as is fixed from time to time by the Higher Salaries Commission.

(7) Members are to be paid such travelling allowances and expenses as the Minister approves from time to time.

(8) An act or decision of the Commission is not invalid merely because of a defect or irregularity, in, or in connection with, the appointment of a member or a vacancy in the office of a member.

(9) Schedule 1 has effect with respect to the members of the Commission.

#### *Associate members*

7.-(1) The Minister may from time to time appoint a person to be an associate member of the Commission.

(2) An associate member is to be appointed-

(a) only in relation to a matter or class of matters specified in the member's instrument of appointment; and

(b) for such period, not exceeding 3 years, as is specified in the instrument.

(3) Subject to subsection (4), an associate member is taken to be a member for the purposes of the performance by the Commission of a function of the Commission and, unless the contrary intention appears, a reference in this Act to a member includes a reference to an associate member.

(4) An associate member may attend and vote only at a meeting of the Commission relating to the matter or class of matters specified in the member's instrument of appointment (including a meeting at which matters incidental to that matter or class of matters are considered).

#### *Procedure of Commission*

8. Schedule 2 has effect with respect to the procedure of the Commission.

#### *Objectives in relation to access*

9. The Commission has the following objectives in relation to regulated industries and access regimes-

(a) to promote effective competition in the interests of consumers;

(b) to facilitate an approximate balance between efficiency and environmental and social considerations;

(c) to ensure non-discriminatory access to monopoly and near monopoly infrastructure or services.

#### *Functions*

10.-(1) The Commission has the following functions in relation to regulated industries-

(a) the provision of advice to the Minister about proposed access agreements;

(b) the maintenance of a register of access agreements;

(c) the facilitation of negotiations about access to infrastructure facilities or services under access regimes;

(d) the arbitration of disputes about access to infrastructure facilities or services under access regimes;

(e) if, under a law relating to a regulated industry, the referring authority delegates to the Commission the power to impose, modify or revoke conditions in respect of licences granted under that law - the imposition, modification and revocation of those conditions in accordance with the relevant delegation;

(f) any other function conferred on the Commission by or under this or another law.

- (2) The Commission has the following functions in relation to the Fair Trading Decree-
- (a) to administer those provisions of the Decree in respect of which functions are conferred on it on or under the Decree;
  - (b) to facilitate the operation of the Decree.
- (3) The Commission has such other functions as are conferred on it by or under this Act or any other written law.

*Commission not subject to Ministerial control*

11. Except as provided by this Act, the Commission is not subject to the control or direction of the Minister or any other referring authority in the performance of its functions.

*Staff of Commission*

12.-(1) The Commission may from time to time appoint such employees (including employees on secondment from other organisations) as it thinks necessary for the efficient performance of its functions and, subject to subsection (2), may at any time terminate or suspend the employment of any employee.

(2) Employees are to be employed on such terms and conditions and are to be paid such salaries and allowances as the Commission from time to time determines.

(3) The Commission may arrange for the use of the services of any staff or facilities of a government agency.

*Arrangements with other entities*

13.-(1) The Commission may enter into arrangements with any government agency, or other body or person (whether in the public or private sector), for the provision of assistance to the Commission in connection with the performance of the functions of the Commission.

(2) The Commission may engage consultants to assist it in the performance of its functions.

*Delegation of Commission's functions*

14.-(1) Subject to this section, the Commission may, in writing, delegate its functions to any member, to any member of the staff of the Commission or to any committee of persons (whether of members only or members and other persons).

(2) The Commission may not delegate its function of providing advice about proposed access agreements to a committee that includes persons who are not members of the Commission.

(3) If the Commission is conducting an arbitration, it must not delegate its function of making a determination in relation to the arbitration.

### *Bank accounts*

15.-(1) The Commission must open at one or more banks such accounts as are necessary for the performance of its functions.

(2) Money received by the Commission or by any officer or employee on behalf of the Commission, must, as soon as practicable after it has been received, be paid into such bank account opened under subsection (1) as the Commission from time to time determines.

(3) The withdrawal or payment of money from an account opened under subsection (1) must be authorised by prior resolution of the Commission or must be submitted to the Commission for confirmation as soon as practicable after the withdrawal or payment.

(4) The withdrawal or payment of money from an account opened under subsection (1) may be made only by such person or persons as the Commission from time to time authorises.

### *Funds of Commission*

16.-(1) The funds of the Commission consist of-

(a) all money appropriated by the Parliament for the purposes of the Commission and paid to it for those purposes;

(b) all other money lawfully received by the Commission for the purposes of the Commission; and

(c) all accumulations of income derived from money referred to in paragraph (a) or (b).

(2) All fees, salaries, wages, allowances, expenses and other expenditure payable or incurred under, or in administration of, this Act are payable out of money appropriated by the Parliament for the purpose.

### *Exemption from certain taxes and duties*

17.-(1) The income of the Commission is exempt from income tax.

(2) The Commission is exempt from stamp duty on all instruments executed by it or on its behalf.

### *Annual report*

18.-(1) Within 4 months after the end of each financial year, the Commission must prepare a report of its activities during that financial year (annual report).

(2) The Commission must send a copy of the annual report to the Minister who must cause it to be laid before parliament as soon as practicable.

(3) The annual report must contain, among other things-

(a) details of-



- (i) advice about proposed access agreements;
- (ii) the number of access agreements notified;
- (iii) arbitration disputes;
- (iv) determinations of arbitration disputes;
- (v) the number of notices issued under section 37;
- (vi) the general use made by the Commission, of information and documents obtained as a result of notices issued under section 37;
- (b) information about the activities of the Commission under Part 5;
- (c) information about the performance of the Commission's functions under Part VIIIA of the Fair Trading Decree and under any other provisions of that Decree that confer functions on the Commission;
- (d) an audited statement of accounts prepared in accordance with generally accepted accounting practice as determined by the Fiji Institute of Accountants;
- (e) a statement of the Commission's financial performance, including a statement of the financial position;
- (f) a statement of cashflows;
- (g) any other information required to give a true and fair view of the Commission's financial affairs; and
- (h) a copy of the auditor's report.

### **Part 3-ACCESS AGREEMENTS**

#### *Notice of access agreements*

19.-(1) A person who proposes to enter into an access agreement in relation to-

- (a) infrastructure facilities in a regulated industry; or
- (b) services in a regulated industry provided by means of infrastructure facilities,

being facilities or services that are wholly or substantially owned, controlled or operated by the person, must notify the Commission of the proposal at least 30 days before entering into the agreement.

(2) A person who notifies the Commission under subsection (1) must, at the request of the

Commission, give the Commission a copy of the proposed access agreement and any requested details of the proposal.

(3) The Commission may give advice about the proposal to-

(a) the person who noticed the proposal; and

(b) the Minister.

#### *Registration of access agreements*

20.-(1) A person who enters into an access agreement in relation to -

(a) infrastructure facilities in a regulated industry; or

(b) services in a regulated industry provided by means of infrastructure facilities,

being facilities or services that are wholly or substantially owned, controlled or operated by the person, must notify the Commission of that fact.

(2) A person who notifies the Commission under subsection (1) must, at the request of the Commission, give the Commission a copy of the access agreement and any requested details of the agreement.

(3) The Commission must register an access agreement provided under subsection (2) in the register referred to in section 22, including in the record of registration:

(a) the names of the parties to the agreement;

(b) the regulated industry, and the particular services, to which it relates;

(c) the date on which it was made;

(d) any other details prescribed by the regulations.

#### *Failure to notify proposals and agreements*

21.-(1) If a person fails to notify the Commission under section 19 of a proposal for an access agreement, or under section 20 of entering into an access agreement, the Commission may request the person to provide the Commission with written reasons for the failure.

(2) The Commission must give a report to the Minister about a failure to notify a proposal for an access agreement or the entering into of an access agreement, and include in the report any reasons provided under subsection (1).

(3) A failure to comply with section 19 or 20, or a failure by the Commission to give advice under section 19, does not affect the validity of the agreement.

*Register of agreements*

22.-(1) The Commission must maintain a register of agreements for the purposes of this Part.

(2) The Commission must make the register maintained under subsection (1) available for inspection by any person during the office hours of the Commission or such other hours as are prescribed by the regulations.

**Part 4-ARBITRATION OF ACCESS REGIME DISPUTES**

*Interpretation*

23. In this Part-

"access provider" means the person that, under an access regime, wholly or substantially owns, controls or operates the infrastructure facilities or services concerned;

"third party", in relation to infrastructure facilities or services, means a person who desires access to the infrastructure facilities or the services, or desires a change to some aspect of that access.

*Negotiations on access*

24.-(1) If an access provider and a third party propose to negotiate, or are negotiating, with a view to-

(a) agreeing on terms and conditions for access to infrastructure facilities or services; or

(b) agreeing on a variation of an access agreement to which they are parties,

either or both of them may request the Commission to arrange for a representative of the Commission to attend the negotiations.

(2) The Commission must comply with a request or requests under subsection (1) by taking steps to ensure that-

(a) a member of the Commission;

(b) a member of the staff of the Commission; or

(c) a person whose services are made available to the Commission under subsection 12(3),

attends the negotiations on its behalf with a view to facilitating agreement between the parties.

*Arbitration of access disputes*

25.-(1) If a dispute exists with respect to an access regime, a party to the dispute may refer the dispute to arbitration under this Part.

(2) The Arbitration Act (Cap. 38) applies to an arbitration under this Part subject to this Part and the regulations.

(3) A dispute is taken to exist with respect to an access regime if-

(a) the third party and the access provider are unable to agree about any aspect of access to the infrastructure facilities or the services provided under that regime; or

(b) the third party and the access provider are unable to agree about a variation of an existing determination.

(4) The parties to a dispute referred to arbitration under this Part are the third party and the access provider.

#### *Appointment and functions of arbitrator*

26.-(1) The Commission, or a person appointed under subsection (2), may act as arbitrator to hear and determine a dispute referred to arbitration under this Part.

(2) The Commission may appoint one or more persons to act as arbitrators to hear and determine a dispute referred to arbitration under this Part.

(3) If a dispute involves a third party who desires, but does not have, access to infrastructure facilities or services, the arbitrator must give public notice of the dispute. The notice must invite submissions to the arbitrator from the public concerning the dispute and specify when and how those submissions may be made.

(4) in the arbitration of a dispute referred under this Part, or in the variation of an existing determination, the arbitrator must take into account-

(a) the access provider's legitimate business interests and investment in the infrastructure facilities or services;

(b) the costs to the access provider of providing access, including any costs of extending the facilities but not costs associated with losses arising from increased competition in upstream or downstream markets;

(c) the terms of access for the third party;

(d) the economic value to the access provider of any additional investment that the third party or the access provider has agreed to undertake;

(e) the interests of all persons holding contracts for use of the facilities;

(f) firm and binding contractual obligations of the access provider and other persons already using the facilities or services;

(g) the operational and technical requirements necessary for the safe and reliable operation of the

facilities or services;

(h) the economically efficient operation of the facilities or services;

(i) the benefit to the public from having competitive markets;

(j) whether, if the access provider were required or permitted to extend the infrastructure facilities, the extension should be technically and economically feasible and consistent with the safe and reliable operation of the facilities;

(k) the compensation (if any) which should be paid to the access provider;

(l) in a case to which subsection (3) applies any submissions made concerning the dispute by the public;

(m) any other matters that the arbitrator considers relevant.

(5) Parts 16 and 7 apply in relation to an arbitration as if references in those parts to the Commission were references to the arbitrator.

*Previous activities as member of Commission do not disqualify  
member from acting as arbitrator*

27. A member is not disqualified from acting as an arbitrator to hear and determine a dispute referred to arbitration under this Part merely because, under section 24, the member represented the Commission at negotiations about the matter for arbitration.

*Determination of dispute by arbitrator*

28.-(1) The arbitrator must determine the dispute by making a written determination on access to the infrastructure facilities or the services by the third party.

(2) A determination under subsection (1) may deal with any matter relating to access by a third party to the infrastructure facilities or the services, including matters that were not the basis for notification of the dispute and matters such as-

(a) a requirement that the access provider give the third party access to specified infrastructure facilities or services;

(b) a requirement that the third party accept, and pay for, access to the infrastructure facilities or services;

(c) a determination of the terms and conditions of access to the infrastructure facilities or services;

(d) a requirement that the access provider extend the infrastructure facilities; (e) a determination of the extent to which the determination is to override any earlier determination relating to access to the infrastructure facilities or services by the third party.

(3) The determination need not require the provider to provide access to the infrastructure facilities or services by the third party.

*Parties required to give effect to determination*

29.-(1) The parties to an arbitration must give effect to a determination under section 28.

(2) If the determination is in favour of the third party's access to infrastructure facilities or services, the access provider must not engage in conduct for the purpose of preventing or hindering the third party's access to the infrastructure facilities or services under the determination.

*Termination of arbitration*

34.-(1) An arbitrator may, without making a determination, terminate the arbitration at any time if the arbitrator thinks that any of the following grounds exists-

(a) the notification of the dispute was vexatious;

(b) the subject-matter of the dispute was trivial, misconceived or lacking in substance;

(c) the party who notified the dispute has not engaged in negotiations in good faith,

(d) access to the infrastructure facilities or services should continue to be governed by an existing contract between the access provider and the third party;

(e) if the dispute is about varying an existing determination - there is no sufficient reason why the previous determination should not continue to have effect in its present form.

**Part 5-CONTROL OF PRICES**

*Interpretation*

31. In this Part, unless the contrary intentions appears-

"controlled goods or services" means goods or services in respect of which an Order is for the time being in force;

"order" means an order made under section 32.

*Minister may impose price control in circumstances of restricted competition*

32.-(1) The Minister may, on a recommendation of the Commission, by Order declare that the prices for goods or services specified in the order are controlled in accordance with this pct.

(2) The Commission must not make a recommendation under subsection (1) unless it is satisfied that-

(a) goods or services to which the recommendation relates are or will be supplied or acquired in a

market in which competition is limited or is likely to be lessened; and

it is necessary or desirable for the prices of those goods or services to be controlled in accordance with this Act in the interests of users, consumers or suppliers.

(3) An Order may identify the goods or services to which it relates-

(a) by a description of the goods or services; or

(b) by a description of the class to which the goods or services belong.

(4) An Order may apply to goods and, with necessary modifications, to services-

(a) supplied in or for delivery within specified regions, areas, or localities in the Fiji Islands;

(b) supplied in different quantities, qualities, grades, or classes; or

(c) supplied by, or to, or for the use of different persons or classes of persons.

(5) Every Order must specify the date on which it expires.

*Commission may be required to report to Minister as to price control*

33.-(1) The Minister may, by notice in writing to the Commission, require it to report to the Minister, by such date as the Minister specifies, on whether an order should be extended, amended, varied or revoked.

(2) if the Commission is required by the Minister to report under subsection (1)-

(a) the Commission must cause to be published, in the *Gazette* and in any other manner as the Commission considers appropriate, a notice-

(i) stating that the requirement has been made and specifying the matter to which it relates; and

(ii) inviting interested persons to furnish their views on that matter to the commission, and specifying the time and manner within which they may do so; and

(b) the Commission must not submit a report to the Minister until it has given a reasonable opportunity to interested persons to furnish their views in accordance with paragraph (a)(ii).

(3) The Commission may, of its own motion, recommend to the Minister that an Order be extended, amended, varied or revoked.

(4) The Minister must cause a copy of every report submitted to the Minister by the Commission under this section to be published in such manner as he or she considers appropriate.

(5) Nothing in this section limits or affects the powers of the Minister under section 32.

*Controlled goods or services not to be supplied except  
in accordance with authorised price*

34.-(1) A person must not supply any controlled goods or services unless a price for those goods or services has been authorised by the Commission and the goods or services are supplied in accordance with the authorisation.

Penalty: \$50,000.

(2) Any provision of a contract, and any covenant, in contravention of subsection (1) is unenforceable.

*Records to be kept for pricing purposes*

35.-(1) A supplier of controlled goods or services must retain such accounts and costing records in relation to the controlled goods or services as the Commission from time to time specifies either in relation to suppliers of those goods or services generally or in relation to a particular supplier of the goods or services.

(2) A supplier of controlled goods or services must retain the accounts and records referred to in subsection (1) for a period of 3 years from the date of the revocation or expiry of the Order in respect of the controlled goods or services to which they relate.

Penalty: \$100,000

*Other laws relating to price control not affected*

36. Nothing in this Part or the Fair Trading Decree limits or affects the exercise by a person or body other than the Commission of a power under any other law to fix maximum prices for goods or services.

**Part 6-INFORMATION**

*Provision of information to Commission*

37.-(1) If the Commission has reason to believe that a person has information or a document that may assist it in performing its functions, it may, by written notice, require the person to give it the information or a copy of the document.

(2) A requirement under subsection (1) must-

(a) identify the information or document;

(b) specify the period within which the requirement is to be complied with;

(c) specify the form in which the information or the copy of the document is to be given to the Commission;



(d) state that it is made under this section; and

(e) be accompanied by a copy of this Part.

(3) A person must not, without reasonable excuse, fail to comply with a requirement under this section.

Penalty:

(a) if the offender is a natural person - \$1,000 and imprisonment for 12 months;

(b) if the offender is a body corporate - \$5,000.

(4) It is a reasonable excuse for the purposes of subsection (3) that to comply with the notice or to answer the question might tend to incriminate the person or make the person liable to any forfeiture or penalty.

#### *Restrictions on publication*

38.-(1) The Commission may, if satisfied that for any reason it is desirable to do so, give directions prohibiting or restricting the disclosure of matters contained in documents or information given to the Commission.

(2) A person must not contravene a direction under subsection (1).

Penalty:

(a) if the offender is a natural person - \$1,000 and imprisonment for 12 months,

(b) if the offender is a body corporate - \$5,000.

#### *Inspection of documents*

34.-(1) Notwithstanding section 38, the Commission must make a document (including any statement or document given to the Commission under section 37) available for inspection on request by a person unless-

(a) the document contains confidential information, and its disclosure is not otherwise permitted by this Part; or

(b) the Commission considers that the disclosure of information in the document could reasonably be expected to damage the commercial or other interests of the State, of the person who supplied the document or of a person who provides regulated services.

(2) In making a document available under subsection (1), the Commission may, if it considers that paragraph (a) or (b) of that subsection applies to any information in the document, do either or both of the following-

(a) make a part or parts only of the document available, or make the document available with a part or parts deleted, in order not to disclose that information;

(b) impose conditions on the availability of part or all of the document (for example, conditions limiting the availability to certain classes of persons or requiring persons not to reveal the contents of the part or document).

(3) A. person must not contravene a condition imposed under subsection (2)(b).

Penalty:

(a) if the offender is a natural person - \$1,0010;

(b) if the offender is a body corporate - \$5,000.

#### *Disclosure of confidential information*

40.-(1) A person must not disclose any confidential information obtained in carrying out the person's functions in relation to this Act, except in accordance with subsection (3).

Penalty:

(a) if the offender is a natural person - \$1,1000 and imprisonment for 12 months,

(b) if the offender is a body corporate - \$5,1000.

(2) A person must not use any confidential information obtained in carrying out the person's functions in relation to this Act to obtain, directly or indirectly, a pecuniary or other advantage for himself or herself or any other person, except in accordance with subsection (3).

Penalty:

(a) if the offender is a natural person-\$1,000 and imprisonment for 12 months;

(b) if the offender is a body corporate - \$5,1000.

(3) A person may disclose or use confidential information if

(a) the disclosure or use is made in the performance of a function in relation to this Act or any other law permitting such disclosure or use;

(b) the disclosure or use is made with the consent of the person who supplied the information;

(c) the disclosure or use is made in legal proceedings at the direction of a court; or

(d) the information is in the public domain at the time that it is disclosed.

(4) For the avoidance of doubt, subsection (3) does not override any right another person may

have with regard to the disclosure or use of the information.

*Confidential information - notice to show cause*

41.-(1) If the Commission proposes to disclose confidential information under section 42, it must first give any affected person written notice inviting the person to show cause, within 28 days after the date the notice is given, why the confidential information should not be disclosed.

(2) A notice under subsection (1) must contain-

(a) particulars of the proposed disclosure, including details of the person or persons to whom the confidential information is to be disclosed;

(b) particulars of the facts and circumstances relied upon by the Commission to justify the disclosure; and

(c) a statement to the effect that the affected person may, within 28 days after the day on which the notice is given, give the Commission particulars of the facts and circumstances relied on to show cause why the proposed disclosure ought not to be carried out.

(3) in this section-

"affected person" means-

(a) the supplier of the confidential information to the Commission; or

(b) any person who provided the confidential information to that supplier, if the Commission is aware of the identity and address of that person.

*Confidential information - general disclosure*

42.-(1) Subject to section 43, the Commission may only disclose confidential information if-

(a) it is of the opinion-

(i) that the disclosure would not cause detriment to the person who provided the information or document; or

(ii) that, although the disclosure would cause such detriment, the public benefit in disclosure outweighs the detriment;

(b) it is of the opinion, in relation to any other person who is aware of the information or the contents of the document-

(i) that the disclosure would not cause detriment to that person; or

(ii) that, although the disclosure would cause detriment to the person the public benefit in disclosure outweighs the detriment;

(c) it gives a notice to show cause in relation to the information or document under section 41; and

(d) 28 days have elapsed since the notice was given.

(2) in making a decision under subsection( 1), the Commission must take into account any representation made in accordance with the invitation in the notice under section 41.

(3) for the purposes of this section, the disclosure of anything that is in the public domain at the time the Commission proposes to disclose it is not to be taken to cause detriment to any person referred to in subsection (1)(a) or (b).

#### *Confidential information-disclosure within the Commission*

43.-(1) The Commission may disclose confidential information to any of the following persons for the purposes of the performance of its functions-

(a) a delegate of the Commission, or a member of a committee that is a delegate of the Commission;

(b) a member of staff of the Commission;

(c) a person, body or consultant with which or whom the Commission has entered into an arrangement as referred to in section 13.

(2) A person to whom confidential information is disclosed under subsection (1) may disclose the information to another person referred to in that subsection for the purposes of the performance of the functions of the Commission.

#### *Cabinet documents*

44. Nothing in this Act entitles the Commission-

(a) to require a person to give any statement or information or answer any question which relates to Cabinet proceedings;

(b) to require any person to produce an official record of Cabinet; or

(c) to inspect an official record of Cabinet.

### **Part 7-CO-OPERATION WITH THE COMMISSION**

#### *Attendance before Commission*

45. For the purpose of performing its functions the Commission may, by notice in writing served on a person, require the person to attend before the Commission to give evidence.

#### *Non-co-operation offences*

46.-(1) A person must not, without reasonable excuse -

(a) fail to comply with a notice served under section 45; or

(b) fail to answer a question that the Commission requires the person to answer for the purposes of this Act.

Penalty:

(a) if the offender is a natural person- \$1,010 and imprisonment for 12 months;

(b) if the offender is a body corporate - \$5,0100.

(2) It is a reasonable excuse for the purposes of subsection (1) that to comply with the notice or to answer the question might tend to incriminate the person or make the person liable to any forfeiture or penalty.

(3) A person must not-

(a) give to the Commission, whether orally or in writing information that the person knows to be false or misleading in a material particular; or

(b) give to the Commission evidence that the person knows to be false or misleading in a material particular.

Penalty:

(a) if the offender is a natural person - \$1,000 and imprisonment for 12 months;

(b) if the offender is a body corporate - \$5,000.

(4) A person must not hinder, obstruct or interfere with the Commission, a member of the Commission, a member of staff of the Commission or a person assisting the Commission in the performance of its functions.

Penalty:

(a) if the offender is a natural person - \$1,000 and imprisonment for 12 months;

(b) if the offender is a body corporate - \$5,000.

(5) A person must not-

(a) threaten, intimidate or coerce another person because the other person assisted, or intends to assist, the Commission in the performance of its functions; or

(b) take or threaten to take, incite or be otherwise involved in an action that causes another person

to suffer any loss, injury or disadvantage because the person assisted, or intends to assist, the Commission in the performance of its functions.

Penalty:

(a) if the offender is a natural person-\$1,000 and imprisonment for 12 months;

(b) if the offender is a body corporate - \$5,000.

(6) Civil proceedings do not lie against a person in respect of loss; damage or injury of any kind suffered by another person because of the making in good faith of a written or oral statement, or the giving in good faith of a document or information, to the Commission in the course of the performance (or purported performance) of its functions.

### **Part 8-ENFORCEMENT OF ARBITRATION DETERMINATIONS**

47. This Part applies if - application

(a) a person contravenes, or is, in the opinion of the Commission, likely to contravene, a determination; and

(b) the Commission considers that the contravention or likely contravention is not trivial.

#### *Orders*

48.-(1) If this Part applies in relation to a person, the Commission may serve an order on the person requiring the person to comply with the determination.

(2) If the Commission proposes to make an order in respect of a person, it must first give the person written notice inviting the person to show cause, within 28 days after the date of the notice, why the order should not be made.

(3) A notice under subsection (2) must contain -

(a) particulars of the proposed order;

(b) particulars of the facts and circumstances relied upon by the Commission to justify the order;

(c) a statement to the effect that the person may, within 28 days after the day on which the notice is given, give the Commission particulars of the facts and circumstances relied on to show cause why the proposed order should not be made.

(4) In considering whether to make an order in respect of a person, the Commission must take into account any representation made by the person pursuant to the invitation in the notice under subsection (2).

(5) The Commission must, as soon as possible after serving an order on a person, publish a copy of the order in the *Gazette*.

(6) A person must not, without reasonable excuse, contravene an order served on the person under subsection (1).

Penalty:

(a) in the case of a natural person - \$2,000;

(b) in the case of a body corporate- \$10,000.

(7) If a person is convicted of an offence against subsection (6) in relation to the contravention of an order, the person is, in respect of each day after the service of the order during any part of which that contravention continues, guilty of an offence punishable on conviction by a fine of-

(a) in the case of a natural person - \$200;

(b) in the case of a body corporate - \$1,000.

#### *Injunctions and declarations*

49. The Commission may apply to the High Court for an injunction or declaration (or both) in respect of an order served under subsection 48(1).

### **Part 9-MISCELLANEOUS**

#### *Conduct of directors, servants and agents*

50.-(1) When, for the purposes of this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show-

(a) that the conduct was engaged in by a director, servant or agent of the body within the scope of his or her actual or apparent authority; and

(b) that the director, servant or agent had the state of mind.

(2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body within the scope of his or her actual or apparent authority is taken, for the purposes of this Act, to have been engaged in also by the body unless the body establishes that took reasonable precautions and exercised due diligence to avoid the conduct.

(3) When, for the purposes of this Act, it is necessary to establish the state of mind of a natural person in relation to particular conduct, it is sufficient to show-

(a) that the conduct was engaged in by a servant or agent of the person within the scope of his or her actual or apparent authority; and

(b) that the servant or agent had the state of mind.

(4) Any conduct engaged in on behalf of a natural person by a servant or agent of the person within the scope of the servant's or agent's actual or apparent authority is taken, for the purposes of this Act, to have been engaged in also by the person unless he or she establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

(5) If-

(a) a natural person is convicted of an offence; and

(b) the person would not have been convicted of the offence in the absence of subsections (3) and (4), the person is not liable to be punished by imprisonment for that offence.

(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to-

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or purpose.

(7) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

#### *Personal liability of members etc*

51. A matter or thing done by the Commission, a member of the Commission or any person acting under the direction of the Commission does not, if the matter or thing was done in good faith for the purposes of executing this or any other law, subject the member or a person so acting personally to any action, liability, claim or demand.

#### *Service of documents on Commission*

52.-(1) A document may be served on the Commission by leaving it at, or by sending it by post to, the office of the Commission.

(2) Nothing in this section affects the operation of any provision of all law or of the rules of a court authorising a document to be served on the Commission in any other way.

#### *Regulations*

53.-(1) The Minister may make regulations prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The regulations may make provision for or with respect to the following matters-

(a) fees;

(b) the procedure of the Commission;



the arbitration of disputes under Part 4.

(3) The regulations may require the payment of fees-

(a) by recipients of services provided by the Commission; or

(b) to meet the costs of the arbitration of access disputes under Part 4.

(4) A regulation may create an offence punishable by a penalty not exceeding \$200.

**SCHEDULE 1**  
**PROVISIONS RELATING TO MEMBERS OF COMMISSION**  
(Section 6 (9))

*Deputy Chairperson and acting Deputy Chairperson*

1. The Deputy Chairperson may act as Chairperson-

(a) during a vacancy in the office of Chairperson, whether or not an appointment has previously been made to the office;

(b) during any period, or during all periods, when the chairperson is for any reason unable to perform the functions of the office; or

if the Chairperson considers it not proper or desirable that he or she adjudicate personally on a particular matter.

(2) If subparagraph (1) applies but the Deputy Chairperson is incapable of acting as Chairperson because-

(a) a vacancy exists in the office of the Deputy Chairperson;

(b) the Deputy Chairperson is for any reason unable to perform the functions of Chairperson; or

(c) the Deputy Chairperson considers it not proper or desirable that he or she adjudicate personally on a particular matter, the members may, by resolution, appoint one of their number to act as Chairperson for the period or purpose stated in the resolution.

(3) Anything done by a person purporting to act pursuant to subparagraph (1) or (2) is not invalid on the ground that-

(a) the appointment was ineffective or had ceased to have effect; or

(b) the occasion to act had not arisen or had ceased.

*Vacancy in office of member*

2.-(1) The office of a member becomes vacant if the member-

- (a) dies;
  - (b) completes a term of office and is not re-appointed;
  - (c) resigns the office by instrument in writing addressed to the Minister;
  - (d) is removed from office by the Minister under this clause;
  - (e) is absent from duty, except on leave of absence granted by the Minister, for 14 consecutive days or 28 days in any period of 12 months;
  - (f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;
  - (g) becomes mentally incapacitated; or
  - (h) is convicted in the Fiji Islands or elsewhere of an offence which is punishable in the Fiji islands by imprisonment for 12 months or more.
- (2) The Minister may remove a member from office for misbehaviour, incompetence, incapacity of failure to comply with paragraph 3.

*Disclosure of interests*

3. If a member takes part, or is to take part, in the consideration or determination of a matter in which the member has a direct or indirect pecuniary interest, the member-

- (a) must disclose the interest in writing to the Minister; and
- (b) must not continue to take part, or take part, in the consideration or determination of the matter.

**SCHEDULE 2**  
**PROVISIONS RELATING TO PROCEDURE**  
**OF COMMISSION AT MEETINGS**  
(Section 8)

*General Procedure*

1. Subject to this Act and the regulations, the procedure for the calling of meetings of the Commission and for the conduct of business at those meetings is as determined by the Commission.

*Chairperson to convene meeting*

2.-(1) The Chairperson must convene such meetings of the Commission as the Chairperson thinks necessary.

(2) Meetings of the Commission are to be held at such times and places as the Chairperson determines.

#### *Quorum*

3. The quorum for a meeting of the Commission is-

(a) if the Commission consists of three members - 2 members; and

(b) if the Commission consists of more than 3 members - 3 members,

one of whom is to be the Chairperson.

#### *Presiding member*

4.-(1) The Chairperson is to preside at a meeting of the Commission.

(2) The Chairperson has a deliberative vote and in the event of an equality of votes, has a second or casting vote.

#### *Voting*

5. A decision supported by a majority of the votes cast at a meeting of the Commission at which a quorum is present is the decision of the Commission.

#### *Transaction of business outside meetings or by telephone etc*

6.-(1) The Commission may, if it thinks fit transact any of its business by the circulation of papers among all the members for the time being, and a resolution in writing approved in writing by a majority of those members is taken to be a decision of the Commission.

(2) The Commission may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, closed-circuit television or other means, but only if any member who speaks on a matter before the meeting can be heard by the other members.

(3) For the purposes of-

(a) the approval of a resolution under subparagraph (1); or

(b) a meeting held in accordance with subparagraph (2),

the Chairperson and each member have the same voting rights as they have at an ordinary meeting of the Commission.

(4) A resolution approved under subparagraph (1) is, subject to the regulations, to be recorded in the minutes of the meetings of the Commission.

(5) Papers may be circulated among members for the purposes of subclause (1) by facsimile or other transmission of the information in the papers.

*Minutes*

7. The Commission, and any committee appointed by the Commission, must keep minutes of its meetings in proper form.

*First meeting*

8. The Minister may call the first meeting of the Commission in any manner as the Minister thinks fit.

Passed by the House of Representatives this 15th day of October 1998.

Passed by the Senate this 29th day of October 1998.

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**INDIA**

THE  
COMPETITION ACT,  
2002  
No. 12 OF 2003

as amended by

The Competition (Amendment) Act, 2007

2007

# THE COMPETITION ACT, 2002<sup>1</sup>

No. 12 OF 2003

[13th January, 2003.]

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:—

## CHAPTER I PRELIMINARY

Short title, extent and commencement

1. (1) This Act may be called the Competition Act, 2002.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Definitions

2. In this Act, unless the context otherwise requires,—
  - (a) "acquisition" means, directly or indirectly, acquiring or agreeing to acquire—
    - (i) shares, voting rights or assets of any enterprise; or
    - (ii) control over management or control over assets of any enterprise;

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<sup>1</sup> The following Act of Parliament received the assent of the President on the 13th January, 2003

- (b) "agreement" includes any arrangement or understanding or action in concert,—
- (i) whether or not, such arrangement, understanding or action is formal or in writing; or
  - (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;
- <sup>2</sup>[(ba)“Appellate Tribunal” means the Competition Appellate Tribunal established under sub-section (1) of Section 53A”]
- (c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;
- (d) "Chairperson" means the Chairperson of the Commission appointed under sub-section (1) of section 8;
- (e) "Commission" means the Competition Commission of India established under sub-section(1) of section 7;
- (f) "consumer" means any person who—
- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;
  - (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;
- (g) "Director General" means the Director General appointed under sub-section (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section;

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<sup>2</sup> Ins. by Competition (Amendment) Act, 2007

- (h) "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation.—For the purposes of this clause,— (a)

"activity" includes profession or occupation;

- (b) "article" includes a new article and "service" includes a new service; (c)

"unit" or "division", in relation to an enterprise, includes—

- (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
- (ii) any branch or office established for the provision of any service;

- (i) "goods" means goods as defined in the Sale of Goods Act, 1930 (3 of 1930) and includes—

(A) products manufactured, processed or mined; (B)

debentures, stocks and shares after allotment;

(C) in relation to goods supplied, distributed or controlled in India, goods imported into India;

- (j) "Member" means a Member of the Commission appointed under sub-section (/) of section 8 and includes the Chairperson;

- (k) "notification" means a notification published in the Official Gazette; (l)

"person" includes—

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) a company;



- (iv) a firm;
  - (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
  - (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
  - (vii) any body corporate incorporated by or under the laws of a country outside India;
  - (viii) a co-operative society registered under any law relating to cooperative societies;
  - (ix) a local authority;
  - (x) every artificial juridical person, not falling within any of the preceding sub-clauses;
- (m) "practice" includes any practice relating to the carrying on of any trade by a person or an enterprise;
- (n) "prescribed" means prescribed by rules made under this Act;
- (o) "price", in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing;
- (p) "public financial institution" means a public financial institution specified under section 4A of the Companies Act, 1956 (1 of 1956) and includes a State Financial, Industrial or Investment Corporation;
- (q) "regulations" means the regulations made by the Commission under section 64;
- (r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;
- (s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;
- (t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the

consumer, by reason of characteristics of the products or services, their prices and intended use;

- (u) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;
- (v) "shares" means shares in the share capital of a company carrying voting rights and includes—
  - (i) any security which entitles the holder to receive shares with voting rights;
  - (ii) stock except where a distinction between stock and share is expressed or implied;
- (w) "statutory authority" means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto;
- (x) "trade" means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services;
- (y) "turnover" includes value of sale of goods or services;
- (z) words and expressions used but not defined in this Act and defined in the Companies Act, 1956 (1 of 1956) shall have the same meanings respectively assigned to them in that Act.

CHAPTER II  
PROHIBITION OF CERTAIN AGREEMENTS, ABUSE OF DOMINANT  
POSITION AND REGULATION OF COMBINATIONS

Prohibition of agreements

Anti-competitive agreements

3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
- (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.
- (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
- (a) directly or indirectly determines purchase or sale prices;
  - (b) limits or controls production, supply, markets, technical development, investment or provision of services;
  - (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
  - (d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

- (a) tie-in arrangement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement; (d)  
refusal to deal;
- (e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

- (a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

- (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
  - (a) the Copyright Act, 1957 (14 of 1957);

- (b) the Patents Act, 1970 (39 of 1970);
  - (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
  - (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000);
  - (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
- (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

### Prohibition of abuse of dominant position

#### Abuse of dominant position

4. <sup>3</sup>[(1)No enterprise or group] shall abuse its dominant position.]

(2) There shall be an abuse of dominant position <sup>4</sup>[under sub-section (1), if an enterprise or a group].—

- (a) directly or indirectly, imposes unfair or discriminatory—
  - (i) condition in purchase or sale of goods or service; or
  - (ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

- (b) limits or restricts—
  - (i) production of goods or provision of services or market therefor; or
  - (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

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<sup>3</sup> Subs. by Competition (Amendment) Act, 2007 for “No enterprise shall abuse its dominant position.”

<sup>4</sup> Subs. by Competition (Amendment) Act, 2007 for “under sub-section (1), if an enterprise”

- (c) indulges in practice or practices resulting in denial of market access <sup>5</sup>[in any manner]; or
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

- (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—
  - (i) operate independently of competitive forces prevailing in the relevant market; or
  - (ii) affect its competitors or consumers or the relevant market in its favour.
- (b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

<sup>6</sup>[(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]

## Regulation of combinations

### Combination

5. The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—
  - (a) any acquisition where—
    - (i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—
      - (A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

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<sup>5</sup> Ins. by Competition (Amendment) Act, 2007

<sup>6</sup> Ins. by Competition (Amendment) Act, 2007

- (B)<sup>7</sup> [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]
- (ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—
- (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
- (B)<sup>8</sup> [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]
- (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—
- (i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,—
- (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
- (B)<sup>9</sup> [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

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<sup>7</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or”

<sup>8</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or”

<sup>9</sup> Subs. by Competition (Amendment) Act, 2007 for

“ in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or”

(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) <sup>10</sup>[in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) <sup>11</sup>[in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—

(A) either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or

(B) <sup>12</sup>[in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six



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- 10 Subs. by Competition (Amendment) Act, 2007 for  
“ in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or”
- 11 Subs. by Competition (Amendment) Act, 2007 for  
“ in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or”
- 12 Subs. by Competition (Amendment) Act, 2007 for:  
“in India or outside India, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars.

billion US dollars, including at least rupees fifteen hundred crores in India;]

Explanation.— For the purposes of this section,—

- (a) "control" includes controlling the affairs or management by—
- (i) one or more enterprises, either jointly or singly, over another enterprise or group;
  - (ii) one or more groups, either jointly or singly, over another group or enterprise;
- (b) "group" means two or more enterprises which, directly or indirectly, are in a position to —
- (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or
  - (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
  - (iii) control the management or affairs of the other enterprise;
- (c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

### Regulation of combinations

6. (1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.
- (2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or

which proposes to enter into a combination, <sup>13</sup>[shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within <sup>14</sup>[thirty days] of—

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<sup>13</sup> Subs. by Competition (Amendment) Act, 2007 for “may, at his or its option”

<sup>14</sup> Subs. by Competition (Amendment) Act, 2007 for “seven days”

- (a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
- (b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

<sup>15</sup>[(2A)No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier.]

- (3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.
- (4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.
- (5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Explanation.—For the purposes of this section, the expression—

- (a) "foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961(43 of 1961);
- (b) "venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of section 10 of the Income-tax Act, 1961(43 of 1961);

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<sup>15</sup> Ins. by Competition (Amendment) Act, 2007

CHAPTER III  
COMPETITION COMMISSION OF INDIA

Establishment of Commission

7. (1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India".
- (2) The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.
- (3) The head office of the Commission shall be at such place as the Central Government may decide from time to time.
- (4) The Commission may establish offices at other places in India.

Composition of Commission

- <sup>16</sup>[8.(1) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.
- (2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.
- (3) The Chairperson and other Members shall be whole-time Members.]

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<sup>16</sup> Subs. by Competition (Amendment) Act, 2007 for ;

“ (1) The Commission shall consist of a Chairperson and not less than two and not more than ten other Members to be appointed by the

Central Government:

Provided that the Central Government shall appoint the Chairperson and a Member

to act under the direction, superintendence and control of the Member Administration.”

during the first year of the establishment of the Commission.

- (2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has been, or is qualified to be a judge of a High Court, or, has special knowledge of, and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which, in the opinion of the Central Government may be useful to the Commission.
- (3) The Chairperson and other Members shall be whole-time Members.”

<sup>17</sup>[Selection Committee for Chairperson and Members of Commission]

<sup>18</sup>[9.(1)The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

- |    |                                                                                                                                                                                                                                                                     |      |              |
|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|--------------|
| a) | the Chief Justice of India or his nominee                                                                                                                                                                                                                           | ---- | Chairperson; |
| b) | the Secretary in the Ministry of Corporate Affairs                                                                                                                                                                                                                  | ---- | Member;      |
| c) | the Secretary in the Ministry of Law and Justice                                                                                                                                                                                                                    | ---- | Member;      |
| d) | two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy | ---- | Members.     |

(2) The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.]

#### Term of office of Chairperson and other Members

10. (1) The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment:

<sup>19</sup>[Provided that the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years]

to act under the direction, superintendence and control of the Member Administration.”

- (2) A vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 8 and 9.
- (3) The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed.
- (4) In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in

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<sup>17</sup> Subs. by Competition (Amendment) Act, 2007 for “Selection of Chairperson and other Members”

<sup>18</sup> Subs. by Competition (Amendment) Act, 2007 for:  
“The Chairperson and other Members shall be selected in the manner as may be prescribed.”

<sup>19</sup> Subs. by Competition (Amendment) Act, 2007 for:  
“Provided that no Chairperson or other Member shall hold office as such after he has attained- (a) in the case of the Chairperson, the age of sixty-seven years;  
(b) in the case of any other Member, the age of sixty-five years.”

accordance with the provisions of this Act to fill such vacancy, enters upon his office.

- (5) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.

#### Resignation, removal and suspension of Chairperson and other members

- 11.(1) The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:

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Provided that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

to act under the direction, superintendence and control of the Member Administration.”

- (2) Notwithstanding anything contained in sub-section (1), the Central Government may, by order, remove the Chairperson or any other Member from his office if such Chairperson or Member, as the case may be,—
- (a) is, or at any time has been, adjudged as an insolvent; or
  - (b) has engaged at any time, during his term of office, in any paid employment; or
  - (c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
  - (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or
  - (e) has so abused his position as to render his continuance in office prejudicial to the public interest; or
  - (f) has become physically or mentally incapable of acting as a Member.
- (3) Notwithstanding anything contained in sub-section (2), no Member shall be removed from his office on the ground specified in clause (d) or clause (e) of that subsection unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.

#### Restriction on employment of Chairperson and other Members in certain cases

12. The Chairperson and other Members shall not, for a period of <sup>20</sup>[two years] from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission under this Act:

Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).

<sup>21</sup>~~[Administrative powers of Chairperson]~~

- <sup>22</sup>[13. The Chairperson shall have the powers of general superintendence, direction and control in respect of all administrative matters of the Commission:

Provided that the Chairperson may delegate such of his powers relating to administrative matters of the Commission, as he may think fit, to any other Member or officer of the to act under the direction, superintendence and control of the Member Administration.

Commission.”]

Salary and allowances and other terms and conditions of service of Chairperson and other Members

14.(1) The salary, and the other terms and conditions of service, of the Chairperson and other Members, including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities shall be such as may be prescribed.

(2)The salary, allowances and other terms and conditions of service of the Chairperson or a Member shall not be varied to his disadvantage after appointment.

Vacancy, etc. not to invalidate proceedings of Commission

15. No act or proceeding of the Commission shall be invalid merely by reason of— (a)  
any vacancy in, or any defect in the constitution of, the Commission; or

<sup>20</sup> Subs. by Competition (Amendment) Act, 2007 for “one year”

<sup>21</sup> Subs. by Competition (Amendment) Act, 2007 for “Financial and administrative powers of Member Administration”

<sup>22</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ The Central Government shall designate any Member as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules made by the Central Government:

Provided that the Member Administration shall have authority to delegate such of his financial and administrative powers as he may think fit to any other officer of the Commission subject to the condition that such officer shall, while exercising such delegated powers continue

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to act under the direction, superintendence and control of the Member Administration.”

- (b) any defect in the appointment of a person acting as a Chairperson or as a Member; or
- (c) any irregularity in the procedure of the Commission not affecting the merits of the case.

Appointment of Director General, etc.

16. <sup>23</sup>[(1)The Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.
- (1A)The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees shall be such as may be prescribed.”]
- (2) Every Additional, Joint, Deputy and Assistant Directors General or <sup>24</sup>[such officers or other employees,] shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General.
- (3) The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, <sup>25</sup>[such officers or other employees,] shall be such as may be prescribed.
- (4) The Director General and Additional, Joint, Deputy and Assistant Directors General or <sup>26</sup>[such officers or other employees,] shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.



<sup>23</sup> Subs. by Competition (Amendment) Act, 2007 for :

“ The Central Government may, by notification, appoint a Director General and as many Additional, Joint, Deputy or Assistant Directors General or such other advisers, consultants or officers, as it may think fit, for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for the conduct of cases before the Commission and for performing such other functions as are, or may be, provided by or under this Act”

<sup>24</sup> Subs. by Competition (Amendment) Act, 2007 for “such other advisers, consultants and officers,”

<sup>25</sup> Subs. by Competition (Amendment) Act, 2007 for “such other advisers, consultants and officers,”

<sup>27</sup> [Appointment of Secretary, experts, professionals and officers and other employees of Commission]

<sup>28</sup> [17.(1) The Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

(2) The salaries and allowances payable to and other terms and conditions of service of the Secretary and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed.

(3) The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under this Act.]

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<sup>27</sup> Subs. by Competition (Amendment) Act, 2007 for “Registrar and officers and other employees of Commission”

<sup>28</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ (1) The Commission may appoint a Registrar and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act

(2) The salaries and allowances payable to and other terms and conditions of service of the Registrar and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed.”

CHAPTER IV  
DUTIES, POWERS AND FUNCTIONS OF COMMISSION

Duties of Commission

18. Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

Inquiry into certain agreements and dominant position of enterprise

19. (1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
- (a) <sup>29</sup>[receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
  - (b) a reference made to it by the Central Government or a State Government or a statutory authority.
- (2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).
- (3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—
- (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market;
  - (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers;

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<sup>29</sup> Subs. by Competition (Amendment) Act, 2007 for “receipt of a complaint,”

- (e) improvements in production or distribution of goods or provision of services;
  - (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.
- (4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—
- (a) market share of the enterprise;
  - (b) size and resources of the enterprise;
  - (c) size and importance of the competitors;
  - (d) economic power of the enterprise including commercial advantages over competitors;
  - (e) vertical integration of the enterprises or sale or service network of such enterprises;
  - (f) dependence of consumers on the enterprise;
  - (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
  - (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
  - (i) countervailing buying power;
  - (j) market structure and size of market; (k) social obligations and social costs;
  - (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
  - (m) any other factor which the Commission may consider relevant for the inquiry.
- (5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

- (6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—
- (a) regulatory trade barriers;
  - (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs;
  - (f) language;
  - (g) consumer preferences;
  - (h) need for secure or regular supplies or rapid after-sales services.
- (7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—
- (a) physical characteristics or end-use of goods; (b) price of goods or service;
  - (c) consumer preferences;
  - (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products.

#### Inquiry into combination by Commission

20. (1) The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India:

Provided that the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect.

- (2) The Commission shall, on receipt of a notice under sub-section (2) of section 6<sup>30</sup> [\*\*\*], inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.
- (3) Notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, by notification, enhance or reduce, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, the value of assets or the value of turnover, for the purposes of that section.
- (4) For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:—
- (a) actual and potential level of competition through imports in the market; (b) extent of barriers to entry into the market;
  - (c) level of combination in the market;
  - (d) degree of countervailing power in the market;
  - (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
  - (f) extent of effective competition likely to sustain in a market;
  - (g) extent to which substitutes are available or are likely to be available in the market;
  - (h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
  - (i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
  - (j) nature and extent of vertical integration in the market; (k) possibility of a failing business;
  - (l) nature and extent of innovation;
  - (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

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<sup>30</sup> The words “or upon receipt of a reference under sub-section (1) of section 21” omitted by Competition (Amendment) Act, 2007

- (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Reference by statutory authority

21. (1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission:

<sup>31</sup>[Provided that any statutory authority, may, suo motu, make such a reference to the Commission.]

<sup>32</sup>[(2)On receipt of a reference under sub-section (1), the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give its findings recording reasons therefor on the issues referred to in the said opinion.]

<sup>33</sup>[Reference by Commission]

<sup>34</sup>[21A.(1)Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

Provided that the Commission, may, suo motu, make such a reference to the statutory authority.

(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.]

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<sup>31</sup> Ins. by Competition (Amendment) Act, 2007

<sup>32</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ On receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit: Provided that the Commission shall give its opinion under this section within sixty days of receipt of such reference.”

<sup>33</sup> Ins. by Competition (Amendment) Act, 2007

<sup>34</sup> Ins. by Competition (Amendment) Act, 2007

<sup>35</sup> [Meetings of Commission]

<sup>36</sup> [22.(1) The Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations.

(2) The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote:

Provided that the quorum for such meeting shall be three Members.]

<sup>37</sup> 23. [Omitted by the Competition (Amendment) Act, 2007]

<sup>38</sup> 24. [Omitted by the Competition (Amendment) Act, 2007]

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<sup>35</sup> Subs. by Competition (Amendment) Act, 2007 for “Benches of Commission”

<sup>36</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ (1) The jurisdiction, powers and authority of the Commission may be exercised by Benches thereof.

(2) The Benches shall be constituted by the Chairperson and each Bench shall consist of not less than two Members. (3) Every Bench shall consist of at least one Judicial Member.

Explanation.—For the purposes of this sub-section, "Judicial Member" means a Member who is, or has been, or is qualified to be, a Judge of a High Court.

(4) The Bench over which the Chairperson presides shall be the Principal Bench and the other Benches shall be known as the Additional Benches.

(5) There shall be constituted by the Chairperson one or more Benches to be called the Mergers Bench or Mergers Benches, as the case may be, exclusively to deal with matters referred to in sections 5 and 6.

(6) The places at which the Principal Bench, other Additional Bench or Mergers Bench shall ordinarily sit, shall be such as the Central Government may, by notification, specify.”

<sup>37</sup> Prior to omission, Section 23 read as under:-

“ Distribution of business of Commission amongst Benches

(1) Where any Benches are constituted, the Chairperson may, from time to time, by order, make provisions as to the distribution of the business of the Commission amongst the Benches and specify the matters, which may be dealt with by each Bench.

(2) If any question arises as to whether any matter falls within the purview of the business allocated to a Bench, the decision of the

Chairperson thereon

shall be final. (3) The

Chairperson may

(i) transfer a Member from one Bench to another Bench , or

(ii) authorize the Members of one Bench to discharge also the functions of the Members of other Bench:

Provided that the Chairperson shall transfer, with the prior approval of the Central Government, a Member from one Bench situated in one city to another Bench situated in another city.

(4) The Chairperson may, for the purpose of securing that any case or matter which, having regard to the nature of the questions involved, requires or is required in his opinion or under the rules made by the Central Government in this behalf, to be decided by a Bench composed of more than two Members, issue such general or special orders as he may deem fit.”

<sup>38</sup> Prior to omission Section 24 read as under:

“ Procedure for deciding a case where Members of a Bench differ in opinion

If the Members of a Bench differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case, including those who first heard it.”

<sup>39</sup>25. [Omitted by the Competition (Amendment) Act, 2007]

<sup>40</sup>[Procedure for inquiry under section 19]

<sup>41</sup>[26.(1)On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the



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39 Prior to omission, Section  
25 read as under:

“ Jurisdiction of Bench

An inquiry shall be initiated or a complaint be instituted or a reference be made under this Act before a Bench within the local limits of

whose  
jurisdiction—

- (a) the respondent, or each of the respondents, where there are more than one, at the time of the initiation of inquiry or institution of the complaint or making of reference, as the case may be, actually and voluntarily resides, or carries on business, or personally works for gain;  
or
- (b) any of the respondents, where there are more than one, at the time of the initiation of the inquiry or institution of complaint or making of reference, as the case may be, actually and voluntarily resides or carries on business or personally works for gain provided that in such case either the leave of the Bench is given, or the respondents who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution;  
or
- (c) the cause of action, wholly or in part, arises.

Explanation.—A respondent, being a person referred to in sub-clause (iii) or sub-clause (vi) or sub-clause (vii) or sub-clause (viii) of clause (l) of section 2, shall be deemed to carry on business at its sole or principal place of business in India or at its registered office in India or where it has also a subordinate office at such place.”

40 Subs. by Competition (Amendment) Act, 2007 for “Procedure for inquiry on complaints under section 19”

41 Subs. by Competition (Amendment) Act, 2007 for:

“ Procedure for inquiry on  
complaints under Section 19

- (1) On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.
- (2) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.
- (3) Where on receipt of a complaint under clause (a) of sub-section (1) of section 19, the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it deems fit, including imposition of costs, if necessary.
- (4) The Commission shall forward a copy of the report referred to in sub-section (2) to the parties concerned or to the Central Government or the State Government or the statutory authority, as the case may be.
- (5) If the report of the Director General relates on a complaint and such report

- recommends that there is no contravention of any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director General.
- (6) If, after hearing the complainant, the Commission agrees with the recommendation of the Director General, it shall dismiss the complaint.
  - (7) If, after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.
  - (8) If the report of the Director General relates on a reference made under sub-section (/) and such report recommends that there is no contravention of the provisions of this Act, the Commission shall invite comments of the Central Government or the State Government or the statutory authority, as the case may be, on such report and on receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a prima facie case.
  - (9) If the report of the Director General referred to in sub-section (2) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.”

Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

- (3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.
- (4) The Commission may forward a copy of the report referred to in sub section (3) to the parties concerned:

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub- section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

- (5) If the report of the Director General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.
- (6) If, after consideration of the objections and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the

parties concerned, as the case may be.

- (7) If, after consideration of the objections or suggestions referred to in sub section (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.
- (8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.]

#### Orders by Commission after inquiry into agreements or abuse of dominant position

27. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

- (a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
- (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

<sup>42</sup>[Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.]

<sup>43</sup>(c) [Omitted by Competition (Amendment) Act, 2007]

- (d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- (e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;;

<sup>44</sup>(f) [Omitted by Competition (Amendment) Act, 2007]

(g) pass such other <sup>45</sup>[order or issue such directions] as it may deem fit.

<sup>46</sup>[Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause(b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.]

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<sup>42</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent. of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher;”

<sup>43</sup> Prior to omission, Clause (c) of Section 27 read as under:-

“award compensation to parties in accordance with the provisions contained in section 34;”

<sup>44</sup> Prior to omission, Clause (c) of Section 27 read as under:-

“recommend to the Central Government for the division of an enterprise enjoying dominant position;”

<sup>45</sup> Subs. by Competition (Amendment) Act, 2007 for “order”

<sup>46</sup> Ins. by Competition (Amendment) Act, 2007

#### Division of enterprise enjoying dominant position

28 (1) The <sup>47</sup>[Commission] may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

(2) In particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters, namely:—

(a) the transfer or vesting of property, rights, liabilities or obligations;

(b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;

(c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;

<sup>48</sup>(d) [Omitted by Competition (Amendment) Act, 2007]

(e) the formation or winding up of an enterprise or the amendment of the

memorandum of association or articles of association or any other instruments regulating the business of any enterprise;

- (f) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
- (g) any other matter which may be necessary to give effect to the division of the enterprise.

(3) Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser.

### Procedure for investigation of combination

29. (1) Where the Commission is of the <sup>49</sup>[prima facie] opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the

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<sup>47</sup> Subs. by Competition (Amendment) Act, 2007 for “Central Government, on recommendation under clause(f) of section 27”

<sup>48</sup> Prior to omission, clause (d) of sub-section(2) of section 28 read as under:-  
“the payment of compensation to any person who suffered any loss due to dominant position of such enterprise;”

<sup>49</sup> Ins. by Competition (Amendment) Act, 2007

receipt of the notice, as to why investigation in respect of such combination should not be conducted.

<sup>50</sup>[1(A)After receipt of the response of the parties to the combination under sub- section (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.]

(2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, <sup>51</sup>[or the receipt of the report from Director General called under sub section (1A), whichever is later] direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons

affected or likely to be affected by such combination.

- (3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published under sub-section (2).
- (4) The Commission may, within fifteen working days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.
- (5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within fifteen days from the expiry of the period specified in sub-section (4).
- (6) After receipt of all information and within a period of forty-five working days from the expiry of the period specified in sub-section (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31.

<sup>52</sup>[Procedure in case of notice under sub-section (2) of section 6]

<sup>53</sup>[30. Where any person or enterprises has given a notice under sub-section (2) of section 6, the Commission shall examine such notice and form its prima facie

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<sup>50</sup> Ins. by Competition (Amendment) Act, 2007

<sup>51</sup> Ins. by Competition (Amendment) Act, 2007

<sup>52</sup> Subs. by Competition (Amendment) Act, 2007 for “Inquiry into disclosure under sub-section(2) of section 6”

<sup>53</sup> Subs. by Competition (Amendment) Act, 2007 for:

“Where any person or enterprise has given a notice under sub-section (2) of section 6. The Commission shall inquire— (a) whether the disclosure made in the notice is correct;

(b) whether the combination has, or is likely to have, an appreciable adverse effect on competition.”

opinion as provided in sub-section (1) of section 29 and proceed as per provisions contained in that section.]

#### Orders of Commission on certain combinations

31. (1) Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under

sub-section (2) of section 6.

- (2) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.
  - (3) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination.
  - (4) The parties, who accept the modification proposed by the Commission under subsection (3), shall carry out such modification within the period specified by the Commission.
  - (5) If the parties to the combination, who have accepted the modification under subsection (4), fail to carry out the modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and the Commission shall deal with such combination in accordance with the provisions of this Act.
  - (6) If the parties to the combination do not accept the modification proposed by the Commission under sub-section (3), such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission under that sub-section.
  - (7) If the Commission agrees with the amendment submitted by the parties under subsection (6), it shall, by order, approve the combination.
  - (8) If the Commission does not accept the amendment submitted under sub-section (6), then, the parties shall be allowed a further period of thirty working days within which such parties shall accept the modification proposed by the Commission under sub-section (3).
  - (9) If the parties fail to accept the modification proposed by the Commission within thirty working days referred to in sub-section (6) or within a further period of thirty working days referred to in sub-section (8), the combination shall be deemed to
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have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of this Act.

(10) Where the Commission has directed under sub-section (2) that the combination shall not take effect or the combination is deemed to have an appreciable adverse effect on competition under sub-section (9), then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that—

- (a) the acquisition referred to in clause (a) of section 5; or
- (b) the acquiring of control referred to in clause (b) of section 5; or
- (c) the merger or amalgamation referred to in clause (c) of section 5, shall not be given effect to:

Provided that the Commission may, if it considers appropriate, frame a scheme to implement its order under this sub-section.

(11) If the Commission does not, on the expiry of a period of <sup>54</sup>[two hundred and ten days from the date of notice given to the Commission under sub-section (2) of section 6], pass an order or issue direction in accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (7), the combination shall be deemed to have been approved by the Commission.

Explanation.—For the purposes of determining the period of <sup>55</sup>[two hundred and ten] days specified in this subsection, the period of thirty working days specified in sub-section (6) and a further period of thirty working days specified in sub-section (8) shall be excluded.

(12) Where any extension of time is sought by the parties to the combination, the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties.

(13) Where the Commission has ordered a combination to be void, the acquisition or acquiring of control or merger or amalgamation referred to in section 5, shall be dealt with by the authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had not taken place and the parties to the combination shall be dealt with accordingly.

(14) Nothing contained in this Chapter shall affect any proceeding initiated or which may be initiated under any other law for the time being in force.

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<sup>54</sup> Subs. by Competition (Amendment) Act, 2007 for:  
“ninety working days from the date of publication referred to in sub-section(2) of section 29”



<sup>55</sup> Subs. by Competition (Amendment) Act, 2007 for "ninety days"

Acts taking place outside India but having an effect on competition in India

32. The Commission shall, notwithstanding that,—

- (a) an agreement referred to in section 3 has been entered into outside India; or
- (b) any party to such agreement is outside India; or
- (c) any enterprise abusing the dominant position is outside India; or
- (d) a combination has taken place outside India; or
- (e) any party to combination is outside India; or
- (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India,

have power to inquire <sup>56</sup>[in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act] into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India <sup>57</sup>[and pass such orders as it may deem fit in accordance with the provisions of this Act.]

<sup>58</sup>[Power to issue interim orders]

<sup>59</sup>[33. Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.]

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<sup>56</sup> Ins. by Competition (Amendment) Act, 2007

<sup>57</sup> Ins. by Competition (Amendment) Act, 2007

<sup>58</sup> Subs. by Competition (Amendment) Act, 2007 for "Power to grant interim relief"

<sup>59</sup> Subs. by Competition (Amendment) Act, 2007 for:

"(1) Where during an inquiry before the Commission, it is proved to the satisfaction of the Commission, by affidavit or otherwise, that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to

be committed or that such act is about to be committed, the Commission may, by order, grant a temporary injunction restraining any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to the opposite party, where it deems it necessary.

- (2) Where during the inquiry before the Commission it is proved to the satisfaction of the Commission by affidavit or otherwise that import of any goods is likely to contravene sub-section (1) of section 3 or subsection (1) of section 4 or section 6, it may, by order, grant a temporary injunction restraining any party from importing such goods until the conclusion of such inquiry or until further orders, without giving notice to the opposite party, where it deems it necessary and a copy of such order granting temporary injunction shall be sent to the concerned authorities.
- (3) The provisions of rules 2A to 5 (both inclusive) of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall, as far as may be, apply to a temporary injunction issued by the Commission under this Act, as they apply to a temporary injunction issued by a civil court, and any reference in any such rule to a suit shall be construed as a reference to any inquiry before the Commission.”

<sup>60</sup>34. [Omitted by Competition (Amendment) Act, 2007]

#### Appearance before Commission

35. A <sup>61</sup>[person or an enterprise] or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

Explanation.—For the purposes of this section,—

- (a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

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<sup>60</sup> Prior to omission, section 34  
read as under:- “ Power to  
award compensation

- (1) Without prejudice to any other provisions contained in this Act, any person may make an application to the Commission for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of any contravention of the provisions of Chapter II, having been committed by such enterprise.
- (2) The Commission may, after an inquiry made into the allegations mentioned in the application made under sub-section (1), pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise.
- (3) Where any loss or damage referred to in sub-section (1) is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Commission, make an application under that sub-section for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Commission and the order of the Commission thereon.”

<sup>61</sup> Subs. by Competition (Amendment) Act, 2007 for “complainant or defendant”

Power of Commission to regulate its own procedure

<sup>62</sup>[36.(1)In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.

- (2) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-
  - (a) summoning and enforcing the attendance of any person and examining him on oath;
  - (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit;
  - (d) issuing commissions for the examination of witnesses or documents;
  - (e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such of record or document from any office.
- (3) The Commission may call upon such experts, from the field of economics,

commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.

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<sup>62</sup> Subs. by Competition (Amendment) Act, 2007 for:

- “(1) The Commission shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have powers to regulate its own procedure including the places at which they shall have their sittings, duration of oral hearings when granted, and times of its inquiry.
- (2) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908(5 of 1908), while trying a suit, in respect of the following matters, namely:—
- (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents;
  - (c) receiving evidence on affidavits;
  - (d) issuing commissions for the examination of witnesses or documents;
  - (e) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
  - (f) dismissing an application in default or deciding it ex parte; (g) any other matter which may be prescribed.
- (3) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Commission shall be deemed to be a civil court for the purposes of section 195 (2 of 1974) and Chapter XXVI of the Code of Criminal Procedure, 1973.
- (4) The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry or proceeding before it.
- (5) The Commission may direct any person—
- (a) to produce before the Director General or the Registrar or an officer authorised by it, such books, accounts or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;
  - (b) to furnish to the Director General or the Registrar or any officer authorised by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.
- (6) If the Commission is of the opinion that any agreement referred to in section 3 or "abuse of dominant position referred to in section 4 or the combination referred to in section 5 has caused or is likely to cause an appreciable adverse effect on competition in the relevant market in India and it is necessary to protect, without further delay, the interests of consumers and other market participants in India, it may conduct an inquiry or adjudicate upon any matter under this Act after giving a reasonable oral hearing to the parties concerned.”

(4) The Commission may direct any person:

- (a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;
- (b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.]

<sup>63</sup>37. [Omitted by Competition (Amendment) Act, 2007]

#### Rectification of orders

38. (1) With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act.

(2) Subject to the other provisions of this Act, the Commission may make— (a)

an amendment under sub-section (1) of its own motion;

(b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.

Explanation.— For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

<sup>64</sup>[Execution of orders of Commission imposing monetary penalty]

<sup>65</sup>[39.(1)If a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations.

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<sup>63</sup> Prior to omission, section 37  
read as under:- “ Review of  
orders of Commission

Any person aggrieved by an order of the Commission from which an appeal is allowed by this Act but no appeal has been preferred, may, within thirty days from the date of the order, apply to the Commission for review of its order and the Commission may make such order thereon as it thinks fit:

Provided that the Commission may entertain a review application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time:

Provided further that no order shall be modified or set aside without giving an opportunity of being heard to the person in whose favour the order is given and the Director General where he was a party to the proceedings.”

<sup>64</sup> Subs. by Competition (Amendment) Act, 2007 for  
“Execution of orders of Commission”

(2) In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

(3) Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 (43 of 1961) and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine, and interest under the Income-tax Act, 1961 (43 of 1961) and to the Commission instead of the Assessing Officer.

Explanation 1 – Any reference to sub-section (2) or sub-section (6) of section 220 of the income-tax Act, 1961 (43 of 1961), in the said provisions of that Act or the rules made thereunder shall be construed as references to sections 43 to 45 of this Act.

Explanation 2 – The Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act, 1961 (43 of 1961) shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer for the purposes of recovery of sums imposed by way of penalty under this Act and reference made by the Commission under sub-section (2) would amount to drawing of a certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act.

Explanation 3– Any reference to appeal in Chapter XVIII and the Second Schedule to the Income-tax Act, 1961 (43 of 1961), shall be construed as a reference to appeal before the Competition Appellate Tribunal under section 53B of this Act.]

<sup>66</sup>40. [Omitted by Competition (Amendment) Act, 2007]

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<sup>65</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ Every order passed by the Commission under this Act shall be enforced by the Commission

in the same manner as if it were a decree or order made by a High Court or the principal civil court in a suit pending therein and it shall be lawful for the Commission to send, in the event of its inability to execute it, such order to the High Court or the principal civil court, as the case may be, within the local limits of whose jurisdiction,—

(a) in the case of an order against a person referred to in sub-clause (iii) or sub-clause (vi) or subclause (vii) of clause (l) of section 2, the registered office or the sole or principal place of business of the person in India or where the person has also a subordinate office, that subordinate office, is situated;

(b) in the case of an order against any other person, the place, where the person concerned voluntarily resides or carries on business or personally works for gain, is situated, and thereupon the court to which the order is so sent shall execute the order as if it were a decree or order sent to it for execution.”

<sup>66</sup> Prior to omission, section 40 read as under:-

“ Any person aggrieved by any decision or order of the Commission may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Commission to him on one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5 of 1908): Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days: Provided further that no appeal shall lie against any decision or order of the Commission made with the consent of the parties.”

CHAPTER V  
DUTIES OF DIRECTOR GENERAL

Director General to investigate contravention

41. (1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.
- (2) The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36.
- (3) Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

<sup>67</sup>[Explanation.—For the purposes of this section, --

- (a) the words “the Central Government” under section 240 of the Companies Act, 1956 (1 of 1956) shall be construed as “the Commission”;
- (b) the word “Magistrate” under section 240A of the Companies Act, 1956 (1 of 1956) shall be construed as “the Chief Metropolitan Magistrate, Delhi”.]

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<sup>67</sup> Ins. by Competition (Amendment) Act, 2007



CHAPTER

VI

PENALTI

ES

Contravention of orders of Commission

<sup>68</sup>[42.(1)The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

(2) If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

(3) If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit:

Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.]

<sup>69</sup>[Compensation in case of contravention of orders of Commission]

<sup>70</sup>[42A. Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or

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<sup>68</sup> Subs. by Competition (Amendment) Act, 2007 for:

“(1) Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Commission, or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or fails to pay the penalty imposed under this Act, he shall be liable to be detained in civil prison for

- a term which may extend to one year, unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakhs.
- (2) The Commission may, while making an order under this Act, issue such directions to any person or authority, not inconsistent with this Act, as it thinks necessary or desirable, for the proper implementation or execution of the order, and any person who commits breach of, or fails to comply with, any obligation imposed on him under such direction, may be ordered by the Commission to be detained in civil prison for a term not exceeding one year unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakhs.”

<sup>69</sup> Ins. by Competition (Amendment) Act, 2007

<sup>70</sup> Ins. by Competition (Amendment) Act, 2007

granted under this Act or delaying in carrying out such orders or directions of the Commission.]

#### Penalty for failure to comply with directions of Commission and Director General

<sup>71</sup>[43. If any person fails to comply, without reasonable cause, with a direction given by—

- (a) the Commission under sub-sections (2) and (4) of section 36; or
- (b) the Director General while exercising powers referred to in sub-section (2) of section 41,

such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission]

<sup>72</sup>[Power to impose penalty for non-furnishing of information on combinations]

<sup>73</sup>[43A.If any person or enterprise who fails to give notice to the Commission under sub-section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent. of the total turnover or the assets, whichever is higher, of such a combination.]

#### Penalty for making false statement or omission to furnish material information

44. If any person, being a party to a combination,—

- (a) makes a statement which is false in any material particular, or knowing it to be false; or
- (b) omits to state any material particular knowing it to be material,

such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

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<sup>71</sup> Subs. by Competition (Amendment) Act, 2007 for:

“If any person fails to comply with a direction given by—

- (a) the Commission under sub-section (5) of section 36; or
  - (b) the Director General while exercising powers referred to in sub-section (2) of section 41,
- the Commission shall impose on such person a penalty of rupees one lakh for each day during which such failure continues.”

<sup>72</sup> Ins. by Competition (Amendment) Act, 2007

<sup>73</sup> Ins. by Competition (Amendment) Act, 200

#### Penalty for offences in relation to furnishing of information

<sup>74</sup>[45.(1)Without prejudice to the provisions of section 44, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information,—

- (a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or
- (b) omits to state any material fact knowing it to be material; or
- (c) wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid,

such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission.]

- (2) Without prejudice to the provisions of sub-section(1), the Commission may also pass such other order as it deems fit.

#### Power to impose lesser penalty

- 46. The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or

the rules or the regulations:

<sup>75</sup>[Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure.]

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who <sup>76</sup>[has] made the full, true and vital disclosures under this section.

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<sup>74</sup> Subs. by Competition (Amendment) Act, 2007 for :

“(1) Without prejudice to the provisions of section 44, if any person, who furnishes or is required to furnish under this Act any particulars, documents or any information,—

(a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or

(b) omits to state any material fact knowing it to be material; or

(c) wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, the Commission shall impose on such person a penalty which may extend to rupees ten lakhs.”

<sup>75</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ Provided that lesser penalty shall not be imposed by the Commission in cases where proceedings for the violation of any of the provisions of this Act or the rules or the regulations have been instituted or any investigation has been directed to be made under section 26 before making of such disclosure: “

<sup>76</sup> Subs. by Competition (Amendment) Act, 2007 for “first”

<sup>77</sup>[Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.]

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,—

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or

(b) had given false evidence; or

(c) the disclosure made is not vital,

and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall

also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

#### Crediting sums realised by way of penalties to Consolidated Fund of India

47. All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.

#### Contravention by companies

48. (1) Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

- (2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or

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<sup>77</sup> Ins. by Competition (Amendment) Act, 2007

other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

- (a) "company" means a body corporate and includes a firm or other association of individuals; and
- (b) "director", in relation to a firm, means a partner in the firm.

CHAPTER VII  
COMPETITION ADVOCACY

Competition advocacy

49. <sup>78</sup>[(1)The Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.]
- (2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government <sup>79</sup>[or the State Government, as the case may be] in formulating such policy.
- (3) The Commission shall take suitable measures <sup>80</sup>[\*\*\*] for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

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<sup>78</sup> Subs. by Competition (Amendment) Act, 2007 for:

“(1) In formulating a policy on competition (including review of laws related to competition), the Central Government may make a reference to the Commission for its opinion on possible effect of such policy on competition and on receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, which may thereafter formulate the policy as it deems fit.”

<sup>79</sup> Ins. by Competition (Amendment) Act, 2007

<sup>80</sup> The words “as may be prescribed” omitted by Competition (Amendment) Act, 2007

## CHAPTER VIII

### FINANCE, ACCOUNTS AND AUDIT

#### Grants by Central Government

50. The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Commission grants of such sums of money as the Government may think fit for being utilised for the purposes of this Act.

#### Constitution of Fund

51. (1) There shall be constituted a fund to be called the "Competition Fund" and there shall be credited thereto—

(a) all Government grants received by the Commission;

<sup>81</sup>(b) [Omitted by Competition (Amendment) Act, 2007] (c)

the fees received under this Act;

(d) the interest accrued on the amounts referred to in <sup>82</sup>[clauses (a) and (c)].

- (2) The Fund shall be applied for meeting—

(a) the salaries and allowances payable to the Chairperson and other Members and the administrative expenses including the salaries, allowances and pension payable to the Director General, Additional, Joint, Deputy or Assistant Directors General, the Registrar and officers and other employees of the Commission;

(b) the other expenses of the Commission in connection with the discharge of its functions and for the purposes of this Act.

- (3) The Fund shall be administered by a committee of such Members of the Commission as may be determined by the Chairperson.

- (4) The committee appointed under sub-section (3) shall spend monies out of the Fund for carrying out the objects for which the Fund has been constituted.

#### Accounts and Audit

52. (1) The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by

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<sup>81</sup> Prior to omission, clause (b) of section 51(1) read as under :-

“the monies received as costs from parties to proceedings before the Commission;”

<sup>82</sup> Subs. by Competition (Amendment) Act, 2007 for “clauses (a) to (c)”

the Central Government in consultation with the Comptroller and Auditor-General of India.

- (2) The accounts of the Commission shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General of India.

Explanation.—For the removal of doubts, it is hereby declared that the orders of the Commission, being matters appealable to the <sup>83</sup>[Appellate Tribunal or the Supreme Court], shall not be subject to audit under this section.

- (3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Commission shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has, in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.
- (4) The accounts of the Commission as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

#### Furnishing of returns, etc., to Central Government

53. (1) The Commission shall furnish to the Central Government at such time and in such form and manner as may be prescribed or as the Central Government may direct, such returns and statements and such particulars in regard to any proposed or existing measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues, as the Central Government may, from time to time, require.
- (2) The Commission shall prepare once in every year, in such form and at such time as may be prescribed, an annual report giving a true and full account of its activities during the previous year and copies of the report shall be forwarded to the Central Government.
- (3) A copy of the report received under sub-section (2) shall be laid, as soon as may be after it is received, before each House of Parliament.

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<sup>83</sup> Subs. by Competition (Amendment) Act, 2007 for “Supreme Court”



COMPETITION APPELLATE TRIBUNAL

Establishment of Appellate Tribunal:

53A.(1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –

- (a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;
- (b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section(2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

(2) The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify.

Appeal to Appellate Tribunal

53B.(1)The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

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84 “Chapter VIIIA” Inserted by Competition (Amendment) Act, 2007

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

#### Composition of Appellate Tribunal

53C. The Appellate Tribunal shall consist of a Chairperson and not more than two other members to be appointed by the Central Government.

#### Qualifications for appointment of Chairperson and Members of Appellate Tribunal

53D.(1)The Chairperson of the Appellate Tribunal shall be a person, who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(2) A member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty five years in, competition matters including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal.

#### Selection Committee

53E.(1)The Chairperson and members of the Appellate Tribunal shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

- (a) the Chief Justice of India or his nominee ..... Chairperson;
- (b) the Secretary in the Ministry of Corporate Affairs..... Member;
- (c) the Secretary in the Ministry of Law and Justice ..... Member.

(2) The terms of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

### Term of office of Chairperson and Members of Appellate Tribunal

53F. The Chairperson or a member of the Appellate Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office, and shall be eligible for re-appointment:

Provided that no Chairperson or other member of the Appellate Tribunal shall hold office as such after he has attained, -

- (a) in the case of the Chairperson, the age of sixty-eight years;
- (b) in the case of any other member of the Appellate Tribunal, the age of sixty-five years.

### Terms and conditions of service of chairperson and Members of Appellate Tribunal

53G(1) The salaries and allowances and other terms and conditions of service of the Chairperson and other members of the Appellate Tribunal shall be such as may be prescribed.

- (2) The salaries, allowances and other terms and conditions of service of the Chairperson and other members of the Appellate Tribunal shall not be varied to their disadvantage after their appointment.

### Vacancies

53H. If, for any reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a member of the Appellate Tribunal, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the stage at which the vacancy is filled.

### Resignation of Chairperson and Members of Appellate Tribunal

53I. The Chairperson or a member of the Appellate Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the Chairperson or a member of the Appellate Tribunal shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

### Member of Appellate Tribunal to act as its Chairperson in certain cases

53J.(1) In the event of the occurrence of any vacancy in the office of the Chairperson of the Appellate Tribunal by reason of his death or resignation, the senior-most Member of the Appellate Tribunal shall act as the Chairperson of the Appellate Tribunal until the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

(2) When the Chairperson of the Appellate Tribunal is unable to discharge his functions owing to absence, illness or any other cause, the senior-most member or, as the case may be, such one of the Members of the Appellate Tribunal, as the Central Government may, by notification, authorize in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

### Removal and suspension of Chairperson and Members of Appellate Tribunal

53K.(1) The Central Government may, in consultation with the Chief Justice of India, remove from office the Chairperson or any other member of the Appellate Tribunal, who-

- (a) has been adjudged an insolvent; or
  - (b) has engaged at any time, during his terms of office, in any paid employment; or
  - (c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
  - (d) has become physically or mentally incapable of acting as such Chairperson or other Member of the Appellate Tribunal; or
  - (e) has acquired such financial or other interest as is likely to affect prejudicially his functions as such Chairperson or Member of the Appellate Tribunal; or
  - (f) has so abused his position as to render his continuance in office prejudicial to the public interest.
- (2) Notwithstanding anything contained in sub-section (1), no Chairperson or a Member of the Appellate Tribunal shall be removed from his office on the ground specified in clause (e) or clause (f) of sub-section (1) except by an order made by the Central Government after an inquiry made in this behalf by a Judge of the Supreme Court in which such Chairperson or member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

## Restriction on employment of Chairperson and other Members of Appellate Tribunal in certain cases

53L. The Chairperson and other members of the Appellate Tribunal shall not, for a period of two years from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Appellate Tribunal under this Act:

Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government Company as defined in section 617 of the Companies Act, 1956 (1 of 1956).

## Staff of Appellate Tribunal

53M.(1) The Central Government shall provide the Appellate Tribunal with such officers and other employees as it may think fit.

(2) The officers and other employees of the Appellate Tribunal shall discharge their functions under the general superintendence and control of the Chairperson of the Appellate Tribunal.

(3) The salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal shall be such as may be prescribed.

## Awarding compensation

53N.(1) Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise.

(2) Every application made under sub-section (1) shall be accompanied by the findings of the Commission, if any, and also be accompanied with such fees as may be prescribed.

- (3) The Appellate Tribunal may, after an inquiry made into the allegations mentioned in the application made under sub-section (1), pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise:

Provided that the Appellate Tribunal may obtain the recommendations of the Commission before passing an order of compensation.

- (4) Where any loss or damage referred to in sub-section (1) is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Appellate Tribunal, make an application under that sub-section for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon.

Explanation.—For the removal of doubts, it is hereby declared that—

- (a) an application may be made for compensation before the Appellate Tribunal only after either the Commission or the Appellate Tribunal on appeal under clause (a) of sub-section(1) of section 53A of the Act, has determined in a proceeding before it that violation of the provisions of the Act has taken place, or if provisions of section 42A or sub-section(2) of section 53Q of the Act are attracted.
- (b) enquiry to be conducted under sub-section(3) shall be for the purpose of determining the eligibility and quantum of compensation due to a person applying for the same, and not for examining afresh the findings of the Commission or the Appellate Tribunal on whether any violation of the Act has taken place.

#### Procedures and powers of Appellate Tribunal

53O.(1)The Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Appellate Tribunal shall have power to regulate its own procedure including the places at which they shall have their sittings.

- (2) The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of

Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

- a) summoning and enforcing the attendance of any person and examining him on oath;
  - b) requiring the discovery and production of documents;
  - c) receiving evidence on affidavit;
  - d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
  - e) issuing commissions for the examination of witnesses or documents;
  - f) reviewing its decisions;
  - g) dismissing a representation for default or deciding it ex parte;
  - h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte;
  - i) any other matter which may be prescribed.
- (3) Every proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 (2 of 1974) and Chapter XXVI of the Code of Criminal Procedure, 1973.

#### Execution of orders of Appellate Tribunal

53P.(1) Every order made by the Appellate Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send, in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,-

- a) in the case of an order against a company, the registered office of the company is situated; or
  - b) in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated.
- (2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

## Contravention of orders of Appellate Tribunal

53Q.(1) Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit:

Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence punishable under this sub-section, save on a complaint made by an officer authorized by the Appellate Tribunal.

(2) Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise contravening, without any reasonable ground, any order of the Appellate Tribunal or delaying in carrying out such orders of the Appellate Tribunal.

## Vacancy in Appellate Tribunal not to invalidate acts or proceedings

53R. No act or proceeding of the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of existence of any vacancy or defect in the constitution of the Appellate Tribunal.

## Right to legal representation

53S.(1) A person preferring an appeal to the Appellate Tribunal may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal.

(2) The Central Government or a State Government or a local authority or any enterprise preferring an appeal to the Appellate Tribunal may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

(3) The Commission may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.



Explanation – The expressions “chartered accountant” or “company secretary” or “cost accountant” or “legal practitioner” shall have the meanings respectively assigned to them in the Explanation to section 35.

#### Appeal to Supreme Court

53T. The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them;

Provided that the Supreme court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

#### Power to Punish for contempt

53U. The Appellate Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (70 of 1971) shall have effect subject to modifications that,--

- (a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;
- (b) the references to the Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf. ]

CHAPTER IX  
MISCELLANEOUS

Power to exempt

54. The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—
- (a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;
  - (b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;
  - (c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government:

Provided that in case an enterprise is engaged in any activity including the activity relating to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relating to the sovereign functions.

Power of Central Government to issue directions

- 55.(1) Without prejudice to the foregoing provisions of this Act, the Commission shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, other than those relating to technical and administrative matters, as the Central Government may give in writing to it from time to time:

Provided that the Commission shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

- (2) The decision of the Central Government whether a question is one of policy or not shall be final.

## Power of Central Government to supersede Commission

56.(1) If at any time the Central Government is of the opinion—

- (a) that on account of circumstances beyond the control of the Commission, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or
  - (b) that the Commission has persistently made default in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Commission or the administration of the Commission has suffered; or
  - (c) that circumstances exist which render it necessary in the public interest so to do,
- the Central Government may, by notification and for reasons to be specified therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification:

Provided that before issuing any such notification, the Central Government shall give a reasonable opportunity to the Commission to make representations against the proposed supersession and shall consider representations, if any, of the Commission.

(2) Upon the publication of a notification under sub-section (1) superseding the Commission,—

- (a) the Chairperson and other Members shall as from the date of supersession, vacate their offices as such;
- (b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Commission shall, until the Commission is reconstituted under sub-section (3), be exercised and discharged by the Central Government or such authority as the Central Government may specify in this behalf;
- (c) all properties owned or controlled by the Commission shall, until the Commission is reconstituted under sub-section (3), vest in the Central Government.

(3) On or before the expiration of the period of supersession specified in the notification issued under subsection (1), the Central Government shall reconstitute the Commission by a fresh appointment of its Chairperson and other Members and in such case any person who had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment.

- (4) The Central Government shall cause a notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest.

#### Restriction on disclosure of information

57. No information relating to any enterprise, being an information which has been obtained by or on behalf of <sup>85</sup>[the Commission or the Appellate Tribunal] for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

<sup>86</sup>[Chairperson, Members, Director General, Secretary, officers and other employees, etc., to be public servants]

- <sup>87</sup>[58. The Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Secretary and officers and other employees of the Commission and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed, while acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).]

#### Protection of action taken in good faith

59. No suit, prosecution or other legal proceedings shall lie against the Central Government or Commission or any officer of the Central Government or the Chairperson or any Member or the Director- General, Additional, Joint, Deputy or Assistant Directors General or <sup>88</sup>[the Secretary or officers or other employees of the Commission or the Chairperson, Members, officers and other employees of the Appellate Tribunal] for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

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<sup>85</sup> Subs. by Competition (Amendment) Act, 2007 for “the Commission”

<sup>86</sup> Subs. by Competition (Amendment) Act, 2007 for “Members, Director General, Registrar, officers and other employees, etc. of Commission to be public servants”

<sup>87</sup> Subs. by Competition (Amendment) Act, 2007 for :

“ The Chairperson and other Members and the Director General, Additional, Joint, Deputy or

Assistant Directors General and Registrar and officers and other employees of the Commission shall be deemed, while acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).”

<sup>88</sup> Subs. by Competition (Amendment) Act, 2007 for “the Registrar or officers or other employees of the Commission”

#### Act to have overriding effect

60. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

#### Exclusion of jurisdiction of civil courts

61. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the <sup>89</sup>[Commission or the Appellate Tribunal] is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

#### Application of other laws not barred

62. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

#### Power to make rules

63. (1) The Central Government may, by notification, make rules to carry out the provisions of this Act;

- (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

<sup>90</sup>[(a) the term of the Selection Committee and the manner of selection of panel of names under sub-section (2) of Section 9;]

(b) the form and manner in which and the authority before whom the oath of office and of secrecy shall be made and subscribed to under sub-section (3) of section 10;

<sup>91</sup>(c) [Omitted by Competition (Amendment) Act, 2007.

(d) the salary and the other terms and conditions of service including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities to be provided to the Chairperson and other Members under sub-section (1) of section 14;

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<sup>89</sup> Subs. by Competition (Amendment) Act, 2007 for “Commission”

<sup>90</sup> Subs. by Competition (Amendment) Act, 2007 for:

“the manner in which the Chairperson and other Members shall be selected under section 9;”

<sup>91</sup> Prior to omission, clause (c) of sub-section(2) of section 63 read as under:-

“the financial and administrative powers which may be vested in the Member Administration under section 13;”

- <sup>92</sup>[(da)the number of Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner in which such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees may be appointed under sub- section (1A) of section 16; ]
- (e) the salary, allowances and other terms and conditions of service of the Director General, Additional, Joint, Deputy or Assistant Directors General or <sup>93</sup>[such officers or other employees] under sub-section (3) of section 16 ;
- (f) the qualifications for appointment of the Director General, Additional, Joint, Deputy or Assistant Directors General or <sup>94</sup>[such officers or other employees] under sub-section (4) of section 16;
- (g) the salaries and allowances and other terms and conditions of service of the <sup>95</sup>[Secretary] and officers and other employees payable, and the number of such officers and employees under sub-section (2) of section 17 ;
- <sup>96</sup>(h) [Omitted by Competition (Amendment) Act, 2007]
- <sup>97</sup>(i) [Omitted by Competition (Amendment) Act, 2007]
- <sup>98</sup>(j) [Omitted by Competition (Amendment) Act, 2007]
- (k) the form in which the annual statement of accounts shall be prepared under sub-section (1) of section 52;
- (l) the time within which and the form and manner in which the Commission may furnish returns, statements and such particulars as the Central Government may require under sub-section (1) of section 53;
- (m) the form in which and the time within which the annual report shall be prepared under sub-section (2) of section 53;
- <sup>99</sup>[(ma) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (2) of section 53B and the fees payable in respect of such appeal;

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<sup>92</sup> Ins. by Competition (Amendment) Act, 2007

<sup>93</sup> Subs. by Competition (Amendment) Act, 2007 for “such other advisers, consultants or officers”

94 Subs. by Competition (Amendment) Act, 2007 for “such other advisers, consultants or officers”

95 Subs. by Competition (Amendment) Act, 2007 for “Registrar”

96 Prior to omission, clause (h) of sub-section(2) of section 63 read as under:-

“ for securing any case or matter which requires to be decided by a Bench composed of more than two Members under sub-section (4) of section 23;”

97 Prior to omission, clause (i) of sub-section(2) of section 63 read as under:-

“any other matter in respect of which the Commission shall have power under clause (g) of sub-section (2) of section 36;”

98 Prior to omission, clause (j) of sub-section(2) of section 63 read as under:-

“ the promotion of competition advocacy, creating awareness and imparting training about competition issues under sub-section (3) of section 49;”

(mb) the term of the Selection Committee and the manner of selection of panel of names under sub-section(2) of section 53E;

(mc) the salaries and allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under sub- section (1) of section 53G;

(md) the salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal under sub-section (3) of section 53M;

(me) the fee which shall be accompanied with every application made under sub-section (2) of section 53N;

(mf) the other matters under clause (i) of sub-section(2) of section 53O in respect of which the Appellate Tribunal shall have powers under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit;]

100 [(n)the manner in which the monies transferred to the Competition Commission of India or the Appellate Tribunal shall be dealt with by the Commission or the Appellate Tribunal, as the case may be, under the fourth proviso to sub-section(2) of section 66 ;]

(o) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

(3) Every notification issued under sub-section(3) of section 20 and section 54 and every rule made under this Act by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the



session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or rule, or both Houses agree that the notification should not be issued or rule should not be made, the notification or rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule, as the case may be.

#### Power to make regulations

64.(1) The Commission may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

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<sup>99</sup> Ins. by Competition (Amendment) Act, 2007

<sup>100</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ the manner in which the monies transferred to the Central Government shall be dealt with by that Government under the fourth proviso to sub-section (2) of section 66;”

(2) In particular, and without prejudice to the generality of the foregoing provisions, such regulations may provide for all or any of the following matters, namely:—

(a) the cost of production to be determined under clause (b) of the Explanation to section 4;

(b) the form of notice as may be specified and the fee which may be determined under sub-section(2) of section 6;

(c) the form in which details of the acquisition shall be filed under subsection(5) of Section 6;

<sup>101</sup>[(d) the procedures to be followed for engaging the experts and professionals under sub-section(3) of section 17;

(e) the fee which may be determined under clause (a) of sub-section(1) of section 19;

(f) the rules of procedure in regard to the transaction of business at the meetings of the Commission under sub-section(1) of section 22;

(g) the manner in which penalty shall be recovered under sub-section(1) of section 39;

(h) any other matter in respect of which provision is to be, or may be, made by regulations.]

(3) Every regulation made under this Act shall be laid, as soon as may be after it is

made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

#### Power to remove difficulties

65. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary for removing the difficulty:

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<sup>101</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ (d) the fee which may be determined under clause (a) of sub-section (1) of section 19;  
(e) any other matter in respect of which provision is to be, or may be, made by regulations.”

Provided that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

#### Repeal and saving

66. <sup>102</sup>[(1)The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section(1) of section 5 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved:

Provided that, notwithstanding anything contained in this sub-section, the Monopolies and Restrictive Trade Practices Commission established under sub section(1) of section 5 of the repealed Act, may continue to exercise jurisdiction and power under the repealed Act for a period of two years from the date of the commencement of this Act in respect of all cases or proceedings (including complaints received by it or references or applications made to it) filed before the commencement of this Act as if the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) had not been repealed and all the provisions of the said Act so repealed shall mutatis mutandis apply to such cases or proceedings or complaints or references or applications and to

all other matters.

Explanation: For the removal of doubts, it is hereby declared that nothing in this proviso shall confer any jurisdiction or power upon the Monopolies and Restrictive Trade Practices Commission to decide or adjudicate any case or proceeding arising under the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) on or after the commencement of this Act.

(1A)The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) shall, however, not affect,-

- (a) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or
- (b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or
- (c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or
- (d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and

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<sup>102</sup> Subs. by Competition (Amendment) Act, 2007 for :

“ (1)The Monopolies and Restrictive Trade Practices Act, 1969 is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the said Act (hereinafter referred to as the repealed Act) (54 of 1969) shall stand dissolved.”

any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.]

(2) On the dissolution of the Monopolies and Restrictive Trade Practices Commission, the person appointed as the Chairman of the Monopolies and Restrictive Trade Practices Commission and every other person appointed as Member and Director General of Investigation and Registration, Additional, Joint, Deputy, or Assistant Directors General of Investigation and Registration and any officer and other employee of that Commission and holding office as such immediately before such dissolution shall vacate their respective offices and such Chairman and other Members shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service:

Provided that the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission appointed on deputation

basis to the Monopolies and Restrictive Trade Practices Commission, shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be:

<sup>103</sup>[Provided further that the Director-General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission, employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Competition Commission of India or the Appellate Tribunal, in such manner as may be specified by the Central Government, with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Competition Commission of India or the Appellate Tribunal, as the case may be, and shall continue to do so unless and until his employment in the Competition Commission of India or the Appellate Tribunal, as the case may be, is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Competition Commission of India or the Appellate Tribunal, as the case may be.]

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<sup>103</sup> Subs. by Competition (Amendment) Act, 2007 for:

“Provided further that the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission, employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Central Government with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Central Government and shall continue to do so unless and until his employment in the Central Government is duly terminated or until his remuneration, terms and conditions of employment are duly altered by that Government:”

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947(14 of 1947), or in any other law for the time being in force, the transfer of the services of any Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee, employed in the Monopolies and Restrictive Trade Practices Commission, to <sup>104</sup>[the Competition Commission of India or the Appellate Tribunal], as the case may be, shall not entitle such Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee any compensation under this Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority:

Provided also that where the Monopolies and Restrictive Trade Practices Commission has

established a provident fund, superannuation, welfare or other fund for the benefit of the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or the officers and other employees employed in the Monopolies and Restrictive Trade Practices Commission, the monies relatable to the officers and other employees whose services have been transferred by or under this Act to<sup>105</sup> [the Competition Commission of India or the Appellate Tribunal, as the case may be, shall, out of the monies standing] on the dissolution of the Monopolies and Restrictive Trade Practices Commission to the credit of such provident fund, superannuation, welfare or other fund, stand transferred to, and vest in,<sup>106</sup> [the Competition Commission of India or the Appellate Tribunal as the case may be, and such monies which stand so transferred shall be dealt with by the said Commission or the Tribunal, as the case may be, in such manner as may be

prescribe  
d.]

<sup>107</sup> [(3) All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall, after the expiry of two years referred to in the proviso to sub-section (1) stand transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.]

(4) Subject to the provisions of sub-section(3), all cases pertaining to unfair trade practices other than those referred to in clause (x) of sub-section(1) of section

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<sup>104</sup> Subs. by Competition (Amendment) Act, 2007 for “the Central Government”

<sup>105</sup> Subs. by Competition (Amendment) Act, 2007 for “the Central Government shall, out of the monies standing”

<sup>106</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ the Central Government and such monies which stand so transferred shall be dealt with by the said Government in such manner as may be prescribed.”

<sup>107</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ All cases pertaining to monopolistic trade practices or restrictive trade practices pending before the Monopolies and Restrictive Trade Practices Commission on or before the commencement of this Act, including such cases, in which any unfair trade practice has also been alleged, shall, on such commencement, stand transferred to the Competition Commission of India and shall be adjudicated by that Commission in accordance with the provisions of the repealed Act as if that Act had not been repealed.”

36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission<sup>108</sup> [on or before the expiry of two years referred to in the proviso to sub-section (1)], shall, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission shall dispose of such

cases as if they were cases filed under that Act:

Provided that the National Commission may, if it considers appropriate, transfer any case transferred to it under this sub-section, to the concerned State Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986) and that State Commission shall dispose of such case as if it was filed under that Act.

<sup>109</sup> [(5) All cases pertaining to unfair trade practices referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Monopolies and Restrictive Trade Practices Commission shall, after the expiry of two years referred to in the proviso to sub-section (1) stand transferred to the Appellate Tribunal and the Appellate Tribunal shall dispose of such cases as if they were cases filed under that Act.]

(6) All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

(7) All investigations or proceedings, relating to unfair trade practices, other than those referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

(8) All investigations or proceedings relating to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969), and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission

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<sup>108</sup> Subs. by Competition (Amendment) Act, 2007 for “on or before the commencement of this Act shall, on such commencement”

<sup>109</sup> Subs. by Competition (Amendment) Act, 2007 for:

“ All cases pertaining to unfair trade practices referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India shall dispose of such cases as if they were cases filed under that Act.”

of India and the Competition Commission of India may conduct or order for conduct of such investigation in the manner as it deems fit.

- (9) Save as otherwise provided under sub-sections (3) to (8), all cases or proceedings pending before the Monopolies and Restrictive Trade Practices Commission shall abate.
- (10) The mention of the particular matters referred to in sub-sections (3) to (8) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

## STATEMENT OF OBJECTS AND REASONS

The Competition Act was enacted in 2002 keeping in view the economic development that resulted in opening up of the Indian economy, removal of controls and consequent economic liberalization which required that the Indian economy be enabled to allow competition in the market from within the country and outside. The Competition Act, 2002 (hereinafter referred to as the Act) provided for the establishment of a Competition Commission, (the Commission) to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto.

2. The Competition Commission of India was established on the 14th October, 2003 but could not be made functional due to filing of a writ petition before the Hon'ble Supreme Court. While disposing of the writ petition on the 20th January, 2005, the Hon'ble Supreme Court held that if an expert body is to be created by the Union Government, it might be appropriate for the Government to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions based on the doctrine of separation of powers recognised by the Constitution. Keeping in view the judgment of the Hon'ble Supreme Court, the Competition (Amendment) Bill, 2006 was introduced in Lok Sabha on the 9th March,

2006 and the same was referred for examination and report to the Parliamentary Standing Committee. Taking into account the recommendations of the Committee, the Competition (Amendment) Bill, 2007 is being introduced.

3. The Competition (Amendment) Bill, 2007, inter alia, provides for the following:-

(a) the Commission shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices in the country in accordance with the Act and it would also have advisory and advocacy functions in its role as a regulator;

(b) for mandatory notice of merger or combination by a person or enterprise to the Commission within thirty days and to empower the Commission for imposing a penalty of up to one per cent. of the total turnover or the assets, whichever is higher, on a person or enterprise which fails to give notice of merger or combination to the Commission;

(c) for establishment of the Competition Appellate Tribunal, which shall be a three member quasi judicial body headed by a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission;

(d) for adjudication by the Competition Appellate Tribunal of claims on compensation and passing of orders for the recovery of compensation from any



enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Act;

(e) for implementation of the orders of the Competition Appellate Tribunal as a decree of a civil court;

(f) for filing of appeal against the orders of the Competition Appellate Tribunal to the Supreme Court;

(g) for imposition of a penalty by the Commission for contravention of its orders and in certain cases of continued contravention a penalty which may extend to rupees twenty-five crores or imprisonment which may extend to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit, may be imposed.

4. The Bill also aims at continuation of the Monopolies and Restrictive Trade Practices Commission (MRTPC) till two years after constitution of Competition Commission, for trying pending cases under the Monopolies and Restrictive Trade Practices Act, 1969 after which it would stand dissolved. The Bill also provides that MRTPC would not entertain any new cases after the Competition Commission is duly constituted. Cases still remaining pending after this two year period, would be transferred to Competition Appellate Tribunal or the National Commission under the Consumer Protection Act, 1986 depending on the nature of cases.

5. The Bill seeks to achieve the above objectives.

NEW DELHI;  
The 9th August, 2007.

PREM CHAND GUPTA.

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PRESIDENT'S RECOMMENDATION UNDER ARTICLE 117 OF  
THE CONSTITUTION OF INDIA

[Copy of letter No. 5/18/2006-IGC, dated the 20th August, 2007 from Shri Prem Chand Gupta, Minister of Corporate Affairs to the Secretary-General, Lok Sabha]

The President, having been informed of the subject matter of the proposed Competition (Amendment) Bill, 2007, recommends introduction of the Bill under article 117(1) of the Constitution and also recommends the consideration of the Bill under article 117(3) of the Constitution.

## Notes on Clauses

Clause 2. —This clause seeks to amend section 2 of the Competition Act, 2002 relating to definitions. It is proposed to define the expression “Appellate Tribunal” used in the Bill.

Clause 3. —This clause seeks to amend section 4 of the Competition Act, 2002 relating to abuse of dominant position. The existing provisions of section 4 applies only to an enterprise and not to the group of enterprises. Clause (c) of sub-section (2) of section 4 states that there shall be an abuse of dominant position if an enterprise indulges in practice or practices resulting in denial of market access.

It is proposed to amend the provisions of section 4 so as to make it applicable to group of enterprises also. It is also proposed to amend clause (c) of sub-section (2) of said section so as to insert the words “in any manner”. This amendment is clarificatory in nature.

Clause 4. —This clause seeks to amend section 5 of the Competition Act, 2002 relating to combination.

Under the existing provisions of section 5, there is no specific provision regarding local nexus for foreign entities which are parties to combinations.

It is proposed to substitute item (B) in sub-clause (i) and item (B) in sub-clause (ii) of clause (a) of section 5 to provide for a local nexus for combinations involving foreign entity and an Indian entity. A threshold value of local assets and operations in terms of asset value of at least rupees 500 crores and turnover of atleast rupees 1500 crores, is proposed for operations in India in addition to the existing global asset or turnover limits provided in the Act.

Clause 5. —This clause seeks to amend section 6 of the Competition Act, 2002 relating to regulation of combinations.

Under the existing provisions of section 6, it is voluntary for a person or enterprise to give notice of the formation of combination within seven days to the Commission.

It is proposed to amend sub-section (2) of section 6 so as to provide for mandatory notice of combinations to the Commission within thirty days. It is also proposed to add subsection (2A) providing that no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission or the Commission has passed orders under section 31, whichever is earlier.

Clause 6. —This clause seeks to substitute section 8 of the Competition Act, 2002 relating to composition of Competition Commission of India.

The new clause provides that the Commission shall consist of a Chairperson and not less than two and not more than six other Members instead of ten Members as provided for under the existing provisions of section 8, to be appointed by the Central Government. It also proposes to remove from eligibility requirement that the person who has been or is qualified to be a Judge of a High Court, and to omit the special knowledge of, and professional experience of administration or in any other matter from the qualifications for appointment as Chairperson or any other Member.

Clause 7. —This clause seeks to substitute section 9 of the Competition Act, 2002 relating to selection of Chairperson and other Members of the Competition Commission of India.

Under the existing provisions, the Chairperson and other Members shall be selected in the manner as may be prescribed by the rules made by the Central Government. The Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules, 2003 made under this section provide for selection of the Chairperson and other Members by a Selection Committee consisting of (a) a person, who has been a retired judge of the Supreme Court or a High Court or a retired Chairperson of a Tribunal established or constituted under an Act of Parliament or a distinguished jurist or a Senior Advocate for five years or more – as Member, (b) a person who has special knowledge of, and professional experience of twenty-five years or more in international trade, economics, business, commerce or industry – as Member, (c) a person who has special knowledge of, and professional experience of twenty-five years or more in accountancy, management, finance, public affairs or administration – as Member nominated by the Central Government.

The new clause provides that the Chairperson and other Members of the Competition Commission of India shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of (a) the Chief Justice of India or his nominee— as Chairperson, (b) the Secretary in the Ministry of Corporate Affairs – as Member, (c) the Secretary in the Ministry of Law and Justice—as Member and (d) two experts of repute having special knowledge in specified fields – as Member.

It also provides that the term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

Clause 8.—This clause seeks to amend section 10 of the Competition Act, 2002 relating to term of office of Chairperson and other Members of the Competition Commission of India.

Under the existing provisions contained in section 10, no Chairperson of the

Competition Commission of India shall hold office as such after he has attained the age of sixty-seven years and no other Member shall hold office as such after he has attained the age of sixty-five years.

It is proposed to amend the said section 10 to provide that the Chairperson or other Member shall not hold office as such after he has attained the age of sixty-five years.

Clause 9.—This clause seeks to amend section 12 of the Competition Act, 2002 relating to restriction on employment of Chairperson and other Members of the Competition Commission of India in certain cases.

Under the existing provisions contained in the said section, the Chairperson and other Members shall not, for a period of one year from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission under this Act. However, this provision does not apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State, or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956.

It is proposed to amend the said section so as to increase the said period of restriction on employment of Chairperson and other Members of the Competition Commission of India from one year to two years.

Clause 10.—This clause seeks to substitute section 13 of the Competition Act, 2002 relating to financial and administrative powers of Member Administration.

Under the existing provisions contained in the said section, the Central Government is to designate any Member as Member Administration who shall exercise such financial and administrative powers as are vested in him under the rules.

It is proposed to substitute the said section 13 by a new section to provide that the Chairperson shall have the powers of general superintendence, direction and control in respect of all administrative matters of the Commission. However, the Chairperson may delegate such of his powers relating to administrative matters of the Commission, as he may think fit to any other Member or officer of the Commission.

Clause 11.—This clause seeks to amend section 16 of the Competition Act, 2002 relating to appointment of Director General, etc.

Under the existing provisions contained in the said section, the Central Government can appoint a Director General and as many Additional, Joint, Deputy or Assistant Director General or such other advisers, consultants or officers, as it may think fit, for the purposes of assisting the Commission in conducting inquiry into

contravention of any of the provisions of the Act and for the conduct of cases before the Commission and for performing such other functions as are, or may be, provided by or under the Act.

It is proposed to amend the said section so as to, inter alia, omit the “advisers” and “consultants” from the scope of section 16 and therefore the Central Government would not appoint “advisers” and “consultants” in the Competition Commission of India. The power to engage the “advisers”, and “consultants” is proposed to be conferred upon the Competition Commission of India.

Clause 12.—This clause seeks to substitute section 17 of the Competition Act, 2002 relating to Registrar and officers and other employees of the Competition Commission of India by a new section.

Under the existing provisions contained in the said section, the Commission may appoint a Registrar and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

It is proposed to substitute said section so as to confer power upon the Commission to appoint a Secretary instead of Registrar in addition to officers and other employees in the discharge of its functions under the said Act and also proposed to confer power on the Commission to engage such experts and professionals of integrity and outstanding ability who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission.

Clause 13.—This clause seeks to amend section 19 of the Competition Act, 2002 relating to inquiry into certain agreements and dominant position of enterprise.

Under the existing provisions contained in clause (a) of sub-section (1) of said section, the Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on receipt of a complaint.

It is proposed to amend said section so as to substitute “receipt of a complaint”, by the words “receipt of any information, in such manner” to enable the Commission to inquire into any alleged contravention on receipt of any information instead of receipt of a complaint.

Clause 14. —This clause seeks to amend sub-section (2) of section 20 of the Competition Act, 2002 relating to inquiry into combination by the Commission.

Under the existing provisions contained in sub-section (2) of section 20, the Commission shall, upon receipt of a reference under sub-section (1) of section 21, inquire whether the combination referred to in the reference is likely to cause an appreciable adverse effect on competition in India.

It is proposed to amend the said sub-section (2) so as to delete the provision of inquiry on a reference from a statutory authority as the reference has been made on an issue, which is under consideration of the statutory authority.

Clause 15.—This clause seeks to amend sub-sections (1) and (2) of section 21 of the Competition Act, 2002 relating to reference by statutory authority.

Under the existing provisions contained in sub-section (1) of said section where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions of the Act then such statutory authority may make a reference in respect of such issue to the Commission. Under the existing sub-section (2), on receipt of a reference from a statutory authority, the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit.

It is proposed to add a proviso to said sub-section (1) so as to provide that any statutory authority may suo motu make a reference to the Commission. It is also proposed to amend sub-section (2) so as to provide that the statutory authority on the opinion of the Commission shall give its findings recording reasons therefor.

Clause 16.—This clause seeks to insert a new section 21A regarding reference by Commission.

This new section provides for making of a reference by the Commission to statutory authorities on an issue raised in any matter before it or suo motu. The statutory authority shall be duty bound to give its opinion within sixty days to the Commission and the Commission shall consider the opinion of the statutory authority and give its findings recording reasons therefor.

Clause 17.—This clause seeks to substitute section 22 of the Competition Act, 2002 relating to Benches of the Competition Commission of India.

Under the existing provisions contained in the said section, the jurisdiction, powers and authority of the Commission may be exercised by Benches thereof.

It is proposed to substitute the said section for the meetings of the Competition Commission of India. It, inter alia, provides that the Commission shall meet at such times and places, and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be provided by the regulations. It also provides that all questions which come up before any meeting of the Commission shall be decided by a majority of the members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or casting vote. It also provides that the quorum for such meeting shall be three Members.

Clause 18. —This clause seeks to omit sections 23, 24 and 25 of the Competition Act, 2002 relating to distribution of business of the Competition Commission of India amongst Benches, procedure for deciding a case where Members of a Bench differ in opinion and jurisdiction of Bench.

Clause 19. —This clause seeks to substitute section 26 of the Competition Act, 2002 relating to procedure for enquiry on complaints under section 19.

It is proposed to provide that on receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter. It also provides that on receipt of reference under the above provision, if the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be. The Director General on receipt of direction under the above provision shall submit a report on his findings within such period as may be specified by the Commission. The Commission may forward a copy of the report to the parties concerned. It also provides that if the report of the Director General recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General. It provides that if the Commission agrees to the recommendations of the Director General, it shall close the matter and pass such order as it deems fit and communicate its order to the authorities mentioned. It further provides that after consideration of the objections or suggestions referred to above, if any, the Commission is of the opinion that further investigation is called for, it may direct for further investigation. It further provides that if the report of the Director General recommends that there is contravention of any of the provisions of the Act and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of the Act. It is also proposed to provide that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

Clause 20. —This clause seeks to amend section 27 of the Competition Act, 2002 relating to orders by Commission after inquiry into agreements or abuse of dominant position.

The existing provisions contained in the said section, inter alia, confer power upon the Commission to pass orders awarding compensation to parties in accordance with the provisions contained in section 34.

The power to award compensation is proposed to be conferred upon the Appellate Tribunal by new section 53N proposed to be inserted by clause 43 of the Bill. It is, therefore, proposed to omit clauses (c) and (f) of section 27 which confer powers on the Commission to pass orders awarding compensation.

It is also proposed to add a proviso to this section providing that if the Commission comes to a finding that an enterprise, in contravention to section 3 or section 4 of the Act, is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass any orders against such members of the group.

Clause 21. —This clause seeks to amend section 28 of the Competition Act, 2002 relating to division of enterprise enjoying dominant position.

Under the existing provisions contained in the said section the Central Government can, on recommendation of the Commission, order division of enterprise enjoying dominant position.

It is proposed to amend section 28 so as to confer said power upon the Commission to order division of an enterprise instead of the Central Government to order the division.

Clause 22. —This clause seeks to amend section 29 of the Competition Act, 2002 relating to procedure for investigation of combinations.

It is, inter alia, proposed to insert a new sub-section (1A) to provide that the Commission may, after receipt of the response of the parties to the combination under subsection (1), call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.

Clause 23. —This clause seeks to substitute section 30 of the Competition Act, 2002 relating to inquiry into disclosures under sub-section (2) of section 6.

Under the existing provisions contained in the said section, where any person or enterprise has given a notice under sub-section (2) of section 6, the Commission shall inquire, (a) whether the disclosure made in the notice is correct, (b) whether the combination has, or is likely to have, an appreciable adverse effect on competition.

It is proposed to substitute section 30 so as to provide that where any person or enterprise has given a notice under sub-section (2) of section 6, the Commission shall examine such notice and form its prima facie opinion and proceed in accordance with the provisions of section 29.

Clause 24.—This clause seeks to amend sub-section (11) of section 31 of the Competition Act, 2002 relating to orders of Commission on certain combinations.



Under the existing provisions contained in the said sub-section (11) the combination is deemed to have been approved by the Commission if the Commission does not pass orders on expiry of a period of ninety working days from the date of publication referred to in sub-section (2) of section 29.

It is proposed to provide for deemed approval for the combination if the Commission does not pass orders in two hundred and ten days from the date of notice given to the Commission under sub-section (2) of section 6. This amendment is consequential in nature.

Clause 25. —This clause seeks to amend section 32 of the Competition Act, 2002 relating to acts taking place outside India but having an effect on competition in India. The proposed amendment is clarificatory in nature.

Clause 26. —This clause seeks to substitute section 33 of the Competition Act, 2002 relating to power to grant interim relief.

The existing provisions of section 33 provides that where during an inquiry before the Commission it is proved to the satisfaction of the Commission that an act in contravention of sections 3, 4 and 6 has been committed, the Commission may by order grant a temporary injunction restraining any party from carrying on such act. It also provides that where during the inquiry before the Commission, if the Commission is satisfied that import of any goods is likely to contravene sections 3, 4 and 6 it may, by order, grant a temporary injunction restraining any party from importing such goods until the conclusion of such inquiry or until further orders, without giving notice to the opposite party, where it deems it necessary and a copy of such order granting temporary injunction shall be sent to the concerned authorities. It further provides that the provisions of rules 2A to 5 (both inclusive) of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908 shall, as far as may be, apply to a temporary injunction issued by the Commission under this Act, as they apply to temporary injunction issued by a civil court.

The proposed section 33 provides that where during an inquiry, the Commission is satisfied that an act in contravention of sections 3, 4 and 6 has been committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party.

Clause 27. —This clause seeks to omit section 34 of the Competition Act, 2002 relating to power to award compensation.

The power to award compensation is proposed to be conferred upon the Appellate Tribunal by new section 53N proposed to be inserted by clause 43 of the Bill. It is, therefore, proposed to omit aforesaid section 34 conferring power upon the Competition Commission of India to award compensation.

Clause 28. —This clause seeks to amend section 35 of the Competition Act, 2002 relating to appearance before the Competition Commission of India.

Under the existing provisions contained in the said section, a complainant or defendant or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

It is proposed to amend the said section so as to substitute the words “person or an enterprise”, for the words “complainant or defendant” for appearance before the Commission.

Clause 29. —This clause seeks to substitute section 36 of the Competition Act, 2002 relating to power of Commission to regulate its own procedure.

The existing section 36 confer powers upon the Commission, inter alia, to dismiss an application in default or deciding it ex parte or exercise power in respect of any other matter which may be prescribed. It also provides that every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code and the Commission shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

It is proposed to substitute the said section so as to provide that the Commission may direct any person to produce before the Director General or Secretary or an officer authorized by it the books or other documents, being documents relating to any trade, in the custody or under the control of such person for the purpose of examination under the Act and also that the Commission may direct any person to furnish to the Director General or Secretary or any officer authorised by it, such other information as may be in his position in relation to the trade carried on by such person as required for the purpose of this Act.

Clause 30. —This clause seeks to omit section 37 of the Competition Act, 2002 relating to review of orders of the Competition Commission of India.

Clause 31. —This clause seeks to substitute section 39 of the Competition Act, 2002 relating to execution of orders of the Competition Commission of India.

The existing section provides that every order passed by the Commission under this Act shall be enforced by the Commission in the same manner as if it were a decree or order made by a High Court or the principal civil court in a suit pending therein and it shall be lawful for the Commission to send, in the event of its inability to execute it, such order to the High Court or the principal civil court, as the case may be.

It is proposed to substitute said section, inter alia, to provide that if a person fails to pay any monetary penalty imposed on him under the Act, the Commission shall proceed to recover such penalty, in the manner as may be specified by regulations. Sub-section (2) of proposed section provides that in a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under the Competition Act, 2002 in accordance with the provisions of the Income-tax Act, 1961, it may make a reference to this effect to the concerned income-tax authority under the Income-tax Act, 1961 for recovery of the penalty as tax due under the said Act. It is also proposed to provide that any reference made by the Commission under sub-section (2) would amount to drawing of a certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act and any reference to appeal in Chapter XVIII and the Second Schedule of the Income-tax Act, 1961, shall be construed as a reference to appeal before the Competition Appellate Tribunal under section 53B of this Act.

Clause 32.—This clause seeks to omit section 40 of the Competition Act, 2002 relating to appeal.

Under the existing provisions contained in the said section, any person aggrieved by any decision or order of the Commission may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Commission to him on one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908.

It is proposed to insert, by clause 43 of the Bill, new sections 53B and 53T to provide filing of appeal from any direction, decision or order referred to in clause (a) of new section 53A to the Appellate Tribunal and filing of an appeal to the Supreme Court from any decision or order of the Appellate Tribunal. Omission of section 40 is therefore consequential in nature.

Clause 33.—This clause seeks to amend section 41 of the Competition Act, 2002 relating to Director General to investigate contraventions.

The existing sub-section (3) of section 41 provides that, without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956, so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

It is proposed to add an Explanation to sub-section (3) of section 41 to provide that the words “the Central Government” under section 240 of the Companies Act, 1956 shall be construed as “the Commission” and the word “Magistrate” under section 240A of the Companies Act, 1956 shall be construed as “the Chief Metropolitan Magistrate, Delhi”.

Clause 34.—This clause seeks to substitute section 42 of the Competition Act, 2002 relating to contravention of orders of the Competition Commission of India.

Under the existing provisions contained in the said section if any person contravenes, without any reasonable ground, any order of the Commission, or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or fails to pay the penalty imposed under this Act, he shall be liable to be detained in civil prison for a term which may extend to one year, unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakh.

It is proposed to substitute the said section so as to provide that if any person, without reasonable cause fails to comply with the orders or directions issued under the sections specified therein, he shall be punishable with fine which may extend to rupees one lakh for each day subject to a maximum of rupees ten crore as the Commission may determine. It also provides that if any person does not comply with the orders or directions issued under this section, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to rupees twenty-five crore or with both as the Chief Metropolitan Magistrate, Delhi may deem fit. It further provides that the Chief Metropolitan Magistrate, Delhi may pass such orders as it may deem fit on a complaint filed before it by the Commission for non-compliance of its orders.

Clause 35.—This clause seeks to insert a new section 42A regarding compensation in case of contravention of orders of Commission.

The proposed new section provides that any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission.

Clause 36. —This clause seeks to substitute section 43 of the Competition Act, 2002 relating to penalty for failure to comply with the directions of the Competition Commission of India and Director General of the Commission. The new section seeks to provide that a penalty which may extend to rupees one lakh for each day subject to a maximum of rupees one crore may be imposed on the person who, without reasonable cause, fails to comply with the directions given by the Commission and the Director General issued under the specified sections.

Clause 37.—This clause seeks to insert a new section 43A regarding power to impose penalty for non-furnishing of information on combinations.

The new section seeks to empower the Commission for imposing a penalty on the person or enterprise for not giving the notice to the Commission about the combination under sub-section (2) of section 6. This insertion is consequential in nature.

Clause 38.—This clause seeks to substitute sub-section (1) of section 45 of the Competition Act, 2002 regarding penalty for offences in relation to furnishing of information.

The existing provision provides for imposition of a penalty on a person, which may extend to rupees ten lakh, for furnishing documents or making statements which he knows and has reasons to believe to be false.

It is proposed to provide for imposition of a fine which may extend to rupees one crore, as the Commission may determine, on a person for furnishing documents or making statements which he knows and has reason to believe to be false.

Clause 39.—This clause seeks to amend section 46 of the Competition Act, 2002 relating to power to impose lesser penalty.

Under the existing provisions of the said section the Competition Commission of India has been conferred power to impose lesser penalty in the circumstances mentioned in that section. The first proviso to said section provides that the Commission shall not impose lesser penalty in cases where proceedings, for the violation of any of the provisions of this Act or the rules or the regulations, have been instituted or any investigation has been directed to be made under section 26 before making of such disclosure.

It is proposed to substitute said first proviso to provide that the Commission shall not impose lesser penalty in cases where the report of investigation directed under section 26 has been received before making of such disclosure. It is also proposed to amend second proviso so as to provide for lesser penalty upon a person who discloses the information about a cartel. It is also proposed to add a third proviso to the said section providing that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to co-operate with the Commission till the completion of the proceedings before the Commission.

Clause 40.—This clause seeks to amend section 49 of the Competition Act, 2002 relating to Competition advocacy.

Under the existing provisions contained in sub-section (1) of the said section the Central Government may, in formulating a policy on competition (including review of laws related to competition), make a reference to the Commission for its opinion on possible effect of such policy on competition and on receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, which may thereafter formulate the policy as it deems fit. The existing sub-section (2) provides that the opinion given by the Commission shall not be binding upon the Central Government in formulating such policy. The existing sub-section (3) provides that the Commission shall take suitable measures, for the promotion of competition advocacy, creating awareness and imparting training about competition issues in the manner as may be prescribed by rules.

It is proposed to amend sub-section (1) of the said section so as to enable the Central Government to make reference to the Commission on any other matter also apart from the existing proviso of making a reference on policy on competition (including review of laws related to competition) and also to enable the State Government to make a reference to the Commission in formulating a policy on competition or on any other matter. It is also proposed to amend sub-section (2) of the said section to provide that the opinion of the Commission shall not be binding on State Government as well as the Central Government. It is further proposed to amend sub-section (3) of the said section to provide that the Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues in the manner as may be decided by the Commission and not as may be prescribed by rules.

Clause 41. —This clause seeks to amend section 51 of the Competition Act, 2002 relating to constitution of fund.

The provisions contained in clause (b) of sub-section (1) of the said section, inter alia, provide that the monies received as costs from parties to proceedings before the Commission shall be credited to the “Competition Fund” constituted by that section.

It is proposed to omit said clause (b).

Clause 42. —This clause seeks to amend section 52 of the Competition Act, 2002 relating to accounts and audit.

The Explanation to the existing sub-section (2) of the said section clarified that the orders of the Commission, being matters appealable to the Supreme Court, shall not be subject to audit under this section.

It is proposed to amend the said Explanation so as to provide that the orders of the Commission, being matters appealable to the Competition Appellate Tribunal shall also not be subject to audit under this section.

Clause 43. —This clause seeks to insert new Chapter VIIIA to the Competition Act, 2002 relating to establishment of Competition Appellate Tribunal.

The new Chapter VIIIA contains provisions for (a) establishment of Appellate Tribunal, (b) appeal to Appellate Tribunal, (c) composition of Appellate Tribunal, (d) qualifications for appointment of Chairperson and Members of Appellate Tribunal, (e) Selection Committee, (f) term of office of Chairperson and Members of Appellate Tribunal, (g) terms and conditions of service of Chairperson and Members of Appellate Tribunal, (h) vacancies, (i) resignation of Chairperson and Members, (j) Member of Appellate Tribunal to act as Chairperson in certain cases, (k) removal and suspension of chairperson and Members of Appellate Tribunal, (l) restriction on employment of Chairperson and other Members in certain cases, (m) staff of Appellate Tribunal, (n)

Procedure for awarding compensation, (o) procedure and powers of Appellate Tribunal, (p) execution of orders of Appellate Tribunal, (q) contravention of orders of Appellate Tribunal, (r) vacancy in Appellate Tribunal not to invalidate acts or proceedings, (s) right to legal representation, (t) appeal to the Supreme Court and (u) power to punish for contempt.

Clause 44. —This clause seeks to amend section 57 of the Competition Act, 2002 relating to restriction on disclosure of information.

It is proposed to bring the Appellate Tribunal also within the scope of section 57 of the Competition Act, 2002 consequent to the proposal to insert a new Chapter VIII-A vide clause 43 of the Bill. The proposed amendment is consequential in nature.

Clause 45.—This clause seeks to amend section 58 of the Competition Act, 2002 relating to Members, Director General, Registrar, officers and other employees, etc., of the Competition Commission of India.

Under the existing provisions contained in the said section, the Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Registrar and officers and other employees of the Commission shall be deemed, while acting or purporting to act in pursuance of any of the provisions of the Competition Act, 2002, to be public servants within the meaning of section 21 of the Indian Penal Code. Clause 12 of the Bill proposes to confer power upon the Commission to appoint a Secretary instead of Registrar. Clause 43 of the Bill proposes to insert new Chapter VIII-A in the Competition Act, 2002 to establish the Competition Appellate Tribunal. Hence, it is proposed to bring the Secretary, officers and other employees of the Commission and the Chairperson, Members, officers and other employees of the Appellate Tribunal within the scope of section 58 of the Competition Act, 2002. The proposed amendment is consequential in nature.

Clause 46.—This clause seeks to amend section 59 of the Competition Act, 2002 relating to protection of action taken in good faith.

Under the existing provisions contained in the said section, no suit, prosecution or other legal proceedings can lie against the Central Government or Commission or any officer of the Central Government or the Chairperson or any Member or the Director General, Additional, Joint, Deputy or Assistant Directors General or Registrar or officers or other employees of the Commission for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

Clause 12 of the Bill proposes to confer power upon the Commission to appoint a Secretary instead of Registrar. Clause 43 of the Bill proposes to insert new Chapter VIII- A in the Competition Act, 2002 proposing to establish the Competition Appellate Tribunal. It is proposed to bring the Secretary, officers and other employees of the Commission and the Chairperson, Members, officers and other employees of the

Appellate Tribunal within the scope of the aforesaid section. The proposed amendment is consequential in nature.

Clause 47.—This clause seeks to amend section 61 of the Competition Act, 2002 relating to exclusion of jurisdiction of civil courts.

Under the existing provisions contained in the said section, no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Clause 43 of the Bill proposes to insert new Chapter VIII-A in the Competition Act, 2002 proposing to establish the Competition Appellate Tribunal. It is proposed to exclude the jurisdiction of civil courts in respect of any matter in which the Commission or Appellate Tribunal is empowered to determine. The proposed amendment is consequential in nature.

Clause 48. —This clause seeks to amend section 63 of the Competition Act, 2002 relating to power to make rules.

It is proposed to amend said section so as to confer powers upon the Central Government to make rules in respect of certain matters specified in that section and to make certain other amendments which are consequential in nature.

Clause 49.—This clause seeks to amend section 64 of the Competition Act, 2002 relating to power to make regulations by the Competition Commission of India.

It is proposed to amend said section 64 so as to confer powers upon the Competition Commission of India to make regulations in respect of certain matters specified in the said section.

Clause 50. —This clause seeks to amend section 66 of the Competition Act, 2002 relating to repeal and saving.

Under the existing provisions, the Monopolies and Restrictive Trade Practices Act, 1969 is proposed to be repealed and upon such repeal, the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the repealed Act shall stand dissolved. Sub-sections (2) to (10) of the aforesaid section deals with the matters arising out of such repeal.

It is proposed to amend said section 66 so as to provide that the Monopolies and Restrictive Trade Practices Commission may continue to exercise jurisdiction and powers under the Monopolies and Restrictive Trade Practices Act, 1969 for a period of two years from the date of bringing into force of section 66 of the Competition Act, 2002 only in respect of cases or proceedings filed before such commencement. It further



provides for the transfer of pending cases after the two years period to the Appellate Tribunal or the National Commission under the Consumer Protection Act, 1986 depending on the nature of cases. It also provides that the staff of the Monopolies and Restrictive Trade Practices Commission who has been employed on regular basis by the Monopolies and Restrictive Trade Practices Commission shall, on its dissolution, become employees of the Competition Commission or the Appellate Tribunal in the manner as may be specified by the Central Government.

## FINANCIAL MEMORANDUM

Clause 43 of the Bill seeks to establish a Competition Appellate Tribunal with a Chairperson and up to two Members, along with associated staff, whose expenses would be paid from the Consolidated Fund of India. However, clause 6 of the Bill seeks to reduce the strength of the Competition Commission from ten additional Members to six additional Members. Clause 17 of the Bill further provides for Commission to function as a collegium and not through Benches, leading to absence of need for provision of offices to these Benches, and the need for branches of Director General's office at these Benches.

2. The expenditure to be incurred on creation of the Competition Appellate Tribunal would be rupees 109.61 lakh per annum. However, there would be a decrease in expenditure up to an extent of rupees 222.39 lakh in a year due to reduction of strength of Competition Commission of India from ten additional members to six additional members, and by removal of the concept of Benches functioning at different locations, and their associated Director General subordinate offices. Thus, there would be an overall saving of rupees 112.78 lakh per annum.

3. Thus, there would not be any additional financial outgo due to the changes proposed in the amendment Bill.

## MEMORANDUM REGARDING DELEGATED LEGISLATION

Clause 48 of the Bill seeks to amend section 63 of the Competition Act, 2002. This clause empowers the Central Government to make rules, by notification, to carry out the provisions of the proposed legislation. The matters in respect of which such rules may be made are specified therein. These matters relate to, inter alia, provide for (a) the term of the Selection Committee and the manner of selection of panel of names under sub-section (2) of section 9; (b) the number of Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner in which such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees may be appointed under sub-section (1A) of section 16; (c) the salary, allowances and other terms and conditions of service of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under sub-section (3) of section 16; (d) the qualifications for appointment of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under subsection (4) of section 16; (e) the salaries and allowances payable to, and other terms and conditions of service of, the Secretary and officers and other employees of the Commission and the number of such officers and other employees under sub-section (2) of section 17; (f) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (2) of section 53B and the fees payable in respect of such appeal; (g) the term of the Selection Committee and the manner of selection of panel of names under sub-section (2) of section 53E; (h) the salaries and allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under sub-section (1) of section 53G; (i) the salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal under sub-section (3) of section 53M; (j) the fee which shall be accompanied with every application made under sub-section (2) of section 53N; (k) the other matters under clause (i) of sub-section (2) of section 53-O in respect of which the Appellate Tribunal shall have powers under the Code of Civil Procedure while trying a suit; (l) the manner in which the monies transferred to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall be dealt with by the Commission or the Appellate Tribunal under the fourth proviso to sub-section (2) of section 66.

2. Clause 49 of the Bill seeks to amend section 64 of the Competition Act, 2002. This clause empowers the Competition Commission of India to make regulations, by notification, to carry out the purposes of the proposed legislation. The matters in respect of which such regulations may be made are specified therein. These matters relate to, inter alia, (a) the procedure to be followed for engaging the experts and professionals under sub-section (3) of section 17; (b) the manner and fee which may be determined under clause (a) of subsection (1) of section 19; (c) the rules of procedure in regard to the transaction of business at the meetings of the Commission under sub-section (1) of section 22; (d) the manner in which penalty shall be recovered under sub-section (1) of section 39; (e) any other matter in respect of which provision is to be, or may be, made by regulations.

3. The rules made by the Central Government and the regulations made by the Competition Commission of India shall be laid, as soon as may be after they are made, before each House of Parliament.

4. The matters in respect of which rules and regulations may be made are generally matters of procedure and administrative details and it is not practicable to provide for them in the Bill itself. The delegation of legislative power involved is of a normal character.

# ISRAEL

## Restrictive Business Practices Law

### Chapter A - Definitions

#### 1. In this Law

"The Court President" includes the Court Vice-President;

"Business Union" a band of persons, whether associated or not, all or some of whose purposes are promotion of the business affairs of the members therein;

"Consumers Organization" an organization representing consumers approved by the Minister of Justice for the purpose of this Law;

"The Court" The Court for Trade Restrictions, established under this Law;

"Trade Restriction" A restrictive arrangement, monopoly or merger of companies;

"Arrangement" either explicit or implicit, written or oral or behavioral, whether required by law or not; "Company" a company founded and registered according to the Companies Order [New

Version], 5743-

1983, including a foreign company so registered, a registered cooperative association within its meaning in the Cooperative Associations Order and a partnership registered according to the Partnerships Order [New Version] 5735-1975;

"Subsidiary" a company over which another company has control;

"Price" including linkage differences to an index or currency, interest, payment rates and other terms of payment;

"Merger of Companies" including acquisition of most of the assets of a company by another company or acquisition of shares in the company by another company that accords the acquiring company more than a quarter of the face value of the issued shared capital, or of the voting power or of the power to appoint more than a quarter of the directors or participation in more than a quarter of the company's profits; the acquisition may be direct or indirect or through rights accorded by contract;

"The Director" the officer over trade restrictions appointed according to

Section 41; "Asset" chattels, lands and rights;

"Business" occupation in production, sale, marketing, acquisition, import or export of an asset and also an occupation of providing or receiving a service;

"Control" holding of more than half of one of the following means of control:

(1) Right to vote at a general meeting of a company or a parallel body of another corporation; (2) The right to appoint directors of the corporation;

"The Minister" the Minister of Industry and Trade.

## **Chapter B - Restrictive Arrangement**

### **Part A - What a restrictive arrangement is**

#### **Restrictive Arrangement**

2. (a) A restrictive arrangement is one made between persons conducting businesses, according to which at least one of the parties restricts himself in a way that could obviate or reduce the competition in business between him and the other parties to the arrangement, or some thereof, or between him and a person who is not a party to the arrangement.

(b) Without detracting from the generality of what is stated in sub-section (a), an arrangement in which the restriction concerns one of the following issues will be deemed to be a restrictive arrangement:

- (1) The price that is demanded, offered or is to be paid;
- (2) The profit to be obtained;
- (3) Division of all or part of the market, according to the location of the business or according to the persons or type of persons with whom business is being done;
- (4) The quantity, quality or type of the assets or services in the business.

#### **Arrangements that are not Restrictive Arrangements**

Despite what is stated in Section 2, the following arrangements will not be deemed to be restrictive arrangements:

- (1) An arrangement all of whose restrictions have been determined by law;
- (2) An arrangement all of whose restrictions concern the right of use of one of the following assets: a patent, sample, trade mark, copyright, perpetrators right or nurturers right, with the two following provisos
  - a. The arrangement is between an owner of such an asset and the recipient of the usage right therein;
  - b. If the asset has to be registered by law - that it is registered.
- (3) An arrangement between one who accords a right to land and one who acquires the right, all of whose restrictions concern the type of assets or services in which the acquirer of the right will engage on the said land;
- (4) An arrangement all of whose restrictions concern the growing and marketing of agricultural produce from a local crop of the following types: fruits, vegetables, field crops, milk, eggs, honey, cattle, sheep, poultry or fish, if all the parties to the arrangement are wholesale growers or marketers; this provision will not apply to products that are manufactured from such agricultural produce; the Minister, with the consent of the Minister of Agriculture and approval of the Knesset Finance Committee, may, in an order, add to or detract from the types of agricultural produce;
- (5) An arrangement to which the parties are a company and a subsidiary thereof;
- (6) An arrangement between the purchaser of an asset or service and a supplier, all of whose restrictions are an undertaking of the supplier not to supply certain assets or services for marketing other than to the purchaser, and an undertaking of the purchaser to purchase those assets or services only from the supplier, provided that both the supplier and the purchaser do not engage in the production of those assets or provision of those services; such an arrangement can be for the whole of the area of the State of Israel or for a part thereof;
- (7) An arrangement, all of whose restrictions concern international transportation by sea or air or combined sea, air and land international transportation, provided that all the parties thereto are

1. Shippers by sea or air; or,
2. Shippers by sea or air and a international union or aviation or shipping companies, approved for this purpose by the Minister of Transport; and the notification thereon was given to the Minister of Transport in the way prescribed by him; the Minister of Transport will, once a year, advise the Knesset Finance Committee of such notifications;

(8) An undertaking of the vendor of a business, in its entirety, vis-à-vis the purchaser of the business that he will not engage in the same type of business, where the undertaking is not contrary to reasonable and accepted norms;

(9) An arrangement to which a staff organization or employers organization is a party and all of whose restrictions concern the employment of staff and the conditions of work.

## **Part B - Prohibition of Restrictive Arrangement**

### **Prohibition of Restrictive Arrangement**

4 . A person may not be a party to all or part of a restrictive arrangement unless he has obtained approval from the Court according to Section 9 or a provisional permit according to Section 13 or an exemption according to Section 14, and, if the approval, provisional permit or exemption were conditional - according to the conditions set therein.

### **Determination of a Line of Action by a Business Union**

5 . A line of action that a business union had laid down for its members or some thereof that could prevent or reduce competition in business between them, or such line of action that it has recommended to them, will be viewed as a restrictive arrangement as stated in Section 2, and the business union and any of its members acting according thereto as a party to a restrictive arrangement.

### **Adapting Action to a Restrictive Arrangement**

6. A person who manages a business and, knowing about the existence of a restrictive arrangement, adapts his actions to all or some of the arrangement, will be viewed as a party to the arrangement.

## **Part C: Registration and Approval of a Restrictive Arrangement**

### **Application for Approval of a Restrictive Arrangement**

7. (a) The applicant to make a restrictive arrangement will submit to the Court an application for approval of the restrictive arrangement, in the way determined in the Regulations, after a copy thereof has been registered according to sub-section (b).

(b) The applicant will deliver a copy of the application to the Director; the Director will register the application in the ledger that is kept according to Section 42 and will be publish a notification thereon in Reshumoth and in two daily newspapers; details of the publication and its modes will be determined in Regulations.

### **Hearing the Director and Objections**

8. (a) The Director will be invited to the Court to express his position and arguments regarding the application.

(b) Anyone viewing himself as hurt by a restrictive arrangement, a business union and also a consumers association may submit to the Court a reasoned objection in writing within thirty days of the date of publication of the notification in Reshumoth according to Section 7(b).

## **The Decision of the Court**

9. The Court will decide to approve all or part of the restrictive arrangement, if it is of the opinion that such is for the public good, and it may stipulate its approval on conditions.

## **Considerations for the Public Good**

10. When looking at the public good for the purpose of this chapter, the Court will consider, inter-alia, the contribution of the restrictive arrangement to the matters enumerated below and whether the benefit expected for the public substantially exceeds the damage that could be caused to the public or a part thereof, or anyone who is not a party to the arrangement, namely:

- (1) Efficiency of the production and marketing of assets or services, a guarantee of their quality or a reduction in their prices to the consumer;
- (2) Assuring adequate supply of assets or services to the public;
- (3) Prevention of unfair competition that could result in the restriction of the competition for the supply or the assets or services in which the parties to the arrangement engage, on the part of a person who is not a party to the arrangement;
- (4) Giving a possibility to the parties to an arrangement to obtain a supply of assets or services on reasonable terms from a person in whose hands is a considerable part of the supplies, or to supply on reasonable terms assets or services to a person in whose hands is a considerable part of the purchasing of those assets or services;
- (5) Prevention of grievous harm to an industry that is important for the State economy;
- (6) Safeguarding the continued existence of plants as a source of employment in an area in which real unemployment could be created as the result of their closure or a production cut-back in them;
- (7) Improvement in the balance of payments of the State by cutting back on or reducing the price of imports or by increasing exports and their feasibility.

## **The Period of the Approval**

11. The approval of the Court will be for the period that it shall determine; if the Court does not determine a period, the arrangement will be approved for the period that the parties have determined or for three years, whichever is shorter.

### **Cancellation and Alteration of the Approval**

12. (a) The Court may revoke an approval that it has given or alter its conditions, if it is convinced, according to an application of the Director, that there have been substantive changes in the circumstances that were in effect at the time when the approval was given.

(b) A person seeing himself as hurt by a restrictive arrangement and a consumers organization and business union that are of the opinion that there has been a substantive change in the circumstances of the arrangement that was approved, may apply to the Director with a request that he use his power according to sub-section (a); if the Director decides that the circumstances do not justify use of his said power, he will so advise the applicant, in writing with grounds, within thirty days of the date of receipt of the application.



## **Provisional Permit**

13. (a) If an application has been submitted for approval of a restrictive arrangement, the Court President may, if the Director has so recommended and if he is convinced that the arrangement is apparently for the public good within its meaning in Section 10, give the parties, at their request, a provisional permit to act according to the arrangement; the permit will be for a set period that will not exceed one year or until the giving of the decision of the Court according to Section 9, whichever is sooner; the Court President may stipulate the permit on certain conditions.

(b) The Director will give a notification about the grant of a provisional permit to whomsoever filed an objection to that arrangement according to Section 8.

(c) The Court President may, at the request of the Director or of whomsoever filed an objection to the arrangement, revoke a provisional approval that he gave or change its terms, provided that the parties to the restrictive arrangement, the Director and the person seeking the cancellation are given an opportunity to put their arguments.

## **Exemption from Obtaining Approval**

14. (a) If the Director is convinced, according to the application of a party to a restrictive arrangement, that the arrangement restricts business competition in an insignificant manner, he may, with an argued decision, exempt the parties to the arrangement from the obligation to obtain approval of the Court for the arrangement.

(b) The Director may stipulate the exemption on conditions, change them and also revoke the

exemption. (c) A notification about an exemption and its terms, about a change in the terms and cancellation of an exemption will be given to the parties to the arrangement and the Court President and will be published in Reshumoth.

(d) If an application is submitted for an exemption with respect to an arrangement in a matter falling under the purview of one of the Government ministries, the Director will notify the director-general of that ministry about the application and will not decide on the application until fourteen days have elapsed from the date on which the notification was sent.

## **Cancellation of the Exemption**

15. (a) A person seeing himself as hurt by a restrictive arrangement for which an exemption was given according to Section 14, a business union or consumers organization, may, in writing and with grounds, appeal the decision of the Director to grant an exemption to the Court President or may appeal his decision not to revoke the exemption that he gave.

(b) If the Court President sees that the restrictive arrangement is not complying with the conditions stated in Section 14(a), he will cancel the exemption; the validity of the cancellation will be from the date that the Court President shall determine.

(c) The decision of the Court President shall not be given until after the parties to the arrangement and the Director are given an opportunity to put their arguments.

## **Change in a Restrictive Arrangement**

16. (a) A change in a substantive detail in a restrictive arrangement that the Court has approved or in an arrangement with respect to which a provisional permit was given according to Section 13 or in an arrangement with respect to which an exemption was given according to Section 14, is as a new restrictive arrangement, necessitating an application for approval according to Section 7, within thirty days of the date of the change.

(b) The parties to such a restrictive arrangement will advise the Director of any change therein that, in their opinion, is not a substantive change; if the Director is of the opinion that the change is substantive, he will apply to the Court President to resolve the dispute.

(c) In this section "change" includes the addition of a party to an arrangement for removal of a party therefrom.

## **Chapter C - Merger of Companies**

### **Part A - Incidence and Prohibition of Merger**

#### **Incidence (Amendment of 5749)**

17. (a) The provisions of this Chapter will apply to the merger of companies in which one of the following applies:

(1) As a result of the merger, the share of the merging companies in total production, sale, marketing or purchase of a particular asset or similar asset or provision of a particular service or similar service exceeds half, or a lower proportion if the Minister has so determined, in the matter of a monopoly, according to Section 26(c);

(2) The sales turnover of the merging companies together, in the fiscal year preceding the merger, exceeded an amount of 501 million New Sheqels; the Minister may, with the approval of the Knesset Finance Committee, change the said amount;

(3) One of the merging companies has a monopoly within its meaning in Section 26.

(b) (1) The amount stated in sub-section (a)(2) will be updated on January 1 and July 1 of each year (hereinafter: the Update Day), by the rate of the rise in the Index as against the base index, provided that such rate of rise of the Index exceeds ten percent.

(2) An amount so updated will be rounded off to the nearest amount that is a multiple of 10,000 New Sheqels.

(3) An updated amount will come into effect on the date on which the Minister publishes a notification thereon in Reshumoth.

(4) In this Section

"Index" means the Consumer Price Index that the Central Bureau of Statistics publishes; "The New Index" means the Index last published prior to the Update Date;

"The Base Index" means the Index last published prior to the previous Update Date and, for the purpose of the first Update Date after the incidence of this Law the Index published in October 1988.

(c) The Minister, with the approval of the Knesset Finance Committee, may determine in Regulations the way for determination of the share of a company, as stated in sub-section (a)(1), and the sales turnover as stated in sub-section (a)(2).

(d) In this Section

"Similar asset" means an asset with similar characteristics even if not identical from all points of view; "Similar service" means a service with similar characteristics even if not identical from all points of view.

#### **Merger with a Company doing business overseas**

18. The provisions of this Section will apply to a company doing business both in Israel and overseas only with respect to the sales turnover of the company in Israel and with respect to the proportion in Israel of the company in the production, sale, purchase and marketing of an asset or provision of a service or its receipt in Israel.

## **Part B - Notice of Merger and Agreement of the Director**

### **Prohibition of Merger of Companies**

19. Companies may not merge unless a merger notice has first been given and the agreement of the Director has been obtained to the merger and, if his agreement was conditional - according to the conditions he set, all being as stated in this Part.

20. (a) Each of the companies intending to merge shall notify the Director thereon in a notification, the details of which will be determined in Regulations (hereinafter: Merger Notice); the Director may demand further particulars that seem necessary to him for examination of the application.

(b) Within thirty days from the day on which he received a Merger Notice from all the companies seeking to merge, the Director will notify them whether he agrees to the merger or objects to it or is conditioning it on conditions that he notes in his notification; failure to give such notification within the said thirty days is as a notification of agreement, unless the said period is extended according to Section 38.

(c) If a Merger Notice is given to the Director and the sphere of activity of the companies seeking to merge comes under the purview of one of the government ministries, the Director will forward a copy of the application to the director-general of that ministry.

### **The Decision of the Director**

21. (a) The Director will object to the merger of companies or stipulate conditions for it if, in his opinion, there is a reasonable suspicion that, as a result of the merger as proposed, the competition in that industry will be significantly harmed or that the public will be harmed in one of the following:

(1) The level of prices of an asset or of a service; (2) Low quality of an asset or of a service;

(3) The quantity supplied of the asset or the scale of the service, or regularity and conditions of the supply

(b) The Director will publish a notice in Reshumoth and in two daily newspapers about the decision of the Director to agree to a merger of companies, to object to it or to stipulate conditions.

### **Appeal against the Decision of the Director**

22. (a) If the Director objects to the merger of companies or stipulates his agreement on conditions, each of the companies seeking to merge may file an appeal with the Court within thirty days of the day on which it received the decision of the Director.

(b) If the Director agrees to the merger of companies, conditionally or unconditionally, any person who may be hurt by the merger, a business union and consumers organization, may file an appeal with the Court against the decision of the Director, within thirty days of the date on which the decision of the Director was published in two daily newspapers.

(c) The Court may confirm, cancel or change the decision of the Director.

(d) The filing of an appeal according to sub-section (b) will not delay the merger unless an order is given according to Section 36.

### **Advisory Committee for Company Mergers**

23. (a) An advisory committee will be set up for company mergers, the members of which will have know-how and expertise in economics.
- (b) The Minister will appoint a chairman for the committee and a vice-chairman and will also determine a list of five members who are civil servants, and a list of five members who are not civil servants.
- (c) A panel of the committee shall be of three persons; the committee chairman will determine the committee panel that will discuss a particular Merger Notice; each panel shall comprise the chairman of the committee or the vice-chairman and one member from the list of members who are civil servants and one member from the list of members who are not civil servants, to be determined, as far as is possible, according to the order of the lists.
- (d) One whose other occupations could create a clash of interests with his position as member of a panel of the committee in discussing a certain Merger Notice or who has a personal interest in the discussion will not be a member of the panel that discusses that Merger Notice.
- (e) The chairman of the committee will set its order of work.

### **Obligation to Consult**

24. (a) The Director will not agree to the merger of companies, conditionally or unconditionally, until after consultation with the advisory committee according to Section 23.
- (b) The Director will provide the committee chairman with a copy of every Merger Notice, immediately upon its receipt.

### **Part C - Separation of Companies**

#### **The Authority of the Court to Separate Companies that had Merged**

25. (a) If the Court considers, upon application of the Director, that there is a reasonable suspicion that, as the result of a merger of companies, made contrary to the provisions of this Law, competition in that industry will be significantly harmed or the public will be harmed as stated in Section 21, it may order separation of the companies that merged.
- (b) Separation of companies that have merged will be by way of restoring the situation to its previous state or by way of transferring part of the shares to a body, of their choice, that is not associated with them, or establishment of an additional company to which will be transferred part of the assets of the companies or in any other way that the Court deems fit.
- (c) If the sphere of activity of the company comes under the purview of one of the government ministries, the Office will forward a copy of the application to the director-general of that ministry.
- (d) Nothing stated in this Section is tantamount to detracting from the provisions of Section 31.

## **Chapter D - Monopoly**

### **Monopoly and Monopolist**

26. (a) For the purpose of this Law, a concentration of more than half of the total supply of assets or their total acquisition, or more than half of total services or their total acquisition in the hands of one person (hereinafter: Monopolist) will be deemed a Monopoly. The Director will proclaim the existence of a Monopoly with a notice in Reshumoth; the provisions of Section 34(b) to (e) will apply to such proclamation, as though it were a determination according to Section 43(a).

(b) A Monopoly can be in a particular region.

(c) The Minister may, at the recommendation of the Director, determine that, with respect to certain assets or a certain service, a concentration at a rate lower than half will be seen as a Monopoly if he sees that person holding such concentration has a decisive impact in the market with respect to those assets or those services.

(d) If the concentration stated in sub-section (a) or determined according to sub-section (c) is held by two or more persons between whom there is no competition or only slight competition (hereinafter: Concentration Group), the concentration will be seen as a Monopoly and the Concentration Group as a Monopolist, if the Director has determined this according to Section 43(a)(4).

(e) Once every six months, the Director will give the Knesset Finance Committee a list of all

Monopolists. (f) In this Section "person" includes a company and its subsidiaries, the

subsidiaries of one company and also a person and a company that he controls.

### **Restrictions regarding a Monopolist**

27. (a) The Director may

(1) Demand in writing from a Monopolist who contracts or plans to contract with customers or suppliers according to a uniform contract, within its meaning in the Uniform Contracts Law, 5743-1982, that he submit an application for approval of the contract according to Chapter C of the said Law; if the Monopolist does not file the application within the time determined in the demand, he may not propose to his customers or suppliers to contract with a uniform contract to which the demand applies;

(2) Demand from a Monopolist who manufactures or imports an asset or a service supplier, the specification of which is determined as a Standard according to the Standards Law, 5713-1953, that he not manufacture, not import and not sell the asset nor provide the service unless he has adapted it to the requirement of the Standard.

### **Appeal against Restriction of a Monopoly**

28 . A Monopolist may appeal to the Court against the demand of the Director according to Section 27, within thirty days of receipt of the demand; filing an appeal will not delay implementation of the demand of the Director unless the Court decides otherwise.

### **Unreasonable Arrangement**

29 . A Monopolist may not refuse unreasonably to provide the asset or the service in the Monopoly.

## **Abuse of Position**

29A. (a) A Monopolist will not abuse his position in the market in a way that could reduce competition in business or harm the public.

(b) A Monopolist will be considered to be abusing his position in the market in a way that could reduce competition in business or harm the public, in each of the following instances:

- (1) Determination of the level of unfair buying or selling prices of the asset or the service in the Monopoly;
- (2) Reduction or increase of the quantity of the assets or the scope of the services offered by the Monopolist, not in the framework of fair competitive activity;
- (3) Determination of differing contractual conditions for similar transactions that could grant certain customers or suppliers an unfair advantage vis-à-vis those competing with them;
- (4) Stipulating a contractual arrangement regarding the asset or the service in the Monopoly on conditions that, by their nature or in accordance with accepted trading conditions, are not pertinent to the subject of the contract.

The provisions of this sub-section are intended to add to the provisions of sub-section (a).

## **Arrangement of Monopolistic Actions**

30. If the Court considers, upon application of the Director or of a consumers organization that, as the result of the existence of a Monopoly, the public is being hurt in one of the following:

- (1) Level of prices of an asset or of a service;
- (2) Low quality of an asset or of a service;
- (3) Quantity of the assets delivered or the scope of the service or the regularity and conditions of the supply;
- (4) Existence of unfair competition in business between the Monopolist and others,

It may give the Monopolist instructions regarding the steps that he must adopt in order to prevent the harm.

## **Dissolution of a Monopoly**

31. If the Court considers, upon application of the Director, that, as the result of the existence of a Monopoly, the public is harmed, in a significant way, in one of the things enumerated in Section 30, and that the harm cannot be avoided efficiently by arranging the actions of the Monopoly according to Section 30 but only by dissolving the Monopoly into two or more separate business corporations, it may order dissolution of the Monopoly.

(b) Dissolution of the Monopoly will be by way of transfer of part of the shares to a body that is not associated with the Monopolist, at the choice of the Monopolist, or establishment of an additional company to which part of the assets of the Monopoly will be transferred or in any other way as the

Court shall see fit.

(c) If the sphere of activity of the Monopoly comes under the purview of one of the government ministries, the Director will forward a copy of his application to the director-general of that ministry.



## **Chapter E - Trade Restrictions Court**

### **Establishment of the Court and Appointment of its Members**

32. (a) A Court for Trade Restrictions is hereby established.

(b) The number of members of the Court shall not exceed seventeen.

(c) The President and Vice-President of the Court will be judges of a District Court whom the Minister of Justice will appoint in consultation with the President of the Supreme Court.

(d) The other members of the Court will be appointed by the Minister of Justice, at the recommendation of the Minister, and will include at least three representatives of consumers organizations and three representatives of economic organizations; the number of members who are civil servants shall not exceed a third of all members.

(e) The term of office of members of the Court shall be two years; a member whose term of office has ended can be re-appointed, provided that a member not serve for more than three consecutive terms of office.

(f) Notice of the appointment of the members of the Court will be published in Reshumoth.

### **The Court Panel (5754 Amendment)**

33. (a) The Court will adjudicate in a panel of three<sup>1</sup>, but the President may instruct, before the start of the hearing on a particular matter, that the discussion thereon will be before a larger, odd number.

(b) The Court President will determine the panel of the Court; on each panel will be the Court President or Vice-President and other members, provided that the number of civil servants on the panel not exceed half. Clash of Interests

34. (a) One whose other interests could create a clash of interests with his position as a panel member of the Court in a particular proceeding or who has a personal interest in the proceeding will not be a member of the panel that adjudicates in that proceeding and he will deliver a statement thereon to the Court President.

(b) If a panel member is doubtful whether a clash of interests might be created, he will so inform the Court President.

### **Accompanying Powers**

35 . If the Court has decided regarding a trade restriction, it may, in that decision or in another decision, give any order that seems to it to be necessary in order to ensure that its decision be upheld.

### **Interim Orders**

36 . In any matter brought before the Court or before the Court President, the Court or the Court President may issue an interim order, if they find that it would be right to do so in the circumstances of the case.

## **Evidence and Procedures**

37. (a) The Court and the Court President will not be bound by the laws of evidence, apart from laws regarding immunity of witnesses and regarding privileged evidence as stated in Chapter C of the Evidence Order [New Version] 5731-1971.

(b) Regarding the summoning of witnesses and taking of evidence, the Court President will have the powers that a District Court has in a civil matter; and, for the purpose of performance of orders and contempt of court, an order of the Court is as an order of a District Court in a civil matter.

## **Extension of Periods**

38 . The Court President may, at the request of the Director or an interested person, extend a period set according to this Law, even if ended, if he sees that there are special reasons for doing so.

## **Right of Appeal**

39 . A litigant who considers himself hurt by a decision of the Court, including a decision according to Section 30 and an interim order or a provisional permit that the Court President gave according to Section 13, may appeal thereon to the Supreme Court within forty-five days from the date on which he was advised thereof; an appeal against an interim order, against a decision of the Court on appeal according to Section 43 or against a provisional permit, will be heard by a single judge unless the President of the Supreme Court has determined otherwise.

## **Procedures**

40. (a)The Court and the Court President will adjudicate according to the Procedures that the Minister of Justice shall decree according to sub-section (b); in the absence of such procedures, they will adjudicate in the way that seems to them most effective for a just and rapid decision.

(b) The Minister of Justice may decree Procedural Regulations

(1) For discussions before the Court or the Court President, including provisions regarding  
(a) Persons and organizations that may argue on behalf of a litigant or that may be respondents or that should be heard before a decision is given;  
(b) Continuity of the hearing;  
(c) Payment of costs, legal fees and witnesses time; (d) Court fees.

(2) For hearings before the Supreme Court on appeals according to

Section 39. (5754 Amendment)  
Chapter F: Trade Restrictions Authority and the  
Director, His Functions and Powers  
The Director (5754 Amendment)

41. (a) The Government will appoint, at the suggestion of the Minister, a Trade Restrictions Director; the Director will be a civil servant.

(b) Notification of the appointment will be published in Reshumoth.

## **The Authority**

41a. (a) An Antitrust Authority is hereby established (hereinafter: the

Authority). (b) The Director will be the Director of the Authority.

(c) The budget of the Authority will be set in the Budget Law in a separate budgetary line, within its meaning in the Bases of the Budget Law, 5745-1985.

(d) The Director of the Authority will be authorized, together with the accountant of the Authority, to representative the Government in transactions as stated in Sections 4 and 5 of the State Assets Law, 5711-

11951, excepting for real estate transactions, for the purpose of implementation of this Law, and to sign in the name of the State on documents regarding such transactions.

## **Management of a Register and Publication in Reshumoth**

42. (a) The Director will keep a register of applications for restrictive arrangements and of restrictive arrangements approved, a register of provisional permits given, a register of exemptions given according to Section 14, a register of mergers of companies for which the agreement of the Director or agreement of the Court was given, and a register of monopolies.

(b) The register will be open to public scrutiny; the Court may, however, instruct that a particular matter not be open to public scrutiny if it is of the opinion that this should be done for reasons of State security, its public relations or some other vital issue, including a persons interest in a commercial secret.

(c) The Director will publish in Reshumoth a notice about decisions of the Court and about decisions of the Supreme Court in appeals thereon, in the following matters:

- (1) Approval of a restrictive arrangement according to Section 9;
- (2) A decision on appeal regarding the merger of companies according to Section 22;
- (3) Instructions to a Monopolist according to Section 30.

## **Determination of the Director (5756 Amendment)**

43. (a) The Director may determine if

- (1) An arrangement or an arrangement that the parties wish to reach is a restrictive arrangement;
- (2) A line of action that a business union has determined or recommended or wishes to determine or recommend is a restrictive arrangement;

(3) The conditions of Section 17 hold in a merger of

companies; (4) A Concentration Group is a Monopoly;

(5) A Monopolist has abused his status in the market according to the provisions of Section 29a.

(b) Notification about a determination of the Director will be delivered to the parties to a restrictive arrangement, to the parties to a merger of companies and to the Monopolist, as relevant, and he may even publish it in Reshumoth; if the Director is of the opinion that the public interest requires publication, he will publish the determination in Reshumoth and in two daily newspapers, after the elapse of thirty days from the date of issue of the notification.

(c) One to whom a notification according to sub-section (b) has been delivered who disputes the determination or a part thereof, may appeal to the Court within thirty days from the date on which the notification was served to him. The burden of proof before the Court is on the appellant.

(d) The Court, having heard the parties, may approve, cancel or change the determination of the Director. (e) The determination of the Director will be apparent evidence for what is determined therein in any legal procedure.

(f) Use or non-use by the Director of his power under this Section entails no obstacle to putting on trial a person who offended against the provisions of this Law.

### **Application to the Court by the Director**

44. The Director will apply to the Court for it to activate its power according to Section 25, 30 or 31, as relevant, if he has seen that

(1) There is reasonable suspicion that, as the result of a merger of companies done contrary to the provisions of this Law, competition in that industry will be significantly harmed or the public will be harmed in one of the things enumerated in Section 21(a);

(2) As the result of the existence of a Monopoly, the public has been harmed in one of the things enumerated in Section 30(1) to (4);

(3) The said harm in para. (2) cannot be prevented by arrangement of the Monopoly but only by its dissolution as stated in Section 31.

### **Searching and Seizures**

45. (a) The Director, or one whom he empowers therefore, may, if he has a reasonable basis for assuming that such is necessary to ensure implementation of this Law or to prevent an offence against its provisions

(1) enter any place in which business is being conducted and conduct a search there; but he may not enter a place serving for residential purposes other than according to a search warrant from a competent court; the provisions of Sections 26 to 29 for the Criminal Procedures Order (Arrest and Search) [Now Version], 5729-

1969, will apply, mutatis mutandis, to a search according to this paragraph;

(2) seize any article, as defined in the said Order, where he has a reasonable basis for assuming that it could serve as evidence in a trial for such an offence;

(b) An article seized according to sub-section (a) may be held until a court to which a charge sheet has been submitted about the offence associated with that article decides what shall be done with it; if no such charge sheet is submitted within sixty days of the date of seizure the article will be returned; if there is doubt as to whom to return it, the Magistrates' Court within whose jurisdiction the article was seized will decide upon a request by a person claiming a right to it or upon a request of the Director or upon a request of one whom he so empowered.

(c) If a document of a person is seized according to sub-section (a), the seizer will allow a photocopy to be made at the request of that person.

(d) One holding an article seized according to sub-section (a) will treat it as would its owner; if he does not do so and the article is destroyed or damaged, compensation will be paid to the owner from the State Treasury.

(e) The Magistrates` Court within whose jurisdiction the article was seized may, at the request of the Director or at the request of one whom he so empowered or at the request of a person claiming a right to the article, order that the article be handed over to the person claiming a right thereto or to someone else or that it be handled otherwise as the Court shall instruct, all being on the conditions that it determines.

### **Investigations and Provision of Information**

46 (a) The Director, or one whom he so empowered, may investigate any person with respect to an offence under this Law; the provisions of Sections 2 and 3 of the Criminal Procedure (Testimony) Order will apply to the investigation.

(b) Every person must, at the demand of the Director or of whomsoever he has so empowered, give him all the information, documents, ledgers and other certificates that, in the opinion of the Director, might ensure or ease the implementation of this Law.

(c) The provisions of Section 45(b), (c), (d) and (e) will apply, mutatis mutandis, to the possession and return of certificates given according to sub-section (b).

## **Chapter F - Representative Action**

### **Representative Action [5756 Amendment (No. 2)]**

46a. (a) A person or consumers organization (hereinafter: the Claimant) may file action in the name of a group of persons for any reason with respect to which the Claimant can according to this Law claim in his name against any defendant whom the Claimant can sue in his name (hereinafter: Representative Action).

(b) A judgment in a Representative Action will constitute a court action with respect to all those enumerated with the group, subject to the provisions of Section 46c(b).

### **Court Approval [5756 Amendment (No. 2)]**

46b. Filing of a Representative Action requires approval of the Court or the Tribunal, as relevant (in this

Chapter the Court), and it will not approve it unless it is convinced that the following conditions

are upheld: (1) The size of the group justifies submission of the action as a Representative Action;

(2) There is a reasonable possibility that substantive issues of fact and law that are common to the group will be decided in the Representative Action in favor of the group;

(3) Submission of the Representative Action is a preferable way to submission of personal actions, is justified and fair for a decision in the dispute in the pertinent circumstances;

(4) There is a reasonable basis for assuming that the Claimant represents in a fitting manner the interest of those enumerated with the group.

### **Definition of the Group [5756 Amendment (No. 2)]**

46c. (a) If the Court approves submission of the action as a Representative Action, it will define the group in whom name the Representative Action is being filed and will instruct as to the manner of publication of its decision.

(b) One who is a member of the group that the Court has defined will be seen as one who has agreed to submission of the action as a Representative Action, unless he has notified the Court on his desire not to be enumerated with the group, this being within forty-five days of the date of publication of the decision of the Court; the Court may, at the request of any person, extend with respect to him the said period, if it sees special reason therefore.

### **Arrangement or Compromise [5756 Amendment (No. 2)]**

46d. A claimant may not leave a Representative Action and may not make an arrangement or a compromise with a defendant other than with the approval of the Court.

### **Regulations [5756 Amendment (No. 2)]**

46e. (a) The Minister of Justice will determine procedures for the purpose of a Representative Action and how it is conducted and he may determine ways for hearing the position of the Attorney-General or of the Director.

(b) The Minister of Justice may determine instructions regarding ways of proof of the damage caused to each of those enumerated with the group.

### **Notification [5756 Amendment (No. 2)]**

46f. A claimant who files a Representative Action will so advise the Attorney-General and the Director in writing.

### **Exemption from Fee [5756 Amendment (No. 2)]**

46g. Submission of a Representative Action will be exempt from payment of the Court fee.

### **Legal Fees [5756 Amendment (No. 2)]**

46h. The fees of the lawyer who represents the claimant in a Representative Action will require the approval of the Court.

### **Indemnification and Special Compensation [5756 Amendment (No. 2)]**

46i. (a) If the Court rules financial compensation in a Representative Action, it may:

(1) instruct that the compensation will be paid immediately or within a period that the Court shall determine;

(2) instruct that the compensation will be paid in periodic installments, on conditions that the Court shall determine;

(3) instruct that a portion as it sees fit of the amount that it ruled, after deduction of costs and legal fees, will be paid to the claimant who troubled to file the action and prove it, and that the balance will be divided among those enumerated with the group pro rata to their damages, or in any other way that the Court shall instruct.

(b) If the Court sees that financial compensation to all or some of the members of the group is impractical under the circumstances, either because they cannot be identified and the payment made at a reasonable cost or for another reason, it may instruct any other welfare in favor of all or some of the group or in favor of the public, as it shall see fit, under the circumstances.

### **Non-prevention of Other Welfares [5756 Amendment (No. 2)]**

46j. There is nothing in the provisions of this chapter to deny a claimant according to this Law other legal welfare vis-à-vis a defendant.

## **Chapter G - Penalties and Remedies**

### **Penalties (5756 Amendment)**

47. (a) A person who has done one of:

(1) Was party to a restrictive arrangement that was not lawfully approved and for which no provisional permit or exemption was issued according to Section 14;

(2) Did not uphold a condition according to which the restrictive arrangement was approved or according to which the provisional permit or the exemption, as relevant, was issued.

(3) Did not notify of the merger of companies or did an act tantamount to a full or partial merger, contrary to the provisions of Chapter C;

(4) Did not keep a condition determined in the merger approval;

(4a) Abused his status in the market according to the provisions of Section 29a, provided that his intent to reduce business competition or to harm the public has been proven;

(5) Has offended against an instruction given according to Section 30 or against an order given according to Sections 25 or 31;

(6) Has offended against an order given according to Sections 35 or 36,

will be liable to imprisonment of two years or a fine that is ten times the fine stated in Section 61(a)(4) of the

Penal Code, 5737-1977 (hereinafter: the Penal Code) and an additional fine that is ten times the fine stated

in Section 61(c) of the Penal Code (hereinafter: Additional Fine) for each day that the offence continues, and, if there was an offence against paras. (1) or (3) for each day the offence continues after the notification of the Director as stated in Section 43 has been delivered; if a corporation, double the fine or the Additional Fine, as relevant.

(b) Who commits an offence against any other of the provisions of this Law will be liable to imprisonment of one year or a fine that is ten times the fine stated in Section 61(a)(3) of the Penal Code and an additional fine for each day the offence continues; if a corporation, double the fine or the Additional Fine, as relevant.

### **Responsibility of a Company of Persons**

48 . If an offence is committed against this Law by a company of persons, each person who, when the offence was committed, was, in that company of persons, an active director, a partner excepting a limited partner or a senior administrative employee with responsibility for that sphere, will be charged with the offence, if it has not been proven that the offence was committed without his knowledge and that he took all reasonable steps to ensure the keeping of this Law.

### **Defense for Employees and Agents**

49. A good defense for an employee or agent charged with an offence according to this Law will be if he proves that he acted in the name of his employer or in the name



of his client and in accordance with his instructions, and that he believed in good faith that his act was not tantamount to an offence against this Law.

### **Injustice in Torts**

50 . An act or omission contrary to the provisions of this Law is as a wrong-doing according to the Torts Order [New Version].

### **Prohibitory Injunction**

50a. At the request of the Director, the Court President , in his absence, another judge of the Jerusalem District Court, may

- (1) order any person to not take an action that is an offence according to this Law, and to give a surety thereon;
- (2) to order any action necessary for prevention of such an offence.

## **Chapter H: Miscellaneous Provisions**

### **Implementation and Regulations**

**JAMAICA****FAIR COMPETITION***THE FAIR COMPETITION ACT*

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6. Commission shall seek information.
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9. Minister may give directions.
10. Powers of entry and search, etc.
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**SCHEDULE.**

## THE FAIR COMPETITION ACT

Act  
9 of 1993

[9th March, 1993.]

1. This Act may be cited as the Fair Competition Act.

Short title.

### PART I. *Preliminary*

2. (1) In this Act, unless the context otherwise requires—

Interpretation.

"acquire"—

[Amended,  
2001]

(a) in relation to goods, includes obtain by way of gift, purchase of exchange, and by way of lease, hire or hire purchase;

(b) in relation to services, includes accept.

"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;

"agreement" includes any agreement, arrangement or understanding whether oral or in writing or whether or not it is or is intended to be legally enforceable;

"authorized officer" means any officer of the Commission authorized by the Commission to assist it in the performance of its functions under this Act;

"business" means any activity that is carried on for gain or reward or in the course of which goods or services are manufactured, produced or supplied, including the export of goods from Jamaica;

"Commission" means the Fair Trading Commission established under section 4;

"consumer" means any person who is either—

(a) a person to whom goods are or are intended to be supplied in the course of a business carried on by the supplier or potential supplier;

(b) a person for whom services are supplied in the course of a business carried on by the supplier or potential supplier,

and who does not seek to receive the goods or services in the course of a business carried on by him;

"Court" means the Supreme Court;

"dealer" means a person carrying on a business of supplying goods, whether by wholesale or retail;

"employee" means a person who works under a contract of employment; "enterprise" means any person who carries on business in Jamaica but does not include a person who—

(a) works under a contract of employment; or

(b) holds office as director or secretary of a company and in either case is acting in that capacity;

"functions" includes powers and duties;

"goods" means all kinds of property other than real property, money, securities or choses in action;

"group", where the reference is to a group of persons fulfilling specified conditions (other than the condition of being interconnected companies), means any two or more persons fulfilling those conditions, whether or not, apart from fulfilling them they would be regarded as constituting a group;

"group of interconnected companies" means a group consisting of two or more companies all of which are interconnected with each other;

"interconnected company" shall be construed in accordance with subsection (2)(a);

"price" includes any charge or fee, by whatever name called;

"service" means a service of any description whether industrial, trade, professional or otherwise;

"supply"—

(a) in relation to goods, includes supply or resupply 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.

(2) For the purposes of this Act—

(a) any two companies are to be treated as interconnected companies if one of them is a company of which the other is a subsidiary of if both of them are subsidiaries of the same company;

(b) a group of interconnected companies shall be treated as a single enterprise.

(3) Every reference in this Act to the term "market" is a reference to a market in Jamaica 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.

(4) References in this Act to the lessening of competition shall, unless the context otherwise requires, include references 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 Jamaica.

**3.** Nothing in this Act shall apply to—

Application of  
the Act.

(a) combinations or 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) the entering into of an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trade mark;

(d) the entering into or carrying out of such an agreement or the engagement in such business practice, as is authorized by the Commissioner under Part V.

(e) any act done to give effect to a provision of an arrangement referred to in paragraph (c);

(f) activities expressly approved or required under any treaty or agreement to which Jamaica is a party;

(g) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public;

(h) such other business or activity declared by the Minister by order subject to affirmative resolution.

## **PART II. *The Fair Trading Commission***

**4.** (1) There is hereby established for the purposes of this Act, a body to be called the Fair Trading Commission which shall be a body corporate to which section 28 of the Interpretation Act shall apply.

(2) The provisions of the Schedule shall have effect as to the constitution of the Commission and otherwise in relation thereto.

Establishment  
of Commission.

**5.** (1) The functions of the Commission shall be—

Schedule.

(a) to carry out, on its own initiative or at the request of any person such investigations in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices;

Functions of the  
Commission.

(b) to carry out such other investigations as may be requested by the Minister or as it may consider necessary or desirable in connection with matters falling within the provisions of this Act;

[Amended,  
2001]

(c) 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;

(d) to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise; and

(e) to carry out such other duties as may be prescribed by or pursuant to the Act.

(2) It shall be the duty of the Commissioner—

(a) to make available—

(i) to persons engaged in business, general information with respect to their rights and obligations under this Act;

(ii) for the guidance of consumers, general information with respect to the rights and obligations of persons under this Act affecting the interests of consumers;

(b) to undertake studies and publish reports and information regarding matters affecting the interests of consumers;

(c) to co-operate with and assist any association or body of persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act.

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

Commission shall seek information.

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

[Amended, 2001]

(a) summon and examine witnesses; (b) call for and examine documents; (c) administer oaths;

Powers of the Commission.

(d) require that any document submitted to the Commission be verified by affidavit;

(e) adjourn any investigation from time to time.

[Amended, 2001]

(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 or services 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 uncompetitive practice.

(4) If the information specified in subsection (3) is not furnished to the



satisfaction of the Commission, it may make a finding on the basis of the information available before it.

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

Hearings to be held in public.

**9.** (1) The Minister may give to the Commission such directions of a general nature as the Minister considers necessary in the public interest as to the policy to be followed by the Commission.

Minister may give directions.

(2) The Commission shall give effect to any directions given pursuant to subsection (1).

**10.** (1) Subject to this section, the Commission may, for the purpose of ascertaining whether any person has engaged or is engaging in conduct constituting or likely to constitute a contravention of this Act, require an authorized officer to enter and search any premises and inspect and remove for the purpose of making copies, any documents or extracts therefrom in the possession or under the control of any person.

Powers of entry and search, etc.

(2) An authorized officer shall not exercise the powers conferred by subsection (1) unless he obtains a warrant authorizing him to exercise those powers in accordance with subsection (4)

(3) Where a Justice of the Peace is satisfied on information on oath that there is reasonable ground for believing that any person has engaged or is engaged in conduct constituting or likely to constitute a contravention of this Act, the Justice of the Peace may by warrant under his hand, permit an authorized officer to exercise the powers conferred by subsection (1) in relation to any premises specified in the warrant, so, however, that such warrant shall not authorize the detention of a document for a period exceeding seven days.

(4) An authorized officer shall—

(a) on entering any premises pursuant to a warrant issued under subsection (3), produce evidence of his authority to enter the premises and evidence of his identity;

(b) upon completing a search authorized under this section, leave a receipt listing documents or extracts therefrom removed for the purposes of this section.

(5) The occupier or person in charge of any premises entered pursuant to this section shall provide the authorized officer with all reasonable facilities and assistance for the effective exercise of his functions under this section.

**11.** (1) At any stage of an investigation under this Act, if the Commission is of the opinion that the matter being investigated does not justify further investigation, the Commission may discontinue the investigation.

(2) The Commission shall, on discontinuing an inquiry, make a report in writing to the Minister stating the information obtained and the reason for discontinuing the investigation.

Discontinuance of investigation.

[Amended, 2001]

*Financial Provision, Accounts and Reports*

**12.** The funds of the Commission shall consist of—

Funds of  
Commission.

(a) such sums as may be appropriated by Parliament for the purposes of the Act;

(b) any other moneys which may in any manner become payable to or vested in the Commission in respect of any matter incidental to his functions

**13.** (1) The accounts of the Commission shall be audited annually by the Auditor-General or by any auditor or auditors approved by him and a statement of accounts so audited shall form part of the annual report referred to in section 14 (1).

Accounts and  
audits.

(2) The Commission shall, in each year, before a date specified by the Minister—

(a) submit to the Minister a statement of accounts audited in accordance with subsection (1);

(b) submit to the Minister for approval estimates of revenue and expenditure for the financial year next following.

**14.** (1) The Commission shall, within three months after the end of each financial year, or within such longer period as the Minister may in special circumstances allow, cause to be made and transmitted to the Minister a report dealing generally with the activities of the Commission during the preceding financial year.

Reports.

(2) The Commission may from time to time furnish to the Minister a report relating to any particular matter or matters investigated, or being investigated which, in the opinion of the Commission, require the special attention of the Minister.

(3) The Minister shall cause a copy of a report submitted under this section to be laid on the Table of the House of Representatives and of the Senate.

**15.** (1) The Commission shall appoint and employ an Executive Director who shall hold office for a period of seven years and may be re-appointed for a period not exceeding five years at a time.

Appointment of  
Executive  
Director,  
Secretary and  
other employees.

(2) The Executive Director shall be in charge of the day to day management of the Commission.

(3) Subject to subsection (4), the Executive Director shall receive such emoluments and be subject to such terms and conditions of service as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives.

(4) The emoluments and terms and conditions of service of the Executive Director, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during the period of his appointment or reappointment, as the case may be.

(5) The emoluments for the time being payable to the Executive Director by

virtue of this Act shall be charged on and paid out of the Consolidated Fund.

(6) The Commission may appoint and employ at such remuneration and on such terms and conditions as it thinks fit, such other officers and employees as it thinks necessary for the proper carrying out of the provisions of this Act:

Provided that—

(a) no salary in excess of the prescribed rate shall be assigned to any post without the prior approval of the Minister; and

(b) no appointment shall be made without the prior approval of the Minister to any post to which a salary in excess of the prescribed rate is assigned.

(7) In subsection (6) "the prescribed rate" means a rate of \$100,000 per annum or such higher rate as the Minister may, by order, prescribe.

(8) The Governor-General may, subject to such conditions as he may impose, approve of the appointment of any officer in the service of the Government to any office with the Commission, and any officer so appointed shall, during such appointment, in relation to pension, gratuity or other allowance, and to other rights as a public officer, be treated as continuing in the service of the Government.

**16.** The Commission may enter into arrangements respecting schemes, whether by way of insurance policies or not, for medical benefits, pensions, gratuities and other retiring or disability or death benefits relating to employees of the Commission and such arrangements may include provisions for the grant of benefits to the dependants and the legal personal representatives of such employees.

Pensions, gratuities and other retiring benefits.

### PART III. *Control of Uncompetitive Practices*

**17.** (1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.

Provisions of agreement having effect of lessening competition.

(2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that—

(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) affect tenders to be submitted in response to a request for bids;

(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(f) 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,

being provisions which have or are likely to have the effect referred to in

subsection (1)

(3) Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.

(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorized under Part V or which the Commission is satisfied—

(a) contributes to—

(i) the improvement of production or distribution of goods and services;  
or

(ii) the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

**18.** (1) For the purposes of this Act, a provision of an agreement is an exclusionary provision if—

(a) the agreement is entered into or arrived at between persons of whom any two or more are in competition with each other; and

(b) the effect of the provision is to prevent, restrict or limit the supply of goods or services to, or the acquisition of goods or services from, any particular person or class of persons either generally or in particular circumstances or in particular conditions, by all or any of the parties to the agreement or, if a party is a company, by an interconnected company

(2) For the purposes of subsection (1), a person is in competition with another person if that person or any inter-connected company is, or is likely to be or, but for the relevant provision, would be or would be likely to be, in competition with the other person or with an interconnected company, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.

(3) No person shall give effect to an exclusionary provision of an agreement.

Agreements containing exclusionary provisions void.

**19.** For the purposes of this Act an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.

Existence of dominant position.

**20.** (1) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, if it—

Abuse of dominant position.

- (a) restricts the entry of any person into that or any other market;
  - (b) prevents or deters any person from engaging in competitive conduct in that or any other market;
  - (c) eliminates or removes any person from that or any other market;
  - (d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;
  - (e) limits production of goods or services to the prejudice of consumers;
  - (f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.
- (2) An enterprise shall not be treated as abusing a dominant position—
- (a) if it is shown that—
    - (i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and
    - (ii) consumers were allowed a fair share of the resulting benefit;
  - (b) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.

**21.** (1) Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse has had or is having the effect of lessening competition substantially in a market, the Commission shall—

Action in relation to abuse of dominant position.

(a) notify the enterprise of its finding; and

(b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned.

[Amended, 2001]

(2) In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is a result of superior competitive performance.

(3) For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property.

#### *PART IV. Resale Price Maintenance*

##### *Collective Resale Price Maintenance*

**22.** (1) It is unlawful for any two or more enterprises, being suppliers of goods, to enter into or carry out any agreement by virtue of which they undertake—

Collective agreements by suppliers prohibited.

(a) to withhold supplies of goods from dealers (whether parties to the agreement or not) who resell or have resold goods in breach of any

condition as to the price at which those goods may be resold;

(b) to refuse to supply goods to such dealers except on terms and conditions which are less favourable than those applicable in the case of other dealers carrying on business in similar circumstances;

(c) to supply goods only to persons who undertake or have undertaken to do any of the acts described in paragraph (a) or (b).

(2) It is unlawful for any two or more enterprises referred to in subsection

(1) to enter into or carry out any agreement authorizing—

(a) the recovery of penalties (however described) by or on behalf of the parties to the agreement from dealers who resell or have resold goods in breach of any condition as described in subsection (1) (a); or

(b) the conduct of any proceedings in connection therewith.

**23.** (1) It is unlawful for any two or more enterprises, being dealers in any goods, to enter into or carry out any agreement by which they undertake—

Collective agreement by dealers.

(a) to withhold orders for supplies of goods from suppliers (whether parties to the agreement or not)

(i) who supply or have supplied goods without imposing such a condition as is described in section 22 (1) (a); or

(ii) who refrain or have refrained from taking steps to ensure compliance with such conditions in respect of goods supplied by them; or

(b) to discriminate in their handling of goods against goods supplied by those suppliers.

(2) It is unlawful for any two or more enterprises referred to in subsection

(1) to enter into or carry out an agreement authorizing—

(a) the recovery of penalties (however described) by or on behalf of the parties to the agreement from the suppliers referred to in subsection (1); or

(b) the conduct of any proceedings in connection therewith

**24.** Section 22 and 23 apply in relation to an association whose members consist of or include—

(a) enterprises which are suppliers or dealers in any goods; or

(b) representatives of such enterprises, as they apply to an enterprise.

Application of sections 22 and 23 to associations.

#### *Individual Minimum Resale Price Maintenance*

**25.** (1) Any term or condition of an agreement for the sale of goods by a supplier to a dealer is void to the extent that it purports to establish or provide for the establishment of minimum prices to be charged on the resale of the goods in Jamaica.

(2) Subject to subsections (3) and (4), it is unlawful for a supplier of goods

Minimum resale price maintained by contract or agreement.

(including an association or person acting on behalf of such supplier) to—

(a) include in an agreement for the sale of goods, a term or condition which is void by virtue of this section;

(b) require, as a condition of supplying goods to a dealer, the inclusion in the agreement of any term or condition, or the giving of any undertaking to the like effect;

(c) notify to dealers, or otherwise publish on or in relation to any goods, a price stated or calculated to be understood as the minimum price stated or calculated to be understood as the minimum price which may be charged on the resale of the goods in Jamaica.

(3) Paragraph (a) of subsection (2) does not affect the enforceability of an agreement except in respect of the term of condition which is void by virtue of this section.

(4) Nothing in paragraph (c) of subsection (2) shall be construed as precluding a supplier (or an association or person acting on behalf of a supplier) from notifying to dealers or otherwise publishing prices recommended as appropriate for the resale of goods supplied or to be supplied by the supplier.

**26.** (1) Section 25 applies to patented goods (including goods made by a patented process) as it applies to other goods.

Patented goods under section 25.

(2) Notice of any term or condition which is void by virtue of section 25, or which would be so void if included in an agreement relating to the sale of any such goods, is of no effect for the purpose of limiting the right of a dealer to dispose of those goods without infringement of the patent.

(3) Nothing in section 25 and in this section affects the validity, as between the parties and their successors, of any term or condition—

(a) of a licence granted by the proprietor of a patent or by a licensee under any such licence; or

(b) of any assignment of a patent,

so far as it regulates the price at which goods produced or processed by the licensee or assignee may be sold by him

**27.** (1) It is unlawful for a supplier to withhold supplies of any goods from a dealer seeking to obtain them for resale on the grounds that the dealer—

Maintenance of minimum resale prices by other means.

(a) has sold goods obtained either directly or indirectly from that supplier, at a price below the resale price or has supplied such goods either directly or indirectly to a third party who had done so; or

(b) is likely, if the goods are supplied by him, to sell them at a price below that price, or supply them either directly or indirectly to a third party who would be likely to do so.

(2) In this section "the resale price", in relation to a sale of any description, means—

(a) any price notified to the dealer or otherwise published by or on behalf of

a supplier of the goods in question (whether lawfully or not) as the price or minimum price which is to be charged on or is recommended as appropriate for a sale of that description; or

(b) any price prescribed or purporting to be prescribed for the purpose by an agreement between the dealer and any such supplier.

(3) Where under this section it would be unlawful for a supplier to withhold supplies of goods, it is unlawful for him to cause or procure any other supplier to do so.

**28.** (1) For the purposes of this Part, a supplier of goods shall be treated as withholding supplies from a dealer—

Interpretation.

(a) if he refuses or fails to supply those goods to the order of the dealer;

(b) if he refuses to supply those goods to that dealer except at prices, or on terms or conditions as to credit, discount or other matters, which are significantly less favourable than those at or on which he normally supplies those goods to other dealers carrying on business in similar circumstances; or

(c) if, although he enters into an agreement to supply goods to the dealer, he treats him in a manner significantly less favourable than that in which he normally treats other such dealers in respect of times or methods of delivery or other matters arising in the execution of the agreement.

(2) A supplier shall not be treated as withholding supplies of goods on any ground mentioned in section 27 (1) if, in addition to that ground, he has other grounds which, standing alone, would have led him to withhold those supplies.

(3) Subject to subsection (4), if, in proceedings brought against a supplier of goods in respect of a contravention of section 27 (1), it is proved that supplies of goods were withheld by the supplier from a dealer, and it is further proved that—

(a) during a period ending immediately before the supplies were so withheld, the supplier was doing business with the dealer or was supplying goods of the same description to other dealers carrying on business in similar circumstances; and

(b) the dealer, to the knowledge of the supplier, had within the preceding six months acted as described in section 27 (1) (a) or had indicated his intention to act as described in section 27 (1) (b) in relation to the goods in question,

it shall be presumed, unless the contrary is proved, that the supplies were withheld on the ground that the dealer had so acted or was likely so to act.

(4) Subsection (3) does not apply where the proof that supplies were withheld consists only of evidence of requirements imposed by the supplier in respect of the time at which or the form in which payment was to be made for goods supplied or to be supplied.

#### PART V. *Authorizations*

**29.** (1) Subject to subsection (2), any person who proposes to enter into or carry

Grant of



out an agreement or to engage in a business practice which in the opinion of that person is an agreement or practice affected or prohibited by this Act, may apply to the Commission for an authorization to do so. authorization.

(2) In respect of an application under subsection (1) the Commission—

(a) may notwithstanding any other provision of the Act, if it is satisfied that the agreement or practice, as the case may be, is likely to promote the public benefit grant an authorization subject to such terms and conditions as it thinks fit; or

(b) may refuse to grant an authorization and if it does so, the Commission shall inform the applicant in writing of its reasons for refusal.

**30.** While an authorization granted under section 29 remains in force, nothing in this Act shall prevent the person to whom it is granted from giving effect to any agreement or any provision of an agreement or from engaging in any practice to which the authorization relates. Effect of authorization.

**31.** (1) Subject to subsection (2), the Commission may revoke or amend an authorization if it is satisfied that— Revocation of authorization.

(a) the authorization was granted on information that was false or misleading ;

(b) there has been a breach of any terms or conditions subject to which the authorization was granted.

(2) The Commission shall, before revoking or amending an authorization, serve on the relevant applicant a notice in writing specifying the default and inform him of his right to apply to the Commission to be heard on the matter within such time as may be specified in the notice.

**32.** (1) The Commission shall keep a register, in such form as it may determine, of authorizations granted under this Part. Register of authorizations.

(2) The register shall be kept at the office of the Commission and shall be available for inspection by members of the public at all reasonable times.

## PART VI. *Exclusive Dealing, Tied Selling and Market Restriction*

**33.** (1) For the purposes of this section— Exclusive dealing.

"exclusive dealing" means—

(a) any practice whereby a supplier of goods, as a condition of supplying the goods to a customer requires that customer to— [Amended, 2001]

(i) deal only or primarily in goods supplied by or designated by the supplier or his nominee; or

(ii) refrain from dealing in a specified class or kind of goods except as supplied by the supplier or his nominee; and

(b) any practice whereby a supplier of goods induces a customer to meet a condition referred to in sub-paragraph (a) by offering to supply the

goods to the customer on more favourable terms or conditions if the customer agrees to meet that condition;

"market restriction" means any practice whereby a supplier of goods, as a condition of supplying the goods to a customer, requires that customer to supply any goods only in a defined market, or exacts a penalty of any kind from the customer if he supplies any goods outside a defined market;

"tied selling" means—

(a) any practice whereby a supplier of an article, as a condition of supplying the article (in this section referred to as the "tied article") to a customer, requires the customer to—

- (i) acquire any other article from the supplier or his nominee;
- (ii) refrain from using or distributing, in conjunction with the tied article, another article that is not of a brand or manufacture designated by the supplier or the nominee; and

(b) any practice whereby a supplier of an article induces a customer to meet a condition set out in paragraph (a) by offering to supply the tied article to the customer on more favourable terms or conditions if the customer agrees to meet that condition.

(2) Where on investigation the Commission finds that an enterprise is engaging in tied selling, the Commission shall prohibit that enterprise from so doing.

(3) Where on investigation the Commission finds that exclusive dealing or market restriction, because it is engaged in by a major supplier of goods in a market or because it is widespread in a market, is likely to—

- (a) impede entry into or expansion of an enterprise in the market;
- (b) impede introduction of goods into or expansion of sales of goods in the market; or
- (c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Commission may prohibit that supplier from continuing to engage in market restriction or exclusive dealing and to take such other action as, in the Commission's opinion, is necessary to restore or stimulate competition in relation to the goods.

(4) The Commission shall not take action under this section where, in its opinion exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of goods into a market or of new goods into a market and this section shall not apply in respect of exclusive dealing or market restriction between or among interconnected companies.

## PART VII. *Offences against Competition*

**34.** (1) A person who is engaged in the business of producing or supplying goods shall not, directly or indirectly—

- (a) by agreement, threat, promise or any like means, attempt to influence upward or discourage the reduction of, the price at which any other

Price fixing.

[Amended,  
2001]

person supplies or offers to supply or advertises goods;

(b) refuse to supply goods to or otherwise discriminate against any other person engaged in business;

(c) refuse to supply goods to or otherwise discriminate against any other person engaged in business because of the low pricing policy of that other person.

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are—

(a) interconnected companies; or

(b) principal and agent.

(3) For the purposes of this section, a suggestion by a producer or supplier of goods of a resale price or minimum resale price in respect thereof, however arrived at, is proof of an attempt to influence the person to whom the suggestion is made, unless it is proved that the person making the suggestion, in so doing, also made it clear to the person to whom it was made that he was under no obligation to accept it and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion.

(4) For the purposes of this section, the publication by a supplier of goods other than a retailer, of an advertisement that mentions a resale price for the goods is an attempt to influence upward the selling price of any person into whose hands the goods come for resale unless the price is so expressed as to make it clear to any person who becomes aware of the advertisement that the goods may be sold at a lower price.

**35.** (1) No person shall conspire, combine, agree or arrange with another person to—

Conspiracy

(a) limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;

(b) prevent, limit or lessen unduly, the manufacture or production of any goods or to enhance unreasonably the price thereof;

(c) lessen unduly, competition in the production, manufacture, purchase, barter, sale, supply, rental or transportation of any goods or in the price of insurance on persons or property;

(d) otherwise restrain or injure competition unduly.

(2) Nothing in subsection (1) applies to a conspiracy, combination, agreement or arrangement which relates only to a service and to standards of competence and integrity that are reasonable necessary for the protection of the public—

(a) in the practice of a trade or profession relating to the service; or

(b) in the collection and dissemination of information relating to the service.

**36.** (1) Subject to subsection (2), it is unlawful for two or more persons to enter into an agreement whereby— Bid-rigging.

(a) one or more of them agree of undertake not to submit a bid in response to a call or request for bids or tenders; or

(b) as bidders or tenderers they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves.

(2) This section shall not apply in respect of an agreement that is entered into or a submission that is arrived at only by companies each of which is, in respect of everyone of the others, an affiliate.

**37.** (1) A person shall not, in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest, by any means—

Misleading  
advertising

(a) make a representation to the public that is false or misleading in a material respect;

[Amended,  
2001]

(b) make a representation to the public in the form of a statement, warranty or guarantee of performance, efficacy or length of life of goods that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

(c) make a representation to the public in the form of a statement, warranty or guarantee that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by person of a particular trade, qualification or skill;

(d) make a representation to the public in a form that purports to be— (i) a warranty or guarantee of any goods; or

(ii) a promise to replace, maintain or repeat an article or any part thereof or to repeat or continue service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out;

(e) make a materially misleading representation to the public concerning the price at which any goods or services or like goods or services have been, are or will be ordinarily supplied.

(2) For the purpose of paragraph (e) of subsection (1), a representation as to price to be construed as referring to the price at which the goods or services have been supplied generally in the relevant market unless it is clearly specified to be the price at which the goods or services have been supplied by the person by whom or on whose behalf the representation is made.

(3) For the purposes of this section and section 38, the following types of representation shall be deemed to be made to the public by and only by the person who caused it to be expressed, made or contained, that is to say, a representation that is—

(a) expressed on an article offered or displayed for sale;

(b) expressed on anything attached to, inserted in or accompanying an

article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale;

- (c) expressed on a display in the place where the article is sold;
- (d) made in the course of selling the article to the ultimate consumer;
- (e) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner made available to a member of the public.

(4) Where the person referred to in subsection (3) is outside of Jamaica, the representation shall be deemed to be made—

- (a) in the case described in paragraph (a), (b) or (e) of that subsection, by the person who imported the article; and
- (b) in a case described in paragraph (c) of that subsection, by the person who imported the display into Jamaica.

(5) Subject to subsection (3) and (4), every person who, for the purpose of promoting, directly or indirectly, the supply or use of any goods or any business interest, supplies to a wholesaler, retailer or other distributor of goods any material or thing that contains a representation of a kind referred to on subsection (1) shall be deemed to have made that representation to the public.

**38.** A person shall not, for the purpose of promoting, directly or indirectly, any business interest—

Representation as to reasonable test and publication of testimonials.

(a) make a representation to the public that a test as to the performance, efficacy or length of life of the goods has been made by any person; or

(b) publish a testimonial with respect to the goods, unless he can establish that—

(i) the representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, as the case may be; or

(ii) before the representation or testimonial was made or published, it was approved and permission to make or publish it was given in writing by the person who made the test or gave the testimonial, as the case may be,

and it accords with the representation or testimonial previously made, published or approved.

**39.** A person shall not supply any article at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the article in the quantity in which it is so supplied at the time at which it is so supplied—

Double ticketing.

(a) on the article, its wrapper or container;

(b) on anything attached to, inserted in or accompanying the article, its wrapper or container or anything on which the article is mounted for display or sale; or

(c) on a display or advertisement at the place at which the article is purchased.

**40.** (1) For the purposes of this section, "bargain price" means—

Sale at bargain price.

(a) a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or

[Amended, 2001]

(b) a price so represented in an advertisement, that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the goods advertised or like articles are ordinarily sold.

(2) A person shall not advertise at a bargain price goods which he—

(a) does not intend to supply; or

(b) does not have reasonable grounds for believing he can 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, the nature and size of his enterprise and the nature of the advertisement.

(3) Subsection (2) does not apply where the person who is advertising proves that—

(a) he took reasonable steps to obtain in adequate time a quantity of the article that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond his control that he could not reasonably have anticipated;

(b) he obtained a quantity of the article that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed his reasonable expectations; or

(c) after he became unable to supply the article in accordance with the advertisement, he undertook to supply the same article or equivalent article of equal or better quality at the bargain price and within a reasonable time to all persons who requested the article and who were not supplied therewith during the time when the bargain price applied and that he fulfilled the undertaking.

**41.** (1) A person who advertises goods for sale or rent in a market shall not, during the period and in the market to which the advertisement relates, supply goods at a price that is higher than that advertised.

Sale above advertised price.

(2) This section shall not apply in respect of—

(a) an advertisement that appears in a catalogue or other publication in which it is prominently stated that the prices contained therein are subject to error if the person establishes that the price advertised is in error;

(b) an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement.

(3) For the purposes of this section, the market to which an advertisement relates shall be deemed to be the market to which it could reasonably be expected to reach, unless the advertisement defines market specifically by reference to a geographical area, store, sale by catalogue or otherwise.

**42.** Any person who, in any manner, impedes, prevents or obstructs any investigation by the Commission under this Act or any authorized officer in the executive of his duties under this Act is guilty of an offence and liable on conviction in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

Obstruction of investigation.

[Amended, 2001]

**43.** Every person who—

(a) refuses to produce any document, record or thing, or to supply any information, when required to do so by the Commission under this Act; or

Destruction of records, etc.

[Amended, 2001]

(b) destroys or alters or causes to be destroyed or altered, any document, record or thing required to be so produced or in respect of which a warrant is issued under this Act,

is guilty of an offence and liable on conviction in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

**44.** Any person who gives to the Commission or an authorized officer any information which he knows to be false or misleading is guilty of an offence and liable on conviction in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

Giving false or misleading information to Commission.

[Amended, 2001]

**45.** Any person who—

(a) refuses or fails to comply with a requirement of the Commission under this Act;

Failure to attend and give evidence.

(b) having been required to appear before the Commission—

(i) without reasonable excuse refuses or fails so to appear and give evidence;

[Amended, 2001]

(ii) refuses to take an oath or make an affirmation as a witness; (iii) refuses

to answer any question put to him,

is guilty of an offence and liable on conviction before a Resident Magistrate to a fine not exceeding twenty thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

### PART VIII. *Enforcement, Remedies and Appeals*

**46.** If the Court is satisfied on an application by the Commission that any person—

(a) has contravened any of the obligations or prohibitions imposed in Part III, IV, VI or VII; or

Application for enforcement.

(b) has failed to comply with any direction of the Commission,

the Court may exercise any of the powers referred to in section 47.

**47.** (1) Pursuant to section 45 the Court may—

Powers of Court.

(a) order the offending person to pay to the Crown such pecuniary penalty not exceeding one million dollars in the case of an individual and not exceeding five million dollars in the case of a person other than an individual;

(b) grant an injunction restraining the offending person from engaging in conduct described in paragraph (a) or (b) of section 45,

in respect of each contravention or failure referred to in section 45.

(2) In exercising its powers under this section the Court shall have regard

to—

(a) the nature and extent of the default;

(b) the nature and extent of any loss suffered by any person as a result of the default;

(c) the circumstances of the default;

(d) any previous determination against the offending person.

(3) The standard of proof in proceedings under this section and section 46 shall be the standard of proof applicable in civil proceedings.

**48.** (1) Every person who engages in conduct which constitutes—

Civil liability.

(a) a contravention of any of the obligations or prohibitions imposed in Parts III, IV, VI or VII;

(b) aiding, abetting, counselling or procuring the contravention of any such provision;

(c) inducing by treats, promises, or otherwise the contravention of any such provision;

(d) being knowingly conceived in or party to any such contravention; or

(e) conspiring with any other person to contravene any such provision,

is liable in damages for any loss caused to any other person by such conduct. (2) An

action under subsection (1) may be commenced at any time within three years from the time when the cause of action arose.

**49.** (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—

Appeals against finding of Commission.

(a) confirm, modify or reserve 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 just concerning the reconsideration or otherwise the whole or any part of the matter that is referred back for reconsideration.

(4) In reconsideration of the matter, the Commission shall have regard to the Judge's reasons for giving a direction under subsection (1) and the Judge's direction under subsection (3).

**50.** Where an appeal is brought against any findings 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.

Operation of order pending determination of appeal.

### PART IX. *General*

**51.** (1) The income of the Commission shall be exempt from income tax.

Exemption from income tax, stamp duties, transfer tax and customs duty.

(2) The Commission shall be exempt from stamp duty on all instruments executed by it or on its behalf.

(3) There shall be exempt from taxation under the Transfer Tax Act any transfer by the Commission of property belonging to it or interest created in, over or otherwise with respect to any such property.

(4) No customs duty or other similar impost shall be payable upon any article imported into Jamaica, or taken out of bond in Jamaica, by the Commission, and shown to the satisfaction of the Commission of Customs to be required for the use of the Commission in the performance of its functions under this Act.

**52.** The Commission may, with the approval of the Minister, make regulations generally for giving effect to the provisions of this Act and, without prejudice to the generality of the foregoing, may make regulations—

Regulations.

(a) prescribing the procedure to be followed in respect of applications and notices to, and proceedings of, the Commission;

(b) prescribing any other matters which are required by this Act to be prescribed.

**53.** (1) The Commission may prohibit the publication or communication of any information furnished or obtain, documents produced, obtained or tendered, or evidence given to the Commission in connection with the operations of the Commission.

Powers of the Commission to prohibit disclosure of information, documents and evidence.

(2) Every person who publishes or communicates any such information, documents or evidence the publication of which is prohibited by the Commission under subsection (1) is guilty of an offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

**54.** Subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown.

Application to the Crown.

*FAIR COMPETITION*

**SCHEDULE**

(Section 4)

***The Fair Trading Commission***

1. (1) The commission shall consist of such number of persons not being less than three nor more than five as the Minister may from time to time appoint. Constitution of the Commission.  
 (2) The Executive Director shall be a member *ex officio* of the Commission.
2. (1) The members referred to in paragraph 1 (1) shall be appointed by the Minister by instrument in writing. Appointment of directors.  
 (2) A member other than the Executive Director, shall, subject to the provisions of this Schedule, hold office for such period not exceeding three years, as the Minister may specify in the instrument appointing the member and each member shall be eligible for reappointment.
3. The Minister shall appoint one of the members of the Commission referred to in paragraph 1(1) to be chairman thereof. Chairman.
4. If the chairman or any other member of the Commission is absent or unable to act, the Minister may appoint any person to act in the place of the chairman or other member. Acting appointments.
5. (1) Any member other than the chairman or the Executive Director may at any time resign his office by instrument in writing addressed to the Minister and transmitted through the chairman, and from the date of the receipt by the Minister of that instrument, that member shall cease to be a member of the Commission. Resignations.  
 (2) The chairman may at any time resign his office by instrument in writing addressed to the Minister, and such resignation shall take effect as from the date on which the Minister receives that instrument.
6. The Minister may terminate the appointment of any member other than the Executive Director if such member - Revocation of appointments.
  - (a) becomes of unsound mind or becomes permanently unable to perform his functions by reason of ill health;
  - (b) is convicted and sentenced to a term of imprisonment;
  - (c) fails without reasonable excuse to carry out any of the functions conferred or imposed on him under this Act; or
  - (d) engages in such activities as are reasonably considered prejudicial to the interest of the Commission.
7. The names of all members of the Commission as first constituted and every change of membership shall be published in the *Gazette*. Gazetting of appointments.
8. The Minister may, on the application of any member other than the Leave of absence.

Executive Director, grant leave of absence to the member.

**9.** (1) The seal of the Commission shall be kept in the custody of the Executive Director or the secretary and shall be affixed to instruments pursuant to a resolution of the Commission, in the presence of the Executive Director or any other member of the Commission, and the secretary thereof.

Seal and execution of documents.

(2) The seal of the Commission shall be authenticated by the signatures of the Executive Director or any other member authorized to act in that behalf, and the secretary.

(3) All documents other than those required by law to be under seal, made by, and all decisions of, the Commission may be signified under the hand of the Executive Director or any other member of the Commission authorized to act in that behalf, and the secretary.

**10.** (1) The Commission shall meet as often as may be necessary or expedient for the transaction of its business and such meetings shall be held at such places and times and on such days as the Commission may determine.

Procedure and meetings.

(2) The Chairman may at any time call a special meeting of the Commission, and shall call a special meeting to be held within seven days of receipt of a written request for that purpose addressed to him by any two members of the Commission.

(3) The Chairman shall preside at all meetings of the Commission, and if the chairman is absent from a meeting the members present and constituting a quorum shall elect one of their number to preside at the meeting.

(4) The Quorum of the Commission shall be three.

(5) The decisions of the Commission shall be by a majority of votes, and in addition to an original vote the chairman or other person presiding at the meeting shall have a casting vote in any case in which the voting is equal.

(6) Minutes in proper form of each meeting of the Commission shall be kept and shall be confirmed as soon as practicable thereafter at a subsequent meeting.

(7) Subject to the provisions of this Schedule the Commission may regulate its own proceedings.

**11.** A member who is directly or indirectly interested in any matter which is being dealt with by the Commission -

Disclosure of interest.

(a) shall disclose the nature of his interest at a meeting of the Commission; and

(b) shall not take part in any deliberation or decision of the Commission with respect to that matter.

**12.** No act done or proceeding taken under this Act shall be questioned on the ground—

Protection of the Commission.

(a) of the existence of any vacancy in the membership of, or any defect in the constitution of the Commission; or

(b) of any omission, defect or irregularity not affecting the merits of the

case.

**13.** (1) No action, suit or other proceedings shall be brought or instituted personally against any member in respect of any act done *bona fide* in the course of carrying out the provisions of this Act. Protection of members.

(2) Where any member is exempt from liability by reason only of the provisions of this paragraph, the Commission shall be liable to the extent that it would be if that member were a servant or agent of the Commission.

**14.** There shall be paid from the funds of the Commission to the chairman and other members of the Commission such remuneration whether by way of honorarium, salary of fees, and such allowances as the Minister may determine. Remuneration of members.

**15.** The office of a member other than the Executive Director shall not be a public office for the purposes of Chapter V of the Constitution of Jamaica. Office of member other than Executive Director, not public office.

# FAIR COMPETITION (AMENDMENT) ACT, 2001

JAMAICA

No. 22-2001

H. F. Cooke (sgd)

20<sup>th</sup> August, 2001

AN ACT to Amend the Fair Competition Act.

[21<sup>st</sup> August, 2001.]

BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:-

16. This Act may be cited as the Fair Competition (Amendment) Act, 2001 and shall be read and construed as one with the Fair Competition Act (hereinafter referred to as the principal Act) and all amendments thereto.

Short title and construction

17. Subsection (1) of section 2 of the principal Act is amended by inserting next after the definition of "dealer" the following definition -

Amendment of section 2 of principal Act.

"document" includes, in addition to a document in writing -

(c) any map, plan, graph or drawing;

(d) any photograph;

(e) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;

(f) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom."

18. Subsection (1) of section 5 of the principal Act is amended by inserting next after the word "investigations" wherever it appears the words "or inquiries".

4. Section 6 of the principal Act is amended by inserting next after the word "investigation" the words "or inquiry".

Amendment of section 5 of principal Act.

5. Section 7 of the principal Act is amended by inserting next after the word "investigation" wherever it appears the words "or inquiry".

Amendment of section 6 of principal Act.

6. Section 11 of the principal Act is amended -

Amendment of section 7 of principal Act.

(g) in subsection (1) -

(iv) by inserting next after the word "investigation" wherever it appears the words "or inquiry"; and

Amendment of section 11 of principal Act.

(v) by inserting next after the word "investigation" the words "or subject

to inquiry";

(h) in subsection (2) -

(vi) by inserting immediately after the word "an" the words "investigation or"; and

(vii) by inserting immediately after the word "investigation" the words "or inquiry".

7. Subsection (1) of section 21 of the principal Act is amended by deleting the words "had or is having" and substituting therefor the words "had, is having or is likely to have."

Amendment  
of section 21  
of principal  
Act.

8. Subsection (1) of section 33 of the principal Act is amended by deleting the definition of "tied selling" and substituting therefor the following -

Amendment  
of section 33  
of principal  
Act.

" "tied selling" means -

(i) any practice whereby a supplier of goods or services, as a condition of supplying the goods or services (in this section referred to as "tied goods" or "tied services", respectively) to a customer, requires the customer to -

(viii) acquire any other goods or services from the supplier or his nominee; or

(ix) refrain from using or distributing, in conjunction with the tied goods any other goods that are not of a brand or manufacture designated by the supplier or his nominee; or

(j) any practice whereby a supplier of goods or services induces a customer to meet a condition set out in paragraph (a) by offering to supply the tied goods or tied services to the customer on more favourable terms or conditions if the customer agrees to meet that condition."

9. Subsection (1) of section 34 of the principal Act is amended -

(k) by inserting next after the words "supplying goods" the words "or supplying services";

Amendment  
of section 34  
of principal  
Act.

(l) by inserting in paragraphs (a), (b) and (c) next after the word "goods" wherever it appears the words "or services".

10. Subsection (1) of section 37 of the principal Act is amended -

(m) by inserting in paragraph (a) next after the word "misleading" the following words "or is likely to be misleading";

Amendment  
of section 37  
of principal  
Act.

(n) by deleting paragraph (c) and substituting therefor the following -

" (c) falsely represent to the public in the form of a statement, warranty or guarantee that services are -

(x) of a particular kind, standard, quality, or quantity; or

supplied by a particular person or by a person of a particular trade, qualification or skill."

11. Section 40 of the principal Act is amended by deleting subsection (2) and substituting therefor the following -

Amendment  
of section 40  
of principal  
Act.

“ (2) A person shall not advertise at a bargain price, goods or services which he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.”.

12. The principal Act is amended by deleting section and substituting therefor the following -

Amendment  
of section 42  
of principal  
Act.

42. A person who in any manner impedes, prevents or obstructs an investigation or inquiry by the Commission under this Act or an authorized officer in the execution of his duties under this Act is guilty of an offence and is liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding on year or to both such fine and imprisonment.”.

-Obstruction  
of  
investigation.

13. Section 43 of the principal Act is amended by deleting the words "conviction in a Circuit Court to a fine or to imprisonment for a term not exceeding five years" and substituting therefor the words "summary conviction in a Resident Magistrate's Court to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding one year or to both such fine and imprisonment”.

Amendment  
of section 43  
of principal  
Act.

14. Section 44 of the principal Act is amended by deleting the words "conviction in a Circuit Court to a fine or to imprisonment for a term not exceeding five years" and substituting therefor the words "summary conviction in a Resident Magistrate's Court to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding one year or to both such fine and imprisonment”.

Amendment  
of section 44  
of principal  
Act.

15. Section 45 of the principal Act is amended by deleting the words "twenty thousand" and substituting therefor the words "one million”.

Amendment  
of section 45  
of principal  
Act.

Passed in the Senate this 29<sup>th</sup> day of June, 2001.

SYRINGA MARSHALL-BURNETT, C.D.  
President.

Passed in the House of Representatives this 17<sup>th</sup> day of July, 2001.

O.T. WILLIAMS,  
Deputy Speaker.

This printed impression has been carefully compared by me with the authenticated impression of the foregoing Act, and has been found by me to be a true and correct printed copy of the said Act.

Clerk to the Houses of Parliament.

# THE JAMAICA GAZETTE

## SUPPLEMENT

### PROCLAMATIONS, RULES AND REGULATIONS

465

Vol. CXXIII

THURSDAY, OCTOBER 19, 2000

No. 87

No. 136

THE FAIR COMPETITION ACT

#### THE FAIR COMPETITION (NOTICES AND PROCEDURES) REGULATIONS, 2000

In exercise of the power conferred upon the Commission by section 52 of the Fair Competition Act and with the approval of the Minister, the following Regulations are hereby made -

16. These Regulations may be cited as the Fair Competition (Notice and Procedures) Regulations, 2000.

17. In these Regulations -

"authorized officer" means the Executive Director or an officer of the Commission authorized by the Executive Director for the purposes of these Regulations;

"informant" means a person who supplies information to the Commission regarding a complaint;

"respondent" means a person against whom -

(o) a complaint is made to the Commission; or

(p) an application is made to the court by the Commission pursuant to section 46.

#### Notice of Examination of Witnesses

18. Where the presence of a witness is required for the purposes of an investigation, the Commission shall serve on that witness a notice in the form set out as Form A or Form B in the Schedule as the case may require.

Form A.  
Form B.  
Schedule.

#### Notice to Produce Documents

19. -(1)Where the Commission requires a document to be produced for the purposes of an investigation, the Commission shall serve on the relevant person, a notice in the form set out as Form C in the Schedule.

Form C.

(2)The person notified pursuant to paragraph (1) shall produce the document specified in the notice within twenty days of the date of the service thereof.

#### Settlement Procedures

20. -(1) Where a complaint is being investigated by the Commission, the Commission may discontinue the investigation and the matter may be settled by the Commission in accordance with these Regulations.

(2)The Commission may take action under paragraph (1) -



- (q) where the respondent -
- (xi) indicates that he wishes to settle the claims without admitting liability; or
- (xii) admits liability and agrees to the terms of settlement proposed by the Commission;
- (r) if the Commission considers it appropriate at any time during a hearing conducted by the Commission; or
- (s) where proceedings are initiated by the Commission pursuant to section 46, upon an application by the Commission to the Court for adjournment of those proceedings in order to facilitate a settlement.

21. -(1) An authorized officer may make a recommendation for settlement to the Commission.

(2) The Commission may approve the recommendation under paragraph (1) subject to such modification as it thinks fit.

(3) Where a settlement is approved pursuant to paragraph (2), the authorized officer shall -

(t) record the terms of the settlement in the Consent Agreement set out as Form D in the Schedule; and

(u) provide the respondent with a copy thereof signed by the respondent.

Form D.  
Schedule.

22. -(1) Where an authorized officer decides to hold an informal meeting with the respondent, the authorized officer shall notify the respondent in writing -

(v) of the place, date and time of the meeting; and

(w) that he may be represented by an Attorney-at-law or any other person at the meeting.

(2) If the respondent is unable to attend the meeting, he shall notify the Commission in writing at least five days before the date of the meeting.

23. -(1) In deciding whether to recommend a settlement, the authorized officer shall have regard to -

(x) the degree of cooperation offered by the respondent during the course of investigation;

(y) the nature, degree and gravity of the breach;

(z) whether it is the first time that the respondent is under investigation for a breach;

(aa) any other relevant factor.

(2) A settlement may provide for one or more of the following -

(bb) the payment of compensation by the respondent to the informant in kind or in money, or a refund to the informant of an amount equivalent to any monetary loss suffered by the informant as a result of the breach;

(cc) a requirement that the respondent -

(xiii) makes a donation to charity of such amount as is specified in the

Consent Agreement;

(xiv) makes an apology to the informant for the injury occasioned by the breach;

(dd) such other remedy as the Commission deems appropriate, having regard to all the circumstances.

24. The respondent may be required to pay the cost of the investigation and hearing, based on the gravity of the breach and the length of time, effort and money expended by the Commission in conducting the investigation or hearing.

25. Where the Commission takes action under regulation 5(2)(c), for the settlement of a matter which is before the Court -

(ee) the Commission shall notify the Court in writing of such settlement;

(ff) the settlement shall be endorsed on the records.

SCHEDULE FORM A

(Regulations 3, 4 and 6)  
(Regulation 3)

Summons to Witness to Appear before the Fair Trading Commission

TO: .....

(name of witness)

.....

(address of witness)

Take Notice that you are hereby required to appear before the Commission for examination pursuant to section 6 of the Fair Competition Act.

The Commission is presently conducting a complaint against .....

.....

(name of respondent)

Nature of Complaint

.....

.....

.....

.....

Please be present as follows:-

Date: .....

Time:.....

Place:.....

..... You have a

right to be represented by an Attorney-at-law or any other person.

Failure to appear without reasonable excuse may subject you to a fine not exceeding Twenty Thousand Dollars (\$20,000.00) and/or imprisonment for a term not exceeding two (2) years pursuant to section 45 of the Fair Competition Act.

Dated the                      day of

.....

Commissioner/Executive Director, Fair Trading Commission.

FORM B

(Regulation 3)

Summons to witness to appear before the Fair Trading Commission

TO: .....

(name of witness)

.....

(address of witness)

Take Notice that you are hereby required to appear before the Commission for examination pursuant to section 7(1)(a) of the Fair Competition Act.

The Commission is presently conducting an investigation—

\*Pursuant to section 5(1)(a) of the Act in order to determine whether

.....

(name of enterprise)

is engaged in business practices in contravention of the Act.

\*Pursuant to section 5(1)(d) of the Act with respect to abuse of dominant

position by .....

(name of enterprise)

\*Cross out whichever is inapplicable.

Please be present as follows:

Date: .....

Time: .....

Place: .....

..... You have a

right to be represented by an Attorney-at-law or any other person.

Failure to appear without reasonable excuse may subject you to a fine not exceeding Twenty Thousand Dollars (\$20,000.00) and/or imprisonment for a term not exceeding two (2) years pursuant to section 45 of the Fair Competition Act.

Dated the                      day of

.....

Commissioner/Executive Director, Fair Trading Commission.

FORM C

(Regulation 4)

NOTICE TO PRODUCE DOCUMENTS

CASE NO: FTC -

IN RELATION TO AN INVESTIGATION BY THE FAIR TRADING COMMISSION

Nature of Investigation .....

.....

TO: .....

(name of person required to provide documents)

.....

(address)

Take Notice that pursuant to section 7(1)(b) of the Fair Competition Act the Commission requires you to produce for its inspection the following document(s) which must be produced at the offices of the Fair Trading Commission located at

.....

.....

within twenty (20) days of the date of service of this Notice.

Description of Documents required .....

.....

.....

Failure to produce the document(s) as required is an offence under section 43 of the Fair Competition Act and subject to the offender to a fine not exceeding One Hundred Thousand Dollars (\$100,000.00) and/or imprisonment for a term not exceeding two (2) years.

.....

Date  
Director, Fair Trading Commission

.....

Commissioner/Executive

FORM D

(Regulation 6 (3) )

Consent Agreement

This Agreement is made the .....day of .....,  
between the Fair Trading Commission, a body corporate established under the Fair  
Competition Act, with its offices located at ..... in  
the parish of .....(hereinafter  
called "the Commission"), of the First Part and .....  
[RESPONENT] .....of the Second  
Part.

WHEREAS:

(insert paragraphs containing facts and law)

IT IS HEREBY AGREED:

(insert paragraphs containing terms agreed upon)

## FORM D, contd.

The parties hereto agree to waive any and all further procedural steps, any right to seek judicial review, or otherwise to challenge or contest the validity of this Agreement.

However, should the Respondent fail to implement the terms herein agreed to, the Commission may thereafter either withdraw its acceptance of this Agreement and take such action as it considers appropriate and so notify the respondent, or issue and serve a complaint in such form as the circumstances may require.

The respondent understands and accepts that formal proceedings may be instituted against him by the Commission on failure to abide by this Agreement.

.....  
Respondent,  
Fair Trading Commission.

.....  
Executive Director,

.....  
Chairman,  
Fair Trading Commission.

Dated the 11<sup>th</sup> day of September, 2000.

Chairman,  
Fair Trading Commission.

Approved:  
No. 17/12/05, 17/12/09

PHILLIP PAULWELL,  
Minister of Industry,  
Commerce and Technology.

**MALAYSIA**



**LAWS OF MALAYSIA**

**Act 712**


**COMPETITION ACT 2010**



Date of Royal Assent	...	...	2 June 2010
Date of publication in the Gazette	...	...	10 June 2010

PERCETAKAN  
NASIONAL MALAYSIA  
BERHAD

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## LAWS OF MALAYSIA

Act 712

## COMPETITION ACT 2010

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## LAWS OF MALAYSIA

Act 712

## COMPETITION ACT 2010

An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith.

WHEREAS the process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers:

AND WHEREAS in order to achieve these benefits, it is the purpose of this legislation to prohibit anti-competitive conduct:

NOW, THEREFORE, IT IS ENACTED by the Parliament of Malaysia as follows:

## PART

## I

## PRELIMINAR

## Y

Short title and commencement

1. (1) This Act may be cited as the Competition Act 2010.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the Gazette.

## Interpretation

2. In this Act, unless the context otherwise requires—

“agreement” means any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices;

“Chairman” means the Chairman of the Commission appointed under the Competition Commission Act 2010 [Act 713];

“Commission” means the Competition Commission established under the Competition Commission Act 2010;

“Commission officer” has the same meaning assigned to it in the Competition Commission Act 2010;

“concerted practice” means any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either—

- (a) to influence the conduct of one or more enterprises in a market; or
- (b) to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition;

“consumer” means any direct or indirect user of goods or services supplied by an enterprise in the course of business, and includes another enterprise that uses the goods or services thus supplied as an input to its own business as well as a wholesaler, a retailer and a final consumer;

“direction” means a direction given by the Commission under Part III or Part IV of this Act;

“document” has the same meaning assigned to it in the Evidence Act 1950 [Act 56];



“dominant position” means a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors;

“enterprise” means any entity carrying on commercial activities relating to goods or services, and for the purposes of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market;

“goods” means property of every kind, whether tangible or intangible and includes—

- (a) all kinds of movable property;
- (b) buildings and other structures;
- (c) vessels and vehicles;
- (d) utilities;
- (e) minerals, trees and crops, whether on, under or attached to land or not;
- (f) animals, including fish; and
- (g) choses-in-action;

“horizontal agreement” means an agreement between enterprises each of which operates at the same level in the production or distribution chain;

“infringement” means an infringement of any prohibition under this Act;

“market” means a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services;

“Minister” means the Minister charged with the responsibility for domestic trade and consumer affairs;

“price” includes any form of consideration given in return for any goods or services of any kind, whether such consideration has actually been given or is advertised or stated as being required to be given in exchange for such goods or services;

“prohibition” means any prohibition under this Act;

“publish”, where no mode is specified, means to publish in any form or manner as may be determined by the Commission;

“supply” includes—

- (a) in relation to goods, the supply and resupply, by way of sale, exchange, lease, hire or hire-purchase of the goods; and
- (b) in relation to services, the provision by way of sale, grant or conferment of the services;

“this Act” includes any subsidiary legislation made under this Act;

“vertical agreement” means an agreement between enterprises each of which operates at a different level in the production or distribution chain.

## Application

3. (1) This Act applies to any commercial activity, both within and subject to subsection (2), outside Malaysia.

(2) In relation to the application of this Act outside Malaysia, this Act applies to any commercial activity transacted outside Malaysia which has an effect on competition in any market in Malaysia.

(3) This Act shall not apply to any commercial activity regulated under the legislation specified in the First Schedule and the Minister may, by order published in the Gazette, amend the First Schedule.

(4) For the purposes of this Act, “commercial activity” means any activity of a commercial nature but does not include—

- (a) any activity, directly or indirectly in the exercise of governmental authority;
- (b) any activity conducted based on the principle of solidarity; and
- (c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

## PART II

### ANTI-COMPETITIVE PRACTICES

#### Chapter 1

##### Anti-competitive agreement

##### Prohibited horizontal and vertical agreement

4. (1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

(2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—

- (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- (b) share market or sources of supply;
- (c) limit or control—
  - (i) production;
  - (ii) market outlets or market access;
  - (iii) technical or technological development; or
  - (iv) investment; or
- (d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

(3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.

### Relief of liability

5. Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:

- (a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- (b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- (c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- (d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

### Individual exemption

6. (1) An enterprise may apply to the Commission for an exemption with respect to a particular agreement from the prohibition under section 4.

(2) The Commission may, by order published in the Gazette, grant the exemption if, in the opinion of the Commission, the agreement is one to which section 5 applies.

(3) An exemption granted under this section is referred to as an “individual exemption”.

(4) The individual exemption granted by the Commission may be—

- (a) subject to any condition or obligation as the Commission considers it appropriate to impose; and
- (b) for a limited duration as specified in the order.

(5) An individual exemption may provide for it to have effect from a date earlier than that on which the order is made.

#### Cancellation or variation of individual exemption

7. (1) If the Commission is satisfied that—

- (a) there has been a material change of circumstance since it granted an individual exemption; or
- (b) an obligation has been breached,

the Commission may, by order published in the Gazette—

- (i) cancel the individual exemption;
- (ii) vary or remove any condition or obligation; or
- (iii) impose additional condition or obligation.

(2) If the Commission is satisfied that—

- (a) the information on which the Commission based its decision to grant an individual exemption is false or misleading in a material particular; or
- (b) any condition has been breached,

the Commission may, by order published in the Gazette, cancel the individual exemption.

(3) Any action taken by the Commission under subsection (1) shall have effect from the date the order is made.

- (4) An individual exemption which is cancelled—
- (a) by virtue of paragraph (2)(a) shall be void ab initio; or
  - (b) by virtue of paragraph (2)(b) shall have effect from the date the condition is breached.

### Block exemption

8. (1) If agreements which fall within a particular category of agreements are, in the opinion of the Commission, likely to be agreements to which section 5 applies, the Commission may, by order published in the Gazette, grant an exemption to the particular category of agreements.

(2) An exemption granted under this section is referred to as a “block exemption”.

(3) An agreement which falls within a category specified in a block exemption is exempt from the prohibition under section 4.

(4) The Commission in granting the block exemption may impose any condition or obligation subject to which a block exemption shall have **effect**.

- (5) A block exemption may provide that—
- (a) if there is a breach of a condition imposed by the block exemption, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement from the date of the breach;
  - (b) if there is a failure to comply with an obligation imposed by the block exemption, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement;
  - (c) if the Commission considers that a particular agreement is not one to which section 5 applies, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement from such date as the Commission may specify;

- (d) the block exemption shall cease to have effect at the end of a period specified in the order; or
- (e) the block exemption is to have effect from a date earlier than that on which the order is made.

### Procedure for block exemption

- 9. The Commission shall, before granting a block exemption—
  - (a) publish details of the Commission's proposed block exemption;
  - (b) give at least thirty days from the date of publication to allow any submission to be made by members of the public in relation to the proposed block exemption; and
  - (c) give due consideration to any submission made.

## Chapter 2

### Abuse of dominant position

#### Abuse of dominant position is prohibited

10. (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

(2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include—

- (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- (b) limiting or controlling—
  - (i) production;
  - (ii) market outlets or market access;

- (iii) technical or technological development; or
- (iv) investment,

to the prejudice of consumers;

- (c) refusing to supply to a particular enterprise or group or category of enterprises;
- (d) applying different conditions to equivalent transactions with other trading parties to an extent that may—
  - (i) discourage new market entry or expansion or investment by an existing competitor;
  - (ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or
  - (iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;
- (e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;
- (f) any predatory behaviour towards competitors; or
- (g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.

(3) This section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.

(4) The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market.



Chapter 3

Market review

Power to conduct market review

11. (1) The Commission may, on its own initiative or upon the request of the Minister, conduct a review into any market in order to determine whether any feature or combination of features of the market prevents, restricts or distorts competition in the market.

(2) The market review includes a study into—

- (a) the structure of the market concerned;
- (b) the conduct of enterprises in the market;
- (c) the conduct of suppliers and consumers to the enterprises in the market; or
- (d) any other relevant matters.

Determination of market review

12. (1) Upon conclusion of the market review, the Commission shall publish a report of its findings and recommendations.

(2) The report of the Commission shall be made available to the public.

Chapter 4

Exclusion

Exclusion

13. (1) The prohibitions under Part II shall not apply to the matters specified in the Second Schedule.

(2) The Minister may, by order published in the Gazette, amend the Second Schedule.

(3) The Minister shall, before making an amendment to the Second Schedule—

- (a) publish a notice of his intention to make the amendment and the proposed amendment;
- (b) give at least thirty days from the date of the notice to allow any submission to be made by members of the public in relation to the proposed amendment; and
- (c) give due consideration to any submission made.

### PART III

#### INVESTIGATION AND ENFORCEMENT

##### Investigation by the Commission

14. (1) The Commission may conduct any investigation as the Commission thinks expedient where the Commission has reason to suspect that any enterprise has infringed or is infringing any prohibition under this Act or any person has committed or is committing any offence under this Act.

(2) The Commission shall, on the direction of the Minister, investigate any suspected infringement of any of the prohibition or commission of an offence under this Act.

##### Complaint to the Commission

15. (1) The Commission may, upon a complaint by a person, conduct an investigation on any enterprise, agreement or conduct that has infringed or is infringing any prohibition under this Act or against any person who has committed or is committing any offence under this Act.

(2) The complaint shall specify the person against whom the complaint is made and details of the alleged infringement or offence under this Act.

### Close of an investigation

16. (1) If a complaint has been made to the Commission under section 15 in relation to an infringement, the Commission may make inquiries on the complainant for the purpose of deciding whether the Commission should, in its discretion, investigate the matter.

(2) If the Commission, after such inquiries mentioned in subsection (1), decides not to investigate such complaint, it shall as soon as practicable and in such manner as it thinks fit, inform the complainant of the decision and the reasons for the decision.

(3) Notwithstanding subsections (1) and (2), the Commission may, after deciding to investigate the complaints under section 15, at any time, decide to close an investigation of an infringement under this Act, if the Commission is of the opinion that—

- (a) it would be inappropriate to continue the investigation in view of the provision of an undertaking pursuant to section 43; or
- (b) in all the circumstances the continuation of the investigation would not constitute the making of the best use of the Commission's resources.

(4) When deciding to close an investigation, the Commission shall publish a statement that the investigation has been closed, and set out a brief summary of the Commission's reasons for closing that investigation.

### Power of investigation

17. (1) A Commission officer shall have all the powers of investigation and enforcement under this Act.

(2) For the avoidance of doubt, it is declared that for the purposes of this Act, the Commission officer investigating any commission of an offence under this Act shall have all or any of the powers of a police officer in relation to police investigation in seizable cases as provided for under the Criminal Procedure Code [Act 593].

## Power to require provision of information

18. (1) The Commission may, by notice in writing, require any person whom the Commission believes to be acquainted with the facts and circumstances of the case—

- (a) to provide or produce to the Commission, within the period and in the manner specified in the notice, any information or document which is relevant to the performance of the Commission's powers and functions; or
- (b) to make a statement to the Commission providing an explanation on any information or document referred to in paragraph (a) within the period and in the manner specified in the notice.

(2) Where the Commission directs any person to produce any document under subsection (1) and the person is not in custody of the document, the person shall—

- (a) state, to the best of his knowledge and belief, where the document may be found; and
- (b) identify, to the best of his knowledge and belief, the last person who had custody of the document and to state, to the best of his knowledge and belief, where the last-mentioned person may be found.

(3) Any person required or directed to provide information under subsection (1) or (2) shall ensure that the information provided is true, accurate and complete and such person shall provide an express representation to that effect, including a declaration that he is not aware of any other information which would make the information provided untrue or misleading.

## Commission may retain document

19. (1) The Commission may take and retain for such duration as it deems necessary, possession of any document obtained under this Part.

(2) The person who provided the document is entitled to be supplied, as soon as practicable, with a copy certified by the Commission to be a true copy of the document.

(3) Notwithstanding the provisions of any other written law, the certified copy of the document shall be admissible as evidence as if it were the original document.

(4) If the Commission is satisfied that the retaining of the document is no longer necessary, the Commission may, as soon as practicable, return the document to the person who provided the document.

Access to records, etc.

20. (1) A person shall, if at any time directed by the Commission, allow the Commission access to his records, books, accounts, or other things for the purposes of carrying out any of the Commission's functions or powers under this Act.

(2) Any person who fails to comply with the direction under subsection (1) commits an offence.

Confidentiality

21. (1) Any person who discloses or makes use of any confidential information with respect to a particular enterprise or the affairs of an individual obtained by virtue of any provision of this Act commits an offence.

(2) Nothing in subsection (1) shall operate to prevent the disclosure of information where—

- (a) the disclosure is made with the consent of the person from whom the information was obtained;
- (b) the disclosure is necessary for the performance of the functions or powers of the Commission;
- (c) the disclosure is reasonably made during any proceedings under this Act provided that such disclosure is not made against any direction by the Commission or the Competition Appeal Tribunal before which the proceedings are taking place;

- (d) the disclosure is made in connection with an investigation of an infringement or an offence under this Act; or
- (e) the disclosure is made with the authorization of the Commission to any competition authority of another country in connection with a request by that country's competition authority for assistance.

(3) For the purposes of this section, “confidential information” means trade, business or industrial information that belongs to any person, that has economic value and is not generally available to or known by others.

### Privileged communication

22. (1) No person shall be required, under any provision of this Part, to produce or disclose any communication between a professional legal adviser and his client which would be protected from disclosure in accordance with section 126 of the Evidence Act 1950.

(2) Where—

- (a) the Commission makes a requirement under section 18 of an advocate and solicitor in respect of any information or document; and
- (b) the information or document contains a privileged communication made by or on behalf of or to the advocate and solicitor in his capacity as an advocate and solicitor,

the advocate and solicitor is entitled to refuse to comply with the requirement unless the person to whom or by or on behalf of whom the communication was made or, if the person is a body corporate that is under receivership or is in the course of being wound up, the receiver or the liquidator, as the case may be, agrees to the advocate and solicitor complying with the requirement, but where the advocate and solicitor so refuses to comply with the requirement, the advocate and solicitor shall forthwith furnish in writing to the Commission the name and address of the person to whom or by whom the communication was made.

Giving false or misleading information, evidence or document

23. A person who fails to disclose or omits to give any relevant information or evidence or document, or provides any information, evidence or document that he knows or has reason to believe is false or misleading, in response to a direction issued by the Commission, commits an offence.

Destruction, concealment, mutilation or alteration of records, etc.

24. A person who—

- (a) destroys, conceals, mutilates or alters; or
- (b) sends or attempts to send or conspires with any other person to remove from its premises or send out of Malaysia,

any record, book, account, document, computerized data or other thing kept or maintained with intent to defraud the Commission or to prevent, delay or obstruct the carrying out of an investigation or the exercise of any power by the Commission under this Act commits an offence.

Search and seizure with warrant

25. (1) If it appears to a Magistrate, upon written information on oath from the Commission officer and after such inquiry as the Magistrate considers necessary, that there is reasonable cause to believe that—

- (a) any premises has been used for; or
- (b) there is in any premises evidence necessary to the conduct of an investigation into,

the infringement of any prohibition or the commission of an offence under this Act, the Magistrate may issue a warrant authorizing the Commission officer named in the warrant at any reasonable time by day or night and with or without assistance, to enter the premises and if need be by force.

(2) Without affecting the generality of subsection (1), the warrant issued by the Magistrate may authorize the search and seizure of any record, book, account, document, computerized data or other thing which contains or is reasonably suspected to contain information as to any infringement or offence suspected to have been committed.

(3) A Commission officer conducting a search under subsection (1) may, for the purpose of investigating into the infringement or offence, search any person who is in or on the premises.

(4) A Commission officer making a search of a person under subsection (3) may seize or take possession of, and place in safe custody all things other than the necessary clothing found upon the person, and any of those things which there is reason to believe were the instruments or other evidence of the infringement or offence may be detained until the discharge or acquittal of the person.

(5) Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency.

(6) If, by reason of its nature, size or amount, it is not practicable to remove any record, book, account, document, computerized data or other thing seized under this section, the Commission officer shall by any means seal such record, book, account, document, computerized data or other thing in the premises or container in which it is found.

(7) A person who, without lawful authority, breaks, tampers with or damages the seal referred to in subsection (6) or removes any record, book, account, document, computerized data or other thing under seal or attempts to do so commits an offence.

#### Search and seizure without warrant

26. If a Commission officer is satisfied upon information received that he has reasonable cause to believe that by reason of delay in obtaining a search warrant under section 25 the investigation would be adversely affected or evidence of the commission of an infringement or offence is likely to be tampered with, removed,



damaged or destroyed, the Commission officer may enter the premises and exercise in, upon and in respect of the premises all the powers referred to in section 25 in as full and ample a manner as if he were authorized to do so by a warrant issued under that section.

#### Access to computerized data

27. (1) Any Commission officer conducting a search under this Act shall be given access to computerized data whether stored in a computer or otherwise.

(2) For the purpose of this section, the Commission officer shall be provided with the necessary password, encryption code, decryption code, software or hardware or any other means required for his access to enable the comprehension of the computerized data.

#### Warrant admissible notwithstanding defect

28. A search warrant issued under this Act shall be valid and enforceable notwithstanding any defect, mistake or omission therein or in the application for such warrant and any record, book, account, document, computerized data or other thing seized under such warrant shall be admissible in evidence in any proceedings under this Act.

#### List of record, book, account, etc., seized

29. (1) Except as provided in subsection (2), where any record, book, account, document, computerized data or other thing is seized pursuant to this Act, the Commission officer making the seizure—

(a) shall prepare—

(i) a list of the record, book, account, document, computerized data or other thing seized and shall sign the list; and

(ii) a written notice of the seizure containing the grounds for the seizure and shall sign the notice; and

(b) shall, as soon as practicable, serve a copy of the list of the record, book, account, document, computerized data or other thing seized and the written notice of the seizure to the occupier of the premises which have been searched, or to his agent or servant at those premises.

(2) The written notice of the seizure shall not be required to be served pursuant to paragraph (1)(b) where the seizure is made in the presence of the person against whom proceedings under this Act are intended to be taken, or in the presence of the owner of such property or his agent, as the case may be.

(3) If the premises are unoccupied, the Commission officer shall post a copy of the list of the record, book, account, document, computerized data or other thing seized conspicuously on the premises.

Release of record, book, account, etc., seized

30. If any record, book, account, document, computerized data or other thing has been seized under this Act, the Commission officer who effected the seizure may release the record, book, account, document, computerized data or other thing to the person he determines to be lawfully entitled to it, if the record, book, account, document, computerized data or other thing is not otherwise required for the purpose of any proceedings under this Act or for the purpose of any prosecution under any other written law, and in such event neither the Commission officer effecting the seizure, nor the Federal Government, the Commission or any person acting on behalf of the Federal Government or the Commission shall be liable to any proceedings by any person if the seizure and the release of the record, book, account, document, computerized data or other thing had been effected in good faith.

No cost or damages arising from seizure to be recoverable

31. No person shall, in any proceedings before any court in respect of any record, book, account, document, computerized data or other thing seized in the exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief unless such seizure was made without reasonable cause.

## Obstruction

32. Any person who—

- (a) refuses any Commission officer access to any premises which the Commission officer is entitled to have under this Act or in the execution of any duty imposed or power conferred by this Act; or
- (b) assaults, obstructs, hinders or delays any Commission officer in effecting any entry which the Commission officer is entitled to effect under this Act or in the execution of any duty imposed or power conferred by this Act, commits an offence.

## Tipping off

33. (1) Any person who—

- (a) knows or has reasonable grounds to suspect that a Commission officer is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted under or for the purposes of this Act and discloses to any other person information or any other matter which is likely to prejudice that investigation or proposed investigation; or
- (b) knows or has reasonable grounds to suspect that a disclosure has been made to a Commission officer under this Act and discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure, commits an offence.

(2) Nothing in subsection (1) makes it an offence for an advocate and solicitor or his employee to disclose any information or other matter—

- (a) to his client or the client's representative in connection with the giving of advice to the client in the course and for the purpose of the professional employment of the advocate and solicitor; or

(b) to any person in contemplation of, or in connection with and for the purpose of, any legal proceedings.

(3) Subsection (2) does not apply in relation to any information or other matter which is disclosed with a view to furthering any illegal purpose.

(4) In proceedings against a person for an offence under this section, it is a defence to prove that—

- (a) he did not know or suspect that the disclosure made under paragraph (1)(b) was likely to prejudice the investigation; or
- (b) he had lawful authority or reasonable excuse for making the disclosure.

#### Threat and reprisal is prohibited

34. (1) No person shall—

- (a) coerce or attempt to coerce any person to refrain from doing any act referred to in subsection (3); or
- (b) subject any person to any commercial or other disadvantage as a reprisal against the person for doing any act referred to in subsection (3).

(2) For the purposes of and without prejudice to the generality of paragraph (1)(b), the commercial or other disadvantage may include a threat of late payment of amounts properly due to the person, the unreasonable bringing or conduct of litigation against the person, the cancellation of orders with the person, or the diversion of business from, or refusal to trade with, the person.

(3) The acts referred to in subsection (1) are as follows:

- (a) making a complaint to the Commission under section 15; and
- (b) co-operating with, or offering or agreeing to co-operate with, the Commission in connection with any investigation by the Commission.

(4) Any person who contravenes this section commits an offence.

PART  
IVDECISION BY THE  
COMMISSION

## Interim measures

35. (1) This section applies if the Commission has commenced but not completed an investigation under section 14.

(2) If the Commission has reasonable grounds to believe that any prohibition under this Act has been infringed or is likely to be infringed and the Commission considers that it is necessary for it to act under this section as a matter of urgency for the purpose of—

- (a) preventing serious and irreparable damage, economic or otherwise, to a particular person or category of persons; or
- (b) protecting the public interest,

it may give such direction as it considers to be appropriate and proportionate for that purpose.

(3) A direction given under subsection (2) may include requiring or causing any person—

- (a) to suspend the effect of, and desist from acting in accordance with, any agreement which is suspected of infringing any prohibition under Part II;
- (b) to desist from any conduct which is suspected of infringing any prohibition under Part II; or
- (c) to do, or refrain from doing, any act, but which shall not require the payment of money.

(4) The Commission shall, before giving a direction under subsection (2)—

- (a) serve a written notice to the person to whom it proposes to give the direction; and
- (b) give that person an opportunity to make written representations within a period of at least seven days from the date of the written notice.

(5) A notice under subsection (4) shall indicate the nature of the direction which the Commission proposes to give and its reasons for giving the direction.

(6) The Commission may at any time withdraw a direction given under subsection (2).

(7) Without prejudice to subsection (6), any direction given under subsection (2) shall cease to have effect —

- (a) on the date of the decision by the Commission upon completion of the investigation under section 14; or
- (b) twelve months from the date the direction was given,

whichever is earlier.

#### Proposed decision by the Commission

36. (1) If, after the completion of the investigation, the Commission proposes to make a decision to the effect that one of the prohibitions under Part II has been or is being infringed, the Commission shall give written notice of its proposed decision to each enterprise that may be directly affected by the decision.

(2) The notice shall—

- (a) set out the reasons for the Commission's proposed decision in sufficient detail to enable the enterprise to whom the notice is given to have a genuine and sufficient prospect of being able to comment on the proposed decision on an informed basis;
- (b) set out any penalties or remedial action that the Commission proposes to apply; and
- (c) inform each enterprise to whom the notice is given that the enterprise may, within such reasonable period as may be specified in the notice—
  - (i) submit written representations to the Commission; and
  - (ii) indicate whether it wishes to make an oral representation before the Commission.

### Oral representation

37. If an enterprise informs the Commission, within the period specified in the notice given under section 36 that it wishes to make an oral representation, the Commission shall, before taking any relevant decision—

- (a) convene a session for the oral representation to be held at a date, time and place determined by the Commission; and
- (b) give written notice of the date, time and place to—
  - (i) the enterprise concerned;
  - (ii) any person who had lodged a complaint with the Commission concerning the practice that was the subject of the Commission's investigation; and
  - (iii) any other person whose presence at the session of the oral representation is considered necessary by the Commission.

### Conduct of hearings

38. (1) Notwithstanding section 37, the Commission may at any time conduct a hearing for the purpose of determining whether an enterprise has infringed or is infringing any prohibition under Part II.

(2) If the Commission determines that a hearing is to be held, it shall give at least fourteen days notice in writing to the enterprise concerned and to other interested third parties—

- (a) recording its decision to convene the hearing;
- (b) specifying the date, time and place for the holding of the hearing; and
- (c) stipulating the matters to be considered at the hearing.

(3) When the Commission decides to hold a hearing, it shall also decide—

- (a) whether to hold individual hearings with each of the enterprises and any other interested third parties separately or to hold a single hearing attended by all the enterprises involved and the interested third parties; and

- (b) whether to hold a hearing—
  - (i) in public; or
  - (ii) in a closed session, for the purpose of protecting confidential information.

(4) The hearing shall be governed by and conducted in accordance with the procedural rules for the time being in effect, as published by the Commission.

(5) The Commission shall keep a record of the hearing as is sufficient to set out the matters raised by any person participating in the hearing.

- (6) An enterprise may be represented at a hearing by—
  - (a) any of its authorized officers or employees;
  - (b) any advocate and solicitor;
  - (c) any person falling within the description specified for that purpose in the Commission's procedural rules; or
  - (d) any other person, with the consent of the Chairman.

#### Finding of non-infringement

39. Where the Commission has made a decision that there is no infringement of a prohibition under Part II, the Commission shall, without delay, give notice of the decision to any person who is affected by the decision stating the facts on which the Commission bases the decision and the Commission's reason for making the decision.

#### Finding of an infringement

40. (1) If the Commission determines that there is an infringement of a prohibition under Part II, it—
- (a) shall require that the infringement to be ceased immediately;
  - (b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;



- (c) may impose a financial penalty; or
- (d) may give any other direction as it deems appropriate.

(2) The Commission shall, within fourteen days of its making a decision under this Part, notify any person affected by the decision.

(3) The Commission shall prepare and publish reasons for each decision it makes under this section.

(4) A financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred.

### Leniency regime

41. (1) There shall be a leniency regime, with a reduction of up to a maximum of one hundred percent of any penalties which would otherwise have been imposed, which may be available in the cases of any enterprise which has—

- (a) admitted its involvement in an infringement of any prohibition under subsection 4(2); and
- (b) provided information or other form of co-operation to the Commission which significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises.

(2) A leniency regime may permit different percentages of reductions to be available to an enterprise depending on—

- (a) whether the enterprise was the first person to bring the suspected infringement to the attention of the Commission;
- (b) the stage in the investigation at which—
  - (i) an involvement in the infringement was admitted; or
  - (ii) any information or other co-operation was provided; or

- (c) any other circumstances which the Commission considers appropriate to have regard to.

#### Enforcement of direction or decision

42. (1) The Commission may bring proceedings before the High Court against any person who fails to comply with a direction given by the Commission under section 35 or a decision under section 40.

(2) If the High Court finds that the person referred to in subsection (1) has failed to comply with the direction or decision, the High Court shall make an order requiring the person to comply with the direction or decision.

(3) For the purposes of subsection (2), where the High Court finds that the failure to comply with the decision includes a failure to pay a penalty within the specified period, the High Court shall, in addition to ordering that person to pay the penalty, order the person to pay interest at the normal judgment rate running from the day following that on which the payment was due.

(4) Any breach of an order of the High Court made pursuant to this section shall be punishable as a contempt of court.

#### Power to accept undertaking

43. (1) The Commission may, subject to the conditions that the Commission may impose, accept from an enterprise an undertaking to do or refrain from doing anything as the Commission considers appropriate.

(2) If the Commission accepts an undertaking under subsection (1), the Commission shall, in relation to an infringement, close the investigation without making any finding of infringement and shall not impose a penalty on the enterprise.

(3) Any undertaking accepted by the Commission under this section shall be a document available for inspection by the public in a manner determined by the Commission.

(4) The provisions of any undertaking accepted by the Commission under this section shall be enforceable by the Commission as though those provisions had been set out in a decision given to the enterprise providing that undertaking pursuant to section 40.

## PART

### V

## COMPETITION APPEAL TRIBUNAL

### Establishment of the Competition Appeal Tribunal

44. There is established a Competition Appeal Tribunal, which shall have exclusive jurisdiction to review any decision made by the Commission under sections 35, 39 and 40.

### Constitution of the Competition Appeal Tribunal

45. (1) The Competition Appeal Tribunal shall consist of the following members:

- (a) a President; and
- (b) between seven and twenty other members appointed by the Prime Minister on the recommendation of the Minister.

(2) The Prime Minister shall, on the recommendation of the Minister, upon nomination by the Chief Justice of the Federal Court, appoint a judge of the High Court to be the President of the Competition Appeal Tribunal.

(3) The Prime Minister shall appoint persons who, in his opinion, have relevant expertise in industry, commerce, economics, law, accountancy or consumer affairs to be members of the Competition Appeal Tribunal.

(4) In recommending the members of the Competition Appeal Tribunal to the Prime Minister, the Minister shall consider proposals and recommendations by any Government agency or any other body having expertise in any matter referred to in subsection (3).

(5) The President and members of the Competition Appeal Tribunal shall hold office for a term not exceeding six years.

Allowances

46. The President and members of the Competition Appeal Tribunal appointed under section 45 may be paid—

- (a) a daily sitting allowance during the sitting of the Competition Appeal Tribunal;
- (b) a lodging, travelling and subsistence allowance; and
- (c) such fixed allowances or other allowances,

as the Minister may determine.

Resignation and revocation of appointment

47. (1) The President or any other member of the Competition Appeal Tribunal may resign his office by giving sixty days' written notice to the Prime Minister.

(2) The Prime Minister may, at any time, revoke the appointment of the President or any other member of the Competition Appeal Tribunal if—

- (a) he is of unsound mind or otherwise incapable of performing his duties or managing his affairs;
- (b) he becomes bankrupt or insolvent;
- (c) there has been proved against him, or he has been convicted on, a charge in respect of—
  - (i) an offence involving fraud, dishonesty or moral turpitude;
  - (ii) an offence under any law relating to corruption; or
  - (iii) any other offence punishable with imprisonment (in itself only or in addition to or in lieu of a fine) for more than two years;
- (d) he is guilty of serious misconduct in relation to his duties;
- (e) he fails to comply with his obligations under section 49; or
- (f) his performance has been unsatisfactory for a significant period of time.

## Vacation of office and new or temporary appointment

48. (1) The office of the President or any other member of the Competition Appeal Tribunal shall be vacated if—

- (a) he dies;
- (b) he resigns or otherwise vacates his office before the expiry of the term for which he is appointed; or
- (c) his appointment is revoked under section 47.

(2) The Prime Minister shall appoint another person in accordance with section 45 to replace the President or any other member of the Competition Appeal Tribunal during the vacancy in the office of the President or member of the Competition Appeal Tribunal.

(3) The Prime Minister may appoint temporarily another person in accordance with section 45 to act as the President or any other member of the Competition Appeal Tribunal—

- (a) during any period when the President or a member is absent from duty or from Malaysia; or
- (b) if the President or a member is, for any other reason, unable to perform the duties of his office temporarily.

(4) No act done or proceedings taken by the Competition Appeal Tribunal in exercise of its powers or the performance of its functions shall be affected on the ground of any vacancy in the membership of the Competition Appeal Tribunal.

## Disclosure of interest

49. (1) A member of the Competition Appeal Tribunal shall disclose, as soon as practicable, to the President any interest, whether substantial or not, which may be in conflict with the member's duties as a member of the Competition Appeal Tribunal in a particular matter.

(2) If the President is of the opinion that the member's interest is in conflict with the member's duties as a member of the Competition Appeal Tribunal, the President shall inform all the parties to the matter of the conflict.

(3) If none of the parties to the matter objects to the conflict, the member may continue to execute duties as a member of the Competition Appeal Tribunal in relation to that matter.

(4) If a party to the matter objects to the conflict, the member of the Competition Appeal Tribunal shall not continue to execute his duties as a member of the Competition Appeal Tribunal in relation to that matter.

(5) If the member is prohibited from executing his duties under subsection (4), the President shall appoint another member of Competition Appeal Tribunal to execute the duty in relation to that matter.

(6) If the President has any interest, whether substantial or not, which may be in conflict with his duty as the President of the Competition Appeal Tribunal in a particular matter, he shall refrain from executing his duty as the President in relation to that matter.

(7) The failure of the President to refrain from executing his duty under subsection (6) or the failure of a member to disclose his interest shall—

- (a) invalidate the decision of the Competition Appeal Tribunal unless all parties agree to be bound by the decision; and
- (b) subject the President or the member to the revocation of his appointment under section 47.

Secretary to the Competition Appeal Tribunal and other officers

50. (1) The Minister shall appoint a Secretary to the Competition Appeal Tribunal.

(2) The Minister may designate such number of public officers as the Minister thinks fit to assist the Secretary.

(3) For the purpose of this Act, the Secretary and the officers designated under subsection (2) shall be deemed to be officers of the Competition Appeal Tribunal.

### Appeal to the Competition Appeal Tribunal

51. (1) A person who is aggrieved or whose interest is affected by a decision of the Commission under section 35, 39 or 40 may appeal to the Competition Appeal Tribunal by filing a notice of appeal to the Competition Appeal Tribunal.

(2) A notice of appeal shall be made in writing to the Competition Appeal Tribunal within thirty days from the date of the decision of the Commission and the appellant shall give a copy of the notice to the Chairman of the Commission.

(3) The notice of appeal shall state in summary form the substance of the decision of the Commission appealed against, shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate and shall be signed by the appellant or his advocate.

### Record of decision of the Commission

52. (1) The aggrieved person or the person whose interest is affected referred to in section 51 may, on his own initiative, request in writing to the Commission for a statement of the grounds of the decision of the Commission.

(2) Subject to subsection (3), the Commission shall, upon receiving the written request under subsection (1), provide a copy of the statement of its grounds to the aggrieved person or the person whose interest is affected upon payment of the prescribed fee.

(3) When a notice of appeal has been filed with the Competition Appeal Tribunal under section 51, the Commission shall, if it had not already written its grounds for its decision on the matter stated in the notice as requested by the appellant under subsection (1), record in writing its grounds for its decision and the written grounds shall form part of the record of the proceedings before the Competition Appeal Tribunal.

### Stay of decision pending appeal

53. (1) Pending the decision of an appeal by the Competition Appeal Tribunal, a decision of the Commission shall be valid, binding and enforceable except where a stay of the decision of the Commission has been applied for by the appellant and granted by the Competition Appeal Tribunal.

(2) An application for a stay of decision shall be in writing and shall be made to the Competition Appeal Tribunal on or after the day on which the notice of appeal has been filed with the Competition Appeal Tribunal.

### Composition of the Competition Appeal Tribunal

54. Every proceeding of the Competition Appeal Tribunal shall be heard and disposed of by three members or such greater uneven number of members of the Competition Appeal Tribunal as the President may in any particular case determine.

### Sitting of the Competition Appeal Tribunal

55. (1) The Competition Appeal Tribunal shall sit on such dates and at such places as the President may from time to time determine.

(2) The President may cancel or postpone any sitting of the Competition Appeal Tribunal and may change the place of the sittings which has been determined under subsection (1).

(3) Any change to the date or place of any sitting of the Competition Appeal Tribunal shall be informed to the parties to the appeal by a written notice.

### Procedure of the Competition Appeal Tribunal

56. The Competition Appeal Tribunal shall decide its own procedure.



## Powers of the Competition Appeal Tribunal

57. (1) The Competition Appeal Tribunal shall have power—
- (a) to summon parties to the proceedings or any other person to attend before it to give evidence in respect of an appeal;
  - (b) to procure and receive evidence on oath or affirmation, whether oral or documentary, and examine all such persons as witnesses as it considers necessary;
  - (c) where a person is so summoned, to require the production of any information, document or other thing in his possession or under his control which the Competition Appeal Tribunal considers necessary for the purposes of the appeal;
  - (d) to administer any oath, affirmation or statutory declaration, as the case may require;
  - (e) where a person is so summoned, to allow the payment for any reasonable expenses incurred in connection with his attendance;
  - (f) to admit evidence or reject evidence adduced, whether oral or documentary, and whether admissible or inadmissible under the provisions of any written law for the time being in force relating to the admissibility of evidence; and
  - (g) to generally direct and do all such matters as may be necessary or expedient for the expeditious decision of the appeal.
- (2) The Competition Appeal Tribunal shall have the powers of a subordinate court under the Subordinate Courts Act 1948 [Act 92] with regard to the enforcement of attendance of witnesses, hearing evidence on oath or affirmation and punishment for contempt.

## Decision of the Competition Appeal Tribunal

58. (1) The decision of the Competition Appeal Tribunal, on any matter, shall be decided on a majority of the members.

(2) The Competition Appeal Tribunal 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.

(3) A decision of the Competition Appeal Tribunal is final and binding on the parties to the appeal.

#### Enforcement of decision of the Competition Appeal Tribunal

59. A decision given by the Competition Appeal Tribunal may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the decision.

#### Protection against suit and legal proceedings

60. No action, suit, prosecution or other proceedings shall lie or be brought, instituted or maintained in any court against—

- (a) the Competition Appeal Tribunal;
- (b) the President or any member of the Competition Appeal Tribunal;
- (c) the Secretary or any other officer of the Competition Appeal Tribunal; or
- (d) any person authorized to act for and on behalf of the Competition Appeal Tribunal,

in respect of any act or omission done or omitted by him or it in good faith in such capacity.

## PART VI

### GENERAL

#### General penalty

61. Any person who commits an offence under this Act for which no penalty is expressly provided shall, on conviction, be liable—

- (a) if such person is a body corporate, to a fine not exceeding five million ringgit, and for a second or subsequent offence, to a fine not exceeding ten million ringgit; or
- (b) if such person is not a body corporate, to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding five years or to both, and for a second or subsequent offence, to a fine not exceeding two million ringgit or to imprisonment for a term not exceeding five years or to both.

#### Compounding of offences

62. (1) The Minister may, by regulations, prescribe any offence to be a compoundable offence and may prescribe the manner in which offences may be compounded.

(2) The Commission may, with the consent in writing of the Public Prosecutor, compound any offence committed by any person under this Act and prescribed to be a compoundable offence by making a written offer to the person suspected to have committed the offence to compound the offence upon payment to the Commission of an amount of money not exceeding fifty per centum of the amount of maximum fine for that offence within such time as may be specified in the written offer.

(3) An offer under subsection (2) may be made at any time after the offence has been committed but before any prosecution for it has been instituted, and if the amount specified in the offer is not paid within the time specified in the offer or such extended time as the Commission may grant, prosecution for the offence may be instituted at any time after that against the person to whom the offer was made.

(4) Where an offence has been compounded under subsection (2), no prosecution shall be instituted in respect of the offence against the person to whom the offer to compound was made, and any record, book, account, document, computerized data or other thing seized in connection with the offence may be released by the Commission, subject to such terms and conditions as the Commission thinks fit to impose in accordance with the conditions of the compound.

(5) All sums of money received by the Commission under this section shall be paid into the Federal Consolidated Fund.

### Offences by body corporate

63. (1) If a body corporate commits an offence under this Act, any person who at the time of the commission of the offence was a director, chief executive officer, chief operating officer, manager, secretary or other similar officer of the body corporate or was purporting to act in any such capacity or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate or was assisting in such management—

- (a) may be charged severally or jointly in the same proceedings with the body corporate; and
- (b) if the body corporate is found to have committed the offence, shall be deemed to have committed that offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves—
  - (i) that the offence was committed without his knowledge, consent or connivance; and
  - (ii) that he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.

(2) If any person would be liable under this Act to any punishment or penalty for his act, omission, neglect or default, he shall be liable to the same punishment or penalty for every such act, omission, neglect or default of any employee or agent of his, or of the employee of the agent, if the act, omission, neglect or default was committed—

- (a) by that person's employee in the course of his employment;

- (b) by the agent when acting on behalf of that person; or
- (c) by the employee of the agent in the course of his employment by the agent or otherwise on behalf of the agent acting on behalf of that person.

#### Rights of private action

64. (1) Any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II shall have a right of action for relief in civil proceedings in a court under this section against any enterprise which is or which has at the material time been a party to such infringement.

(2) The action may be brought by any person referred to in subsection (1) regardless of whether such person dealt directly or indirectly with the enterprise.

#### Power to make regulations

65. (1) The Minister may make such regulations as may be necessary or expedient for—

- (a) giving full effect to the provisions of this Act;
- (b) carrying out or achieving the objects and purposes of this Act; and
- (c) providing for any supplemental, incidental or consequential matters in relation to this Act.

(2) The Minister may, before making such regulations—

- (a) publish a notice of his intention to make the proposed regulations;
- (b) give at least thirty days from the date of the notice to allow any submission to be made by members of the public in relation to the proposed regulations; and
- (c) give due consideration to any submission made.

(3) The regulations made under this section may prescribe for any act or omission in contravention of the regulations to be an offence and may prescribe for penalties of a fine not exceeding one million ringgit or imprisonment for a term not exceeding five years or to both.

Power to issue guidelines

66. (1) The Commission may issue and publish such guidelines as may be expedient or necessary for the better carrying out of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Commission may issue—

- (a) guidelines on the economic and legal analysis to be used in determining cases under this Act; and
- (b) guidelines on the principles to be used in determining any penalty or remedy imposed under this Act.

(3) The Commission may revoke, vary, revise or amend the whole or any part of any guidelines issued under this section.

Public Authorities Protection Act 1948

67. The Public Authorities Protection Act 1948 [Act 198] shall apply to any action, suit, prosecution or proceedings against the Commission, the Chairman, any Commission officer, any member, officer, servant or agent of the Commission, the President, the Secretary or any member, officer, servant or agent of the Competition Appeal Tribunal in respect of any act, neglect or default done or omitted by him or it in such capacity.

FIRST SCHEDULE

[Section 3]

1. Communications and Multimedia Act 1998 [Act 588]
2. Energy Commission Act 2001 [Act 610]

SECOND SCHEDULE

[Section 13]

Activities not subject to Chapters 1 and 2 of Part II

Chapters 1 and 2 of Part II of this Act shall not apply to—

- (a) an agreement or conduct to the extent to which it is engaged in an order to comply with a legislative requirement;
- (b) collective bargaining activities or collective agreements in respect of employment terms and conditions and which are negotiated or concluded between parties which include both employers and employees or organisations established to represent the interests of employers or employees;
- (c) an enterprise 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 under Chapter 1 and Chapter 2 of Part II would obstruct the performance, in law or in fact, of the particular tasks assigned to that

enterprise.

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DICETAK OLEH  
PERCETAKAN NASIONAL MALAYSIA BERHAD, KUALA LUMPUR  
BAGI PIHAK DAN DENGAN PERINTAH KERAJAAN MALAYSIA

**MEXICO**

**Ley Federal de Competencia  
Económica**

**COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA**

**2014**



***Ley Federal de Competencia Económica***  
**Ley publicada en el DOF del 24-12-1992**  
**Primera reforma publicada en el DOF del 28-06-2006**  
**Declaración de invalidez de artículos de la presente ley, por Sentencia de la SCJN**  
**publicada en el DOF del 12-07-2007**  
**Segunda reforma publicada en el DOF del 10-05-2011**  
**Última reforma publicada en el DOF del 09-04-2012**

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***Capítulo I***

***Disposiciones Generales***

**ARTÍCULO 1o.-** La presente ley es reglamentaria del artículo 28 constitucional en materia de competencia económica, monopolios y libre concurrencia, es de observancia general en toda la República y aplicable a todas las áreas de la actividad económica.

***Tesis aislada 1a. LXIV/2002. No. Registro: 186,053<sup>1</sup>***

**ARTÍCULO 2o.-** Esta Ley tiene por objeto proteger el proceso de competencia y libre concurrencia, mediante la prevención y eliminación de monopolios, prácticas monopólicas y demás restricciones al funcionamiento eficiente de los mercados de bienes y servicios.

Para efectos de esta Ley, se entenderá por Secretaría, la Secretaría de Economía, y por Comisión, la Comisión Federal de Competencia.

***Art. 23 LFCE***

***Artículo reformado DOF 28-06-2006***

**ARTÍCULO 2o.-** Esta ley tiene por objeto proteger el proceso de competencia y libre concurrencia, mediante la prevención y eliminación de monopolios, prácticas monopólicas y demás restricciones al funcionamiento eficiente de los mercados de bienes y servicios.

Para efectos de esta ley, se entenderá por Secretaría, la Secretaría de Comercio y Fomento Industrial, y por Comisión, la Comisión Federal de Competencia.

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<sup>1</sup>“COMPETENCIA ECONÓMICA. EL CONGRESO DE LA UNIÓN ESTÁ FACULTADO EXPLÍCITAMENTE POR LA CONSTITUCIÓN FEDERAL PARA LEGISLAR SOBRE LA MATERIA DE MONOPOLIOS Y, POR ENDE, AL EXPEDIR LA LEY FEDERAL RELATIVA, NO INVADIR LA ESFERA COMPETENCIAL DE LAS ENTIDADES FEDERATIVAS.”

**ARTÍCULO 3o.-** Están sujetos a lo dispuesto por esta Ley todos los agentes económicos, sea que se trate de personas físicas o morales, con o sin fines de lucro, dependencias y entidades de la administración pública federal, estatal o municipal, asociaciones, cámaras empresariales, agrupaciones de profesionistas, fideicomisos, o cualquier otra forma de participación en la actividad económica.

Serán responsables solidarios los agentes económicos que hayan adoptado la decisión y el directamente involucrado en la conducta prohibida por esta Ley.

**ARTÍCULO 3o.-** Están sujetos a lo dispuesto por esta ley todos los agentes económicos, sea que se trate de personas físicas o morales, dependencias o entidades de la administración pública federal, estatal o municipal, asociaciones, agrupaciones de profesionistas, fideicomisos o cualquier otra forma de participación en la actividad

*Jurisprudencia. No. Registro: 182,044*<sup>2</sup>

*Jurisprudencia. No. Registro: 168,978*<sup>3</sup>

*Jurisprudencia. No. Registro: 169,006*<sup>4</sup>

*Jurisprudencia. No. Registro: 169,007*<sup>5</sup>

*Jurisprudencia. No. Registro: 168,470*<sup>6</sup>

*Jurisprudencia. No. Registro: 168,497*<sup>7</sup>

*Jurisprudencia. No. Registro: 168,514*<sup>8</sup>

*Jurisprudencia. No. Registro: 168,677*<sup>9</sup>

*Tesis aislada 1a. XXXI / 2002. No. Registro: 187,163*<sup>10</sup>

*Tesis aislada 1a. XXX / 2002. No. Registro: 187,336*<sup>11</sup>

Artículo reformado DOF 28-06-2006

**ARTÍCULO 4o.-** Para los efectos de esta Ley, no constituyen monopolios las funciones que el Estado ejerza de manera exclusiva en las áreas estratégicas a que se refieren los párrafos cuarto y séptimo del artículo 28 constitucional.

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<sup>2</sup>“AGENTES ECONÓMICOS. PARA EFECTOS DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, NO LO SON LAS ENTIDADES DE LA ADMINISTRACIÓN PÚBLICA CUANDO ACTÚAN EN EJERCICIO DE SUS ATRIBUCIONES PROPIAS DE AUTORIDAD.”

<sup>3</sup>“COMPETENCIA ECONÓMICA. EL ARTÍCULO 3o. DE LA LEY FEDERAL RELATIVA NO VIOLA LA GARANTÍA DE SEGURIDAD JURÍDICA POR EL HECHO DE NO DEFINIR EL CONCEPTO "AGENTES ECONÓMICOS".”

<sup>4</sup>“AGENTES ECONÓMICOS. PARA CONSIDERARSE CON ESE CARÁCTER NECESARIAMENTE SU ACTIVIDAD DEBE TRASCENDER A LA VIDA ECONÓMICA DEL ESTADO.”

<sup>5</sup>“AGENTES ECONÓMICOS. DISTINCIÓN ENTRE SUJETOS DE DERECHO Y FORMAS DE PARTICIPACIÓN EN LA

ACTIVIDAD ECONÓMICA, PARA DETERMINAR LA EXISTENCIA DE PRÁCTICAS MONOPÓLICAS (INTERPRETACIÓN DEL ARTÍCULO 3o. DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA).”

6“GRUPO DE INTERÉS ECONÓMICO. SU CONCEPTO Y ELEMENTOS QUE LO INTEGRAN EN MATERIA DE COMPETENCIA ECONÓMICA.”

7“COMPETENCIA ECONÓMICA. CORRESPONDE A LA EMPRESA SANCIONADA DEMOSTRAR QUE NO FORMA PARTE DEL GRUPO DE INTERÉS ECONÓMICO AL QUE SE ATRIBUYE LA INSTRUMENTACIÓN Y COORDINACIÓN DE LAS CONDUCTAS CONSIDERADAS PRÁCTICAS MONOPÓLICAS.”

8“AGENTES ECONÓMICOS SU CONCEPTO.”

9“EMPRESA. SU CONCEPTO EN MATERIA DE COMPETENCIA ECONÓMICA.”

10“NOTARIOS PÚBLICOS. NO SON AGENTES ECONÓMICOS PARA EFECTOS DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA.”

11“AGENTES ECONÓMICOS, CONCEPTO DE, PARA LOS EFECTOS DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA.”

No obstante, las dependencias y organismos que tengan a su cargo las funciones a que se refiere el párrafo anterior, estarán sujetos a lo dispuesto por esta Ley respecto de los actos que no estén expresamente comprendidos en los supuestos del artículo constitucional referido.

**ARTÍCULO 4o.-** Para los efectos de esta ley, no constituyen monopolios las funciones que el estado ejerza de manera exclusiva en las áreas estratégicas a que se refiere el párrafo cuarto del artículo 28 de la Constitución Política de los Estados Unidos Mexicanos.

Sin embargo, las dependencias y organismos que tengan a su cargo las funciones a que se refiere el párrafo anterior, estarán sujetos a lo dispuesto por esta ley respecto de actos que no estén expresamente comprendidos dentro de las áreas estratégicas.

*Artículo reformado DOF 28-06-2006*

**ARTÍCULO 5o.-** No se considerarán monopolios las asociaciones de trabajadores constituidas conforme a la legislación de la materia para la protección de sus propios intereses.

Tampoco constituyen monopolios los privilegios que se conceden a los autores y artistas para la producción de sus obras y los que se otorguen a los inventores y perfeccionadores para el uso exclusivo de sus inventos o mejoras.

Los agentes económicos referidos en los dos párrafos anteriores estarán sujetos a lo dispuesto en esta Ley respecto de los actos que no estén expresamente comprendidos dentro de la protección que señala el artículo 28 constitucional.

**ARTÍCULO 5o.-** No constituyen monopolios las asociaciones de trabajadores constituidas conforme a la legislación de la materia para proteger sus propios intereses.

Tampoco constituyen monopolios los privilegios que por determinado tiempo se conceden a los autores y artistas para la producción de sus obras y los que para el uso exclusivo de sus inventos, se otorguen a los inventores y perfeccionadores de alguna mejora

*Art. 28, párrafo octavo CPEUM*

*Artículo reformado DOF 28-06-2006*

**ARTÍCULO 6o.-** No constituyen monopolios las asociaciones o sociedades cooperativas que vendan directamente sus productos en el extranjero, siempre que:

- I. Dichos productos sean la principal fuente de riqueza de la región en que se produzcan o no sean artículos de primera necesidad;
- II. Sus ventas o distribución no se realicen dentro del territorio nacional;

**III.** La membresía sea voluntaria y se permita la libre entrada y salida de sus miembros;

**IV.** No otorguen o distribuyan permisos o autorizaciones cuya expedición corresponda a dependencias o entidades de la administración pública federal, y

**V.** Estén autorizadas en cada caso para constituirse por la legislatura correspondiente a su domicilio social.

Los agentes económicos referidos en este artículo estarán sujetos a lo dispuesto en esta Ley respecto de los actos que no estén expresamente comprendidos dentro de la protección que señala el artículo 28 constitucional.

**ARTÍCULO 60.-** Tampoco constituyen monopolios las asociaciones o sociedades cooperativas que vendan directamente sus productos en el extranjero, siempre que:

**I.** Dichos productos sean la principal fuente de riqueza de la región en que se produzcan o no sean artículos de primera necesidad;

**II.** Sus ventas o distribución no se realicen además dentro del territorio nacional;

**III.** Su membresía sea voluntaria y se permita la libre entrada y salida de sus miembros;

**IV.** No otorguen o distribuyan permisos o autorizaciones cuya expedición corresponda a dependencias o entidades de la administración pública federal; y

**V.** Estén autorizadas en cada caso para constituirse por la correspondiente a su domicilio social.

*Art. 28 CPEUM*

Artículo reformado DOF 28-06-2006

**ARTÍCULO 70.-** Para la imposición, en los términos del artículo 28 constitucional, de precios a los productos y servicios que sean necesarios para la economía nacional o el consumo popular, se estará a lo siguiente:

**I.** Corresponde exclusivamente al Ejecutivo Federal determinar mediante decreto los bienes y servicios que podrán sujetarse a precios, siempre y cuando no haya condiciones de competencia efectiva en el mercado relevante de que se trate. La Comisión determinará mediante declaratoria si no hay condiciones de competencia efectiva.

**II.** La Secretaría, sin perjuicio de las atribuciones que correspondan a otras dependencias y previa opinión de la Comisión, fijará los precios que correspondan a los bienes y

servicios determinados conforme a la fracción anterior, con base en criterios que eviten la insuficiencia en el abasto.

La Secretaría podrá concertar y coordinar con los productores o distribuidores las acciones o modalidades que sean necesarias en esta materia, procurando minimizar los efectos sobre la competencia y la libre concurrencia.

La Procuraduría Federal del Consumidor, bajo la coordinación de la Secretaría, será responsable de la inspección, vigilancia y sanción, respecto de los precios que se determinen conforme a este artículo, de acuerdo con lo que dispone la Ley Federal de Protección al Consumidor.

*Arts. 24 fracción V y 33  
bisLFCE Arts. 53, 54  
y 55 RLFCE*

*Artículo relacionado con normativa sectorial  
Tesis aislada 2a. CXLIX/2002. No. Registro: 185,557<sup>12</sup>  
Tesis aislada 2a. CXLVIII/2002. No. Registro: 185,558<sup>13</sup>*

**ARTÍCULO 7o.-** Para la imposición de precios máximos a los productos y servicios que sean necesarios para la economía nacional o el consumo popular, se estará a lo siguiente:

**I.** Corresponde en exclusiva al Ejecutivo Federal determinar mediante decreto cuales bienes y servicios podrán sujetarse a precios máximos: y

**II.** La Secretaría, sin perjuicio de las atribuciones que correspondan a otras dependencias, determinará, mediante acuerdo debidamente fundado y motivado los precios máximos que correspondan a los bienes y servicios determinados conforme a la fracción anterior, con base en criterios que eviten la insuficiencia en el abasto.

La Secretaría podrá concertar y coordinar con los productores o distribuidores las acciones que sean necesarias en esta materia, sin que ello se entienda violatorio de lo dispuesto por esta ley, procurando minimizar los efectos sobre la competencia y la libre concurrencia.

La Procuraduría Federal del Consumidor, bajo la coordinación de la Secretaría de Comercio y Fomento Industrial, será responsable de la inspección, vigilancia y sanción, respecto de los precios máximos que se determinen conforme a este artículo, de acuerdo con lo que dispone la Ley Federal de Protección al Consumidor.

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<sup>12</sup> “GAS LICUADO DE PETRÓLEO. LA DETERMINACIÓN DE LOS PRECIOS Y TARIFAS APLICABLES QUE CORRESPONDE REGULAR A LA SECRETARÍA DE ENERGÍA CONFORME AL ARTÍCULO 14, FRACCIÓN II, DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 CONSTITUCIONAL EN EL RAMO DEL PETRÓLEO, EN RELACIÓN CON EL 7o. DEL REGLAMENTO DE GAS LICUADO

DE PETRÓLEO, NO COMPRENDE LA ATRIBUCIÓN DE DECIDIR SI DICHO PRODUCTO DEBE SER SUJETO A PRECIOS MÁXIMOS.”

<sup>13</sup>“GAS LICUADO DE PETRÓLEO. EL ARTÍCULO 7o. DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA NO VIOLA LA GARANTÍA DE AUDIENCIA DE LOS PERMISIONARIOS O DISTRIBUIDORES CUANDO, CON APOYO EN ÉL SE SUJETA DICHO PRODUCTO A PRECIOS MÁXIMOS.”

Artículo reformado DOF 28-06-2006

## **Capítulo II**

### **De los Monopolios y Prácticas Monopólicas**

**ARTÍCULO 8o.-** Quedan prohibidos los monopolios y estancos, así como las prácticas que, en los términos de esta ley, disminuyan, dañen o impidan la competencia y la libre concurrencia en la producción, procesamiento, distribución y comercialización de bienes o servicios.

**Art. 28 CPEUM Art. 35, fracciones IV y V LFCE**

**ARTÍCULO 9o.-** Son prácticas monopólicas absolutas los contratos, convenios, arreglos o combinaciones entre agentes económicos competidores entre sí, cuyo objeto o efecto sea cualquiera de los siguientes:

**Art. 28 EOCFCE**

**I.** Fijar, elevar, concertar o manipular el precio de venta o compra de bienes o servicios al que son ofrecidos o demandados en los mercados, o intercambiar información con el mismo objeto o efecto;

**Art. 9o., párrafo segundo RLFCE**

**II.** Establecer la obligación de no producir, procesar, distribuir, comercializar o adquirir sino solamente una cantidad restringida o limitada de bienes o la prestación o transacción de un número, volumen o frecuencia restringidos o limitados de servicios;

**II.** Establecer la obligación de no producir, procesar, distribuir o comercializar sino solamente una cantidad restringida o limitada de bienes o la prestación de un número, volumen o frecuencia restringidos o limitados de servicios;

**III.** Dividir, distribuir, asignar o imponer porciones o segmentos de un mercado actual o potencial de bienes y servicios, mediante clientela, proveedores, tiempos o espacios determinados o determinables; o

**IV.** Establecer, concertar o coordinar posturas o la abstención en las licitaciones, concursos, subastas o almonedas públicas.

Los actos a que se refiere este artículo no producirán efectos jurídicos y los agentes económicos que incurran en ellos se harán acreedores a las sanciones establecidas en esta ley, sin perjuicio de la responsabilidad penal que pudiere resultar.

**Art. 35, fracciones I, IV, IX y X  
LFCE Art. 9o.  
RLFCE**



Artículo reformado DOF 28-06-2006

**ARTÍCULO 10.-** Sujeto a que se comprueben los supuestos a que se refieren los artículos 11, 12 y 13 de esta Ley, se consideran prácticas monopólicas relativas los actos, contratos, convenios, procedimientos o combinaciones cuyo objeto o efecto sea o pueda ser desplazar indebidamente a otros agentes del mercado; impedirles sustancialmente su acceso o establecer ventajas exclusivas en favor de una o varias personas, en los siguientes casos:

*Art. 29 EOCFCE*

**I.** Entre agentes económicos que no sean competidores entre sí, la fijación, imposición o establecimiento de la comercialización o distribución exclusiva de bienes o servicios, por razón de sujeto, situación geográfica o por períodos determinados, incluidas la división, distribución o asignación de clientes o proveedores; así como la imposición de la obligación de no fabricar o distribuir bienes o prestar servicios por un tiempo determinado o determinable;

**II.** La imposición del precio o demás condiciones que un distribuidor o proveedor deba observar al comercializar o distribuir bienes o prestar servicios;

**III.** La venta o transacción condicionada a comprar, adquirir, vender o proporcionar otro bien o servicio adicional, normalmente distinto o distinguible, o sobre bases de reciprocidad;

**IV.** La venta, compra o transacción sujeta a la condición de no usar, adquirir, vender, comercializar o proporcionar los bienes o servicios producidos, procesados, distribuidos o comercializados por un tercero;

**V.** La acción unilateral consistente en rehusarse a vender, comercializar o proporcionar a personas determinadas bienes o servicios disponibles y normalmente ofrecidos a terceros;

**VI.** La concertación entre varios agentes económicos o la invitación a éstos, para ejercer presión contra algún agente económico o para rehusarse a vender, comercializar o adquirir bienes o servicios a dicho agente económico, con el propósito de disuadirlo de una determinada conducta, aplicar represalias u obligarlo a actuar en un sentido determinado;

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<sup>14</sup>“COMPETENCIA ECONÓMICA. LA PRUEBA INDIRECTA ES IDÓNEA PARA ACREDITAR, A TRAVÉS DE INDICIOS, CIERTOS HECHOS O CIRCUNSTANCIAS

A PARTIR DE LO QUE SE CONOCE COMO LA MEJOR INFORMACIÓN DISPONIBLE, RESPECTO DE LA ACTUACIÓN DE EMPRESAS QUE HAN CONCERTADO ACUERDOS PARA LLEVAR A CABO PRÁCTICAS MONOPÓLICAS.”

<sup>15</sup>“PRUEBA INDIRECTA. SU CONCEPTO Y ELEMENTOS QUE LA INTEGRAN.”

**VII.** La venta sistemática de bienes o servicios a precios por debajo de su costo medio total o su venta ocasional por debajo del costo medio variable, cuando existan elementos para presumir que estas pérdidas serán recuperadas mediante incrementos futuros de precios, en los términos del Reglamento de esta Ley.

Cuando se trate de bienes o servicios producidos conjuntamente o divisibles para su comercialización, el costo medio total y el costo medio variable se distribuirán entre todos los subproductos o coproductos, en los términos del reglamento de esta Ley;

*Art. 10 RLFCE*

**VIII.** El otorgamiento de descuentos o incentivos por parte de productores o proveedores a los compradores con el requisito de no usar, adquirir, vender, comercializar o proporcionar los bienes o servicios producidos, procesados, distribuidos o comercializados por un tercero, o la compra o transacción sujeta al requisito de no vender, comercializar o proporcionar a un tercero los bienes o servicios objeto de la venta o transacción;

**IX.** El uso de las ganancias que un agente económico obtenga de la venta, comercialización o prestación de un bien o servicio para financiar las pérdidas con motivo de la venta, comercialización o prestación de otro bien o servicio;

**X.** El establecimiento de distintos precios o condiciones de venta o compra para diferentes compradores o vendedores situados en igualdad de condiciones, y

**XI.** La acción de uno o varios agentes económicos cuyo objeto o efecto, directo o indirecto, sea incrementar los costos u obstaculizar el proceso productivo o reducir la demanda que enfrentan sus competidores.

Para determinar si las prácticas a que se refiere este artículo deben ser sancionadas en términos de esta Ley, la Comisión analizará las ganancias en eficiencia derivadas de la conducta que acrediten los agentes económicos y que incidan favorablemente en el proceso de competencia y libre competencia. Estas ganancias en eficiencia podrán incluir las siguientes: la introducción de productos nuevos; el aprovechamiento de saldos, productos defectuosos o percederos; las reducciones de costos derivadas de la creación de nuevas técnicas y métodos de producción, de la integración de activos, de los incrementos en la escala de la producción y de la producción de bienes o servicios diferentes con los mismos factores de producción; la introducción de avances tecnológicos que produzcan bienes o servicios nuevos o mejorados; la combinación de activos productivos o inversiones y su recuperación que mejoren la calidad o amplíen los atributos de los bienes y servicios; las mejoras en calidad, inversiones y su recuperación, oportunidad y servicio que impacten favorablemente en la cadena de distribución; que no causen un aumento significativo en precios, o una reducción significativa en las opciones del consumidor, o una inhibición importante en el grado de innovación en el mercado relevante; así como las demás que

demuestren que las aportaciones netas al bienestar del consumidor derivadas de dichas prácticas superan sus efectos anticompetitivos.

*Arts. 11, 12, 13, 35, fracciones I y V, IX y X  
LFCE Arts. 11, 12, 13 y  
14 RLFCE*

*Artículo relacionado con normativa sectorial*

**ARTÍCULO 10.-** Sujeto a que se comprueben los supuestos a que se refieren los artículos 11, 12 y 13 de esta ley, se consideran prácticas monopólicas relativas los actos, contratos, convenios o combinaciones cuyo objeto o efecto sea o pueda ser desplazar indebidamente a otros agentes del mercado, impedirles sustancialmente su acceso o establecer ventajas exclusivas en favor de una o varias personas, en los siguientes casos:

**I.** Entre agentes económicos que no sean competidores entre sí, la fijación, imposición o establecimiento de la distribución exclusiva de bienes o servicios, por razón de sujeto, situación geográfica o por períodos de tiempo determinados, incluidas la división, distribución o asignación de clientes o proveedores; así como la imposición de la obligación de no fabricar o distribuir bienes o prestar servicios por un tiempo determinado o determinable;

**II.** La imposición del precio o demás condiciones que un distribuidor o proveedor debe observar al expendir o distribuir bienes o prestar servicios;

**III.** La venta o transacción condicionada a comprar, adquirir, vender o proporcionar otro bien o servicio adicional, normalmente distinto o distinguible, o sobre bases de reciprocidad:

**IV.** La venta o transacción sujeta a la condición de no usar o adquirir, vender o proporcionar los bienes o servicios producidos, procesados, distribuidos o comercializados por un tercero;

**V.** La acción unilateral consistente en rehusarse a vender o proporcionar a personas determinadas bienes o servicios disponibles y normalmente ofrecidos a terceros;

**VI.** La concertación entre varios agentes económicos o la invitación a éstos, para ejercer presión contra algún cliente o proveedor, con el propósito de disuadirle de una determinada conducta, aplicar represalias u obligarlo a actuar en un sentido determinado; o

**VII.** En general, todo acto que indebidamente dañe o impida el proceso de competencia y libre concurrencia en la producción, procesamiento, distribución y comercialización de bienes o servicios.

*Tesis aislada Pleno P. LVI/2004 X No. Registro: 180,696<sup>16</sup>*

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16“COMPETENCIA ECONÓMICA. EL ARTÍCULO 7o., FRACCIONES II, IV Y V, DEL REGLAMENTO DE LA LEY FEDERAL RELATIVA, AL ESTABLECER QUE DETERMINADAS CONDUCTAS DEBEN CONSIDERARSE COMO PRÁCTICAS

*Jurisprudencia. No. Registro:*

168,410<sup>19</sup>

*Jurisprudencia. No. Registro:*

168,495<sup>20</sup>

*Jurisprudencia. No. Registro:*

168,580<sup>21</sup>

*Tesis aislada TCC I.8o.A.30 A. No. Registro: 186,409*<sup>22</sup>

Artículo reformado DOF 28-06-2006

**ARTÍCULO 11.-** Para que las prácticas a que se refiere el artículo anterior se consideren violatorias de esta ley, deberá comprobarse que:

**I.** Quien realice dicha práctica tenga poder sustancial sobre el mercado relevante; y

**II.** Se realicen respecto de bienes o servicios que correspondan al mercado relevante de que se trate.

**ARTÍCULO 11.-** Para que las prácticas a que se refiere el artículo anterior se consideren violatorias de esta ley, deberá comprobarse:

**I.** Que el presunto responsable tiene poder sustancial sobre el mercado relevante; y

**II.** Que se realicen respecto de bienes o servicios que correspondan al mercado relevante de que se trate.

Artículo reformado DOF 10-05-2011

**ARTÍCULO 12.-** Para la determinación del mercado relevante, deberán considerarse los siguientes criterios:

*Tesis aislada Pleno. P. CVII/2000 No. Registro: 191,364*<sup>23</sup>

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MONOPÓLICAS, VIOLA EL PRINCIPIO DE RESERVA DE LEY CONTENIDO EN EL ARTÍCULO 28 DE LA CONSTITUCIÓN FEDERAL AL”.

17 “COMPETENCIA ECONÓMICA. EL ARTÍCULO 10, FRACCIÓN VII, DE LA LEY FEDERAL RELATIVA, AL NO ESPECIFICAR LA CONDUCTA SOBRE LA CUAL RECAERÁ LA SANCIÓN QUE PREVÉ, VIOLA LAS GARANTÍAS DE LEGALIDAD Y SEGURIDAD JURÍDICA PREVISTAS EN LOS ARTÍCULOS 14 Y 16 DE LA CONSTITUCIÓN FEDERAL.”

18 “SUSPENSIÓN DEFINITIVA. NO PROCEDE CONCEDERLA CONTRA LOS ACTOS PROHIBITIVOS CONTENIDOS EN LAS RESOLUCIONES EMITIDAS POR LA COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA, APOYADAS EN EL ARTÍCULO 10 DE LA LEY FEDERAL RELATIVA, PUES DE OTORGARSE SE INCORPORARÍAN A LA ESFERA JURÍDICA DEL GOBERNADO DERECHOS QUE NO TENÍA ANTES DE LA EMISIÓN DE TALES ACTOS.”

19 “TÉCNICA DEL "LEVANTAMIENTO DEL VELO DE LA PERSONA JURÍDICA O VELO CORPORATIVO". SU SUSTENTO DOCTRINAL Y LA JUSTIFICACIÓN DE SU APLICACIÓN EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS.”

20“COMPETENCIA ECONÓMICA. LA PRUEBA INDIRECTA ES IDÓNEA PARA ACREDITAR, A TRAVÉS DE INDICIOS, CIERTOS HECHOS O CIRCUNSTANCIAS A PARTIR DE LO QUE SE CONOCE COMO LA MEJOR INFORMACIÓN DISPONIBLE, RESPECTO DE LA ACTUACIÓN DE EMPRESAS QUE HAN CONCERTADO ACUERDOS PARA LLEVAR A CABO PRÁCTICAS MONOPÓLICAS.”

21“PRUEBA INDIRECTA. SU CONCEPTO Y ELEMENTOS QUE LA INTEGRAN.”

22 “SUSPENSIÓN. NO PROCEDE CONTRA ACTOS NEGATIVOS CON EFECTOS POSITIVOS (LEY FEDERAL DE COMPETENCIA ECONÓMICA).”

*Jurisprudencia. No. Registro: 168,609*<sup>24</sup>

**I.** Las posibilidades de sustituir el bien o servicio de que se trate por otros, tanto de origen nacional como extranjero, considerando las posibilidades tecnológicas, en qué medida los consumidores cuentan con sustitutos y el tiempo requerido para tal sustitución;

**II.** Los costos de distribución del bien mismo; de sus insumos relevantes; de sus complementos y de sustitutos desde otras regiones y del extranjero, teniendo en cuenta fletes, seguros, aranceles y restricciones no arancelarias, las restricciones impuestas por los agentes económicos o por sus asociaciones y el tiempo requerido para abastecer el mercado desde esas regiones;

**III.** Los costos y las probabilidades que tienen los usuarios o consumidores para acudir a otros mercados; y

**IV.** Las restricciones normativas de carácter federal, local o internacional que limiten el acceso de usuarios o consumidores a fuentes de abasto alternativas, o el acceso de los proveedores a clientes alternativos.

**ARTÍCULO 13.-** Para determinar si uno o varios agentes económicos tienen poder sustancial en el mercado relevante, o bien, para resolver sobre condiciones de competencia, competencia efectiva, existencia de poder sustancial en el mercado relevante u otras cuestiones relativas al proceso de competencia o libre concurrencia a que hacen referencia ésta u otras leyes, reglamentos o disposiciones administrativas, deberán considerarse los siguientes elementos:

*Tesis aislada Pleno. P. CVII/2000 No. Registro: 191,364*<sup>25</sup>

**I.** Su participación en dicho mercado y si pueden fijar precios o restringir el abasto en el mercado relevante por sí mismos, sin que los agentes competidores puedan, actual o potencialmente, contrarrestar dicho poder;

**II.** La existencia de barreras a la entrada y los elementos que previsiblemente puedan alterar tanto dichas barreras como la oferta de otros competidores;

*Art. 12 RLFCE*

**III.** La existencia y poder de sus competidores;

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23 “COMPETENCIA ECONÓMICA. LA LEY FEDERAL CORRESPONDIENTE NO TRANSGREDE LOS PRINCIPIOS DE LEGALIDAD, SEGURIDAD JURÍDICA Y DIVISIÓN DE PODERES PORQUE CONTIENE LAS BASES NECESARIAS PARA DETERMINAR LOS ELEMENTOS TÉCNICOS REQUERIDOS PARA DECIDIR CUÁNDO SE ESTÁ EN



PRESENCIA DE UNA PRÁCTICA MONOPÓLICA.”  
24“MERCADO RELEVANTE. SU CONCEPTO EN  
MATERIA DE COMPETENCIA ECONÓMICA.”

**IV.** Las posibilidades de acceso del o de los agentes económicos y sus competidores a fuentes de insumos;

**V.** El comportamiento reciente del o los agentes económicos que participan en dicho mercado, y

**VI.** Los criterios que se establezcan en el Reglamento de esta Ley así como los criterios técnicos que para tal efecto emita la Comisión.

*Art. 2, segundo párrafo  
RLFCE Artículo relacionado con  
normativa sectorial*

**ARTÍCULO 13.-** Para determinar si un agente económico tiene poder sustancial en el mercado relevante, deberá considerarse:

**Tesis aislada Pleno. P. CVII/2000 No. Registro: 191,364<sup>26</sup>**

**I.** Su participación en dicho mercado y si puede fijar precios unilateralmente o restringir el abasto en el mercado relevante sin que los agentes competidores puedan, actual o potencialmente, contrarrestar dicho poder;

*Art. 11 RLFCE*

**II.** La existencia de barreras a la entrada y los elementos que previsiblemente puedan alterar tanto dichas barreras como la oferta de otros competidores;

*Art. 12 RLFCE*

**III.** La existencia y poder de sus competidores; de acceso del agente económico y sus competidores a fuentes de insumos;

**V.** Su comportamiento reciente; y

**VI.** Los demás criterios que se establezcan en el reglamento de esta ley.

**Arts. 13 y 14 RLFCE**

*Artículo relacionado con normativa sectorial*

Artículo reformado DOF 10-05-2011

**ARTÍCULO 13 bis.**-Para determinar la existencia de poder sustancial de dos o más agentes económicos que se ubiquen en los supuestos del artículo anterior en prácticas monopólicas relativas en un mismo mercado relevante, la Comisión deberá acreditar los siguientes elementos:

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- I.-**Que se cumplan los criterios establecidos en el artículo 13 de la Ley para los agentes económicos involucrados considerados en conjunto;
- II.-**Que exista un comportamiento similar sostenido, implícito o explícito, entre los agentes económicos de que se trate;
- III.-**Que existan barreras de entrada al conjunto de agentes económicos involucrados, así como barreras de entrada al mercado relevante;
- IV.-** Que exista una disminución, daño o impedimento, actual o potencial, al proceso de competencia y libre concurrencia, y
- V.-**Las que establezca el Reglamento de esta Ley, así como los criterios técnicos que para tal efecto emita la Comisión.

*Art. 2, segundo párrafo RLFCE*

*Artículo adicionado DOF 10-05-2011*

**ARTÍCULO 14.-** La Comisión, de oficio o petición de parte, podrá emitir un dictamen cuando considere que las autoridades estatales o municipales hayan emitido normas o realizado actos cuyo objeto o efecto, directo o indirecto, sea contrario a lo dispuesto por las fracciones IV, V, VI y VII del artículo 117 de la Constitución Política de los Estados Unidos Mexicanos.

Para la elaboración del dictamen la Comisión podrá allegarse de los elementos de convicción que estime necesarios y requerir la documentación o información relevante, la que deberá proporcionársele dentro de un plazo improrrogable de diez días naturales.

En su caso, la Comisión concluirá el dictamen dentro de los veinte días naturales siguientes a la fecha en que haya tenido conocimiento de los hechos y lo remitirá al órgano competente del Ejecutivo Federal o al Procurador General de la República, según corresponda, para que, de considerarlo procedente, ejercite la acción constitucional correspondiente.

*Art. 117, fracciones IV, V, VI y VII  
CPEUM Arts. 19, fracción XXVII y 28,  
fracción II EOCFCE*

**ARTÍCULO 14.-** En los términos de la fracción V del artículo 117 de la Constitución Política de los Estados Unidos Mexicanos, no producirán efectos jurídicos los actos de autoridades estatales cuyo objeto directo o indirecto sea prohibir la entrada a su territorio o la salida de mercancías o servicios de origen nacional o extranjero.

Artículo declarado inválido por sentencia de la SCJN a Controversia Constitucional DOF 10-03-2004.  
Artículo reformado DOF 28-06-2006

**ARTÍCULO 15.-** Derogado.

Derogado DOF 28-06-2006

**ARTÍCULO 15.-** La Comisión podrá investigar de oficio o a petición de parte si se está en presencia de los actos a que se refiere el artículo anterior y, en su caso, declarar su existencia. La declaratoria será publicada en el Diario Oficial de la Federación y podrá ser impugnada por la autoridad estatal ante la Suprema Corte de Justicia de la Nación.

Artículo declarado inválido por sentencia de la SCJN a Controversia Constitucional DOF 10-03-2004.

*Jurisprudencia. No. Registro: 182,012<sup>27</sup>  
Jurisprudencia. No. Registro: 181,999<sup>28</sup>*

### **Capítulo III**

#### **De las Concentraciones**

**ARTÍCULO 16.-** Para los efectos de esta ley, se entiende por concentración la fusión, adquisición del control o cualquier acto por virtud del cual se concentren sociedades, asociaciones, acciones, partes sociales, fideicomisos o activos en general que se realice entre competidores, proveedores, clientes o cualesquiera otros agentes económicos. La Comisión impugnará y sancionará aquellas concentraciones cuyo objeto o efecto sea disminuir, dañar o impedir la competencia y la libre concurrencia respecto de bienes o servicios iguales, similares o sustancialmente relacionados.

*Art. 35, fracciones I, II, III, VI, VII, VIII, IX y X  
RLFCE Art.*

*27 EOCFCE*

*Tesis Aislada Ia. XXXVII/2009. No. Registro: 167,764<sup>29</sup>*

**ARTÍCULO 17.-** En la investigación de concentraciones, la Comisión habrá de considerar como indicios de los supuestos a que se refiere el artículo anterior, que el acto o tentativa:

**I.-** Confiera o pueda conferir al fusionante, al adquirente o agente económico resultante de la concentración, el poder de fijar precios unilateralmente o restringir sustancialmente el abasto o suministro en el mercado relevante, sin que los agentes competidores puedan, actual o potencialmente, contrarrestar dicho poder;

**II.-** Tenga o pueda tener por objeto indebidamente desplazar a otros agentes económicos, o impedirles el acceso al mercado relevante; y

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<sup>27</sup>“COMPETENCIA ECONÓMICA. LOS ARTÍCULOS 14 Y 15 DE LA LEY FEDERAL RELATIVA SON INCONSTITUCIONALES, EN CUANTO PREVÉN UN MEDIO DE CONTROL CONSTITUCIONAL Y FACULTAN A LA COMISIÓN FEDERAL DE COMPETENCIA PARA ANALIZAR Y DECIDIR SOBRE LA CONSTITUCIONALIDAD DE ACTOS DE AUTORIDADES ESTATALES.”

<sup>28</sup>“CONTROL CONSTITUCIONAL. EL ARTÍCULO 117, FRACCIÓN V, DE LA CONSTITUCIÓN FEDERAL, NO FACULTA AL CONGRESO DE LA UNIÓN PARA INSTITUIR UN MEDIO DE ESA NATURALEZA A TRAVÉS DE UNA LEY ORDINARIA, COMO LA LEY FEDERAL DE COMPETENCIA ECONÓMICA.”

<sup>29</sup> “COMPETENCIA ECONÓMICA. LOS ARTÍCULOS 16 Y 19 DE LA LEY FEDERAL RELATIVA NO VIOLAN LA GARANTÍA DE AUDIENCIA”

**III.-** Tenga por objeto o efecto facilitar sustancialmente a los participantes en dicho acto o tentativa el ejercicio de las prácticas monopólicas a que se refiere el capítulo segundo de esta ley.

*Art. 17 RLFCE*

**ARTÍCULO 18.-** Para determinar si la concentración debe ser impugnada o sancionada en los términos de esta Ley, la Comisión deberá considerar los siguientes elementos:

**I.-** El mercado relevante, en los términos prescritos en el artículo 12 de esta Ley;

**II.-** La identificación de los agentes económicos que abastecen el mercado de que se trate, el análisis de su poder en el mercado relevante, de acuerdo con el artículo 13 de esta Ley, el grado de concentración en dicho mercado;

*Arts. 14 y 15 RLFCE*

**III.-** Los efectos de la concentración en el mercado relevante con respecto a los demás competidores y demandantes del bien o servicio, así como en otros mercados y agentes económicos relacionados;

**III.-** Los demás criterios e instrumentos analíticos que prescriba el reglamento de esta ley.

**IV.-** La participación de los involucrados en la concentración en otros agentes económicos y la participación de otros agentes económicos en los involucrados en la concentración, siempre que dichos agentes económicos participen directa o indirectamente en el mercado relevante o en mercados relacionados. Cuando no sea posible identificar dicha participación, esta circunstancia deberá quedar plenamente justificada;

**V.-** Los elementos que aporten los agentes económicos para acreditar la mayor eficiencia del mercado que se lograría derivada de la concentración y que incidirá favorablemente en el proceso de competencia y libre concurrencia.

*Art. 16 RLFCE*

El Reglamento de esta Ley establecerá los términos y condiciones para presentar ante la Comisión los elementos a que se refiere el párrafo anterior, y

**VI.-** Los demás criterios e instrumentos analíticos que prescriba el Reglamento de esta Ley.

Artículo reformado DOF 28-06-2006

**ARTÍCULO 19.-** Si de la investigación y desahogo del procedimiento establecido por esta ley resultara que la concentración configura un acto de los previstos por este capítulo, la Comisión, además de aplicar las medidas de apremio o sanciones que correspondan podrá:

**I.-** Sujetar la realización de dicho acto al cumplimiento de las condiciones que fije la Comisión; o

*Art. 17 RLFCE Art. 27, fracción II EOCFCE*

*Tesis Aislada I.17o.A.14A No. Registro: 165,321<sup>30</sup>*

**II.-** Ordenar la desconcentración parcial o total de lo que se hubiera concentrado indebidamente, la terminación del control o la supresión de los actos, según corresponda.

*Art. 23 RLFCE Tesis Aislada Ia. XXXVII/2009. No. Registro: 167,764<sup>31</sup>*

*Tesis Aislada Ia. XXXIV/2009. No. Registro: 167,768<sup>32</sup>*

**ARTÍCULO 20.-** Las siguientes concentraciones deberán ser notificadas a la Comisión antes de que se lleven a cabo:

*Art. 22, último párrafo RLFCE*

**I.-** Cuando el acto o sucesión de actos que les den origen, independientemente del lugar de su celebración, importen en la República, directa o indirectamente, un monto superior al equivalente a 18 millones de veces el salario mínimo general vigente para el Distrito Federal;

**II.-** Cuando el acto o sucesión de actos que les den origen, impliquen la acumulación del 35 por ciento o más de los activos o acciones de un agente económico, cuyos activos anuales en la República o ventas anuales originadas en la República importen más del equivalente a 18 millones de veces el salario mínimo general vigente para el Distrito Federal; o

**III.-** Cuando el acto o sucesión de actos que les den origen impliquen una acumulación en la República de activos o capital social superior al equivalente a 8.4 millones de veces el salario mínimo general vigente para el Distrito Federal y en la concentración participen dos o más agentes económicos cuyos activos o volumen anual de ventas,

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<sup>30</sup> “COMPETENCIA ECONÓMICA. AL RESOLVER EL PROCEDIMIENTO PARA LLEVAR A CABO LA CONCENTRACIÓN DE AGENTES ECONÓMICOS, LA COMISIÓN FEDERAL DE COMPETENCIA NO PUEDE IMPONER LAS CONDICIONES A QUE SE REFIERE EL ARTÍCULO 19, FRACCIÓN I, DE LA LEY FEDERAL RELATIVA (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE 2006).”



31 “COMPETENCIA ECONÓMICA. LOS ARTÍCULOS 16 Y 19 DE LA LEY FEDERAL RELATIVA NO VIOLAN LA GARANTÍA

DE  
AUDIENCIA”

32 “COMPETENCIA ECONÓMICA. EL ARTÍCULO 16, FRACCIONES I Y VI, DEL REGLAMENTO DE LA LEY FEDERAL RELATIVA NO TRANSGREDE EL PRINCIPIO DE SUBORDINACIÓN JERÁRQUICA (LEGISLACIÓN VIGENTE HASTA EL 12

DE OCTUBRE  
DE 2007).”

conjunta o separadamente, sumen más de 48 millones de veces el salario mínimo general vigente para el Distrito Federal.

Dentro de los diez días siguientes a la presentación de la notificación de la concentración, la Comisión podrá ordenar a los agentes económicos involucrados en la transacción que no ejecuten la concentración hasta en tanto la Comisión emita la resolución favorable. En caso de que la Comisión no emita la orden correspondiente, los agentes económicos, bajo su responsabilidad, podrán ejecutar la concentración. La orden o la falta de ella no prejuzga sobre el fondo del asunto.

*Art. 18 RLFCE Art 19, fracción XVI EOCFCE*

Los actos relativos a una concentración no podrán ser inscritos en el Registro Público de Comercio hasta que se obtenga resolución favorable de la Comisión o haya transcurrido el plazo a que se refiere el artículo 21 sin que dicha Comisión haya emitido resolución.

*Arts. 35, fracción I,II, VI y VII LFCE Art. 23 RLFCE*

Los agentes involucrados en una concentración que no se ubiquen en los supuestos previstos en este artículo, podrán notificarla voluntariamente a la Comisión.

*Arts. 18, 19, 20, 26 y 31, fracción V RLFCE*

**ARTÍCULO 20.-** Las siguientes concentraciones, antes de realizarse, deberán ser notificadas a la Comisión:

**I.-** Si la transacción importa, en un acto o sucesión de actos, un monto superior al equivalente a 12 millones de veces el salario mínimo general vigente para el Distrito Federal;

**II.-** Si la transacción implica, en un acto o sucesión de actos, la acumulación del 35 por ciento o más de los activos o acciones de un agente económico cuyos activos o ventas importen más del equivalente a 12 millones de veces el salario mínimo general vigente para el Distrito Federal; o

**III.-** Si en la transacción participan, dos o más agentes económicos cuyos activos o volumen anual de ventas, conjunta o separadamente, sumen más de 48 millones de veces el salario mínimo general vigente para el Distrito Federal, y dicha transacción implique una acumulación adicional de activos o capital social superior al equivalente a cuatro millones ochocientos mil veces el salario mínimo general vigente para el Distrito Federal.

Para la inscripción de los actos que conforme a su naturaleza deban

deberán acreditar haber obtenido resolución favorable de la Comisión o haber realizado la notificación a que se refiere este artículo sin que dicha Comisión hubiere emitido resolución en el plazo a que se refiere el siguiente artículo.

Artículo reformado DOF 28-06-2006

**ARTÍCULO 21.-** Para los efectos del artículo anterior, se estará a lo siguiente:

**I.-** La notificación se hará por escrito, acompañada del proyecto del acto jurídico de que se trate, que incluya los nombres o denominaciones sociales de los agentes económicos involucrados, sus estados financieros del último ejercicio, su participación en el mercado y los demás datos que permitan conocer la transacción pretendida;

*Arts. 21, 22, fracciones I y II y 22, último párrafo RLFCE*

**II.-** La Comisión podrá solicitar datos o documentos adicionales dentro de los quince días contados a partir de la recepción de la notificación, mismos que los interesados deberán proporcionar dentro de un plazo de quince días, el que podrá ser ampliado en casos debidamente justificados;

*Arts. 22, fracciones III y IV y 22, último párrafo RLFCE*

**II.-** La Comisión podrá solicitar datos o documentos adicionales dentro de los veinte días naturales contados a partir de la recepción de la notificación, mismos que los interesados deberán proporcionar dentro de un plazo de quince días naturales, el que podrá ser ampliado en casos debidamente justificados;

**III.-** Para emitir su resolución, la Comisión tendrá un plazo de treinta y cinco días contado a partir de la recepción de la notificación o, en su caso, de la documentación adicional solicitada. Concluido el plazo sin emitir resolución, se entenderá que la Comisión no tiene objeción alguna;

*Art. 27*

*RLFCE Art. 11, fracción  
II EOCFCE*

**III.-** Para emitir su resolución, la Comisión tendrá un plazo de cuarenta y cinco días naturales contado a partir de la recepción de la notificación o, en su caso, de la documentación adicional solicitada. Concluido el plazo sin emitir resolución

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<sup>33</sup>“COMPETENCIA ECONÓMICA. INAPLICABILIDAD DEL REGLAMENTO DE LA LEY FEDERAL RELATIVA, RESPECTO DEL PLAZO PARA NOTIFICAR LA RESOLUCIÓN QUE DECIDE SOBRE UNA CONCENTRACIÓN DE AGENTES ECONÓMICOS EN TÉRMINOS DEL ARTÍCULO 21, FRACCIONES III Y IV, DE DICHA LEY (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE 2006).”

**IV.-** En casos excepcionalmente complejos, el Presidente de la Comisión, bajo su responsabilidad, podrá ampliar el plazo a que se refieren las fracciones II y III hasta por cuarenta días adicionales;

**IV.-** En casos excepcionalmente complejos, el Presidente de la Comisión, bajo su responsabilidad, podrá ampliar el plazo a que se refieren las fracciones II y III hasta por sesenta días naturales adicionales.

*Tesis aislada 1a. CXV/2007. No. Registro: 172,247<sup>35</sup>*

**V.-**La resolución de la Comisión deberá estar debidamente fundada y motivada; y

**VI.-**La resolución favorable no prejuzgará sobre la realización de otras prácticas monopólicas prohibidas por esta ley, por lo que no releva de otras responsabilidades a los agentes económicos involucrados.

*Art. 31, fracción III  
RLFCE Tesis aislada I.17o.A.IIA No.  
Registro: 165,319<sup>36</sup>*

Artículo reformado DOF 28-06-2006

*Tesis aislada I.17o.A.10A No. Registro: 165,318<sup>37</sup>*

**ARTÍCULO 21 bis.-**Al hacerse la notificación a que se refiere el artículo 20 de esta Ley, los agentes económicos podrán solicitar a la Comisión expresamente que el procedimiento sea desahogado conforme a lo previsto en el presente artículo, para lo cual los agentes económicos solicitantes deberán presentar a la Comisión la información y elementos de convicción conducentes que demuestren que es notorio que la concentración no tendrá como objeto y efecto disminuir, dañar o impedir la competencia y la libre concurrencia, conforme a lo previsto en este artículo.

Se considerará que es notorio que una concentración no tendrá por objeto o efecto disminuir, dañar o impedir la competencia y la libre concurrencia, cuando el adquirente no participe en mercados relacionados con el mercado relevante en el que ocurra la concentración, ni sea competidor actual o potencial del adquirido y, además, concurra cualquiera de las circunstancias siguientes:

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<sup>34</sup>“COMPETENCIA ECONÓMICA. EL ARTÍCULO 21, FRACCIONES III Y IV, DE LA LEY FEDERAL RELATIVA, QUE REGULA EL PROCEDIMIENTO PARA LLEVAR A CABO UNA CONCENTRACIÓN DE AGENTES ECONÓMICOS, NO VIOLA LOS ARTÍCULOS 14 Y 16 DE LA CONSTITUCIÓN FEDERAL (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE 2006).”

<sup>35</sup>“COMPETENCIA ECONÓMICA. INAPLICABILIDAD DEL REGLAMENTO DE LA LEY FEDERAL RELATIVA, RESPECTO DEL PLAZO PARA NOTIFICAR LA RESOLUCIÓN QUE DECIDE SOBRE UNA CONCENTRACIÓN DE AGENTES ECONÓMICOS EN TÉRMINOS DEL ARTÍCULO

21, FRACCIONES III Y IV, DE DICHA LEY (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE 2006).”

<sup>36</sup> “COMPETENCIA ECONÓMICA. LA RESOLUCIÓN QUE SE DICTE EN EL PROCEDIMIENTO PARA LLEVAR A CABO LA CONCENTRACIÓN DE AGENTES ECONÓMICOS PREVISTO EN EL ARTÍCULO 21 DE LA LEY FEDERAL RELATIVA, VIGENTE HASTA EL 28 DE JUNIO DE 2006, SÓLO COMPRENDE LA DETERMINACIÓN RELATIVA A SU AUTORIZACIÓN O NEGATIVA, SIN QUE PUEDA IMPONER SANCIONES O CONDICIONES.”

<sup>37</sup>COMPETENCIA ECONÓMICA. LOS PROCEDIMIENTOS ESTABLECIDOS EN LOS ARTÍCULOS 21, 31 Y 33 DE LA LEY

FEDERAL RELATIVA, SON DIFERENTES Y AUTÓNOMOS ENTRE SÍ (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE

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6).

**I.** La transacción implique la participación del adquirente por primera vez en el mercado relevante. Para estos efectos, la estructura del mercado relevante no deberá modificarse y sólo deberá involucrar la sustitución del agente económico adquirido por el adquirente;

**II.** Antes de la operación, el adquirente no tenga el control del agente económico adquirido y, con la transacción, aquél incremente su participación relativa en éste, sin que ello le otorgue mayor poder para influir en la operación, administración, estrategia y principales políticas de la sociedad, incluyendo la designación de miembros del consejo de administración, directivos o gerentes del propio adquirido;

**III.** El adquirente de acciones, partes sociales o unidades de participación tenga el control de una sociedad e incremente su participación relativa en el capital social de dicha sociedad, o

**IV.** En los casos que establezca el Reglamento de esta Ley.

Dentro de los cinco días siguientes a la recepción de la notificación de la concentración, el Secretario Ejecutivo emitirá el acuerdo de admisión correspondiente, o bien, en el caso del párrafo último de este artículo, ordenará su improcedencia y que el asunto se tramite conforme al artículo 21 de esta ley.

El Pleno deberá resolver si la concentración tiene como objeto o efecto disminuir, dañar o impedir la competencia y libre concurrencia en un plazo no mayor a 15 días siguientes a la fecha del acuerdo de admisión. Concluido el plazo sin que la Comisión haya emitido resolución, se entenderá que no hay objeción alguna para que se realice la concentración.

Cuando, a juicio del Secretario Ejecutivo, la concentración no se ubique en los supuestos previstos en las fracciones I a IV de este artículo o, a juicio del Pleno, la información aportada por el agente económico es insuficiente, el Secretario Ejecutivo emitirá un acuerdo de recepción a trámite conforme a lo previsto en el artículo 21 de esta Ley.

*Art. 11, fracción III EOCFCE*

**ARTÍCULO 21 bis.-** Al hacerse la notificación a que se refiere el artículo 20 de esta Ley, los agentes económicos podrán presentar un análisis y adjuntar la información conducente, para demostrar a la Comisión que es notorio que la concentración no tendrá como objeto o efecto disminuir, dañar, o impedir la competencia y la libre concurrencia.

*Arts. 24 y 25 RLFCE*

En este caso la Comisión resolverá sobre la concentración, dentro de los 15 días siguientes a la fecha del acuerdo de recepción a trámite. Concluido el plazo sin que la Comisión haya emitido resolución, se entenderá que no hay objeción alguna para que se realice la concentración.

*Arts. 27 y 66, fracción I RLFCE*

En caso de que la Comisión considere que no se demuestra la notoriedad prevista en el párrafo primero, la Comisión dictará un nuevo acuerdo de recepción a trámite a partir del cual se estará al procedimiento establecido en el artículo anterior.

Artículo adicionado DOF 28-

06-2006

Artículo reformado DOF 10-

05-2011

**ARTÍCULO 21 bis 1.** No se requerirá la notificación de concentraciones a que se refiere el artículo 20 de esta Ley en los casos siguientes:

**I.** Cuando la transacción implique una reestructuración corporativa, en la cual los agentes económicos pertenezcan a un mismo grupo económico de control y ningún tercero participe en la concentración;

**II.** Cuando el titular de acciones, partes sociales o unidades de participación incremente su participación relativa en el capital social de una sociedad en la que tenga el control de la misma desde su constitución o inicio de operaciones, o bien, cuando el Pleno haya autorizado la adquisición de dicho control y posteriormente incremente su participación relativa en el capital social de la referida sociedad;

**III.** Cuando se trate de la constitución de fideicomisos de administración, garantía o de cualquier otra clase en la que un agente económico aporte sus activos, acciones, partes sociales o unidades de participación sin que la finalidad o consecuencia necesaria sea la transferencia de dichos activos, acciones, partes sociales o unidades de participación a una sociedad distinta tanto del fideicomitente como de la institución fiduciaria correspondiente. Sin embargo, en caso de ejecución del fideicomiso de garantía se deberá de notificar si se actualiza alguno de los umbrales referidos en el artículo 20 de esta Ley;

**IV.** Cuando se trate de actos jurídicos sobre acciones, o partes sociales, unidades de participación o bajo contratos de fideicomiso que se verifiquen en el extranjero relacionadas con sociedades no residentes para efectos fiscales en México, de sociedades extranjeras, siempre que las sociedades involucradas en dichos actos no adquieran el control de sociedades mexicanas, ni acumulen en territorio nacional acciones, partes sociales, unidades de participación o participación en fideicomisos o activos en general, adicionales a los que, directa o indirectamente, posean antes de la transacción;

**V.-** Cuando el adquirente sea una sociedad de inversión de renta variable y la operación tenga por objeto la adquisición de acciones, obligaciones, valores, títulos o documentos con recursos provenientes de la colocación de las acciones representativas del capital social de la sociedad de inversión entre el público inversionista, salvo que como resultado o con motivo de las operaciones la sociedad de inversión pueda tener una influencia significativa en las decisiones del agente económico concentrado;

**VI.** En la adquisición de acciones, valores, títulos o documentos representativos del capital social de sociedades o bien cuyo subyacente sean acciones representativas del capital social de personas morales, y que coticen en bolsas de valores en México o en el



extranjero, cuando el acto o sucesión de actos no le permitan al comprador ser titular del diez por ciento o más de dichas acciones, obligaciones convertibles en acciones, valores, títulos o documentos y, además, el adquirente no tenga facultades para:

- a) designar o revocar miembros del consejo de administración, directivos o gerentes de la sociedad emisora;
- b) imponer, directa o indirectamente, decisiones en las asambleas generales de accionistas, de socios u órganos equivalentes;
- c) mantener la titularidad de derechos que permitan, directa o indirectamente, ejercer el voto respecto del diez por ciento o más del capital social de una persona moral; o
- d) dirigir o influenciar directa o indirectamente la administración, operación, la estrategia o las principales políticas de una persona moral, ya sea a través de la propiedad de valores, por contrato o de cualquier otra forma.

**VII.** Cuando la adquisición sobre acciones, partes sociales, unidades de participación o fideicomisos sean realizadas por uno o más fondos de inversión con fines meramente especulativos, y que no tengan inversiones en sociedades o activos que participan o son empleados en el mismo mercado relevante que el agente económico concentrado.

**VIII.** En los casos que establezca el Reglamento de esta Ley.

Artículo adicionado DOF 10-05-2011

**ARTÍCULO 22.-** No podrán ser investigadas con base en esta Ley las concentraciones que hayan obtenido resolución favorable, excepto cuando dicha resolución se haya obtenido con base en información falsa o bien cuando la resolución haya quedado sujeta a condiciones posteriores y las mismas no se hayan cumplido en el plazo establecido para tal efecto.

*Art. 35, fracciones III, VI y VIII  
LFCE Arts. 29, fracción VI y 31, fracción  
III RLFCE Art. 29, fracción I EOCFCE*

Tampoco podrán ser investigadas las concentraciones que no requieran ser previamente notificadas, una vez transcurrido un año de su realización.

Artículo reformado DOF 28-06-2006

#### **Capítulo IV**

##### **De la Comisión Federal de Competencia**

**ARTÍCULO 23.-** La Comisión Federal de Competencia es un órgano administrativo desconcentrado de la Secretaría de Economía, contará con autonomía técnica y operativa y tendrá a su cargo prevenir, investigar y combatir los monopolios, las prácticas monopólicas y las concentraciones, en los términos de esta ley, y gozará de autonomía para dictar sus resoluciones.

**Artículo reformado DOF 09-04-2012**

**ARTÍCULO 23.-** La Comisión Federal de Competencia es un órgano administrativo desconcentrado de la Secretaría de Comercio y Fomento Industrial, contará con autonomía técnica y operativa y tendrá a su cargo prevenir, investigar y combatir los monopolios, las prácticas monopólicas y las concentraciones, en los términos de esta ley, y gozará de autonomía para dictar sus resoluciones.

**Art. 1**

***EOCFCE Tesis aislada 1a.LXVIII / 2008. No.***

***Registro: 169,349<sup>38</sup>***

***Artículo relacionado con normativa sectorial***

**ARTÍCULO 24.-** La Comisión tendrá las siguientes atribuciones:

**I.** Investigar la existencia de monopolios, prácticas monopólicas, estancos o concentraciones contrarias a esta Ley, incluyendo aquéllos que pudieren realizar los agentes económicos a que se refieren los artículos 4, 5 y 6 de este mismo ordenamiento, respecto de los actos que no estén expresamente comprendidos dentro de la protección que señala el artículo 28 constitucional, para lo cual podrá requerir a los particulares y agentes económicos la información o documentos que estime relevantes y pertinentes;

***Arts. 28, fracción I y 29, fracción I***

***EOCFCE Tesis aislada No.***

***Registro: 2004052<sup>39</sup>***

**I.** Investigar la existencia de monopolios, prácticas monopólicas, estancos o concentraciones contrarias a esta Ley para lo cual podrá requerir a los particulares y agentes económicos la información o documentos que estime relevantes y pertinentes;

***Arts. 31, 34 bis 2 y 35***

***LFCE Art.***

***40 RLFCE***

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<sup>38</sup>“COMPETENCIA ECONÓMICA. EL ARTÍCULO 23 DE LA LEY FEDERAL

RELATIVA, AL ESTABLECER LA NATURALEZA DE LA COMISIÓN FEDERAL DE COMPETENCIA, NO VIOLA EL ARTÍCULO 90 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS.”

<sup>39</sup>“PODER SUSTANCIAL EN EL MERCADO RELEVANTE. LOS ARTÍCULOS 24, FRACCIÓN I, 31, PÁRRAFO PRIMERO Y 33

BIS, FRACCIÓN IV, DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, AL PREVER LAS FACULTADES DE INVESTIGACIÓN OTORGADAS A LA COMISIÓN FEDERAL DE COMPETENCIA, NO VIOLAN EL PRINCIPIO DE LEGALIDAD.”

*Arts. 19, fracción VII y 22, fracción IV  
EOCFCE Jurisprudencia. No.*

*Registro: 168,975<sup>40</sup>*

*Jurisprudencia. No. Registro: 168,976<sup>41</sup>*

*Jurisprudencia. No. Registro: 168,587<sup>42</sup>*

I. Investigar la existencia de monopolios, estancos, prácticas o concentraciones prohibidas por esta ley, para lo cual podrá requerir de los particulares y demás agentes económicos la información o documentos relevantes;

*Jurisprudencia. No. Registro: 181,645<sup>43</sup>*

*Tesis aislada Pleno P. XI /2004 No. Registro: 181,768<sup>44</sup>*

II. Practicar dentro de las investigaciones que lleve a cabo, visitas de verificación en los términos del artículo 31 de esta Ley, y requerir la exhibición de papeles, libros, documentos, archivos e información generada por medios electrónicos, ópticos o de cualquier otra tecnología, a fin de comprobar el cumplimiento de esta ley, así como solicitar el apoyo de la fuerza pública o de otras autoridades federales, estatales o municipales para el eficaz desempeño de las atribuciones a que se refiere esta fracción;

II.- Para realizar visitas de verificación y requerir la exhibición de papeles, libros, documentos, archivos e información generada por medios electrónicos, ópticos o de cualquier otra tecnología, a fin de comprobar el cumplimiento de esta Ley y de las demás disposiciones aplicables;

*Art. 31*

*LFCE Arts. 36, 37, 38, 39,  
40 RLFCE*

*Arts. 18, fracción XII, 19, fracciones VII, XXI y XXXVI, 22, fracciones IV y VIII, 28,  
fracción III y 29,  
fracción II  
EOCFCE*

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40“COMPETENCIA ECONÓMICA. LOS ARTÍCULOS 25, 27, 28, 29, 30 Y 31 DEL REGLAMENTO DE LA LEY FEDERAL RELATIVA, QUE REGULAN EL PROCEDIMIENTO DE INVESTIGACIÓN, A PETICIÓN DE PARTE, ANTE LA COMISIÓN FEDERAL DE COMPETENCIA, NO VULNERAN EL ARTÍCULO 89, FRACCIÓN I, DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS (LEGISLACIÓN VIGENTE HASTA EL 12 DE OCTUBRE DE 2007).”

41“COMPETENCIA ECONÓMICA. LOS ARTÍCULOS 25, 27, 28, 29, 30 Y 31 DEL REGLAMENTO DE LA LEY FEDERAL RELATIVA, QUE REGULAN EL PROCEDIMIENTO DE INVESTIGACIÓN, A PETICIÓN DE PARTE, ANTE LA COMISIÓN FEDERAL DE COMPETENCIA, NO VULNERAN EL ARTÍCULO 49 DE LA CONSTITUCIÓN POLÍTICA DE LOS

ESTADOS UNIDOS MEXICANOS (LEGISLACIÓN VIGENTE HASTA EL 12 DE OCTUBRE DE 2007).”

42“PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS. CUANDO LAS CONDUCTAS ATRIBUIDAS A UNA EMPRESA FUERON DESPLEGADAS POR EL GRUPO DE INTERÉS ECONÓMICO AL QUE PERTENECE, LA COMISIÓN FEDERAL DE COMPETENCIA DEBE VINCULAR TANTO AL AGENTE INVESTIGADO COMO A LA INTEGRACIÓN VERTICAL DE OPERACIÓN DEL ALUDIDO GRUPO.”

43“SUSPENSIÓN EN EL JUICIO DE AMPARO. NO PROCEDE CONCEDERLA CONTRA LOS REQUERIMIENTOS DE INFORMACIÓN Y DOCUMENTACIÓN FORMULADOS POR LA COMISIÓN FEDERAL DE COMPETENCIA EN EJERCICIO DE SUS FUNCIONES PARA INVESTIGAR PRÁCTICAS MONOPÓLICAS, PORQUE DE OTORGARSE SE AFECTARÍA EL INTERÉS SOCIAL Y SE CONTRAVENDRÍAN DISPOSICIONES DE ORDEN PÚBLICO.”

44“COMPETENCIA ECONÓMICA. LOS ARTÍCULOS 24, FRACCIÓN VII, 25, FRACCIÓN VIII, Y 28, FRACCIÓN VII, DEL REGLAMENTO INTERIOR DE LA COMISIÓN FEDERAL RELATIVA, NO TRANSGREDEN EL ARTÍCULO 89, FRACCIÓN I, DE LA CONSTITUCIÓN FEDERAL”

Fracción declarada inválida, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad 33/2006

**III.** Establecer mecanismos de coordinación con las autoridades federales, estatales y municipales para el combate y prevención de monopolios, concentraciones y prácticas prohibidas por esta Ley;

*Arts. 18, fracción VIII, 19, fracción X y 21, fracción VIEOCFCE  
Fracción relacionada con normativa sectorial*

**II.-** Establecer los mecanismos de coordinación para el combate y prevención de monopolios, estancos, concentraciones y prácticas ilícitas;

**IV.** Resolver los casos de su competencia, sancionar administrativamente la violación de esta Ley, así como formular denuncias y en su caso querellas ante el Ministerio Público respecto de las probables conductas delictivas en materia de competencia y libre concurrencia de que tenga conocimiento;

**IV.** Resolver los casos de su competencia, sancionar administrativamente la violación de esta Ley y, en su caso, denunciar ante el Ministerio Público las probables conductas delictivas en materia de competencia y libre concurrencia de que tenga conocimiento;

*Arts. 33, 35 y 25, último párrafo LFCE  
Art. 11, fracción I EOCFCE*

**III.** Resolver los casos de su competencia y sancionar administrativamente la violación de esta ley y denunciar ante el Ministerio Público las conductas delictivas en materia de competencia y libre concurrencia;

**IV bis.** Ordenar la suspensión de los actos constitutivos de una probable práctica monopólica o probable concentración prohibida; así como fijar caución para evitar o levantar dicha suspensión.

*Art. 34 bis 4  
LFCE Arts. 11, fracciones I y XI y 19,  
fracción XVII EOCFCE*

**V.** Resolver sobre condiciones de competencia, competencia efectiva, existencia de poder sustancial en el mercado relevante u otras cuestiones relativas al proceso de competencia o libre concurrencia a que hacen referencia ésta u otras leyes, reglamentos o disposiciones administrativas;

*Arts. 7, 25, último párrafo y 33 bis  
LFCE Arts. 53, 54 y  
55 RLFCE  
Art. 11, fracción I EOCFCE  
Artículo relacionado con normativa sectorial*

**VI.** Emitir, cuando lo considere pertinente o a petición de parte, opinión vinculatoria en materia de competencia económica a las dependencias y entidades de la administración pública federal, respecto de los ajustes a programas y políticas, cuando éstos puedan tener efectos contrarios al proceso de competencia y libre concurrencia, de conformidad con las disposiciones legales aplicables. El Titular del Ejecutivo Federal podrá objetar esta opinión. La opinión y, en su caso, la objeción deberán publicarse;

*Art. 25, último párrafo  
LFCE Arts. 11, fracción I, 19, fracciones X y XXVI y 31,  
fracción III EOCFCE Fracción relacionada con normativa  
sectorial*

**IV.** Opinar sobre los ajustes a los programas y políticas de la administración pública federal, cuando de éstos resulten efectos que puedan ser contrarios a la competencia y la libre concurrencia;

**VII.** Opinar, cuando lo considere pertinente o a petición de parte, sobre iniciativas de leyes y anteproyectos de reglamentos y decretos en lo tocante a los aspectos de competencia y libre concurrencia, sin que estas opiniones tengan efectos vinculatorios. Las opiniones citadas deberán publicarse;

*Arts. 17, 18, fracción VIII, 19, fracciones X y XXVI y 31, fracción III EOCFCE*

**V.** Opinar, cuando se lo solicite el Ejecutivo Federal, sobre las adecuaciones a los proyectos de leyes y reglamentos, por lo que conciernen a los aspectos de competencia y libre concurrencia;

**VIII.** Emitir, cuando lo considere pertinente o a petición de parte, opinión vinculatoria en materia de competencia económica, a las dependencias y entidades de la administración pública federal, respecto de los anteproyectos de disposiciones, reglas, acuerdos, circulares y demás actos administrativos de carácter general que pretendan emitir, cuando puedan tener efectos contrarios al proceso de competencia y libre concurrencia. El Titular del Ejecutivo Federal podrá objetar esta opinión. La opinión y, en su caso, la objeción deberán publicarse;

*Art. 25, último  
párrafo LFCE Arts. 19, fracciones X y XXVI y 31,  
fracción III EOCFCE*

**VI.** Cuando lo considere pertinente, emitir opinión en materia de competencia y libre concurrencia, respecto de leyes, reglamentos, acuerdos, circulares y actos administrativos, sin que tales opiniones tengan efectos jurídicos ni la Comisión pueda ser obligada a emitir opinión;

**IX.** Opinar sobre las consultas que le sean formuladas por los agentes económicos, sin que estas opiniones tengan efectos jurídicos o vinculatorios;

**X.**Emitir, cuando lo considere pertinente, opinión en materia de competencia y libre concurrencia, respecto de leyes, reglamentos, acuerdos, circulares y actos administrativos de carácter general, así como, opiniones sobre competencia y libre concurrencia en prácticas comerciales. Las opiniones citadas deberán publicarse.

*Arts. 11, fracción I, 19, fracciones XXVI y XXVIII, 26, fracción VII y 31, fracción III EOCFCE*

**X.**Emitir, cuando lo considere pertinente, opinión en materia de competencia y libre concurrencia, respecto de leyes, reglamentos, acuerdos, circulares y actos administrativos de carácter general; las opiniones citadas deberán publicarse;

*Art. 25, último párrafo LFCE*

**VI.** Cuando lo considere pertinente, emitir opinión en materia de competencia y libre concurrencia, respecto de leyes, reglamentos, acuerdos, circulares y actos administrativos, sin que tales opiniones tengan efectos jurídicos ni la Comisión pueda ser obligada a emitir opinión;

**XI.** Cuando lo considere pertinente, emitir opinión en materia de competencia y libre concurrencia, respecto de leyes, reglamentos, acuerdos, circulares y actos administrativos, sin que tales opiniones tengan efectos jurídicos ni la Comisión pueda ser obligada a emitir opinión;

*Arts. 17, 18, fracción VIII, 19, fracción XXVI, 30, fracción I y 31, fracción III EOCFCE*

**XII.** Elaborar y hacer que se cumplan, hacia el interior de la Comisión, los manuales de organización y de procedimientos;

**VII.** Elaborar y hacer que se cumplan, hacia el interior de la Comisión, los manuales de organización y de procedimientos.

*Arts. 11, fracción I, 18, fracción V y 21, fracción XI EOCFCE*

**XIII.** Participar con las dependencias competentes en la celebración de tratados internacionales en materia de regulación o políticas de competencia y libre concurrencia;

**VIII.** Participar con las dependencias competentes en la celebración de tratados, acuerdos o convenios internacionales en materia de regulación o políticas de competencia y libre concurrencia, de los que México sea o pretenda ser parte; y

*Arts. 18, fracciones III y VIII y 19, fracción X EOCFCE*

**XIII bis.** Publicar lineamientos en materia de competencia económica y libre concurrencia, escuchando la opinión de la dependencia coordinadora del sector correspondiente y de la Secretaría de Hacienda y Crédito Público en las materias de su competencia, que las



dependencias y entidades deberán tomar en cuenta en el otorgamiento de concesiones, así como en los procedimientos de adquisiciones, arrendamientos, servicios y obras públicas;

*Arts. 11, fracción I, 18, fracción I, 19, fracción X y 30, fracción I EOCFCE*

**XIV.** Celebrar convenios o acuerdos interinstitucionales en materia de regulación o políticas de competencia y libre concurrencia;

*Arts. 17, 18, fracción VIII, 19, fracción X y 25, fracción IX EOCFCE*

**XV.** Establecer oficinas de representación en el interior de la República;

*Arts. 5, fracción VI, 17 y 18, fracciones VIII y XI EOCFCE*

**XVI.** Resolver sobre la incorporación de medidas protectoras y promotoras en materia de competencia económica en los procesos de desincorporación de entidades y activos públicos, así como en los procedimientos de asignación de concesiones y permisos que realicen dependencias y entidades de la administración pública federal, en los casos que determine el Reglamento de esta Ley;

*Arts. 25, último párrafo y 33 bis I  
LFCE Arts. 56 y  
57RLFCE*

*Arts. 11, fracción I y 30 EOCFCE  
Fracción relacionada con normativa sectorial*

**XVII.** Promover, en coordinación con las autoridades federales, estatales y municipales, que sus actos administrativos observen los principios de competencia y libre concurrencia;

*Arts. 18, fracción VIII, 19, fracción X y 32, fracción III EOCFCE*

**XVIII.** Promover la aplicación de los principios de competencia y libre concurrencia, y

*Art. 18, fracción VIII EOCFCE*

**XVIII bis.** Publicar por lo menos cada cinco años, criterios técnicos, previa consulta pública, en la forma y términos que señale el Reglamento de esta Ley, en materia de:

*Art. 2, segundo párrafo RLFCE  
Arts. 11, fracción I, 18, fracción I y 19, fracción XXII EOCFCE*

- a) Imposición de sanciones;
- b) Existencia de prácticas monopólicas;
- c) Concentraciones;
- d) Inicio de investigaciones;
- e) Determinación de poder sustancial para uno o varios agentes económicos en términos de los artículos 13 y 13 bis de esta Ley;
- f) Determinación de mercado relevante;
- g) Beneficio de reducción de sanciones previsto en el artículo 33 bis 3 de esta Ley;

**h)** Suspensión de actos constitutivos de probables prácticas monopólicas o probables concentraciones prohibidas, así como daño irreversible al proceso de competencia y libre concurrencia, de acuerdo a lo establecido en el artículo 34 bis 4 de esta Ley;

*Art. 11, fracción XI EOCFCE*

**i)** Determinación y otorgamiento de cauciones para suspender la aplicación de medidas cautelares a que se refiere el artículo 34 bis 4 de esta Ley;

*Art. 11, fracción XI EOCFCE*

**j)** Otorgamiento de perdón y solicitud de sobreseimiento del procedimiento penal en los casos a que se refiere el artículo 254 bis del Código Penal Federal; y

**k)** Los que sean necesarios para el efectivo cumplimiento de la Ley.

*Art. 11, fracción XIV EOCFCE*

En la elaboración de los criterios técnicos a que se refiere esta fracción, la Comisión considerará, sin que sean vinculantes, los resultados de la consulta pública en los términos que establezca el Reglamento de esta Ley.

*Art. 2, segundo párrafo RLFCE*

**XVIII bis 1.** Publicar cada cinco años una evaluación cuantitativa y cualitativa de las aportaciones netas al bienestar del consumidor que haya generado la actuación de la Comisión en el periodo respectivo.

*Arts. 11, fracción I, 18, fracciones XI y X, 19, fracción XXV y 31, fracciones XVI, XIX y XX EOCFCE*

**XVIII bis 2.** Realizar estudios, trabajos de investigación e informes generales en materia de competencia económica sobre sectores, en su caso, con propuestas de liberalización, desregulación o modificación normativa, cuando detecte riesgos de dañar al proceso de competencia y libre concurrencia o cuando identifique niveles de precios que puedan indicar un problema de competencia o acciones que resulten en un aumento significativo de precios o cuando así se lo notifiquen otras autoridades.

*Arts. 11, fracción I, 18, fracción IX, 19, fracción XXIX y 26, fracción III EOCFCE*

**XVIII bis 3.** Actuar como órgano consultivo sobre cuestiones relativas a la defensa de la competencia. Podrá ser consultada por colegios profesionales, organismos empresariales, asociaciones de consumidores y agentes económicos. Las resoluciones sobre las consultas a las que hace referencia este artículo, no tendrán carácter vinculante.

*Arts. 11, fracción I, 19, fracción IX EOCFCE*

**XIX.** Las demás que le confieran ésta y otras leyes y reglamentos.

**IX.-** Las demás que le confieran ésta y otras leyes y reglamentos.

Para la elaboración de las opiniones, lineamientos y criterios técnicos a que se refieren las fracciones VI, VII, VIII, IX, X, XI, XIII bis, XVIII bis 1 y XVIII bis 2 de este artículo, la

Comisión podrá solicitar la información que estime relevante y pertinente a las dependencias y entidades, a los agentes económicos y, en general, a las personas relacionadas con la materia de dichas disposiciones.

*Art. 2, segundo párrafo RLFCE*

*Art. 19, fracciones I, II, VI, XXII, XXVI y XXIX EOCFCE*

Artículo reformado DOF 10-05-2011

**ARTÍCULO 25.-** El Pleno estará integrado por cinco comisionados, incluyendo al Presidente de la Comisión. Deliberará de forma colegiada y decidirá los casos por mayoría de votos, salvo las decisiones que requieran una mayoría calificada en los términos de esta Ley.

Las deliberaciones del Pleno deberán contar con los votos de todos los comisionados. Los comisionados no podrán abstenerse de votar. Los comisionados que se encuentren ausentes durante las sesiones del Pleno deberán de emitir su voto razonado por escrito dentro de los cinco días hábiles siguientes a la sesión.

En casos graves en los que los comisionados no puedan ejercer su voto o estén impedidos para ello, el Presidente de la Comisión contará con voto de calidad para decidir los casos que se presenten al Pleno.

Corresponde al Pleno el ejercicio de las atribuciones señaladas en las fracciones IV, IV bis, V, VI, VIII, X, XII, XIIIbis, XVI, XVIIIbis, XVIIIbis1, XVIII bis2 y XVIII bis 3 del artículo 24 de esta Ley, y las demás atribuciones concedidas expresamente al Pleno en esta Ley.

**ARTÍCULO 25.-** El Pleno estará integrado por cinco comisionados, incluyendo al Presidente de la Comisión. Deliberará en forma colegiada y decidirá los casos por mayoría de votos, teniendo su Presidente voto de calidad.

Corresponde al Pleno el ejercicio de las atribuciones señaladas en las fracciones IV, V, VI, VIII, X, XVI del artículo 24, emitir los criterios técnicos que sean necesarios para el efectivo cumplimiento de la Ley y expedir los manuales de organización y de procedimientos de la Comisión.

*Art. 24, fracciones V, VI, VIII y IX  
LFCE Arts. 5, fracción I, y  
11 EOCFCE*

Artículo reformado DOF 28-06-2006, DOF 10-05-2011

**ARTÍCULO 25.-** La Comisión estará integrada por cinco comisionados, incluyendo al Presidente de la misma. Deliberará en forma colegiada y decidirá los casos por mayoría de votos, teniendo su Presidente voto de calidad.

La Comisión tendrá el personal necesario para el despacho eficaz de sus asuntos, de acuerdo con su presupuesto autorizado

**ARTÍCULO 26.-** Los comisionados serán designados por el Titular del Ejecutivo Federal.  
**Art. 89, fracción III CPEUM**

*Párrafo declarado inválido, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad DOF 12-07-2007*

Los comisionados deberán cumplir los siguientes requisitos:

**I.-** Ser ciudadano mexicano por nacimiento que no adquiriera otra nacionalidad, estar en pleno goce de sus derechos civiles y políticos, ser profesionales en las áreas de derecho, economía, ingeniería, administración pública, contaduría o materias afines al objeto de esta Ley, mayores de treinta y cinco años de edad y menores de setenta y cinco; y

**II.-** Haberse desempeñado en forma destacada en cuestiones profesionales, de servicio público o académicas sustancialmente relacionadas con el objeto de esta Ley.

Los comisionados deberán abstenerse de desempeñar cualquier otro empleo, trabajo o comisión pública o privada, con excepción de los cargos docentes. Asimismo, estarán impedidos para conocer de asuntos en que tengan interés directo o indirecto, en los términos del Reglamento de esta Ley.

Los Comisionados tendrán el personal necesario para el despacho eficaz de sus asuntos, de acuerdo con el presupuesto autorizado.

**Art. 10 y 39 EOCFCE**

**ARTÍCULO 26.-** Los comisionados serán designados por el titular del Ejecutivo Federal y deberán cumplir los siguientes requisitos:

**I.-** Ser ciudadanos mexicanos, profesionales en materias afines al objeto de esta ley, mayores de treinta y cinco años de edad y menores de setenta y cinco;

**II.-** Haberse desempeñado en forma destacada en cuestiones profesionales, de servicio público o académicas sustancialmente relacionadas con el objeto de esta ley.

*Artículo reformado DOF 23-01-1998,28-06-2006*

**ARTÍCULO 27.-** Los comisionados serán designados para desempeñar sus puestos por períodos de diez años, no renovables, y sólo podrán ser removidos de sus cargos por causa grave, debidamente justificada.

**ARTÍCULO 27.-** Los comisionados serán designados para desempeñar sus puestos por períodos de diez años, renovables, y sólo podrán ser removidos de sus cargos por causa grave, debidamente justificada

*Artículo reformado DOF 28-06-2006*

**ARTÍCULO 28.-** El Presidente de la Comisión será designado por el Titular del Ejecutivo Federal por un periodo de cuatro años, con posibilidad de ser nombrado una sola vez por otro periodo igual, y al término del cual cumplirá, en su caso, su período restante como comisionado.

En la designación correspondiente, el Titular del Ejecutivo Federal podrá considerar inclusive, a cualquiera de los comisionados en funciones, aun cuando finalice su periodo antes de un término de cuatro años. En este último caso, la duración de su encargo como Presidente se reducirá por el tiempo que le reste como comisionado.

*Arts. 5º, fracción II y 18, fracción VII EOCFCE*

El Presidente de la Comisión tendrá las facultades siguientes:

**ARTÍCULO 28.-** El Presidente de la Comisión será designado por el Titular del Ejecutivo Federal por seis años, al términos de los cuales, finalizará su periodo de diez años como Comisionado. Tendrá las siguientes facultades:

**ARTÍCULO 28.-** El Presidente de la Comisión será designado por el Titular del Ejecutivo Federal y tendrá las siguientes facultades:

**I.-** Coordinar los trabajos de la Comisión;

*Art. 18, fracción VI EOCFCE*

**II.-** Instrumentar, ejecutar y vigilar la aplicación de las políticas internas de la Comisión;

**II.-** Instrumentar, ejecutar y vigilar la aplicación de las políticas internas que se establezcan en la materia

**III.-** Presentar al Titular del Ejecutivo Federal un informe anual sobre el desempeño de la Comisión, mismo que deberá ser publicado.

El informe a que hace referencia esta fracción se presentará a más tardar el 31 de marzo del año siguiente a la conclusión del período que se informa, y deberá comprender, cuando menos, los siguientes elementos:

*Arts. ~~17,19~~, fracción XII y 31, fracción IX EOCFCE*

**a.** Los resultados obtenidos en las investigaciones efectuadas durante el periodo correspondiente, sobre prácticas monopólicas absolutas y relativas tanto de compras como de ventas, incluyendo aquéllas que pudieren realizar los agentes económicos a que se refieren los artículos 4, 5 y 6 de este mismo ordenamiento, respecto de los actos que no estén expresamente comprendidos dentro de la protección que señala el artículo 28 constitucional;

**b.** Concentraciones;

**c.** Otorgamiento de beneficios de reducción de sanciones en términos del artículo 33 bis 3 de esta Ley;

**d.** Ejecución de las sanciones referidas en esta Ley;

**e.** Resoluciones sobre la incorporación de medidas protectoras y promotoras en materia de competencia económica en los procesos de desincorporación de entidades y activos públicos, así como en los procedimientos de asignación de concesiones y permisos que realicen dependencias y entidades de la Administración Pública Federal, y

**f.** Querellas presentadas ante el Ministerio Público en el ámbito de sus atribuciones.

En los casos en que la información a la que hace referencia esta fracción tenga carácter confidencial o reservada en los términos de las disposiciones legales aplicables, dicha información será presentada de forma estadística.

**III.-** Presentar al Titular del Ejecutivo Federal un informe anual sobre el desempeño de la Comisión, mismo que deberá ser publicado;

*Fracción declarada inválida, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad DOF 12-07-2007*

*Art. 18 EOCFCE*

**III.-** Expedir y publicar un informe anual sobre el desempeño de las funciones de la Comisión, que incluya los resultados de sus acciones en materia de competencia libre concurrencia;

**IV.-** Solicitar a cualquier autoridad del país o del extranjero la información que requiera para indagar sobre posibles violaciones a esta Ley;

**V.-** Representar legalmente a la Comisión, nombrar y remover al personal, excepto al mencionado en el artículo 29 de esta Ley, crear las unidades técnicas necesarias de conformidad con su presupuesto y delegar facultades en términos del Reglamento de esta Ley.

*Art. 16 EOCFCE*

V.- Representar legalmente a la Comisión, nombrar y remover al personal, crear las unidades técnicas necesarias de conformidad con su presupuesto y delegar facultades en términos del Reglamento de esta Ley, y

V.- Actuar como representante de la Comisión; nombrar remover al personal; crear las unidades técnicas necesarias de conformidad con su presupuesto, así como delegar facultades; y

VI.- Las demás que le confieran las leyes y reglamentos.

VII.- El presidente de la Comisión y los titulares de los organismos reguladores sectoriales se reunirán cuando menos una vez al año. Dichas reuniones tendrán el objetivo de aportar elementos que coadyuven a definir criterios o lineamientos en materia de competencia económica, prácticas anticompetitivas, concentraciones y aportaciones netas al bienestar de los consumidores.

*Art. 17 EOCFCE*

Artículo reformado DOF 28-06-2006, DOF 10-05-2011

**ARTÍCULO 29.-** La Comisión contará con un Secretario Ejecutivo designado por el Pleno a propuesta de cualquiera de sus integrantes, quien tendrá a su cargo la coordinación operativa y administrativa y dará fe de los actos en que intervenga. Además, podrá nombrar y remover al personal de las unidades administrativas directamente a su cargo.

Para la designación o remoción del Secretario Ejecutivo se requerirá la aprobación de cuando menos cuatro comisionados.

En caso de que el Secretario Ejecutivo no sea designado dentro de los quince días naturales posteriores a que el cargo quede vacante, se requerirá la aprobación de cuando menos tres comisionados. En caso de que no sea designado dentro de los treinta días naturales posteriores a que el cargo quede vacante, el Presidente de la Comisión nombrará al Secretario Ejecutivo de entre los candidatos propuestos.

El Secretario Ejecutivo deberá cumplir los requisitos siguientes:

**I.-** Ser ciudadano mexicano en pleno goce de sus derechos civiles y políticos;

**II.-** Contar con Título profesional o de posgrado en las áreas de derecho, economía, ingeniería, administración, contaduría, o materias afines al objeto de esta Ley;

**III.-** Haberse desempeñado durante al menos cinco años, en cuestiones profesionales, de servicio público o académicas relacionadas con el objeto de esta Ley;

**IV.-**No haber sido Secretario de Estado, procurador General de la República, senador, diputado federal o local, dirigentes de un partido o asociación política, gobernador de algún estado o Jefe de Gobierno del Distrito federal, durante el año previo a su nombramiento, y

**V.-**No haber ocupado ningún cargo en las empresas que hayan estado sujetas a alguno de los procedimientos previstos en esta Ley, durante un año previo a su nombramiento.

El Secretario Ejecutivo se abstendrá de desempeñar cualquier otro empleo, trabajo o comisión pública o privada, con excepción de los cargos docentes. Asimismo, estará impedido para conocer de asuntos en que tenga interés directo o indirecto en los términos del Reglamento de esta Ley y demás disposiciones aplicables.

El Secretario Ejecutivo no podrá desempeñarse, durante el año posterior a que concluyan sus funciones, en ningún cargo en las empresas que hayan estado sujetas a alguno de los procedimientos previstos en esta Ley.

**ARTÍCULO 29.-** La Comisión contará con un Secretario Ejecutivo designado por el Presidente de la propia Comisión, quien tendrá a su cargo la coordinación operativa y administrativa. El Secretario Ejecutivo dará fe de los actos en que intervenga.

*Arts. 5º, fracción III, 7, 11, fracción IV, 17y 39 EOCFCE*

Artículo reformado DOF 10-05-2011

### **Capítulo V**

#### **Del Procedimiento**

**ARTÍCULO 30.-** La investigación de la Comisión se iniciará de oficio o a petición de parte y estará a cargo del Secretario Ejecutivo de la Comisión, quien podrá turnarla a trámite a las unidades administrativas bajo su coordinación.

**ARTÍCULO 30.-** La investigación de la Comisión se inicia de oficio o a petición de parte.

*Art. 29  
RLFCE Art. 19,  
fracción I EOCFCE  
Tesis aislada I.4o.A.58 A (10a.) No. Registro: 2003937<sup>45</sup>*

El Secretario Ejecutivo dictará el acuerdo de inicio y publicará en el Diario Oficial de la Federación un extracto del mismo, el cual deberá contener, cuando menos, la probable violación a investigar y el mercado en el que se realiza, con el objeto de que cualquier persona pueda coadyuvar en dicha investigación.

*Arts. 28,30, fracción I y 32 RLFCE*

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<sup>45</sup>“COMPETENCIA ECONÓMICA. DURANTE LA FASE DE INVESTIGACIÓN QUE REALIZA LA COMISIÓN FEDERAL DE LA MATERIA, IGUAL QUE EN LA AVERIGUACIÓN PREVIA A CARGO DEL MINISTERIO PÚBLICO, NO RIGE EL DEBIDO PROCESO LEGAL EN TÉRMINOS DE LOS ARTÍCULOS 14, 16, 19 Y 20 DE LA CONSTITUCIÓN FEDERAL.”



***Art. 19, fracciones XI y XXIII EOCFCE***  
***Párrafo relacionado con normativa sectorial***

El extracto podrá ser difundido en cualquier otro medio de comunicación cuando el asunto sea relevante a juicio de la Comisión. En ningún caso, se revelará en el extracto el nombre, denominación o razón social de los agentes económicos involucrados en la investigación.

El período de investigación comenzará a contar a partir de la publicación del extracto y no podrá ser inferior a treinta ni exceder de ciento veinte días.

Este periodo podrá ser ampliado hasta en cuatro ocasiones, por períodos de hasta ciento veinte días, cuando existan causas debidamente justificadas para ello.

***Tesis aislada I.8o.A.61 A (10a.) No. Registro: 2003496<sup>46</sup>***

Si en cualquier estado de la investigación no se ha efectuado acto procesal alguno por más de sesenta días, el Pleno decretará el cierre del expediente, sin perjuicio de la responsabilidad que pudiera derivar de dicha inactividad de los servidores públicos.

***Art. 11, fracción XVI EOCFCE***

La unidad administrativa encargada de la investigación dictará el acuerdo de conclusión del periodo de investigación, al día siguiente en el que concluya o al del vencimiento del plazo a que se refiere el párrafo anterior.

***Arts. 28, fracción I y 29, fracción I EOCFCE***

Si en cualquier estado de la investigación, la Comisión no ha efectuado acto procesal alguno por más de 60 días, se decretará el cierre del expediente, sin perjuicio de la responsabilidad que pudiera derivar por dicha inactividad de los funcionarios públicos.

***Art. 34, párrafo segundo RLFCE***

La Comisión dictará el acuerdo de conclusión del periodo de investigación, al día siguiente en que la concluya o al del vencimiento del plazo a que se refiere el párrafo anterior.

***Arts. 29, último párrafo, 41 y 44 RLFCE***

**ARTÍCULO 30.-** El procedimiento ante la Comisión se inicia de oficio o a petición de la parte.

***Tesis aislada TCC, III.2o.A.173 A. No. Registro: 169,733<sup>47</sup>***

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<sup>46</sup>“COMISIÓN FEDERAL DE COMPETENCIA. NO ESTÁ OBLIGADA A NOTIFICAR LOS ACUERDOS DE AMPLIACIÓN DEL PLAZO DE INVESTIGACIÓN OFICIOSA DE POSIBLES PRÁCTICAS MONOPÓLICAS A PERSONA O AGENTE ECONÓMICO ALGUNO, SINO SÓLO A FUNDARLOS Y MOTIVARLOS.”

<sup>47</sup>“COMISIÓN FEDERAL DE COMPETENCIA. ES IMPROCEDENTE EL AMPARO PROMOVIDO POR UN NOTARIO PÚBLICO

CONTRA EL  
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ACUERDO POR EL QUE DICHO ÓRGANO ESTABLECE EL INICIO DE INVESTIGACIONES EN EL MERCADO DE LOS SERVICIOS DEL NOTARIADO PÚBLICO EN EL TERRITORIO NACIONAL, CON EL OBJETO DE VERIFICAR POSIBLES PRÁCTICAS MONOPÓLICAS, SI NO ACREDITA QUE LE HAYA GENERADO UN PERJUICIO REAL Y ACTUAL.”

*Tesis aislada TCC I.4o.A.583. No. Registro: 172,076*<sup>48</sup>  
*Tesis aislada TCC I.7o.A.285 A. No. Registro:*  
*181,773*<sup>49</sup>  
*Tesis aislada Pleno, P. CIX/2000 No. Registro:*  
*191,362*<sup>50</sup>  
*Tesis aislada Pleno, P. CVIII/2000 No. Registro:*  
*191,363*<sup>51</sup>  
*Jurisprudencia Segunda Sala, 2ª/J.24/2013 No. Registro 2,002,989*<sup>52</sup>

Artículo reformado DOF 28-06-2006, DOF 10-05-2011

**ARTÍCULO 31.-**La Comisión podrá requerir los informes y documentos que estime relevantes y pertinentes para realizar sus investigaciones, citar a declarar a quienes tengan relación con los hechos de que se trate, así como ordenar y practicar visitas de verificación en el domicilio del investigado, en donde se presume que existen elementos necesarios para la debida integración de la investigación.

*Art. 24, fracciones I y II*  
*LFCE Arts. 34, 35, 36, 37 y*  
*38 RLFCE*  
*Arts. 11, fracción XVI, 19, fracción VII, 22, fracción IV, 28, fracción III y 29,*  
*fracción II EOCFCE*  
*Jurisprudencia. No. Registro:*  
*168,495*<sup>53</sup>  
*Jurisprudencia. No. Registro: 168,497*<sup>54</sup>  
*Jurisprudencia. No. Registro: 168,580*<sup>55</sup>  
*Tesis aislada TCC I.4o.A.647 A. No. Registro: 168,517*<sup>56</sup>  
*Tesis Aislada, Segunda Sala. 2ª. XVII/2013. No. Registro:*  
*2,002,988*<sup>57</sup>  
*Tesis aislada 2a. LVI/2013 (10a.) No. Registro: 2004052*<sup>58</sup>

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48“COMISIÓN FEDERAL DE COMPETENCIA. FINES DEL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS SUSTANCIADO POR ELLA.”

49“COMISIÓN FEDERAL DE COMPETENCIA. LA SEGUNDA ETAPA DEL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS ES UN PROCEDIMIENTO SEGUIDO EN FORMA DE JUICIO PARA LOS EFECTOS DE LA PROCEDENCIA DEL JUICIO DE AMPARO.”

50“COMPETENCIA ECONÓMICA. EL PROCEDIMIENTO OFICIOSO DE INVESTIGACIÓN PARA LA PREVENCIÓN Y DETECCIÓN DE PRÁCTICAS MONOPÓLICAS, CONTENIDO EN LA LEY FEDERAL CORRESPONDIENTE, NO VIOLA LA GARANTÍA DE AUDIENCIA.”

51“COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA. EL PROCEDIMIENTO OFICIOSO DE INVESTIGACIÓN DE ACTOS QUE SE ESTIMAN LESIVOS DE LOS PRINCIPIOS RECTORES DE LA ACTIVIDAD ECONÓMICA DE LOS PARTICULARES, QUE EFECTÚA DICHO ÓRGANO, NO ES UN PROCEDIMIENTO ADMINISTRATIVO SEGUIDO EN FORMA

DE JUICIO.”

52 “COMPETENCIA ECONÓMICA. ES IMPROCEDENTE EL JUICIO DE AMPARO PROMOVIDO CONTRA LOS ACTOS REALIZADOS DURANTE EL PROCEDIMIENTO DE INVESTIGACIÓN SOBRE LA EXISTENCIA DE MONOPOLIOS, PRÁCTICAS MONOPÓLICAS, ESTANCOS O CONCENTRACIONES PROHIBIDAS POR LA LEY FEDERAL RELATIVA, CUANDO SE RECLAMAN CON MOTIVO DE LA NOTIFICACIÓN DEL DIVERSO PROCEDIMIENTO ADMINISTRATIVO DE SANCIONACIÓN.”

53 “COMPETENCIA ECONÓMICA. LA PRUEBA INDIRECTA ES IDÓNEA PARA ACREDITAR, A TRAVÉS DE INDICIOS, CIERTOS HECHOS O CIRCUNSTANCIAS A PARTIR DE LO QUE SE CONOCE COMO LA MEJOR INFORMACIÓN DISPONIBLE, RESPECTO DE LA ACTUACIÓN DE EMPRESAS QUE HAN CONCERTADO ACUERDOS PARA LLEVAR A CABO PRÁCTICAS MONOPÓLICAS.”

54 “COMPETENCIA ECONÓMICA. CORRESPONDE A LA EMPRESA SANCIONADA DEMOSTRAR QUE NO FORMA PARTE DEL GRUPO DE INTERÉS ECONÓMICO AL QUE SE ATRIBUYE LA INSTRUMENTACIÓN Y COORDINACIÓN DE LAS CONDUCTAS CONSIDERADAS PRÁCTICAS MONOPÓLICAS.”

55 “PRUEBA INDIRECTA. SU CONCEPTO Y ELEMENTOS QUE LA INTEGRAN.”

56 “ACTAS DE FE DE HECHOS LEVANTADAS POR CORREDORES PÚBLICOS. AUN CUANDO AQUELLAS EN LAS QUE CONSTAN DECLARACIONES DE PERSONAS ENTREVISTADAS SOBRE DETERMINADO TÓPICO NO SON DOCUMENTOS PÚBLICOS EN SU MÁXIMA PUREZA, NI TESTIMONIALES, SÍ CONSTITUYEN INDICIOS SUFICIENTES PARA SUSTENTAR LA CONDUCTA ATRIBUIDA A UN AGENTE ECONÓMICO EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS.”

57 “COMPETENCIA ECONÓMICA. EL ARTÍCULO 31, PRIMER PÁRRAFO, DE LA LEY FEDERAL RELATIVA NO VIOLA EL DERECHO A LA SEGURIDAD JURÍDICA.”

58 “PODER SUSTANCIAL EN EL MERCADO RELEVANTE. LOS ARTÍCULOS 24, FRACCIÓN I, 31, PÁRRAFO PRIMERO Y 33 BIS, FRACCIÓN IV, DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, AL PREVER LAS FACULTADES DE

Las dependencias y entidades tendrán un plazo de veinte días para remitir los informes y documentos que les requiera la Comisión. A petición de aquéllas, dicho plazo podrá ampliarse, por una sola ocasión hasta por un plazo igual, si así lo amerita la complejidad o volumen de la información requerida.

La práctica de las visitas de verificación se sujetará a las reglas siguientes:

**I.-**El Secretario Ejecutivo someterá a la autorización del Pleno la orden de visita, que contendrá el objeto, alcance y duración a los que deberá limitarse la diligencia; el nombre del visitado; la ubicación del domicilio o domicilios a visitar, así como el nombre o nombres de los servidores públicos que la practican conjunta o separadamente. La Comisión realizará las visitas de verificación sólo respecto de datos y documentos que se relacionen con la investigación.

*Arts. 19, fracción XXXVI, 21, fracción VIII, 28, fracción V y 29, fracción III EOCFCE*

Los servidores públicos estarán obligados a observar las obligaciones a que se refiere el artículo 31 bis de esta Ley.

La práctica de las visitas no podrá exceder un período de dos meses, que podrá prorrogarse hasta por otro periodo igual, en caso de que así lo justifique la investigación.

**II.-**Las visitas se practicarán en días y horas hábiles únicamente por los servidores públicos autorizados para su desahogo, previa identificación y exhibición de la orden de visita respectiva a la persona que se encuentre en el domicilio al momento de la celebración de la visita de verificación.

La Comisión podrá habilitar días y horas inhábiles para continuar una visita iniciada en días y horas hábiles, en cuyo caso el oficio por el que se haya ordenado la visita expresará la autorización correspondiente.

**III.-**(Se deroga)

**IV.-**(Se deroga)

**V.-**El visitado, sus funcionarios o los encargados de los establecimientos en que normalmente se encuentren los visitados o en los que se administren o se lleve la dirección de éstos, estarán obligados a:

a) Permitir el acceso al personal autorizado;

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INVESTIGACIÓN OTORGADAS A LA COMISIÓN FEDERAL DE COMPETENCIA, NO VIOLAN EL PRINCIPIO DE LEGALIDAD.”

b) Permitir la práctica de dicha diligencia, y

c) Proporcionar la información y documentos que le sean solicitados y que se relacionen con la materia de la orden de visita, para lo cual deberán permitir el acceso a oficinas, computadoras, aparatos electrónicos, dispositivos de almacenamiento, archiveros y otros bienes muebles o cualquier otro medio que pueda contener evidencia de la realización de los actos o hechos sancionados conforme a esta Ley.

Para el cumplimiento eficaz de la visita de verificación, el Pleno de la Comisión podrá autorizar que los servidores públicos que lleven a cabo la visita de verificación puedan solicitar el auxilio inmediato de la fuerza pública.

*Arts. 11, fracción XVI y 19, fracción XXI EOCFCE*

En ningún caso la autoridad podrá embargar ni secuestrar información del visitado. No obstante, los servidores públicos autorizados de la Comisión que lleven a cabo la visita de verificación podrán solicitar, al momento de practicar la visita, copias, o reproducir por cualquier medio, papeles, libros, documentos, archivos e información generada por medios electrónicos, ópticos o de cualquier otra tecnología, que tengan relación con la investigación.

Los servidores públicos que practiquen la diligencia podrán asegurar la información y documentos, oficinas y demás medios que puedan contener evidencia de la realización de los hechos sancionados conforme a esta Ley, para lo cual podrán sellarlos y marcarlos, así como ordenar que se mantengan en depósito a cargo del visitado o de la persona con quien se entienda la diligencia, previo inventario que al efecto se realice.

Cuando un documento u objeto asegurado conforme al párrafo anterior resulte indispensable para el desarrollo de las actividades del agente económico, se permitirá el uso o extracción del mismo, previa reproducción de la información que contenga por parte de los servidores públicos autorizados.

Las visitas de verificación no podrán limitar la capacidad de producción, distribución y comercialización de bienes o servicios del agente económico investigado.

Si el visitado, sus funcionarios o los encargados de los establecimientos visitados, no permitieran el acceso al personal autorizado para practicar visitas de verificación o la práctica de la visita, o no proporcionaran la información y documentos solicitados, se les aplicarán las medidas de apremio previstas en el artículo 34 fracción II de esta Ley y las sanciones previstas en el artículo 178 del Código Penal Federal;

**VI.-**El visitado tendrá derecho de hacer observaciones a los servidores públicos autorizados durante la práctica de la diligencia, mismas que se harán constar en el acta. Asimismo, podrá ofrecer pruebas en relación a los hechos contenidos en ella, o bien,

hacer uso por escrito de tal derecho dentro del término de cinco días siguientes a la fecha en que se hubiere levantado;

**VII.** De toda visita se levantará acta en la que se harán constar en forma circunstanciada los hechos u omisiones que se hubieren conocido por los servidores públicos autorizados. El acta se levantará por los servidores públicos autorizados en presencia de dos testigos propuestos por la persona con la que se hubiese entendido la diligencia, o designados por los servidores públicos autorizados que la practicaron si aquélla se hubiese negado a proponerlos, haciendo constar esta circunstancia.

Si la visita se realiza simultáneamente en dos o más lugares, en cada uno de ellos se deberá levantar un acta circunstanciada. En este caso, se requerirá la presencia de dos testigos en cada establecimiento visitado en donde se levante el acta, en términos del párrafo anterior.

En las actas se hará constar:

- a) Nombre, denominación o razón social del visitado;
- b) Hora, día, mes y año en que se inicie y concluya la diligencia;
- c) Calle, número exterior e interior, colonia, población, entidad federativa y código postal en donde se encuentre ubicado el lugar en el que se practique la visita;
- d) Número y fecha del oficio que ordene la visita de verificación;
- e) Objeto de la visita;
- f) Nombre y datos de identificación de los servidores públicos autorizados;
- g) Nombre y cargo o empleo de la persona con quien se entendió la diligencia;
- h) Nombre y domicilio de las personas que fungieron como testigos;
- i) Mención de la oportunidad que se da al visitado para ejercer el derecho de hacer observaciones a los inspectores durante la práctica de la diligencia, inserción de las declaraciones que en su caso efectúe y de las pruebas que aporte;
- j) Narración circunstanciada de los hechos relativos a la diligencia;
- k) Mención de la oportunidad que se da al visitado para ejercer el derecho de confirmar por escrito las observaciones hechas en el momento de la visita, así como del que le asiste para formular aclaraciones u observaciones al acta levantada dentro del término de diez días, y
- l) Nombre y firma de quienes intervienen en la diligencia y, en su caso, la indicación de que el visitado se negó a firmar el acta.

**VIII.** Antes de que se realice la visita de verificación o durante su práctica, la Comisión, a través del Secretario Ejecutivo, podrá autorizar en la orden de visita respectiva que

servidores públicos de otras dependencias y entidades de la Administración Pública Federal, auxilien en cuestiones técnicas o específicas para el desahogo de la visita.

Del acta levantada se dejará copia a la persona con quien se entendió la diligencia, aún cuando se hubiese negado a firmarla, circunstancia que no afectará su validez.

El visitado podrá confirmar por escrito las observaciones que hubiera hecho en el momento de la visita, para lo cual contará con un plazo de cinco días posteriores a la realización de la misma.

**ARTÍCULO 31.-** La Comisión podrá requerir los informes y documentos que estime relevantes y pertinentes para realizar sus investigaciones, citar a declarar a quienes tengan relación con los hechos de que se trate, en cualquier domicilio del investigado, en donde se presuma que existen elementos necesarios para la debida integración de la investigación. La Comisión podrá solicitar las visitas de verificación sólo respecto de datos y documentos que haya requerido anteriormente en el curso de la investigación.

*Arts. 24, fracciones I y II  
LFCE Arts. 34, 35, 36, 37 y 38*

*RLFCE Jurisprudencia. No.*

*Registro: 168,495*<sup>59</sup>

*Jurisprudencia. No. Registro: 168,497*<sup>60</sup>

*Jurisprudencia. No. Registro: 168,580*<sup>61</sup>

*Tesis aislada TCC I.4o.A.647 A. No. Registro: 168,517*<sup>62</sup>

*Párrafo declarado inválido, sólo respecto del texto tachado, por sentencia de la  
SCJN en Acción de  
Inconstitucionalidad DOF 12-07-2007*

La práctica de las visitas de verificación se sujetará a las reglas siguientes:

**I.** Cuando en la investigación la Comisión estime necesaria la práctica de visitas de verificación, expresando su objeto y necesidad, la ubicación del lugar a visitar, así como el objeto y alcance específicos a los que únicamente debe limitarse la diligencia;

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<sup>59</sup>“COMPETENCIA ECONÓMICA. LA PRUEBA INDIRECTA ES IDÓNEA PARA ACREDITAR, A TRAVÉS DE INDICIOS, CIERTOS HECHOS O CIRCUNSTANCIAS A PARTIR DE LO QUE SE CONOCE COMO LA MEJOR INFORMACIÓN DISPONIBLE, RESPECTO DE LA ACTUACIÓN DE EMPRESAS QUE HAN CONCERTADO ACUERDOS PARA LLEVAR A CABO PRÁCTICAS MONOPÓLICAS.”

<sup>60</sup>“COMPETENCIA ECONÓMICA. CORRESPONDE A LA EMPRESA SANCIONADA DEMOSTRAR QUE NO FORMA PARTE DEL GRUPO DE INTERÉS ECONÓMICO AL QUE SE ATRIBUYE LA INSTRUMENTACIÓN Y COORDINACIÓN DE LAS CONDUCTAS CONSIDERADAS PRÁCTICAS MONOPÓLICAS.”

<sup>61</sup>“PRUEBA INDIRECTA. SU CONCEPTO Y ELEMENTOS QUE LA INTEGRAN.”

<sup>62</sup>“ACTAS DE FE DE HECHOS LEVANTADAS POR CORREDORES PÚBLICOS.



AUN CUANDO AQUELLAS EN LAS QUE CONSTAN DECLARACIONES DE PERSONAS ENTREVISTADAS SOBRE DETERMINADO TÓPICO NO SON DOCUMENTOS PÚBLICOS EN SU MÁS PURA ESENCIA, NI TESTIMONIALES, SÍ CONSTITUYEN INDICIOS SUFICIENTES PARA SUSTENTAR LA CONDUCTA ATRIBUIDA A UN AGENTE ECONÓMICO EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS.”

Fracción declarada inválida, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad

DOF 12-07-2007

**II.** Las visitas se practicarán en días y horas hábiles únicamente por el personal de la Comisión, previa identificación y notificación del oficio que ordene la visita de verificación.

Fracción declarada inválida, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad

DOF 12-07-2007

**III.** Oficio que ordene la visita de verificación, mismo que señalará por lo menos la autoridad que lo expide, el motivo y el fundamento de su expedición, el lugar donde se practicará la verificación, el objeto y alcance específicos de la diligencia, el plazo en que se realizará y los nombres de los inspectores que llevarán a cabo la visita;

Fracción declarada inválida, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad

DOF 12-07-2007

**IV.** Los inspectores comisionados o autorizados se constituirán en el domicilio del visitado para notificarle personalmente, en caso de personas físicas o a su representante legal, en caso de personas morales, la orden de visita e iniciar la misma de inmediato si se encuentra. En caso contrario, dejarán citatorio con la persona que se encuentre en dicho lugar para que el mencionado visitado o su representante los esperen a hora determinada del día siguiente para recibir la orden de visita; si no lo hiciera la visita se iniciara con quien se encuentre en el lugar visitado;

**V.** El visitado tendrá la obligación de permitir la práctica de la visita de verificación y la de proporcionar todas las facilidades, información y documentos que le sean solicitados y que se relacionen con la materia de la orden de visita. En ningún caso la autoridad podrá embargar ni secuestrar información del visitado, y se limitará a solicitar copia de los documentos que tengan relación con la investigación;

**VI.** El visitado tendrá derecho de hacer observaciones a los inspectores durante la práctica de la diligencia, y confirmar por escrito las observaciones que hubiera hecho en el momento de la visita;

**VII.** De toda visita se levantará acta circunstanciada en presencia de dos testigos propuestos por la persona con la que se hubiese entendido la diligencia, o por los

inspectores que la practicaron, si aquélla se hubiese negado a proponerlos, haciendo constar esta circunstancia.

En las actas se hará constar:

- a) Nombre, denominación o razón social del visitado;
- b) Hora, día, mes y año en que se inicie y concluya la diligencia;
- c) Calle, número exterior e interior, colonia, población, entidad federativa y código postal  
en donde se encuentre ubicado el lugar en el que se practique la visita;
- d) Número y fecha del oficio que ordene la visita de verificación;
- e) Objeto de la visita;
- f) Nombre y datos de identificación de los inspectores;
- g) Nombre y cargo o empleo de la persona con quien se entendió la diligencia;
- h) Nombre y domicilio de las personas que fungieron como testigos;
- i) Mención de la oportunidad que se da al visitado para ejercer el derecho de hacer observaciones a los inspectores durante la práctica de la diligencia, inserción de las declaraciones que en su caso efectúe y de las pruebas que aporte;
- j) Narración circunstanciada de los hechos relativos a la diligencia;
- k) Mención de la oportunidad que se da al visitado para ejercer el derecho de confirmar  
por escrito las observaciones hechas en el momento de la visita, así como del que le asiste para formular aclaraciones u observaciones al acta levantada dentro del término  
de diez días, y
- l) Nombre y firma de quienes intervienen en la diligencia y, en su caso, la indicación de  
que el visitado se negó a firmar el acta.

*Arts. 39 y 40 RLFCE*

**VIII.** En el desarrollo de la visita de verificación, podrá emitir el oficio de comisión respectivo para que servidores públicos, especialistas en la materia, de otras dependencias y entidades de la administración pública federal apoyen en cuestiones técnicas o específicas para el desahogo de la verificación.

Fracción declarada inválida, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad DOF 12-07-2007

Del acta levantada se dejará copia a la persona con quien se entendió la diligencia, aún cuando se hubiese negado a firmarla, circunstancia que no afectará su validez.

*Jurisprudencia. No. Registro: 181,645<sup>63</sup>*

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63“SUSPENSIÓN EN EL JUICIO DE AMPARO. NO PROCEDE CONCEDERLA CONTRA LOS REQUERIMIENTOS DE INFORMACIÓN Y DOCUMENTACIÓN FORMULADOS POR LA COMISIÓN FEDERAL DE COMPETENCIA EN EJERCICIO

*Jurisprudencia. No. Registro: 172,584<sup>64</sup>  
Tesis aislada Pleno P. XI/2004 No.  
Registro: 181,768<sup>65</sup>  
Tesis aislada Pleno, P. CVIII/2000 No. Registro:  
191,363<sup>66</sup>  
Tesis aislada TCC I.4o.A.344 A. No. Registro:  
187,054<sup>67</sup>  
Tesis aislada TCC I.7o.A.49 K. No. Registro:  
184,495<sup>68</sup>  
Tesis aislada TCC I.4o.A.582. No. Registro:  
171,901<sup>69</sup>  
Tesis aislada I.4o.A.584 A. No. Registro:  
171,586<sup>70</sup>*

**ARTÍCULO 31.**-La Comisión, en ejercicio de sus atribuciones podrá requerir los informes o documentos relevantes para realizar sus investigaciones, así como citar a declarar quienes tengan relación con los casos de que se trate.

La información y documentos que haya obtenido directamente la Comisión en la realización de sus investigaciones, así como los que se le proporcionen, son estrictamente confidenciales. Los servidores públicos estarán sujetos a responsabilidad en los casos de divulgación de dicha información, excepto cuando medie orden de autoridad competente.

*Jurisprudencia. No. Registro: 172,585<sup>71</sup>  
Tesis aislada Pleno P. VII/2004 No. Registro:  
181,769<sup>72</sup>  
Tesis aislada Pleno P. VII/2004 No. Registro:  
181,770<sup>73</sup>  
Tesis aislada Pleno P. X/2004 No.  
Registro: 181,771<sup>74</sup>*

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DE SUS FUNCIONES PARA INVESTIGAR PRÁCTICAS MONOPÓLICAS, PORQUE DE OTORGARSE SE AFECTARÍA EL INTERÉS SOCIAL Y SE CONTRAVENDRÍAN DISPOSICIONES DE ORDEN PÚBLICO.”

<sup>64</sup>“COMPETENCIA ECONÓMICA. LAS ACTUACIONES PRACTICADAS EN LAS ETAPAS DE INVESTIGACIÓN Y DE AUDIENCIA DEL PROCEDIMIENTO PARA INDAGAR LA EXISTENCIA DE PRÁCTICAS MONOPÓLICAS SEGUIDO POR LA COMISIÓN FEDERAL RELATIVA, ASÍ COMO EL OFICIO DE PRESUNTA RESPONSABILIDAD EMITIDO EN ÉSTA, NO AFECTAN EL INTERÉS JURÍDICO DE LOS AGENTES ECONÓMICOS DENUNCIADOS PARA EFECTOS DE LA PROCEDENCIA DEL JUICIO DE AMPARO.”

<sup>65</sup>“COMPETENCIA ECONÓMICA. LOS ARTÍCULOS 24, FRACCIÓN VII, 25, FRACCIÓN VIII, Y 28, FRACCIÓN VII, DEL REGLAMENTO INTERIOR DE LA COMISIÓN FEDERAL RELATIVA, NO TRANSGREDEN EL ARTÍCULO 89, FRACCIÓN I,

DE LA CONSTITUCIÓN  
FEDERAL”

66“COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA. EL PROCEDIMIENTO OFICIOSO DE INVESTIGACIÓN DE ACTOS QUE SE ESTIMAN LESIVOS DE LOS PRINCIPIOS RECTORES DE LA ACTIVIDAD ECONÓMICA DE LOS PARTICULARES, QUE EFECTÚA DICHO ÓRGANO, NO ES UN PROCEDIMIENTO ADMINISTRATIVO SEGUIDO EN FORMA DE JUICIO.”

67“SUSPENSIÓN. ES IMPROCEDENTE EN CONTRA DE LAS RESOLUCIONES DE LA COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA DICTADAS DURANTE EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS.”

68 “DOCUMENTOS CONFIDENCIALES, REQUERIMIENTO DE.”

69“SUSPENSIÓN EN EL AMPARO. CONFORME A LA TEORÍA DE PONDERACIÓN DE PRINCIPIOS, DEBE NEGARSE CONTRA LOS REQUERIMIENTOS DE INFORMACIÓN Y DOCUMENTACIÓN FORMULADOS POR LA COMISIÓN FEDERAL DE COMPETENCIA EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS, PUES EL INTERÉS DE LA SOCIEDAD PREVALECE Y ES PREFERENTE AL DERECHO DE LA QUEJOSA A LA CONFIDENCIALIDAD DE SUS DATOS.”

70“SUSPENSIÓN EN EL AMPARO. SU NEGATIVA CONTRA EL REQUERIMIENTO DE INFORMACIÓN Y DOCUMENTACIÓN FORMULADO POR LA COMISIÓN FEDERAL DE COMPETENCIA DENTRO DEL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS, NO DEJA SIN MATERIA EL JUICIO DE GARANTÍAS.”

71“COMPETENCIA ECONÓMICA. ETAPAS DEL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS SEGUIDO POR LA COMISIÓN FEDERAL RELATIVA (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE 2006).”

72 “COMPETENCIA ECONÓMICA. LA FACULTAD ESTABLECIDA EN EL ARTÍCULO 31 DE LA LEY FEDERAL RELATIVA CONSTITUYE UN ACTO ADMINISTRATIVO QUE SE UBICA EN LA HIPÓTESIS GENERAL DE PROCEDENCIA DEL JUICIO DE AMPARO INDIRECTO, PREVISTA EN EL PÁRRAFO PRIMERO DE LA FRACCIÓN II DEL ARTÍCULO 114 DE LA LEY DE AMPARO.”

73 “COMPETENCIA ECONÓMICA. LA FACULTAD DE LA COMISIÓN FEDERAL DE COMPETENCIA PREVISTA EN EL ARTÍCULO 31 DE LA LEY FEDERAL RELATIVA, ES AUTÓNOMA E INDEPENDIENTE DEL PROCEDIMIENTO CONTENCIOSO ANTE LA MISMA COMISIÓN”

*Tesis aislada TCC .9o.A.58 A. No. Registro:*  
185,639<sup>75</sup>

*Tesis aislada TCC I.4o.A.431 A. No. Registro:*  
180,768<sup>76</sup>

*Tesis aislada TCC I.7o.A.312 A. No. Registro:*  
180,940<sup>77</sup>

*Tesis aislada TCC I.7o.A.311 A. No. Registro:*  
180,939<sup>78</sup>

*Tesis aislada TCC I.4o.A.434 A. No. Registro:*  
181,191<sup>79</sup>

*Tesis aislada TCC I.4o.A.581. No.*  
*Registro:* 171,900<sup>80</sup>

*Tesis aislada TCC I.4o.A.433 A. No. Registro:*  
181,192<sup>81</sup>

*Tesis aislada TCC I.4o.A.432 A. No. Registro:*  
181,195<sup>82</sup>

*Tesis aislada TCC I.3o.A.548 A. No. Registro:*  
212,728<sup>83</sup>

*Tesis aislada TCC I.17o.A.10A No. Registro:*  
165,318<sup>84</sup>

Artículo reformado DOF 28-06-2006, DOF 10-05-2011

**ARTÍCULO 31 bis.**-La información y los documentos que la Comisión haya obtenido directamente en la realización de sus investigaciones y diligencias de verificación, será reservada, confidencial o pública, en términos de este artículo.

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74 “COMPETENCIA ECONÓMICA. EL EJERCICIO DE LA FACULTAD PREVISTA EN EL ARTÍCULO 31 DE LA LEY FEDERAL RELATIVA, REQUIERE DE UNA CAUSA OBJETIVA QUE MOTIVE LA INDAGATORIA CORRESPONDIENTE.”

75“SUSPENSIÓN DEFINITIVA. ES PROCEDENTE SU OTORGAMIENTO CUANDO EL ACTO RECLAMADO CONSISTE EN EL REQUERIMIENTO DE INFORMACIÓN Y DOCUMENTOS QUE EL QUEJOSO ESTIMA SON CONFIDENCIALES (ARTÍCULOS 31 DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA Y 33 DE LA LEY FEDERAL DE PROCEDIMIENTO ADMINISTRATIVO.”

76“SUSPENSIÓN EN EL JUICIO DE AMPARO. PROCEDE CONCEDERLA CONTRA LOS REQUERIMIENTOS DE INFORMACIÓN Y DOCUMENTACIÓN FORMULADOS POR LA COMISIÓN FEDERAL DE COMPETENCIA, FUNDADOS EN EL ARTÍCULO 31 DE LA LEY RELATIVA, QUE TIENEN LA PARTICULARIDAD DE CONTENER UNA PREVENCIÓN QUE CONSISTE EN ARROJAR LA CARGA AL AFECTADO DE

PROBAR LA CONFIDENCIALIDAD DE LOS INSTRUMENTOS MATERIA DEL REQUERIMIENTO, EN EL ENTENDIDO QUE, EN CASO CONTRARIO, SE PRESUMIRÁ QUE CARECEN DE DICHA CARACTERÍSTICA.”

77“COMISIÓN FEDERAL DE COMPETENCIA. LA DOCUMENTACIÓN E INFORMACIÓN CONFIDENCIAL PROPORCIONADAS POR LOS AGENTES ECONÓMICOS INVOLUCRADOS EN UN PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS, DEBE ARCHIVARSE POR CUERDA SEPARADA.”

78 “COMISIÓN FEDERAL DE COMPETENCIA. LA INFORMACIÓN Y DOCUMENTOS EXHIBIDOS POR LOS AGENTES ECONÓMICOS EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS SON CONFIDENCIALES POR DISPOSICIÓN LEGAL, Y NO EXISTE NECESIDAD DE QUE EL OFERENTE JUSTIFIQUE TAL CARÁCTER.”

79“COMPETENCIA ECONÓMICA. LA CONFIDENCIALIDAD DE LOS INFORMES Y DOCUMENTOS RELEVANTES QUE REQUIERA LA COMISIÓN FEDERAL DE COMPETENCIA, CONSTITUYE UNA PRESUNCIÓN Y UN DERECHO DEL GOBERNADO ESTABLECIDOS COMO REGLA GENERAL, POR LO QUE NO REQUIERE SER PROBADA EN UN PROCEDIMIENTO DE PRÁCTICAS MONOPÓLICAS, NI PUEDE SER CALIFICADA POR LA PROPIA AUTORIDAD.”

80“SUSPENSIÓN EN EL AMPARO. LA JURISPRUDENCIA 2a./J. 37/2004, QUE DISPONE LA IMPROCEDENCIA DE SU CONCESIÓN CONTRA LOS REQUERIMIENTOS DE INFORMES Y DOCUMENTOS FORMULADOS POR LA COMISIÓN FEDERAL DE COMPETENCIA EN LA INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS, SIGUE SIENDO APLICABLE A PESAR DE LAS REFORMAS Y ADICIONES A LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, VIGENTES A PARTIR DEL 29 DE JUNIO DE 2006.”

81“COMPETENCIA ECONÓMICA. LA COMISIÓN FEDERAL DE COMPETENCIA DEBE FUNDAR Y MOTIVAR EL REQUERIMIENTO DE INFORMES Y DOCUMENTOS QUE ESTIME RELEVANTES PARA SUS INVESTIGACIONES.”

82“COMISIÓN FEDERAL DE COMPETENCIA. INFORMES Y DOCUMENTOS QUE PUEDE REQUERIR EN SUS INVESTIGACIONES.”

83“SUSPENSIÓN PROVISIONAL, NO PROCEDE CONCEDERLA PORQUE NO SE SATISFACE EL REQUISITO PREVISTO EN LA FRACCIÓN II DEL ARTÍCULO 124 DE LA LEY DE AMPARO, TRATÁNDOSE DE ACTOS CONSISTENTES EN LAS SOLICITUDES DE INFORMACIÓN Y DOCUMENTOS REQUERIDOS, POR LA COMISIÓN FEDERAL DE COMPETENCIA EN USO DE LAS FACULTADES QUE LE CONFIERE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, PORQUE SON ACTOS QUE FORMAN PARTE DE UN PROCEDIMIENTO, EL CUAL NO ES SUSCEPTIBLE DE SUSPENDERSE POR

SER DE ORDEN PUBLICO E INTERES SOCIAL SU PROSECUCION.”

<sup>84</sup>COMPETENCIA ECONÓMICA. LOS PROCEDIMIENTOS ESTABLECIDOS EN  
LOS ARTÍCULOS 21, 31 Y 33 DE LA LEY

FEDERAL RELATIVA, SON DIFERENTES Y AUTÓNOMOS ENTRE SÍ  
(LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE

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6).



Durante la investigación, la Comisión no permitirá el acceso al expediente y, en la secuela del procedimiento, únicamente los agentes económicos con interés jurídico en éste podrán tener acceso al mismo, excepto a aquella información clasificada como confidencial.

Los servidores públicos estarán sujetos a responsabilidad en los casos de divulgación de la información que les sea presentada. Cuando medie orden de autoridad competente para presentar información, la Comisión y dicha autoridad deberán dictar las medidas que sean conducentes para salvaguardar en los términos de esta Ley aquella que sea confidencial.

*Art. 3 EOFCE*

Para efectos de esta Ley, será:

**I.** Información reservada, aquella a la que sólo los agentes económicos con interés jurídico en el procedimiento pueden tener acceso;

**II.** Información confidencial, aquella que de hacerse del conocimiento de los demás agentes económicos con interés jurídico en el procedimiento, pueda causar un daño o perjuicio en su posición competitiva a quien la haya proporcionado, contenga datos personales cuya difusión requiera su consentimiento, pueda poner en riesgo su seguridad o cuando por disposición legal se prohíba su divulgación.

La información sólo será clasificada como confidencial cuando el agente económico así lo solicite, acredite que tiene tal carácter y presente un resumen de la información, a satisfacción de la Comisión, para que sea glosado al expediente o, en su caso, las razones por las que no puede realizar dicho resumen. Si no se cumple con este último requisito, la Comisión requerirá al agente económico un nuevo resumen. Si este último no cumple con lo requerido, la Comisión hará el resumen correspondiente, y

*Arts. 2 y 35, fracción V  
RLFCE Tesis aislada Segunda Sala 2a. XXXIX/2008. No.  
Registro: 169,930<sup>85</sup>*

*Tesis aislada Primera Sala 1a. XL/2008. No. Registro: 169,931<sup>86</sup>*

**III.** Información pública, la que se haya dado a conocer por cualquier medio de difusión público, se halle en registros o en fuentes de acceso públicos.

*Fracción relacionada con normativa sectorial*

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<sup>85</sup>“COMPETENCIA ECONÓMICA. LA CLASIFICACIÓN DE INFORMACIÓN CONFIDENCIAL POR PARTE DE LA COMISIÓN FEDERAL DE COMPETENCIA A QUE SE REFIERE EL ARTÍCULO 31 BIS, FRACCIÓN II, SEGUNDO PÁRRAFO, DE LA LEY FEDERAL RELATIVA, NO CONSTITUYE UN ACTO PRIVATIVO Y, POR ENDE, NO LE ES APLICABLE LA GARANTÍA DE AUDIENCIA PREVIA.”

<sup>86</sup>“COMPETENCIA ECONÓMICA. EL ARTÍCULO 31 BIS, FRACCIÓN II, PÁRRAFO SEGUNDO, DE LA LEY FEDERAL RELATIVA, AL PREVER QUE LA INFORMACIÓN QUE SE RECABE DURANTE EL PROCEDIMIENTO DE INVESTIGACIÓN SEGUIDO ANTE LA COMISIÓN, SÓLO SERÁ CLASIFICADA

COMO CONFIDENCIAL CUANDO EL AGENTE ECONÓMICO  
ASÍ LO SOLICITE, NO VULNERA EL DERECHO DE AUDIENCIA PREVISTO EN  
EL ARTÍCULO 14, PÁRRAFO SEGUNDO,  
DE LA CONSTITUCIÓN POLÍTICA DE LOS  
ESTADOS UNIDOS MEXICANOS.”

La Comisión en ningún caso estará obligada a proporcionar la información confidencial ni podrá publicarla y deberá guardarla en el seguro que para tal efecto tenga.

*Tesis aislada TCC I.4o.A.581. No. Registro: 171,900<sup>87</sup>*

*Tesis aislada TCC I.4o.A.582. No. Registro: 171,901<sup>88</sup>*

El Pleno y cada uno de los comisionados, así como el Secretario Ejecutivo y demás servidores públicos de la Comisión, deberán abstenerse de pronunciarse públicamente o revelar información relacionada con los expedientes o procedimientos administrativos ante la propia Comisión seguidos en forma de juicio y que cause daño o perjuicio directo a las partes involucradas, hasta que se haya notificado al agente económico investigado la resolución del Pleno de la Comisión, preservando en todo momento las obligaciones derivadas del artículo 31 bis de esta Ley.

*Arts. 3 y 12 EOCFCE*

Artículo reformado DOF 28-06-2006, DOF 10-05-2011

**ARTÍCULO 32.-**Cualquier persona en el caso de las prácticas monopólicas absolutas, o el afectado en el caso de las demás prácticas o concentraciones prohibidas por esta Ley, podrá denunciar por escrito ante la Comisión al probable responsable, indicando en qué consiste dicha práctica o concentración.

En el caso de prácticas monopólicas relativas o concentraciones, el denunciante deberá incluir los elementos que puedan configurar la conducta que se estime violatoria de la Ley y, en su caso, los conceptos que demuestren que el denunciante ha sufrido o que permitan presumir que puede sufrir un daño o perjuicio.

En el caso de prácticas monopólicas relativas o concentraciones, el denunciante deberá incluir los elementos que configuran las prácticas o concentraciones y, en su caso, los conceptos que demuestren que el denunciante ha sufrido o puede sufrir un daño o perjuicio sustancial.

El Reglamento de esta Ley establecerá los requisitos para la presentación de las denuncias.

*Arts. 28 y 29 RLFCE*

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<sup>87</sup>“SUSPENSIÓN EN EL AMPARO. LA JURISPRUDENCIA 2a./J. 37/2004, QUE DISPONE LA IMPROCEDENCIA DE SU CONCESIÓN CONTRA LOS REQUERIMIENTOS DE INFORMES Y DOCUMENTOS FORMULADOS POR LA COMISIÓN FEDERAL DE COMPETENCIA EN LA INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS, SIGUE SIENDO APLICABLE A PESAR DE LAS REFORMAS Y ADICIONES A LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, VIGENTES A PARTIR DEL 29 DE JUNIO DE 2006.”

<sup>88</sup>“SUSPENSIÓN EN EL AMPARO. CONFORME A LA TEORÍA DE PONDERACIÓN DE PRINCIPIOS, DEBE NEGARSE CONTRA LOS REQUERIMIENTOS DE INFORMACIÓN Y DOCUMENTACIÓN

FORMULADOS POR LA COMISIÓN FEDERAL DE COMPETENCIA EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS, PUES EL INTERÉS DE LA SOCIEDAD PREVALECE Y ES PREFERENTE AL DERECHO DE LA QUEJOSA A LA CONFIDENCIALIDAD DE SUS DATOS.”

El Secretario Ejecutivo desechará las denuncias que sean notoriamente improcedentes. El desechamiento podrá ser revisado por el Pleno a petición del solicitante en los términos del Reglamento de esta Ley, quedando facultado el Pleno para confirmar o revocar el desechamiento.

La Comisión desechará las denuncias que sean notoriamente improcedentes.

*Art. 86*  
*LCE Arts. 30, fracción II y*  
*31 RLFCE*  
*Arts. 11, fracción V y 19, fracción XI*  
*EOCFCE Tesis aislada 1a. LXVIII / 2008. No.*  
*Registro: 169,348<sup>89</sup>*

*Artículo reformado DOF 28-06-2006, DOF 10-05-2011*

**ARTÍCULO 33.-** Concluida la investigación correspondiente y si existen elementos para determinar la probable responsabilidad del agente económico investigado, la Comisión iniciará y tramitará, a través del Secretario Ejecutivo, un procedimiento administrativo conforme a lo siguiente:

**Artículo 33.-** Concluida la investigación correspondiente y si existen elementos para determinar la probable responsabilidad del agente económico investigado, la Comisión iniciará y tramitará un procedimiento administrativo conforme a lo siguiente:

*Art. 41*  
*RLFCE Arts. 11, fracción VI, VII y 24,*  
*fracción VI EOCFCE Párrafo relacionado*  
*con normativa sectorial*

**I.-** Emitirá un oficio de probable responsabilidad que contendrá:

- a) El nombre del probable responsable;
- b) Los hechos materia de la práctica monopólica o concentración prohibida que se le imputen;
- c) Las disposiciones legales que se estimen violadas, y
- d) Las pruebas y los demás elementos de convicción de los que se derive la probable responsabilidad.

*Arts. 28, fracción V, 29, fracción III EOCFCE y 42 RLFCE*

**II.-** La Comisión emplazará con el oficio a que se refiere la fracción anterior al probable responsable, el que contará con un plazo de treinta días para manifestar lo que a su

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<sup>89</sup>“COMPETENCIA ECONÓMICA. EL ARTÍCULO 24, FRACCIÓN II, DEL

REGLAMENTO DE LA LEY FEDERAL RELATIVA, QUE REGULA LA FORMA DE ACREDITAR LA PERSONALIDAD DEL REPRESENTANTE LEGAL DEL DENUNCIANTE, NO VULNERA EL PRINCIPIO DE EQUIDAD PROCESAL (LEGISLACIÓN VIGENTE HASTA EL 12 DE OCTUBRE DE 2007).”

derecho convenga, adjuntar los medios de prueba documentales que obren en su poder y ofrecer las pruebas que ameriten algún desahogo.

El emplazado deberá referirse a cada uno de los hechos expresados en el oficio de probable responsabilidad. Los hechos respecto de los cuales no haga manifestación alguna se tendrán por ciertos, salvo prueba en contrario. Lo mismo ocurrirá si no presenta su contestación dentro del plazo señalado en el párrafo anterior;

*Arts. 45, 46, 47, 48, 49, 50 y 51  
RLFCE Art. 22, fracción  
VII EOCFCE*

**III.-** Transcurrido el término que establece la fracción anterior, se acordará, en su caso, el desechamiento o la admisión de pruebas y se fijará el lugar, día y hora para su desahogo. El desahogo de las pruebas se realizará dentro de un plazo no mayor de veinte días, contado a partir de su admisión.

Son admisibles todos los medios de prueba. Se desecharán aquéllos que no sean ofrecidos conforme a derecho, no tengan relación con los hechos materia del procedimiento o sean ociosos;<sup>90</sup>

**IV.-** Una vez desahogadas las pruebas y dentro de los diez días siguientes, la Comisión podrá allegarse y ordenar el desahogo de pruebas para mejor proveer o citar para alegatos, en los términos de la siguiente fracción;

*Art. 52 RLFCE*

**V.-** Una vez desahogadas las pruebas para mejor proveer que la Comisión hubiese determinado allegarse, fijará un plazo no mayor a diez días para que se formulen por escrito los alegatos que correspondan, y

**VI.-** El expediente se entenderá integrado a la fecha de presentación de los alegatos o al vencimiento del plazo referido en la fracción anterior. Una vez integrado el expediente por el Secretario Ejecutivo, se turnará por acuerdo del Presidente al Comisionado Ponente, de manera rotatoria, siguiendo rigurosamente el orden de designación de los comisionados, así como el orden cronológico en que se integró el expediente, quien tendrá la obligación de presentar el proyecto de resolución al Pleno para su aprobación o modificación.

*Arts. 14 y 22, fracción III EOCFCE*

En este último caso el Comisionado Ponente incorporará al proyecto las modificaciones o correcciones sugeridas por el Pleno.

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<sup>90</sup> El artículo 34, primer párrafo del RLFCE de 4 de marzo de 1998, enunciaba:

**ARTÍCULO 34.-** Una vez contestado el oficio de presunta responsabilidad, se acordará la admisión de pruebas y se fijará el lugar, día y hora para el desahogo de las mismas. Son admisibles todos los medios de prueba. Se desecharán las pruebas que no fuesen ofrecidas conforme a derecho, no tengan relación con el fondo del asunto, sean improcedentes o innecesarias.

La Comisión dictará resolución en un plazo que no excederá de cuarenta días.

*Art. 24, fracción IV  
LFCE Art. 11,  
fracción VI EOCFCE*

Dentro de los diez días siguientes a la fecha en que quedó integrado el expediente, el probable responsable o el denunciante podrán solicitar a la Comisión una audiencia oral con el objeto de realizar las aclaraciones que se consideren pertinentes únicamente respecto de los argumentos expuestos en la contestación al oficio de probable responsabilidad, las pruebas ofrecidas por el probable responsable y el desahogo de las mismas, los alegatos, así como de los documentos que obren en el expediente de mérito.

El Pleno citará a una única audiencia oral a los agentes económicos con interés jurídico en el expediente, sin que su inasistencia pueda afectar la validez de la misma, y en la que deberán estar los servidores públicos directamente involucrados en el caso. Bastará la presencia de tres comisionados, entre los cuales deberá estar el Comisionado Ponente, para que la audiencia pueda realizarse válidamente.

**VI.** El expediente se entenderá integrado a la fecha de presentación de los alegatos o al vencimiento del plazo referido en la fracción anterior. Una vez integrado el expediente, la Comisión dictará resolución en un plazo que no excederá de cuarenta días.<sup>91</sup>

*Arts. 40, 41 EOCFCE y 48, quinto párrafo RLFCE*

El Reglamento de esta Ley establecerá los términos y condiciones para el ofrecimiento, la admisión y el desahogo de los medios de prueba.

*Art. 46 RLFCE*

En lo no previsto, se estará a lo dispuesto en el Reglamento de esta Ley.

*Arts. 31, fracción III, 49, 50, 51, 60, 61 y 63  
RLFCE Jurisprudencia. No.*

*Registro: 172,585<sup>92</sup>*

*Tesis aislada TCC I.7o.A.285 A. No. Registro: 181,773<sup>93</sup>*

*Tesis aislada Pleno, P. CXIII/2000. No. Registro: 191,429<sup>94</sup>*

*Tesis aislada Pleno, P. CXII/2000. No. Registro: 191,431<sup>95</sup>*

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<sup>91</sup> El artículo 40 del RLFCE de 4 de marzo de 1998, enunciaba:

**ARTÍCULO 40.-** El expediente se entenderá integrado a la fecha de la presentación de los alegatos o al vencimiento del plazo de su presentación, la Comisión hará la declaratoria dentro de los tres días siguientes.

<sup>92</sup>“COMPETENCIA ECONÓMICA. ETAPAS DEL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS



SEGUIDO POR LA COMISIÓN FEDERAL RELATIVA (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE 2006).”

93“COMISIÓN FEDERAL DE COMPETENCIA. LA SEGUNDA ETAPA DEL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS ES UN PROCEDIMIENTO SEGUIDO EN FORMA DE JUICIO PARA LOS EFECTOS DE LA PROCEDENCIA DEL JUICIO DE AMPARO.”

94 “COMPETENCIA ECONÓMICA. EL PROCEDIMIENTO ADMINISTRATIVO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS O CONCENTRACIONES, CONTENIDO EN LA LEY FEDERAL CORRESPONDIENTE, NO VIOLA LA GARANTÍA DE AUDIENCIA.”

95 “COMPETENCIA ECONÓMICA. LAS CARACTERÍSTICAS DEL PROCEDIMIENTO ESTABLECIDO EN LA LEY FEDERAL CORRESPONDIENTE, LO IDENTIFICAN COMO ADMINISTRATIVO Y NO COMO CIVIL.”

**ARTÍCULO 33.-** El procedimiento ante la Comisión se tramitará conforme a las siguientes bases:

**I.** Se emplazará al presunto responsable, informándole en qué consiste la investigación, acompañando, en su caso, copia de la denuncia;

*Tesis aislada TCC I.7o.A.284 A. No. Registro: 181,774<sup>96</sup>*

**II.** El emplazado contará con un plazo de treinta días naturales para manifestar lo que a su derecho convenga y adjuntar las pruebas documentales que obren en su poder y ofrecer las pruebas que ameriten desahogo;

**III.** Una vez desahogadas las pruebas, la Comisión fijará un plazo no mayor a treinta días naturales para que se formulen los alegatos verbalmente o por escrito; y

**IV.** Una vez integrado el expediente, la Comisión deberá dictar resolución en un plazo que no excederá de 60 días naturales.

*Tesis aislada TCC I.2o.A.58 A. No. Registro: 168,374<sup>97</sup>*

En lo no previsto, se estará a lo dispuesto en el reglamento de esta ley.

*Tesis aislada TCC I.7o.A.283 A. No. Registro: 181,775<sup>98</sup>*

*Tesis aislada TCC I.17o.A.10A No. Registro: 165,318<sup>99</sup>*

*Tesis aislada I.17o.A.13A. No. Registro: 165,320<sup>100</sup>*

Artículo reformado DOF 28-06-2006, DOF 10-05-2011

**ARTÍCULO 33 bis.-**Cuando las disposiciones legales o reglamentarias prevengan expresamente que deba resolverse sobre cuestiones de competencia efectiva, existencia de poder sustancial en el mercado relevante u otros términos análogos, la Comisión emitirá de oficio, a solicitud de la autoridad respectiva o a petición de parte afectada la resolución que corresponda. En el caso del artículo 7 de esta Ley, la Comisión sólo podrá emitir resolución a petición del Ejecutivo Federal. En todos los casos, se estará al siguiente procedimiento:

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<sup>96</sup> “COMISIÓN FEDERAL DE COMPETENCIA. EL OFICIO DE PRESUNTA RESPONSABILIDAD DICTADO EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS, POR REGLA GENERAL, NO ES UN ACTO QUE CAUSE UN AGRAVIO NO REPARABLE PARA LOS EFECTOS DE LA PROCEDENCIA DEL JUICIO DE AMPARO.”

<sup>97</sup>“COMPETENCIA ECONÓMICA. LA RESOLUCIÓN QUE SE DICTA FUERA DEL PLAZO DE SESENTA DÍAS QUE ESTABLECE EL ARTÍCULO 33, FRACCIÓN IV, DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, ES VIOLATORIA DE LA GARANTÍA DE SEGURIDAD JURÍDICA (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE 2006).”

<sup>98</sup>“COMISIÓN FEDERAL DE COMPETENCIA. EL OFICIO DE PRESUNTA RESPONSABILIDAD DICTADO EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS, POR REGLA GENERAL, NO ES COMBATIBLE

MEDIANTE EL JUICIO DE  
AMPARO INDIRECTO.”

<sup>99</sup>COMPETENCIA ECONÓMICA. LOS PROCEDIMIENTOS ESTABLECIDOS EN  
LOS ARTÍCULOS 21, 31 Y 33 DE LA LEY  
FEDERAL RELATIVA, SON DIFERENTES Y AUTÓNOMOS ENTRE SÍ  
(LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE

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100 “COMPETENCIA ECONÓMICA. CARACTERÍSTICAS Y ETAPAS DEL  
PROCEDIMIENTO DE SANCIÓN POR  
INFRACCIÓN O CONTENCIOSO PREVISTO EN EL ARTÍCULO 33 DE LA LEY  
FEDERAL RELATIVA, VIGENTE HASTA EL

28 DE JUNIO

DE 2006.”

*Arts. 7 y 24, fracción V LFCCE*  
*Arts. 53, 54 y 55 RLFCE*  
*Artículo relacionado con normativa sectorial*

**I.** Encaso de solicitud de parte o de la autoridad respectiva, el solicitante deberá presentar la información que permita determinar el mercado relevante y el poder sustancial en términos de los artículos 12 y 13 de esta Ley, así como motivar la necesidad de emitir la resolución. El Reglamento de esta Ley establecerá los requisitos para la presentación de las solicitudes;

*Art. 55, fracción I RLFCE*

**II.** Dentro de los diez días siguientes, la Comisión emitirá el acuerdo de inicio o prevendrá al solicitante para que presente la información faltante, lo que deberá cumplir en un plazo de quince días. En caso de que no se cumpla con el requerimiento, se tendrá por no presentada la solicitud;

*Arts. 53, segundo párrafo y 55, fracción II RLFCE*

**III.** El Secretario Ejecutivo dictará el acuerdo de inicio y publicará en el Diario Oficial de la Federación un extracto del mismo, el cual deberá contener el mercado materia de la declaratoria, con el objeto de que cualquier persona pueda coadyuvar en dicha investigación.

*Fracción relacionada con normativa sectorial*

El extracto podrá ser difundido en cualquier otro medio de comunicación cuando el asunto sea relevante a juicio de la Comisión;

**IV.** El período de investigación comenzará a contar a partir de la publicación del extracto y no podrá ser inferior a quince ni exceder de cuarenta y cinco días.

*Art. 11, fracción IX*  
*EOCFCE Tesis aislada 2a. LVI/2013 (10a.) No.*  
*Registro: 2004052<sup>101</sup>*

La Comisión requerirá los informes y documentos relevantes y citará a declarar a quienes tengan relación con el caso de que se trate;

*Arts. 19, fracción VII y 30, fracción VII EOCFCE*

**V.** Concluida la investigación correspondiente y si hay elementos para determinar la existencia de poder sustancial o que no hay condiciones de competencia efectiva, u otros términos análogos, la Comisión emitirá un dictamen preliminar y publicará un extracto en los medios de difusión de la Comisión y publicará los datos relevantes en el Diario Oficial de la Federación;

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<sup>101</sup>“PODER SUSTANCIAL EN EL MERCADO RELEVANTE. LOS ARTÍCULOS 24, FRACCIÓN I, 31, PÁRRAFO PRIMERO Y 33 BIS, FRACCIÓN IV, DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, AL PREVER LAS FACULTADES DE INVESTIGACIÓN OTORGADAS A LA COMISIÓN FEDERAL DE COMPETENCIA, NO VIOLAN EL PRINCIPIO DE LEGALIDAD.”

*Art. 55, fracción III RLFCE*  
*Fracción relacionada con normativa sectorial*

**VI.** Los agentes económicos que demuestren ante la Comisión que tienen interés en el asunto podrán manifestar lo que a su derecho convenga y ofrecer los elementos de convicción que estimen pertinentes ante la Comisión, dentro de los veinte días siguientes al de la publicación de los datos relevantes del dictamen preliminar en el Diario Oficial de la Federación, y

*Arts. 54, fracción II, 55, fracciones IV y V RLFCE*  
*Fracción relacionada con normativa sectorial*

**VII.** Una vez integrado el expediente en un plazo no mayor a treinta días, el Pleno de la Comisión emitirá la resolución que corresponda, misma que se deberá notificar a la autoridad competente y publicará en los medios de difusión de la Comisión y los datos relevantes en el Diario Oficial de la Federación.

*Art. 55, fracción VI*  
*RLFCE Arts. 11, fracciones VIII y IX y 22,*  
*fracción III EOCFCE Fracción relacionada con*  
*normativa sectorial*

El Pleno de la Comisión podrá prorrogar los plazos señalados en las fracciones IV y VII de este artículo por una sola vez y hasta por un término igual a los mismos.

*Artículo adicionado DOF 28-06-2006*

**ARTÍCULO 33 bis 1.-** Cuando la Comisión deba emitir opinión, autorización o cualquier otra resolución en el otorgamiento de concesiones, permisos, cesiones, venta de acciones de empresas concesionarias o permisionarias u otras cuestiones análogas, iniciará y tramitará el procedimiento siguiente:

*Art. 28, párrafodécimo*  
*CPEUM Art. 24,*  
*fracción XVI LFCE*  
*Arts. 56, 57 y 59*  
*RLFCE*  
*Art. 30, fracciones II y IV EOCFCE*  
*Artículo relacionado con normativa sectorial*

**I.** La solicitud se hará por escrito conforme al instructivo que emita la Comisión;

*Arts. 56, 57, 58 y 59 RLFCE*

**II.** Dentro de los cinco días siguientes, la Comisión emitirá el acuerdo de recepción o de prevención a los agentes económicos para que en el plazo de cinco días presenten la información y documentación faltantes. En caso de que no se presente la información o documentación requerida, se tendrá por no presentada la solicitud, y

**III.** La Comisión deberá resolver dentro del plazo de treinta días, contado a partir del acuerdo de recepción o del acuerdo que tenga por presentada la información o documentación faltante. Para emitir la opinión, serán aplicables en lo conducente, los artículos 17 y 18 de esta Ley.

*Arts. 17y 18 LFCE*

La solicitud de opinión deberá hacerse en la fecha que se indique en la convocatoria o bases de la licitación correspondiente. En su defecto, la opinión siempre deberá ser previa a cualquier oferta económica.

*Art. 59 RLFCE*

La convocante deberá enviar a la Comisión, antes de la publicación de la licitación, el Plan Maestro, la convocatoria, las bases de licitación, los proyectos de contrato y los demás documentos relevantes que permitan a la Comisión conocer la transacción pretendida.

*Art. 57, fracción I RLFCE*

El plazo señalado en la fracción III de este artículo podrá modificarse o prorrogarse por el Presidente de la Comisión, por causas debidamente justificadas y en una sola ocasión.

*Arts. 58 y 69 RLFCE*

Artículo relacionado con normativa sectorial

Artículo adicionado DOF 28-06-2006

**ARTÍCULO 33 bis 2.-** Antes de que se dicte resolución definitiva en los procedimientos seguidos ante la Comisión por prácticas monopólicas relativas o concentración prohibida, el agente económico podrá presentar escrito mediante el cual se comprometa a suspender, suprimir, corregir o no realizar la práctica o concentración correspondiente.

*Art. 2 LFCE*

Para tal efecto, el agente económico deberá acreditar que:

**I.-**El compromiso presentado tenga como consecuencia la restauración o protección del proceso de competencia y libre concurrencia, y

**II.-**Los medios propuestos sean los idóneos y económicamente viables para no llevar a cabo o, en su caso, dejar sin efectos la práctica monopólica relativa o concentración prohibida investigada o la práctica monopólica relativa o concentración prohibida por la que se le considere como probable responsable, señalando los plazos y términos para su comprobación.

Recibido el escrito a que se refiere este artículo, el procedimiento quedará suspendido hasta por quince días prorrogables, en tanto la Comisión emite su resolución, con la que podrá concluir anticipadamente dicho procedimiento. En este supuesto, la Comisión podrá cerrar el expediente sin imputar responsabilidad alguna; o bien, podrá imputar responsabilidad e imponer una multa de hasta por la mitad de la que correspondería en términos del artículo 35 sin perjuicio de que se le reclamen los daños y perjuicios.

Los agentes económicos solo podrán acogerse a los beneficios previstos en este artículo, una vez cada cinco años. Este período se computará a partir de la notificación de la resolución de la Comisión.

*Arts. 35, fracción XI y 37, antepenúltimo párrafo LFCE*

**ARTÍCULO 33 bis 2.-** Antes de que se dicte resolución definitiva en cualquier procedimiento seguido ante la Comisión, el agente económico podrá presentar escrito mediante el cual se comprometa a suspender, suprimir, corregir o no realizar la probable práctica monopólica relativa o concentración prohibida.

Para esto deberá acreditar que:

**I.** El proceso de competencia y libre concurrencia sean restaurables al cesar los efectos de la práctica monopólica o concentración prohibida, y

**II.** Los medios propuestos sean los idóneos y económicamente viables para no llevar a cabo o dejar sin efectos la práctica monopólica o concentración, señalando los plazos y términos para su comprobación.

Recibido el escrito a que se refiere este artículo, el procedimiento quedará suspendido hasta por quince días, en tanto la Comisión emite su resolución, con la que podrá concluir anticipadamente dicho procedimiento. En este supuesto, la Comisión podrá imponer una multa de un salario mínimo por la realización de la práctica monopólica o concentración prohibida, sin perjuicio de que se le reclamen los daños y perjuicios.

Los agentes económicos solo podrán acogerse a los beneficios previstos en este artículo, una vez cada cinco años. Este período se computará a partir de la notificación de la resolución de la Comisión.<sup>102</sup>

*Artículo adicionado DOF 28-06-2006*

*Artículo reformado DOF 10-05-2011*

**ARTÍCULO 33 bis 3.-** Cualquier agente económico que haya incurrido o esté incurriendo en una práctica monopólica absoluta; haya participado directamente en prácticas monopólicas absolutas en representación o por cuenta y orden de personas morales; y el agente

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<sup>102</sup>El artículo 41 del RLFCE de 4 de marzo de 1998, enunciaba:

**ARTÍCULO 41.-** En cualquier etapa de un procedimiento seguido ante la Comisión y antes de que ésta dicte resolución definitiva, el presunto responsable podrá presentar escrito mediante el cual se comprometa a suspender, suprimir, corregir o no realizar la presunta práctica monopólica relativa o concentración prohibida, para lo cual, los agentes económicos deberán acreditar que:

**I.** El proceso de competencia y libre concurrencia sea restaurable al cesar los efectos de la práctica monopólica o concentración prohibida, y

**II.** Los medios propuestos sean los idóneos y económicamente viables para dejar sin efectos la práctica monopólica o concentración, señalando los plazos y términos para su comprobación.

Recibido el escrito a que se refiere este artículo, el procedimiento quedará suspendido hasta en tanto la Comisión, en un plazo de quince días, emita su resolución, con la que podrá concluir dicho procedimiento sin perjuicio de que el denunciante pueda reclamar d años y perjuicios.

económico o individuo que haya coadyuvado, propiciado, inducido o participado en la comisión de prácticas monopólicas absolutas, podrá reconocerla ante la Comisión y acogerse al beneficio de la reducción de las sanciones establecidas en esta Ley, siempre y cuando:

**I.-** Sea el primero, entre los agentes económicos o individuos involucrados en la conducta, en aportar elementos de convicción suficientes que obren en su poder y de los que pueda disponer y que a juicio de la Comisión permitan comprobar la existencia de la práctica;

**II.-** Coopere en forma plena y continua con la Comisión en la sustanciación de la investigación que lleve a cabo y, en su caso, en el procedimiento seguido en forma de juicio, y

**III.-** Realice las acciones necesarias para terminar su participación en la práctica violatoria de la Ley.

Cumplidos los requisitos anteriores, la Comisión dictará la resolución a que haya lugar e impondrá una multa mínima.

Los agentes económicos o individuos que no cumplan con lo establecido en la fracción I anterior, podrán obtener una reducción de la multa de hasta el 50, 30 ó 20 por ciento del máximo permitido, cuando aporten elementos de convicción en la investigación, adicionales a los que ya tenga la Comisión y cumplan con los demás requisitos previstos en este artículo. Para determinar el monto de la reducción la Comisión tomará en consideración el orden cronológico de presentación de la solicitud y de los elementos de convicción presentados.

*Arts. 35, fracciones IV, IX y X LFCE*

Los individuos que hayan participado directamente en prácticas monopólicas absolutas, en representación o por cuenta y orden de los agentes económicos que reciban los beneficios de la reducción de sanciones, podrán verse beneficiados con la misma reducción en la sanción que a éstos correspondiere siempre y cuando aporten los elementos de convicción con los que cuenten, cooperen en forma plena y continua en la sustanciación de la investigación que se lleve a cabo y, en su caso, en el procedimiento seguido en forma de juicio, y realicen las acciones necesarias para terminar su participación en la práctica violatoria de la Ley.

La Comisión mantendrá con carácter confidencial la identidad del agente económico y los individuos que pretendan acogerse a los beneficios de este artículo.

El Reglamento de esta Ley establecerá el procedimiento conforme al cual deberá solicitarse y resolverse la aplicación del beneficio previsto en este artículo, así como para la reducción en el monto de la multa.

*Arts. 43 y 44  
RLFCE Arts. 19, fracción XXXI y 28,  
fracción IV EOCFCE*



**ARTÍCULO 33 bis 3.-** Cualquier agente económico que haya incurrido o esté incurriendo en una práctica monopólica absoluta podrá reconocerla ante la Comisión y acogerse al beneficio de la reducción de las sanciones establecidas en esta Ley, siempre y cuando:

**I.** Sea el primero, entre los agentes económicos involucrados en la conducta, en aportar los elementos de convicción suficientes que obren en su poder y de los que pueda disponer y que a juicio de la Comisión permitan comprobar la existencia de la práctica;

**II.** Coopere en forma plena y continua con la Comisión en la sustanciación de la investigación que lleve a cabo y, en su caso, en el procedimiento seguido en forma de juicio, y

**III.** Realice las acciones necesarias para terminar su participación en la práctica violatoria de la Ley.

Cumplidos los requisitos anteriores, la Comisión dictará la resolución a que haya lugar e impondrá una multa mínima. No procederá acción judicial ni administrativa con base en la resolución que emita la Comisión en términos de este párrafo.

Los agentes económicos que no cumplan con lo establecido en el fracción I anterior, podrán obtener una reducción de la multa de hasta el 50, 30 o 20 por ciento del máximo permitido, cuando aporten elementos de convicción en la investigación adicionales a los que ya tenga la Comisión y cumplan con los demás requisitos previstos en este artículo. Para determinar el monto de la reducción la Comisión tomará en consideración el orden cronológico de presentación de la solicitud y de los elementos de convicción presentados.

La Comisión mantendrá con carácter confidencial la identidad del agente económico que pretenda acogerse a los beneficios de este artículo.

El Reglamento de esta Ley establecerá el procedimiento conforme al cual deberá solicitarse y resolverse la aplicación del beneficio previsto en este artículo, así como para la reducción en el monto de la multa.

Artículo adicionado DOF 28-06-2006

Artículo reformado DOF 10-05-2011

**ARTÍCULO 33 bis 4.-**Cualquier persona, física o moral, así como las dependencias y entidades de la administración pública federal, estatal o municipal, podrán formular ante la Comisión cualquier consulta en materia de competencia o libre concurrencia, para lo cual se estará a lo siguiente:

*Art. 24, fracción IX  
LFCE Art. 71, segundo  
~~párrafo~~ RLFCE Art. 22,  
fracción III EOCFCE*

**I.-**Se deberá presentar por escrito, acompañando la información relevante para el análisis que deba practicar la Comisión;

**II.-**La Comisión podrá, dentro de los diez días siguientes a la presentación del escrito, darle curso a la consulta o, en su caso, requerir información al interesado, la cual deberá ser presentada dentro de los quince días siguientes contados a partir del requerimiento.

**III.-**La Comisión, dentro de los quince días siguientes podrá allegarse de los datos y documentos que considere necesarios para resolver la consulta, misma que los interesados deberán presentar dentro de los siguientes diez días.

**IV.-**La Comisión resolverá la consulta en un plazo máximo de treinta días contados a partir de la presentación de la información requerida. Concluido el plazo sin emitir resolución, se entenderá que la Comisión no tiene objeción a la consulta, y

**V.-**La Comisión bajo su responsabilidad, podrá ampliar el plazo a que se refieren las fracciones anteriores hasta por sesenta días adicionales.

Si la información no se proporcionara dentro del plazo previsto en la fracción II anterior, se tendrá por no presentada la consulta, sin perjuicio de que el interesado solicite prórroga a dicho plazo o presente una nueva consulta.

Artículo adicionado DOF 28-06-2006

**ARTÍCULO 34.-**Para el eficaz desempeño de sus atribuciones, la Comisión podrá emplear los siguientes medios de apremio:

*Arts. 51 y 64  
RLECE Arts. 19, fracciones V y VII, 22, fracción V, 24, fracción VII, 31, fracción XVII, 32, fracción VI y 37  
EOCFCE*

**I.-**Apercibimiento; o

**II.-** Multa hasta por el importe del equivalente a 1,500 veces el salario mínimo vigente para el Distrito Federal, cantidad que podrá aplicarse por cada día que transcurra sin cumplimentarse lo ordenado por la Comisión.

*Jurisprudencia. No. Registro: 178,031 <sup>103</sup>  
Tesis aislada 2a. XXVIII/2005. No. Registro: 179,092 <sup>104</sup>  
Tesis aislada 2a. CXXIII/2003. No. Registro: 183,124 <sup>105</sup>*

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<sup>103</sup> “COMPETENCIA ECONÓMICA. LA FRACCIÓN II DEL ARTÍCULO 34 DE LA LEY FEDERAL RELATIVA, QUE PREVÉ LA IMPOSICIÓN DE UNA MULTA COMO MEDIDA DE APREMIO, NO VIOLA LA GARANTÍA DE SEGURIDAD JURÍDICA.”

<sup>104</sup> “COMPETENCIA ECONÓMICA. EL ARTÍCULO 34, FRACCIÓN II, DE LA LEY FEDERAL RELATIVA, AL ESTABLECER

COMO MEDIDA DE APREMIO MULTA HASTA POR EL IMPORTE DEL EQUIVALENTE A 1,500 VECES EL SALARIO MÍNIMO VIGENTE PARA EL DISTRITO FEDERAL, NO TRANSGREDE EL ARTÍCULO 22 DE LA CONSTITUCIÓN FEDERAL.”

**ARTÍCULO 34 bis.**-Cuando los plazos fijados por esta Ley y su Reglamento sean en días, éstos se entenderán como hábiles. Respecto de los establecidos en meses o años, el cómputo se hará de fecha a fecha, considerando incluso los días inhábiles.

Cuando no se especifique plazo, se entenderán cinco días para cualquier actuación.

En lo no previsto por esta Ley o su Reglamento, se aplicará supletoriamente el Código Federal de Procedimientos Civiles.

Artículo adicionado DOF 28-06-2006

*Art. 4*  
*EOCFCE Tesis aislada TCC I.8o.A.44 A. No.*  
*Registro: 178,035*<sup>107</sup>

**ARTÍCULO 34 bis 1.**-Todos los procedimientos a que se refiere esta Ley, así como cualquier solicitud se podrán sustanciar por medios electrónicos o de cualquier otra tecnología, de acuerdo con las disposiciones aplicables.

*Art. 43, fracción I*  
*RLFCE Art. 11,*  
*fracción X EOCFCE*

El Pleno de la Comisión podrá establecer términos y condiciones para realizar los trámites por medios electrónicos o de cualquier otra tecnología, en cuyo caso deberá publicarlos en el Diario Oficial de la Federación.

Artículo relacionado con normativa sectorial

Artículo adicionado DOF 28-06-2006

**ARTÍCULO 34 bis 2.**-Toda persona que tenga conocimiento o relación con algún hecho que investigue la Comisión o con la materia de sus procedimientos en trámite, tiene la obligación de proporcionar en el término de diez días la información, cosas y documentos que obren en su poder en el medio que le sean requeridos; de presentarse a declarar en el lugar, fecha y hora en que sea citada, y de permitir que se realicen las diligencias de verificación que ordene la Comisión.

*Arts. 51 y 62*  
*RLECE Art. 19, fracción*  
*VII EOCFCE*  
Artículo relacionado con normativa sectorial

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105 “COMPETENCIA ECONÓMICA. LA FRACCIÓN II DEL ARTÍCULO 34 DE LA LEY FEDERAL RELATIVA, AL ESTABLECER COMO MEDIDA DE APREMIO UNA SANCIÓN HASTA POR UN MIL QUINIENTAS VECES EL SALARIO MÍNIMO VIGENTE PARA EL DISTRITO FEDERAL, NO TRANSGREDE LA GARANTÍA DE SEGURIDAD JURÍDICA.”

106 “COMISION FEDERAL DE COMPETENCIA ECONOMICA.  
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SUSPENSION, ES IMPROCEDENTE CONCEDERLA,  
TRATANDOSE DE LA IMPOSICION DE MEDIDAS DE APREMIO POR NO  
CUMPLIR CON LOS REQUERIMIENTOS QUE  
FORMULA  
LA.”

107“COMISIÓN FEDERAL DE COMPETENCIA. LAS MEDIDAS DE  
ASEGURAMIENTO O CAUTELARES PREVISTAS EN LOS ARTÍCULOS 384 Y 388  
DEL CÓDIGO FEDERAL DE PROCEDIMIENTOS CIVILES, NO SON DE  
APLICACIÓN SUPLETORIA  
EN EL PROCEDIMIENTO ESTABLECIDO EN LA LEY FEDERAL  
DE COMPETENCIA ECONÓMICA.”

La Comisión adoptará sus resoluciones preliminares o definitivas, según corresponda, con base en los hechos de que tenga conocimiento y la información y documentación disponibles, cuando el agente económico emplazado o aquél cuyos hechos sean materia de investigación, así como las personas relacionadas con éstos, se nieguen a proporcionar información o documentos, declarar, facilitar la práctica de las diligencias que hayan sido ordenadas o que entorpezcan la investigación o el procedimiento respectivo.

Lo dispuesto en este artículo se aplicará sin perjuicio de las sanciones que procedan.

*Art. 24, fracción I*  
~~*LFCE Art. 22,*~~  
*fracción IV EOCFCE*

*Artículo adicionado DOF 28-06-2006*

**ARTÍCULO 34 bis 3.-** Las facultades de la Comisión para iniciar las investigaciones que pudieran derivar en responsabilidad e imposición de sanciones, de conformidad con esta Ley, se extinguen en el plazo de cinco años contado a partir de que se realizó la conducta prohibida por esta Ley.

*Art. 24, fracción I*  
*LFCE Art. 28*  
*RLFCE*

*Artículo adicionado DOF 28-06-2006*

**ARTÍCULO 34 bis 4.-** A partir de la emisión del oficio de probable responsabilidad y hasta antes de que se dicte resolución, en los casos que se pueda presentar un daño irreversible al proceso de competencia y libre concurrencia, el Pleno, a propuesta del Secretario Ejecutivo, podrá ordenar, como medida cautelar, la suspensión de los actos constitutivos de la probable práctica monopólica o probable concentración prohibida, con el propósito de prevenir o evitar que se dañe, disminuya o impida el proceso de competencia y libre concurrencia durante la tramitación del procedimiento.

En los casos en los que se dicte la suspensión en los términos señalados en el párrafo anterior, la sustanciación del procedimiento y la resolución del asunto tendrán trámite preferente y expedito.

La suspensión tendrá una duración máxima de cuatro meses contados a partir de que ésta se haya ordenado, prorrogables hasta por otros dos períodos iguales, siempre y cuando exista causa debidamente justificada. Para el caso de la segunda prórroga la causa debidamente justificada deberá ser aprobada por al menos cuatro comisionados.

Si al finalizar el plazo señalado en el párrafo anterior no se hubiere resuelto el fondo del asunto, se levantará la medida cautelar, a menos de que estuviere pendiente el desahogo de pruebas ofrecidas por el agente económico señalado como probable responsable.

La suspensión a la que hace referencia este artículo, no podrá tener como objeto limitar la capacidad de producción de bienes o prestación de servicios que el agente económico sujeto a la medida tenga al momento del inicio de la investigación. Tampoco podrá dañar

de manera irreversible los procesos de producción, distribución y comercialización de dicho agente económico.

Contra dicha medida el agente económico podrá solicitar al Pleno, que mediante procedimiento expedito que se establezca en el Reglamento de la Ley, le fije caución a fin de evitar la suspensión de los actos constitutivos de dicha práctica. La caución deberá de ser bastante para reparar el daño que se pudiera causar al proceso de competencia y libre concurrencia si no obtiene resolución favorable. La Comisión emitirá los criterios técnicos respectivos para la determinación de las cauciones.

*Art. 24, fracción IV bis LFCE*

*Art. 2, segundo párrafo*

*RLFCE Arts. 11,*

*fracción XI, 19, fracción XVII, 24, fracción VI, 28, fracción V y 29, fracción III EOCFCE*

La suspensión que dicte la Comisión no prejuzga respecto del fondo del asunto. En la resolución que ponga fin al procedimiento, la Comisión determinará el levantamiento de las medidas adoptadas.

**Artículo adicionado DOF 10-05-2011**

**Capítulo VI**

### *De las Sanciones*

**ARTÍCULO 35.**La Comisión podrá aplicar las siguientes sanciones:

- I.** Ordenar la corrección o supresión de la práctica monopólica o concentración de que se trate;
- II.** Ordenar la desconcentración parcial o total de una concentración de las prohibidas por esta Ley, sin perjuicio de la multa que en su caso proceda;
- III.** Multa hasta por el equivalente a ciento setenta y cinco mil veces el salario mínimo general vigente para el Distrito Federal por haber declarado falsamente o entregado información falsa a la Comisión, con independencia de la responsabilidad penal en que se incurra;
- IV.** Multa hasta por el equivalente al diez por ciento de los ingresos del agente económico, por haber incurrido en una práctica monopólica absoluta, con independencia de la responsabilidad penal en que se incurra;
- V.** Multa hasta por el equivalente al ocho por ciento de los ingresos del agente económico, por haber incurrido en una práctica monopólica relativa;
- VI.** Multa hasta por el equivalente al ocho por ciento de los ingresos del agente económico, por haber incurrido en alguna concentración de las prohibidas por esta Ley;



**VII.** Multa hasta por el equivalente al cinco por ciento de los ingresos del agente económico, por no haber notificado la concentración cuando legalmente debió hacerse;

**VIII.** Multa hasta por el equivalente al diez por ciento de los ingresos del agente económico, por haber incumplido con las condiciones fijadas por la Comisión en términos del artículo 22 de esta Ley, sin perjuicio de ordenar la desconcentración;

**IX.** Multas hasta por el equivalente a doscientas mil veces el salario mínimo general vigente para el Distrito Federal, a quienes participen directamente en prácticas monopólicas o concentraciones prohibidas, en representación o por cuenta y orden de personas morales;

**X.** Multas hasta por el equivalente a ciento ochenta mil veces el salario mínimo general vigente para el Distrito Federal, a quienes hayan coadyuvado, propiciado, inducido o participado en la comisión de prácticas monopólicas, concentraciones prohibidas o demás restricciones al funcionamiento eficiente de los mercados en términos de esta Ley;

**XI.** Multa hasta por el equivalente al ocho por ciento de los ingresos del agente económico, por haber incumplido la resolución emitida en términos de los artículos 19 y 33 bis 2 de esta Ley o en las fracciones I y II de este artículo. Lo anterior con independencia de la responsabilidad penal en que se incurra, para lo cual la Comisión deberá denunciar tal circunstancia al Ministerio Público;

**XII.** Multa hasta por el equivalente al ocho por ciento de los ingresos del agente económico, por incumplir la orden de no ejecutar una concentración hasta en tanto la Comisión emita la resolución favorable en términos del artículo 20 de esta Ley, y

**XIII.** Multa hasta por el equivalente al diez por ciento de los ingresos del agente económico, por incumplir la orden de suspender los actos a los que se refiere el artículo 34 bis 4 de esta Ley.

Los ingresos señalados en las fracciones IV, V, VI, VII, VIII, XI, XII y XIII serán los acumulables para el agente económico directamente involucrado, excluyendo los obtenidos de una fuente de riqueza ubicada en el extranjero, así como los gravables si éstos se encuentran sujetos a un régimen fiscal preferente, para los efectos del Impuesto Sobre la Renta del último ejercicio fiscal en que se haya incurrido en la infracción respectiva. De no estar disponible, se utilizará la base de cálculo correspondiente al ejercicio fiscal anterior.

La Comisión podrá solicitar a los agentes económicos la información fiscal necesaria para determinar el monto de las multas a que se refiere el párrafo anterior, pudiendo utilizar para tal efecto los medios de apremio que esta Ley establece.

En caso de reincidencia, se podrá imponer una multa hasta por el doble de la que se hubiera determinado por la Comisión.

Se considerará reincidente al que habiendo incurrido en una infracción que haya sido sancionada, cometa otra del mismo tipo o naturaleza.

En el caso de violaciones por servidores públicos, la Comisión deberá enviar oficio debidamente fundado y motivado a la autoridad competente para que, de ser procedente, se inicie el procedimiento de responsabilidad administrativa a que hubiere lugar, sin perjuicio de la responsabilidad penal en que incurra el servidor público.

Los ingresos que se obtengan de las multas por infracciones a lo dispuesto en esta Ley, se destinarán a los programas de apoyo para la micro, pequeña y mediana empresa.

En ningún caso la Comisión administrará ni dispondrá de los fondos a que se refiere el párrafo anterior.

*Arts. 24, fracciones I y IV y 36*

*LFCE Art. 64*

*RLFCE*

*Arts. 19, fracciones V y XX, 22, fracciones V y IX, 31, fracción XVII y 32, fracción VI EOCFCE*

*Tesis aislada I.4o.A.622 A. No. Registro:*

*168,499<sup>108</sup>*

*Tesis Aislada Segunda Sala 2ª. LVII/2009. No. Registro: 167,071<sup>109</sup>*

**ARTÍCULO 35.-** La Comisión podrá aplicar las siguientes sanciones:

*Art. 24, fracción IV LFCE*

**I.** Ordenar la corrección o supresión de la práctica monopólica o concentración de que se trate;

*Arts. 8, 9, 10, 16 y 18 LFCE*

**II.** Ordenar la desconcentración parcial o total de lo que se haya concentrado indebidamente, sin perjuicio de la multa que en su caso proceda;

*Art. 20 LFCE*

**III.** Multa hasta por el equivalente a treinta mil quinientas veces el salario mínimo general vigente para el Distrito Federal por haber declarado falsamente o entregado información falsa a la Comisión, con independencia de la responsabilidad penal en que se incurra;

**III.** Multa hasta por el equivalente a siete mil quinientas veces el salario mínimo general vigente para el Distrito Federal por haber declarado falsamente o entregar información falsa a la Comisión, con independencia de la responsabilidad penal en que se incurra;

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<sup>108</sup>“COMISIÓN FEDERAL DE COMPETENCIA. JUSTIFICACIÓN Y ALCANCES DEL CONTROL JUDICIAL DE SUS RESOLUCIONES.”

<sup>109</sup>“RESPONSABILIDADES DE LOS SERVIDORES PÚBLICOS. EL ARTÍCULO 64

DE LA LEY FEDERAL RELATIVA, QUE PREVÉ EL PROCEDIMIENTO PARA LA IMPOSICIÓN DE SANCIONES ADMINISTRATIVAS, NO SE RIGE POR EL NUMERAL 20, APARTADO B, FRACCIÓN III, DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS.”

*Art. 22*  
***LFCE Art. 29, fracción***  
***VI RLFCE***

**IV.** Multa hasta por el equivalente a un millón quinientas mil veces el salario mínimo general vigente para el Distrito Federal, por haber incurrido en alguna práctica monopólica absoluta;

**IV.** Multa hasta por el equivalente a 375 mil veces el salario mínimo general vigente para el Distrito Federal, por haber incurrido en alguna práctica monopólica absoluta;

*Art. 9 LFCE*

**V.** Multa hasta por el equivalente a novecientas mil veces el salario mínimo general vigente para el Distrito Federal, por haber incurrido en alguna práctica monopólica relativa;

**V.** Multa hasta por el equivalente a 225 mil veces el salario mínimo general vigente para el Distrito Federal, por haber incurrido en alguna práctica monopólica relativa y hasta por el equivalente a 100 mil veces el salario mínimo general vigente para el Distrito Federal, en el caso de lo dispuesto por la fracción VII del artículo 10 de esta ley;

*Art. 10 LFCE*

**VI.** Multa hasta por el equivalente a novecientas mil veces el salario mínimo general vigente para el Distrito Federal, por haber incurrido en alguna concentración de las prohibidas por esta Ley;

*Arts. 16 y 20 LFCE*

**VII.** Multa hasta por el equivalente a cuatrocientas mil veces el salario mínimo general vigente para el Distrito Federal por no haber notificado la concentración cuando legalmente debió hacerse;

**VI.** Multa hasta por el equivalente a 225 mil veces el salario mínimo general vigente para el Distrito Federal, por haber incurrido en alguna concentración de las prohibidas por esta ley; y hasta por el equivalente a 100 mil veces el salario mínimo general vigente para el Distrito Federal por no haber notificado la concentración cuando legalmente deba hacerse, y

*Arts. 16 y 20 LFCE*

**VIII.** Multa hasta por el equivalente a novecientas mil veces el salario mínimo general vigente para el Distrito Federal, por haber incumplido con las condiciones fijadas por la Comisión en términos del artículo 22 de esta ley, sin perjuicio de ordenar la desconcentración;

*Art. 22 LFCE*

**IX.** Multa hasta por el equivalente a treinta mil veces el salario mínimo general vigente para el Distrito Federal, a los individuos que participen directamente en prácticas monopólicas o concentraciones prohibidas, en representación o por cuenta y orden de personas morales;

*Tesis Aislada, Segunda Sala 2.a. II/2013. No. Registro 2,002,724<sup>110</sup>*

**VII.** Multa hasta por el equivalente a siete mil quinientas veces el salario mínimo general vigente para el Distrito Federal, a los individuos que participen directamente en prácticas monopólicas o concentraciones prohibidas, en representación o por cuenta y orden de personas morales

*Arts. 8, 9, 10, 16 y 18 LFCE*

**X.** Multa hasta por el equivalente a veintiocho mil veces el salario mínimo general vigente para el Distrito Federal, a los agentes económicos o a los individuos que hayan coadyuvado, propiciado, inducido o participado en la comisión de prácticas monopólicas, concentración prohibida o demás restricciones al funcionamiento eficiente de los mercados en términos de esta Ley, y

*Arts. 8, 9, 10, 16 y 18 LFCE*

**XI.** Multa hasta por el equivalente a un millón quinientas mil veces el salario mínimo general vigente para el Distrito Federal, por haber incumplido la resolución emitida en términos del artículo 33 bis 2 de esta Ley.

*Art. 33 bis 2 LFCE*

En caso de reincidencia, se podrá imponer una multa hasta por el doble de la que corresponda, o hasta por el diez por ciento de las ventas anuales obtenidas por el infractor durante el ejercicio fiscal anterior, o hasta por el diez por ciento del valor de los activos del infractor, cualquiera que resulte más alta.

Se considerará reincidente, al que habiendo incurrido en una infracción que haya sido sancionada, cometa otra del mismo tipo o naturaleza.

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110 “COMPETENCIA ECONÓMICA. EL ARTÍCULO 35, FRACCIÓN IX, DE LA LEY FEDERAL RELATIVA, VIGENTE HASTA EL 10 DE MAYO DE 2011, NO ESTABLECE UNA PENA TRASCENDENTAL DE LAS PROHIBIDAS POR EL ARTÍCULO 22 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS.”

En el caso de violaciones por servidores públicos, la Comisión deberá enviar oficio debidamente fundado y motivado a la autoridad competente para que, de ser procedente, se inicie el procedimiento de responsabilidad administrativa a que hubiere lugar, sin perjuicio de la responsabilidad penal en que incurra el servidor público.

Los ingresos que se obtengan de las multas por infracciones a lo dispuesto en esta Ley, se destinarán a los programas de apoyo para la micro, pequeña y mediana empresa.

En ningún caso la Comisión administrará ni dispondrá de los fondos a que se refiere el párrafo anterior.

*Arts. 24 fracciones I y IV y 36  
LFCE Art. 64  
RLFCE*

Artículo reformado DOF 28-06-2006

*Tesis aislada I.4o.A.622 A. No. Registro: 168,499 <sup>111</sup>*

Artículo reformado DOF 28-06-2006, DOF 10-05-2011

**ARTÍCULO 35 bis.** En el caso de aquellos agentes económicos que, por cualquier causa, no declaren o no se les hayan determinado ingresos acumulables para efectos del Impuesto Sobre la Renta, se les aplicarán las multas siguientes:

**I.** Multa hasta por el equivalente a un millón quinientas mil veces el salario mínimo general vigente para el Distrito Federal, para las infracciones a que se refieren las fracciones IV, XI, XII y XIII del artículo 35 de la Ley;

**II.** Multa hasta por el equivalente de novecientas mil veces el salario mínimo general vigente para el Distrito Federal, para las infracciones a que se refieren las fracciones V, VI y VIII del artículo 35 de la Ley;

**III.** Multa hasta por el equivalente a cuatrocientas mil veces el salario mínimo general vigente para el Distrito Federal, para la infracción a que se refiere la fracción VII del artículo 35 de la Ley, y

**IV.** Las correspondientes conforme a las fracciones III, IX y X del artículo 35 de la Ley.

Artículo adicionado DOF 10-05-2011

**ARTÍCULO 36.-** La Comisión, en la imposición de multas, deberá considerar la gravedad de la infracción, el daño causado, los indicios de intencionalidad, la participación del infractor en los mercados; el tamaño del mercado afectado; la duración de la práctica o concentración y la reincidencia o antecedentes del infractor, así como su capacidad económica.

*Arts. 35 y 37, fracción I LFCE*

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111“COMISIÓN FEDERAL DE COMPETENCIA. JUSTIFICACIÓN Y ALCANCES DEL CONTROL JUDICIAL DE SUS RESOLUCIONES.”

**ARTÍCULO 37.**-Cuando la infracción sea cometida por quien haya sido sancionado dos veces o más en términos del artículo 35 de esta Ley, la Comisión considerará los elementos a que hace referencia el artículo 36 de esta Ley y en lugar de la sanción que corresponda, podrá resolver la desincorporación o enajenación de activos, derechos, partes sociales o acciones, por la parte que sea necesaria para que el agente económico no tenga poder sustancial en el mercado relevante.

*Art. 35*  
*LFCE Art.*  
*64 RLFCE*

*Párrafo declarado inválido, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad DOF 12-07-2007*

Para efectos del párrafo anterior, se entenderá que el infractor ha sido sancionado dos veces:

- I.** Cuando las resoluciones que impongan sanciones hayan causado estado;  
*Art. 36 LFCE*
- II.** Que al inicio del segundo o ulterior procedimiento exista resolución previa que haya causado estado, y que entre el inicio del procedimiento y la resolución que haya causado estado no hayan transcurrido más de diez años, y
- III.** Las sanciones por las prácticas monopólicas o concentraciones prohibidas se hayan realizado en el mismo mercado relevante.

Para efectos de este artículo, las sanciones impuestas por una pluralidad de prácticas monopólicas o concentraciones prohibidas por esta Ley en un mismo procedimiento se entenderá como una sola sanción.

No se considerará como sanción, para efectos de este artículo, la resolución emitida por la Comisión, conforme a lo dispuesto por el artículo 33 bis 2 de esta Ley.

*Art. 33 bis 2 LFCE*

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<sup>112</sup>“COMPETENCIA ECONÓMICA. SI UNA EMPRESA QUE FORMA PARTE DE UN GRUPO DE INTERÉS ECONÓMICO A LA QUE SE IMPUSO LA MULTA MÁXIMA LEGALMENTE PREVISTA, AL HABERSE DETERMINADO PRESUNTIVAMENTE SU CAPACIDAD ECONÓMICA ANTE SU OMISIÓN DE EXHIBIR LOS ELEMENTOS OBJETIVOS REQUERIDOS POR LA AUTORIDAD, PROMUEVE JUICIO DE AMPARO INDIRECTO CONTRA DICHA RESOLUCIÓN, A ELLA CORRESPONDE ACREDITAR CON ALGÚN MEDIO DE PRUEBA QUE LA SANCIÓN IMPUESTA, COMPARATIVAMENTE CON SUS INGRESOS, ES DESMEDIDA O MATERIALMENTE IMPOSIBLE O DIFÍCIL DE CUBRIR.”

<sup>113</sup>“COMPETENCIA ECONÓMICA. CUANDO LA COMISIÓN FEDERAL RELATIVA, AL IMPONER LA MULTA MÁXIMA



LEGALMENTE PREVISTA A UNA EMPRESA DE UN GRUPO DE INTERÉS ECONÓMICO DA ARGUMENTOS QUE SE CONSIDERAN VÁLIDOS Y SUFICIENTES PARA MOTIVARLA, ES INNECESARIO QUE RAZONE EN QUÉ MEDIDA EL MERCADO EN EL QUE PARTICIPA CADA AGENTE ECONÓMICO REPERCUTE DE MANERA PARTICULAR EN LA SANCIÓN.”

Los agentes económicos tendrán derecho a presentar programas alternativos de desincorporación en el recurso de reconsideración previsto en esta Ley.

*Párrafo declarado inválido, sólo respecto del texto tachado, por sentencia de la SCJN en Acción de Inconstitucionalidad DOF 12-07-2007*

*Artículo reformado DOF 28-06-2006*

**ARTÍCULO 37.-** En el caso de las infracciones a que se refieren las fracciones IV a VII del artículo 35 que, a juicio de la Comisión, revistan particular gravedad, ésta podrá imponer, en lugar de las multas previstas en las mismas, una multa hasta por el diez por ciento de las ventas anuales obtenidas por el infractor durante el ejercicio fiscal anterior o hasta el diez por ciento del valor de los activos del infractor, cualquiera que resulte más alta.

**ARTÍCULO 38.-** Aquellas personas que hayan sufrido daños o perjuicios a causa de una práctica monopólica o una concentración prohibida podrán interponer las acciones en defensa de sus derechos o intereses de forma independiente a los procedimientos previstos en esta Ley. La autoridad judicial podrá solicitar la opinión de la Comisión en asuntos de su competencia.

Las acciones a que se refiere el párrafo anterior podrán ejercerse de forma individual o colectiva, estas últimas en términos de lo dispuesto en el Libro Quinto del Código Federal de Procedimientos Civiles.

*Arts. 585 y 588 del CFPC*

*Artículo reformado DOF 30-08-2011*

**ARTÍCULO 38.-** Una vez que la resolución de la Comisión haya causado estado, los agentes económicos que hayan sufrido daños y perjuicios a causa de la práctica monopólica o concentración prohibida, podrán deducir su acción por la vía judicial, para obtener una indemnización por daños y perjuicios. Al efecto, la autoridad judicial podrá solicitar a la Comisión la estimación de los daños y perjuicios.

No procederá acción judicial o administrativa alguna con base en esta Ley, fuera de las que la misma establece.

*Artículo reformado DOF 28-06-2006*

**ARTÍCULO 38.-** Los agentes económicos que hayan demostrado durante el procedimiento haber sufrido daños y perjuicios a causa de la práctica monopólica o concentración (lícita, podrán deducir su acción por la vía judicial, para obtener una indemnización hasta por

daños y perjuicios. Al efecto, la autoridad judicial podrá considerar la estimación de los daños y perjuicios que haya realizado la propia Comisión.

**ARTÍCULO 38 bis.** El cumplimiento y la ejecución de las resoluciones de la Comisión, incluyendo las que impongan condiciones conforme a la fracción I del artículo 19 y las que admitan compromisos conforme al artículo 33 bis 2, se tramitarán por la vía incidental.

*Art. 19, fracción V EOCFCE*

La Comisión tendrá veinte días para emitir resolución, contados a partir del día siguiente a aquél en que concluyó la sustanciación del incidente.

Artículo adicionado DOF 10-05-2011

## **Capítulo VII**

### **Del Recurso de Reconsideración**

**ARTÍCULO 39.-** Contra las resoluciones dictadas por la Comisión con fundamento en esta Ley, se podrá interponer, ante la propia Comisión, recurso de reconsideración, dentro del plazo de treinta días siguientes a la fecha de su notificación.

El recurso de reconsideración tiene por objeto revocar, modificar o confirmar la resolución reclamada y los fallos que se dicten contendrán la fijación del acto impugnado, los fundamentos legales en que se apoye y los puntos de resolución. El Reglamento de la presente Ley establecerá los términos y requisitos para la tramitación y sustanciación del recurso.

La interposición del recurso se hará mediante escrito dirigido al Presidente de la Comisión, en el que se deberá expresar el nombre y domicilio del recurrente y los agravios, acompañándose los elementos de prueba que se consideren necesarios, así como las constancias que acrediten la personalidad del promovente.

La interposición del recurso suspenderá la ejecución de la resolución impugnada. Cuando se trate de la suspensión de las sanciones a que se refieren las fracciones I y II del artículo 35 y se pueda ocasionar daño o perjuicio a terceros, la suspensión se concederá si el promovente otorga garantía bastante para reparar el daño e indemnizar los perjuicios si no obtiene resolución favorable.

La Comisión dictará resolución y la notificará en un término que no excederá de 60 días contados a partir de la fecha en que se haya interpuesto el recurso. El silencio de la Comisión significará que se ha confirmado el acto impugnado.

El juicio ordinario administrativo ante los Juzgados de Distrito y Tribunales especializados en materia de competencia económica procede contra resoluciones consistentes en actos decisorios terminales dentro de la etapa generadora del acto administrativo.

En el caso de las resoluciones referidas en el párrafo anterior será optativo para la parte que se sienta agraviada promover el juicio ordinario administrativo o el recurso de reconsideración; y contra la resolución que recaiga a este último también será procedente el juicio ordinario administrativo.

El plazo de interposición del juicio ordinario administrativo, será de treinta días a partir de la notificación de la resolución respectiva.

*Art. Segundo Transitorio EOCFCE*

**ARTÍCULO 39.**-Contra las resoluciones dictadas por la Comisión con fundamento en esta ley, se podrá interponer, ante la propia Comisión, recurso de reconsideración, dentro del plazo de 30 días hábiles siguientes a la fecha de la notificación de tales resoluciones.

*Arts. 71 y 72 RLFCE*

El recurso tiene por objeto revocar, modificar o confirmar la resolución reclamada y los fallos que se dicten contendrán la fijación del acto impugnado, los fundamentos legales en que se apoye y los puntos de resolución. El reglamento de la presente ley establecerá los términos y demás requisitos para la tramitación y sustanciación del recurso.

La interposición del recurso se hará mediante escrito dirigido al Presidente de la Comisión, en el que se deberá expresar el nombre y domicilio del recurrente y los agravios, acompañándose los elementos de prueba que se consideren necesarios, así como las constancias que acrediten la personalidad del promovente.

*Arts. 8º segundo párrafo y 17 último párrafo RLFCE*

La interposición del recurso suspenderá la ejecución de la resolución impugnada. Cuando se trate de la suspensión de las sanciones a que se refieren las fracciones I y II del artículo 35 y se pueda ocasionar daño o perjuicio a terceros, el recurso se concederá si el promovente otorga garantía bastante para reparar el daño e indemnizar los perjuicios si no obtiene resolución favorable.

La Comisión dictará resolución y la notificará en un término que no excederá de 60 días contados a partir de la fecha en que se haya interpuesto el recurso. El silencio de la Comisión significará que se ha confirmado el acto impugnado.

*Jurisprudencia. No. Registro: 183,333* <sup>114</sup>

*Jurisprudencia. No. Registro: 183,334* <sup>115</sup>

*Jurisprudencia. No. Registro: 184,566* <sup>116</sup>

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114 “COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA. EL JUEZ DE DISTRITO NO ESTÁ OBLIGADO A RECABAR ACTAS DE SESIÓN, DICTÁMENES, OPINIONES, INFORMES Y ESTUDIOS ELABORADOS POR SUS DIRECCIONES GENERALES DE ASUNTOS JURÍDICOS Y ESTUDIOS ECONÓMICOS, CUANDO CAREZCAN DE IDONEIDAD PARA EL FIN PROPUESTO. ”

115 “COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA. CARACTERÍSTICAS Y ALCANCES DE LAS ACTAS DE

SESIÓN, DICTÁMENES, OPINIONES, INFORMES Y ESTUDIOS ELABORADOS  
POR SUS DIRECCIONES GENERALES DE  
ASUNTOS JURÍDICOS Y ESTUDIOS  
ECONÓMICOS. ”

*Jurisprudencia. No. Registro: 172,399* <sup>117</sup>  
*Jurisprudencia. No. Registro: 172,585* <sup>118</sup>  
*Jurisprudencia. No. Registro: 167,769* <sup>119</sup>  
*Tesis aislada I.13o.A.138 A. No. Registro:*  
*171,149* <sup>120</sup>

*Tesis aislada TCC I.4o.A.577. No.*

*Registro: 172,586* <sup>121</sup>

*Tesis aislada Pleno P. CLXXVI/2000. No. Registro: 190,688* <sup>122</sup>

*Tesis aislada Pleno, P. CXII/2000. No. Registro: 191,431* <sup>123</sup>

*Tesis aislada TCC I.13o.A.67A. No.*

*Registro: 185,502* <sup>124</sup>

*Tesis aislada TCC VIII.5°5 K. No. Registro: 168,483* <sup>125</sup>

Artículo adicionado DOF 10-05-2011

## TRANSITORIOS

**PRIMERO.-** La presente ley entrará en vigor a los 180 días de su publicación en el Diario Oficial de la Federación.

**SEGUNDO.-** La primera designación de los cinco comisionados a que se refiere esta ley, por única vez, se hará mediante nombramientos por plazos de dos, cuatro, seis, ocho y diez años, respectivamente. Los subsecuentes se harán en los términos de esta ley.

*Art. 25LFCE*

**TERCERO.-** Se abrogan:

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<sup>116</sup> “SUSPENSIÓN PROVISIONAL. ES PROCEDENTE CONTRA LA EJECUCIÓN DE LAS MULTAS ADMINISTRATIVAS IMPUESTAS POR LA COMISIÓN FEDERAL DE COMPETENCIA PARA SANCIONAR LAS CONDUCTAS SEÑALADAS EN EL ARTÍCULO 10, FRACCIÓN VII, DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA, EN RELACIÓN CON EL ARTÍCULO 7o., FRACCIÓN V, DE SU REGLAMENTO.”

<sup>117</sup> “RECURSO DE RECONSIDERACIÓN PREVISTO EN EL ARTÍCULO 39 DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA. ES OBLIGATORIO AGOTARLO ANTES DE ACUDIR A LAS VÍAS JURISDICCIONALES CORRESPONDIENTES, CONTRA LA DETERMINACIÓN DEL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS.”

<sup>118</sup> “COMPETENCIA ECONÓMICA. ETAPAS DEL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS SEGUIDO POR LA COMISIÓN FEDERAL RELATIVA (LEGISLACIÓN VIGENTE HASTA EL 28 DE JUNIO DE 2006).”

<sup>119</sup> “COMISIÓN FEDERAL DE TELECOMUNICACIONES. SU PRESIDENTE ESTÁ OBLIGADO A CUMPLIR Y HACER CUMPLIR LAS MEDIDAS CAUTELARES DECRETADAS POR LOS ÓRGANOS JURISDICCIONALES”

<sup>120</sup> “INTERÉS JURÍDICO EN EL AMPARO. LO TIENE EL DENUNCIANTE DE

UNA PRÁCTICA MONOPÓLICA RELATIVA PARA RECLAMAR LA RESOLUCIÓN DE LA COMISIÓN FEDERAL DE COMPETENCIA EN EL RECURSO DE RECONSIDERACIÓN QUE ESTIMA VIOLATORIA DE SUS GARANTÍAS INDIVIDUALES.”

121 “COMPETENCIA ECONÓMICA. EL PROCEDIMIENTO ADMINISTRATIVO DE INVESTIGACIÓN Y AUDIENCIA DE CARÁCTER COMPLEJO CONCLUYE CON LA DECISIÓN AL RECURSO, POR LO QUE EL JUICIO DE AMPARO ES IMPROCEDENTE CONTRA LAS RESOLUCIONES INTERMEDIAS DICTADAS POR LA COMISIÓN FEDERAL DE COMPETENCIA.”

122 “COMPETENCIA ECONÓMICA. EL ARTÍCULO 39 DE LA LEY FEDERAL CORRESPONDIENTE QUE ESTABLECE LA POSIBILIDAD DE INTERPONER EL RECURSO DE RECONSIDERACIÓN EN CONTRA DE LAS RESOLUCIONES QUE DICTE LA COMISIÓN FEDERAL DE COMPETENCIA, NO VIOLA EL PRINCIPIO DE DIVISIÓN DE PODERES.”

123 “COMPETENCIA ECONÓMICA. LAS CARACTERÍSTICAS DEL PROCEDIMIENTO ESTABLECIDO EN LA LEY FEDERAL CORRESPONDIENTE, LO IDENTIFICAN COMO ADMINISTRATIVO Y NO COMO CIVIL.”

124 “REQUERIMIENTO DE INFORMACIÓN DENTRO DE UN PROCEDIMIENTO DE COMPETENCIA ECONÓMICA. LA COMISIÓN FEDERAL DE COMPETENCIA, CONFORME A LOS ARTÍCULOS 22, FRACCIÓN VII, 25, FRACCIÓN VIII Y 28, FRACCIÓN VIII, DE SU REGLAMENTO INTERIOR, FACULTA PARA TALES EFECTOS AL DIRECTOR GENERAL DE ASUNTOS JURÍDICOS, MEDIANTE ACUERDO DELEGATORIO DE FACULTADES.”

125 “DEFINITIVIDAD EN EL AMPARO. ANTE LA IMPOSIBILIDAD DE CONOCER CON CERTEZA EL RECURSO O MEDIO ORDINARIO DE DEFENSA MEDIANTE EL CUAL PUEDA MODIFICARSE, REVOCARSE O NULIFICARSE EL ACTO RECLAMADO, ES INNECESARIO CUMPLIR CON EL MENCIONADO PRINCIPIO.”

**I.-** La Ley Orgánica del artículo 28 Constitucional en materia de Monopolios publicada en el Diario Oficial de la Federación el 31 de agosto de 1934 y sus reformas;

**II.-**La Ley sobre Atribuciones del Ejecutivo Federal en Materia Económica, publicada en el Diario Oficial de la Federación el 30 de diciembre de 1950 y sus reformas;

**III.-**La Ley de Industrias de Transformación, publicada en el Diario Oficial de la Federación el 13 de mayo de 1941; y

**IV.-**La Ley de Asociaciones de Productores para la Distribución y Venta de sus Productos, publicada en el Diario Oficial de la Federación el 25 de junio de 1937.

En lo que no se opongan a la presente ley, continuarán en vigor las disposiciones expedidas con base en los ordenamientos que se abrogan, hasta en tanto no se deroguen expresamente.

México, D.F., a 18 de diciembre de 1992.- Dip. Salvador Abascal Carranza, Presidente.- Sen. Carlos Sales Gutiérrez, Presidente.- Dip. Luis Pérez Díaz, Secretario.- Sen. Roberto Suárez Nieto, Secretario.- Rúbricas."

En cumplimiento de lo dispuesto por la fracción I del Artículo 89 de la Constitución Política de los Estados Unidos Mexicanos y para su debida publicación y observancia, expido el presente Decreto en la residencia del Poder Ejecutivo Federal, en la Ciudad de México, Distrito Federal, a los veintidós días del mes de diciembre de mil novecientos noventa y dos. Carlos Salinas de Gortari.- Rúbrica.- El Secretario de Gobernación, Fernando Gutiérrez Barrios.- Rúbrica.

**DECRETO por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal de Competencia Económica.**

**Publicado en el Diario Oficial de la Federación el 28 de junio de 2006**

**ARTÍCULO ÚNICO.** Se reforman los artículos 2; 3; 4; 5; 6; 7; 9, fracción II; 10; 14; 18; 20; 21, fracciones II, III y IV; 22; 24; 25; 26; 27; 28; 30; 31; 32; 33; 35; 37 y 38; se adicionan los artículos 21 bis; 31 bis; 33 bis; 33 bis 1; 33 bis 2; 33 bis 3; 33 bis 4; 34 bis; 34 bis 1; 34 bis 2; 34 bis 3; y se deroga el artículo 15, todos de la Ley Federal de Competencia Económica, para quedar como sigue:

[...]

#### **TRANSITORIOS**

**ARTÍCULO PRIMERO.** El presente Decreto entrará en vigor al día siguiente de su publicación en el Diario Oficial de la Federación.



**ARTÍCULO SEGUNDO.** A las infracciones cometidas antes de la entrada en vigor del presente Decreto les serán aplicables las sanciones previstas por la Ley vigente al momento de su comisión.

**ARTÍCULO TERCERO.** Para efectos del artículo 37 de este Decreto, sólo computarán las sanciones impuestas a los hechos que ocurran con posterioridad a la entrada en vigor de este Decreto.

**ARTÍCULO CUARTO.** Los comisionados nombrados con anterioridad a la entrada en vigor de este Decreto continuarán en su encargo hasta la conclusión del periodo para el que fueron designados.

Los futuros nombramientos de los comisionados se harán conforme al artículo 26 del presente Decreto.

Las modificaciones a los artículos 26, 27 y 28 serán aplicables sólo a los nombramientos posteriores a la entrada en vigor de este Decreto.

**ARTÍCULO QUINTO.** Los procedimientos que se encuentren en trámite a la entrada en vigor del presente Decreto, se sustanciarán conforme a las disposiciones vigentes al momento de su inicio.

**ARTÍCULO SEXTO.** El Reglamento de esta Ley deberá expedirse dentro de los 180 días siguientes a la publicación del presente Decreto.

México, D.F., a 27 de abril de 2006.- Dip. Álvaro Elías Loredo, Vicepresidente en funciones de Presidente.- Sen. Enrique Jackson Ramírez, Presidente.- Dip. Marcos Morales Torres, Secretario.- Sen. Sara I. Castellanos Cortés, Secretaria.- Rúbricas."

En cumplimiento de lo dispuesto por la fracción I del Artículo 89 de la Constitución Política de los Estados Unidos Mexicanos, y para su debida publicación y observancia, expido el presente Decreto en la Residencia del Poder Ejecutivo Federal, en la Ciudad de México, Distrito Federal, a los veintiséis días del mes de junio dos mil seis.- Vicente Fox Quesada.- Rúbrica.- El Secretario de Gobernación, Carlos María Abascal Carranza.- Rúbrica.

**DECRETO por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal de Competencia Económica, del Código Penal Federal y del Código Fiscal de la Federación.**

**Publicado en el Diario Oficial de la Federación el 10 de mayo de 2011**

**ARTÍCULO PRIMERO.** Se REFORMAN los artículos 11; 13, primer párrafo, fracciones I, IV, V y VI; 21 bis; 24, fracciones I, II, IV y X; 25; 28, párrafo primero y las fracciones

III y V; 29; 30, párrafos primero, sexto y séptimo; 31, primer párrafo, fracciones I, II, V, VI, VII; 32, párrafo cuarto; 33, primer párrafo y fracción VI; 33 bis 2, 33 bis 3, párrafos primero, segundo, tercero, cuarto, quinto; 33 bis 3, fracción I; 35 y 39; se ADICIONAN los artículos 13 bis; 21 bis 1; 24, fracciones IV bis, XIII bis, XVIII bis, XVIII bis 1, XVIII bis 2, XVIII bis 3, y un último párrafo; 28, párrafos segundo, tercero y dos párrafos a la fracción III y los incisos a) a f), un último párrafo y una fracción VII; 31, párrafo segundo y último; 31 bis último párrafo; 34 bis 4; 35 bis, y 38 bis, y se DEROGAN las fracciones III y IV del artículo 31 todos de la Ley Federal de Competencia Económica, para quedar como sigue:

[...]

## **TRANSITORIOS**

**ARTÍCULO PRIMERO.** El presente decreto entrará en vigor al día siguiente al de su publicación en el Diario Oficial de la Federación, salvo lo dispuesto en los artículos tercero, cuarto y sexto transitorios siguientes.

**ARTÍCULO SEGUNDO.** En un plazo no mayor a seis meses a partir de la entrada en vigor del presente decreto, el Pleno publicará los criterios técnicos a que hace referencia el artículo 24, fracción XVIII bis, incisos a) a j) de la Ley Federal de Competencia Económica.

**ARTÍCULO TERCERO.** El artículo 28, párrafos primero y segundo, de la Ley Federal de Competencia Económica entrará en vigor una vez que concluya el periodo actual del Presidente de la Comisión.

**ARTÍCULO CUARTO.** Las investigaciones, visitas de verificación, procedimientos y cualquier otro asunto que se encuentren en trámite a la entrada en vigor del presente Decreto, se sustanciarán conforme a las disposiciones vigentes al momento de su inicio. Las infracciones y delitos cometidos con anterioridad a la fecha de entrada en vigor del presente Decreto, se sancionarán conforme a la Ley vigente al momento de su realización.

**ARTÍCULO QUINTO.** Los recursos necesarios para la implementación del presente Decreto, serán con cargo al presupuesto autorizado de la Comisión Federal de Competencia.

**ARTÍCULO SEXTO.** La reforma al artículo 39 de la Ley Federal de Competencia Económica entrará en vigor una vez que los juzgados especializados en materia de competencia económica queden establecidos por el Poder Judicial de la Federación y se expidan las reglas procesales aplicables al juicio ordinario administrativo en las disposiciones legales correspondientes, en un plazo que no exceda de 180 días naturales a la entrada en vigor de este Decreto.

**ARTÍCULO SÉPTIMO.** Se derogan las disposiciones que se opongan al presente Decreto.

México, D.F., a 28 de abril de 2011.- Dip. Jorge Carlos Ramirez Marín, Presidente.- Sen. Manlio Fabio Beltrones Rivera, Presidente.- Dip. María de Jesús Aguirre Maldonado, Secretaria.- Sen. Martha Leticia Sosa Govea, Secretaria.- Rúbricas."

En cumplimiento de lo dispuesto por la fracción I del Artículo 89 de la Constitución Política de los Estados Unidos Mexicanos, y para su debida publicación y observancia, expido el presente Decreto en la Residencia del Poder Ejecutivo Federal, en la Ciudad de México, Distrito Federal, a nueve de mayo de dos mil once.- Felipe de Jesús Calderón Hinojosa.- Rúbrica.- El

# MONGOLIA

## THE LAW OF MONGOLIA ON COMPETITION (REVISED VERSION)

### CHAPTER ONE. GENERAL PROVISIONS

#### **Article 1. Purpose of the law**

1.1. The purpose of this law is to establish conditions of fair competition on the market by corporate entities, prevent and prohibit any activities of market monopolization or hostility to competition and defining the legal basis of the institution regulating the competition.

#### **Article 2. Legislation on competition**

2.1. The legislation on competition shall comprise the Constitution of Mongolia, Civil Code, this law and other legislative acts issued in conformity with them.

2.2. Where an international treaty of Mongolia stipulates otherwise, the provisions of the international treaty shall prevail.

2.3. The Law on Competition shall be considered as a law regulating specifically the provision specified in 3.3 of the Civil Code.

#### **Article 3. Scope of the law**

3.1. The scope of this law shall apply to state registered business entities, state, local self-governance and administrative institutions.

3.2. The scope of this law shall apply where it is proven by evidence that a business entity engages outside of the border of Mongolia in activities prohibited by this law and that such activities affects the markets of Mongolia.

3.3. Actions and conditions implemented within the legislation on protection of intellectual property shall not be considered as a restriction of competition.

#### **Article 4. Definitions in the law**

4.1. The definitions used in this law shall have the following meaning:

4.1.1. “product” shall mean any type of an item, payment instrument, work, service or transferrable right intended for selling or trading on the market or converting it to another type of circulation;

4.1.2. “market” shall mean a territory on which a supply and sale of a certain product proceed;

4.1.3. “business entity” shall mean a profit or non-profit legal entity, organization without a right of the legal entity or individual engaging in economic activities;

4.1.4. “competitor” shall mean a business entity providing supply and sale in the market of a certain type of a product;

4.1.5. “monopolizing activity” shall mean pressuring the consumers and restricting the competition on an actual basis by limiting the quantity, amount and price of a certain product sold on the market for the purpose of constraining the conditions for other business entities to enter the market and forcing them out of the market with illegal use of the dominant position;

4.1.6. “related party” shall mean a business entity connected with another business entity by a relationship specified in 6.1.1-6.1.3 of the Law on Corporate Income Tax;

4.1.7. “scope of a product” shall mean a group of mutually substituting products;

4.1.8. “geographic boundary of a market” shall mean a territory in which a possibility to purchase a certain product from another market is economically limited;

4.1.9. “market concentration” shall mean a percentage of a certain product on the market sold by a business entity solely or jointly with other entities or by the related entity;

4.1.10. “market power” shall mean a capacity of a business entity’s certain product to impact the market.

#### **Article 5. Natural monopoly and dominant business entities**

5.1. A business entity shall be considered as having a natural monopoly where it operates on the market in which an average social cost may be the lowest when only one entity supplies a certain product to the market.

5.2. A business entity shall be considered as having a dominant position where it solely or jointly with other entities or its related entity operates on the market with a certain product and occupies one third or more percent of the production and sale.

5.3. An business entity which does not satisfy the requirement specified in 5.2 of this law, but is capable of constraining the conditions for other business entities to enter the market or forcing them out of the market shall be considered as having a dominant position depending on the scope of the product, geographic boundary of the market, market concentration and market power.

## **CHAPTER TWO. REGULATION OF COMPETITION**

### **Article 6. Regulating the activities of the business entity with the natural monopoly**

6.1. The Agency for Fair Competition and Consumers specified in Article 14 of this law shall administer the following regulation in activities of the business entity with the natural monopoly:

6.1.1. Regulating the changes to the quantity and amount of the certain product supplied on the market in relation with its capacity;

6.1.2. Granting the permission on change in the price of the product being sold depending on the actual cost;

6.2. Business entities with the natural monopoly shall be prohibited from engaging in activities specified in 7.1 of this law.

### **Article 7. Illegal use of the dominant position**

7.1. Dominant business entities shall not engage in the following monopolizing activities:

7.1.1. creating an artificial shortage of a certain product, halting the production and sale of a product and limiting the amount;

7.1.2. setting an unjustifiably high price for the product;

7.1.3. demanding additional sale requirements from business entities, selling products of the same type with differing prices on the market and refusing the sale unjustifiably. This shall not apply to changes in the price of products including the actual transportation costs due to the regional location and rewards given to wholesale or retail purchasers by producers and suppliers;

7.1.4. selling the products for the price below the actual costs for the purpose of constraining other business entities in entering the market and forcing them out of the market;

7.1.5. refusing to establish economic relations without actual economic and technical justifications and setting unjustifiable criteria;

7.1.6. setting the price and territory of the product's resale;

7.1.7. forcing a condition during the sale of products to avoid the purchase of competitors' products;

7.1.8. demanding from others to sell it the products with a condition of a possible decrease in production and sale of the certain product;

7.1.9. demanding unjustifiably from a business entity the transfer to itself of financial instruments, property, their entitlements and workforce;

7.1.10. demanding the reorganization of the competitor through merger with itself, consolidation, division and separation;

7.1.11. demanding the inclusion into contracts and agreements on the certain type of a product the provisions unrelated to articles of such contracts and agreements and setting conditions discriminatory to other participants.

7.1.12. attaching goods that are not included in a set in selling goods and products;

7.2. The Government shall adopt the regulation based on international best practices, related to establishment of excessive high prices of products by the dominant business entities.

### **Article 8. Reorganization of the dominant legal entity through merger and consolidation and purchase of shares of other companies**

8.1. Dominant business entities shall submit an application to the Authority for Fair Competition and Consumer Protection where they intend to restructure through merger and amalgamation, purchase more than twenty percent of common shares or more than fifteen percent of preferred shares of the competitor company, which sells same products in the market or merge and amalgamate with related business entities.

8.2. The Authority for Fair Competition and Consumer Protection shall review the application and issue a conclusion within thirty days since receiving it. This period may be extended by up to thirty days where necessary and AFCCP can enforce the additional information.

8.3. The Authority for Fair Competition and Consumer Protection shall review the application and issue a conclusion of refusal where it considers that there will be circumstances restricting the competition and the Government shall adopt a detailed regulation to issue such conclusion.

8.4. The conclusion of refusal by the Authority for Fair Competition and Consumer Protection shall be the grounds for denying the registration of the legal entity in the state registry.

8.5. .8.3 of this law may not be applied where it is proven that the benefit to the economy of the country exceeds the damage to the competition.

### **Article 9. Prohibiting in the governance position of the competing legal entity**

9.1. The management of the dominant legal entity shall be prohibited to work concurrently in the governance position of the competing legal entity.

### **Article 10. Division and separation of the dominant legal entity**

10.1. The court shall upon a claim of the Authority for Fair Competition and Consumer Protection decide on the decision to reorganize the dominant legal entity by division or separation where it is determined that it has engaged in a monopolizing activity twice or more in a single year and has repeated the activity despite being subject to legal sanctions.

### **Article 11. Prohibiting the establishment of contracts and agreements (cartels) aimed at restriction of competition**

11.1. Business entities shall be prohibited from entering into the following contracts and agreements aimed at restriction of competition:

11.1.1. agreeing to set prices of products;

11.1.2. dividing the market by the territory, production, service, sale, trademark, type and consumers;

11.1.3. restricting the production, supply, sale, shipping, transportation and market accessibility of products, investment, technical and technological renovation;

11.1.4. agreeing in advance on the price of products and other conditions and criteria when participating in the activity of procuring products, works and services by a tender, auction and state or locally owned property.

11.2. The following contracts and agreements (cartels) established between business entities shall be prohibited where they contradict the public interests or create circumstances restricting the competition:

11.2.1. refusing to establish economic relations without economic or technical justifications;

11.2.2. limiting the sale or purchase of products by third parties;

11.2.3. refusing in cooperation to enter into deals and agreements important to competition;

11.2.4. impeding the competitor to accede into membership of an institution for the purpose of profitable operation of the business.

11.3. Business entities shall be prohibited to support and participate in any form in the contracts and agreements specified in 11.1 and 11.2 of this law.

11.4. An entity which submits to the Authority for Fair Competition and Consumer Protection the authentic information and relevant evidence on entities that have entered into or have made a decision to enter into contracts and agreements stipulated in 11.1 and 11.2 of this law shall receive a monetary reward equivalent to five percent of the monetary sum of the fine imposed on the entity committing the violation. The Government shall adopt the regulation on provision of the reward.

### **Article 12. Activities aimed at restriction of competition**

12.1. Business entities shall be prohibited from the following activities aimed at restriction of competition:

12.1.1. slandering the reputation of the competitor and its products and disseminating false, contradictory or distorted information leading the competitor to losses;

12.1.2. distributing false or contradictory information about own products or confusing others with distortion of the truth;



- 12.1.3. launching advertisement that has negative consequences for competition;
- 12.1.4. using willfully the trademark, logos, name and product quality guarantees of other business entities and copying individual names and packaging of products;
- 12.1.5. selling, publishing and distributing to others the scientific, technological, industrial and commercial information without the permission of the patent holder or author;
- 12.1.6. concealing the deficiencies of products and qualities harmful to lives and health of people and environment;
- 12.1.7. demanding not to purchase products of the competitor when selling own products;
- 12.1.8. distributing false information that there is a discount or reward during the sale of a certain product and organizing intentionally false actions with advance agreement to provide the reward to another entity;
- 12.1.9. diverting the competitor from actual circumstances and administering pressure on them when participating in the activity of procuring products, works and services by a tender, auction and state or locally owned property;
- 12.1.10. using commercial methods that are illegal and unlawfully harm the consumers.

**Article 13. Prohibiting the state (administrative institutions), local self-governance and local administrative institutions to restrict the competition**

13.1. State administrative institutions, local self-governance and local administrative institutions shall be prohibited to provide permission, licenses and rights related to business activities, maintain a registry and collect fees and payments in cases other than those stipulated in the law.

13.2. State administrative institutions, local self-governance and local administrative institutions shall not engage in the following activities unless the law provides otherwise:

13.2.1. prohibiting or restricting a business entity to engage in a certain type of activity, manufacturing or selling products;

13.2.2. prohibiting or restricting a business entity to sell products from one market to another;

13.2.3. prohibiting or restricting the competition on the market and forcing it out of the market;

13.2.4. reducing the price of products or aiming to keep it at one level;

13.2.5. dividing the market by the territory, production, service, sale, trademark, type and consumers;

13.2.6. giving the products of the business entity as a loan to other organizations and business entities;

13.2.7. granting an advantage to any business entity.

13.3. Regulation, provision of loans and aid by the Government and its authorized institutions intended for establishing the proper level of demand and supply of products and ensuring the stability of consumers' well being on compensating the damages occurring from sudden or force majeure circumstances, overcoming the economic crisis and approving the main strategic products, including, names and types of strategic reserve products and materials which are declared by Parliament according to the State reserving law, shall not be considered as restriction of competition.

13.4. The Government may for a certain period administer a restriction on the license of a certain activity type for the purpose of ensuring the public interests and national security and establishing requirements of an effective competition.

### **CHAPTER THREE.**

#### **LEGAL STATUS OF THE AUTHORITY FOR FAIR COMPETITION AND CONSUMER PROTECTION**

##### **Article 14. Authority for Fair Competition and Consumer Protection**

14.1. The Authority for Fair Competition and Consumer Protection shall be the state administrative institution in charge of supervising the implementation of the legislation on competition, applying the competition policy on a national level and protecting the rights and interests of business entities and consumers.

14.2. The Government shall adopt the charter of the Authority for Fair Competition and Consumer Protection .

14.3. The primary functions specified in this law shall be exercised independently and autonomously from any entities.

14.4. General state inspectors, senior state inspectors, state inspectors and regional state inspectors shall work at the Authority for Fair Competition and Consumer Protection.

14.5. The chief of the Authority for Fair Competition and Consumer Protection shall be the general state inspector and shall appoint or remove senior state inspectors and state inspectors.

14.6. The Authority for Fair Competition and Consumer Protection shall correspond with the President of Mongolia, Parliament and Government through their work offices and directly with other organizations, officials and citizens.

14.7. The Authority for Fair Competition and Consumer Protection shall report its work annually to the Government.

14.8. The state shall finance the expenses of the Authority for Fair Competition and Consumer Protection from the state budget and ensure the economic guarantee of its operation.

14.9. A budget of the year shall be prohibited to be approved lower than that of the previous year.

14.10. The Authority for Fair Competition and Consumer Protection shall have its symbols denoting the specifics of the work and the chief of the Authority for Fair Competition and Consumer Protection shall adopt the regulation on their description, design and usage.

14.11. The Authority for Fair Competition and Consumer Protection shall use seals, stamps and letterheads specified in the approved regulation.

14.12. Activities of political parties, coalitions, unions, movements and religion shall be prohibited in the office of the Authority for Fair Competition and Consumer Protection.

14.13. The office of the Authority for Fair Competition and Consumer Protection shall be under the state protection.

**Article 15. Powers of the Authority for Fair Competition and Consumer Protection**

15.1. The Authority for Fair Competition and Consumer Protection shall implement the following powers according to its functions:

15.1.1. introducing the culture of competition, devising programs on organization of the unfair competition prevention work, ensuring the methodological guidance and supervising the implementation;

15.1.2. creating conditions for competition, devising and implementing the state policy on its protection;

15.1.3. preparing and deciding opinions on improving the legislation on competition;

15.1.4. inspecting business entities and organizations on implementation of the competition legislation regardless of the ownership type, producing conclusions and exempting from administrative penalties;

15.1.5. addressing authorized institutions on other illegal actions revealed during the inspection but not pertaining to the scope of powers and delivering the relevant documents;

15.1.6. determining natural monopoly and dominant business entities and imposing supervision on them. The Government shall adopt the regulation on determining natural monopoly and dominant business entities;

15.1.7. submitting to the relevant upper institutions, officials and administrative court the proposal to annul decisions of the state, local self-governance and local administrative institutions that breach the legislation on competition;

15.1.8. obtaining freely and immediately the data, information, researches, explanations, definitions, financial and other documents required for creating circumstances for competition and researching the market situation from business entities, state, local self-governance and local administrative institutions and officials;

15.1.9. informing publicly and propagating the decisions issued in relation with creating circumstances for competition;

15.1.10. involving in the inspection and research work the professional inspection institution, other organizations and their officials and individuals;

15.1.11. taking actions to ensure the safety of the own institution and employees;

15.1.12. accepting and resolving the requests and complaints within the scope of powers;

15.1.13. requesting the relevant institution and deciding the matter of taking the witnesses and other entities which provided assistance to its activities under the protection of the police institution, where necessary;

15.1.14. cooperating and sharing information with foreign and international organizations of the similar aim on creating circumstances for competition, conducting inspections and on matters of competition;

15.1.15. providing opinions and conclusions to the drafts of proposals and decisions of authorized institutions on privatization of state owned legal entities;

15.1.16. reviewing and resolving the complaints regarding decisions of state inspectors;

15.1.17. adopting the code of ethics of state inspectors.

**Article 16. Meetings of the Authority for Fair Competition and Consumer Protection**

16.1. The main form of decision making activity at the Authority for Fair Competition and Consumer Protection shall be meetings.

16.2. Decisions shall be issued by the majority of votes of members participating in the meeting and the chairman of the meeting shall resolve the matter where the votes of members participating in the meeting become equal.

16.3. The decision of the Agency of the Fair Competition and Consumers shall have the signature of the chief.

16.4. Meetings shall convene no less than once a month and have the procedure of session.

16.5. Where the chief and members of the Agency for Fair Competition and Consumers have family relations with the entity which matter is discussed in the meeting, they shall notify prior to the meeting and shall not participate in the deliberation of the matter in the meeting and in decision making process.

16.6. The meeting shall be valid where a majority of total members are present in the meeting.

16.7. A meeting may convene in the period other than that specified in 16.4 of this law by the written request of no less than three members and by the decision of the chief of the Agency for Fair Competition and Consumers.

16.8. The decision of the meeting shall issue in the form of a resolution.

**Article 17. Appointing the chief and members of the Authority for Fair Competition and Consumer Protection**

17.1. The Agency for Fair Competition and Consumers shall work by the principle of collective management and have the composition of the chief and eight members, two of which are staff and six are non-staff members.

17.2. Government shall appoint or remove the chief, two staff and three non-staff members nominated by Prime Minister and the three non-staff members nominated each by the Mongolian National Chamber of Commerce and Industry, Mongolian Trade Union and the non-governmental organization that works to protect the rights of consumers.

17.3. The following people shall not be nominated to the position of the chief and members:

- 17.3.1. political civil servants;
- 17.3.2. governing officials of political parties;
- 17.3.3. members of the Constitutional Court, judges of all levels and prosecutors;
- 17.3.4. persons working in a state owned or private entity;
- 17.3.5. governing officials of non-governmental organizations engaging in professional business activities.

17.4. The chief shall be a citizen of Mongolia with the completed education in either economics or law having worked by the profession no less than five years including no less than three years in a state institution.

17.5. The member shall be a citizen of Mongolia with the completed education in either economics or law having worked by the profession no less than three years including no less than one year in a state institution;

17.6. Where the Government does not support the nominee, the authorized entity specified in 17.2 of this law shall nominate another person in ten business days and the Government shall review and appoint the person in fifteen business days since receiving the nomination.

**Article 18. Term of office of the chief and members of the Authority for Fair Competition and Consumer Protection**

18.1. The term of office of the chief and members shall be four years and may be reappointed once.

18.2. The term of office of the chief and members shall begin by the issue of the Government's decision on appointment and end by the appointment of the next chief and members.

**Article 19. Powers of the chief of the Agency for Fair Competition and Consumers**

19.1. The chief shall implement the following powers:

- 19.1.1. representing in domestic and foreign relations;
- 19.1.2. participating regularly in meetings of the Government and in the combined session of the Grand State Assembly and meetings of standing committees, where necessary, and expressing the opinion of the institution;
- 19.1.3. determining the agenda of the meeting, which specified in the 16.1 of this law, convening and chairing the meeting;
- 19.1.4. allotting the duties of members and supervising the implementation;
- 19.1.5. other powers specified in the law.

19.2. A member appointed by the chief shall implement the duties of the chief in his or her absence.

## **Article 20. Rights and obligations of state inspectors**

20.1. State inspectors who specified in the 14.4 of this law shall use official and personal identification cards, seals and letterheads adopted by the Authority for Fair Competition and Consumer Protection.

20.2. State inspectors shall implement the rights and obligations specified in Article 10 of the Law on State Inspection and receive guarantees specified in Article 11 of the same law.

20.3. State inspectors shall implement the following rights and obligations:

- 20.3.1. supervising the implementation of the legislation on competition and imposing administrative penalties;

- 20.3.2. obtaining freely the data, information, statements, explanations, definitions and other documents required for the research and inspection from relevant organizations, officials and business entities;

- 20.3.3. being fully responsible for correctness of the conducted inspection;

- 20.3.4. finding facts and evidence of breach during the inspections, searching the body of the inspected person, office, industrial location, warehouses, documents, computers and items for the purpose of identifying the situation relevant to the breach and confiscating necessary materials, documents and items;

- 20.3.5. ensuring the implementation of own decisions and those of the Agency for Fair Competition and Consumers on imposition of the administrative penalty;

- 20.3.6. using special self-defence devices in order to protect own life, lives of family members, health and property from the threat of a sudden directly occurring attack;

- 20.3.7. summoning relevant entities during the inspection with a letter of summoning;

20.3.8. other powers specified in the legislation.

## **Article 21. Guarantees of the chief, members and officials of the Agency for Fair Competition and Consumers**

21.1. The chief, members and officials shall receive the following additional guarantees besides the civil servants' working conditions, guarantees, additional guarantees, related salaries, compensations, aid, reward, pension and subsidies specified in the Law on Civil Service:

21.1.1. prohibiting the removal from the position of the chief and members for reasons other than those stipulated in the law;

21.1.2. providing from the state the difference in the salary, pension and subsidies that have been granted to the employee where the employee temporarily has lost the labour capacity or has become disabled during the performance of duties and covering the expenditure of prosthetic limbs, where necessary;

21.1.3. issuing a single non-returnable aid equivalent to the amount of the salary in five years to the family of the employee that has lost life during the performance of duties or has been killed in relation with the official duties;

21.1.4. issuing a single non-returnable aid equivalent to the amount of the salary in thirty-six months to the employee who has worked no less than ten years and has approached the age of retirement;

21.1.5. insuring on a mandatory basis the life and health of employees and paying the insurance fees from the budget of the institution;

21.1.6. providing the compensations for necessary expenditures occurring in relation to the power of the employees on inspections.

21.2. rewarding the non-staff members. The Government shall adopt the amount of the reward;

21.3. Provision of the same type of salaries, subsidies, aid and supplements shall not overlap when issuing economic guarantees specified in this law to employees and the employees shall select themselves.

21.4. Damages and negative consequences incurred due to the performance by employees of orders and instructions given by authorized employees shall be borne by employees who issued such orders and instructions.

## **CHAPTER FOUR. INSPECTION OF BREACHES**

### **Article 22. Grounds for inspection the breaches**

22.1. Activities to inspect the actions breaching the legislation on competition shall proceed on the following grounds:

22.1.1. applications and complaints from business entities, organizations and citizens;

22.1.2. information appearing in press and media;

22.1.3. own initiative;

22.1.4. other grounds specified in the law.

### **Article 23. Inspecting the breach**

23.1. State inspectors shall conduct the inspection of the breach in sixty days.

23.2. The chief of the Agency for Fair Competition and Consumers may extend the period by up to thirty days where it is not possible to complete the inspection of the breach within the time specified in 23.1 of this law.

23.3. The period of inspecting the breach specified in the Law on Administrative Liability shall not be subject to this law.

23.4. State inspectors shall present the results of the inspection to the chief of the Agency for Fair Competition and Consumers within five business days since the completion of the inspection.

23.5. State inspectors shall during the inspection have the right to write notes about the breach, administer searches, confiscate temporarily the necessary items and documents, take preventive actions regarding the person committing the breach and proceed with actions of detention and shall be governed in such powers by procedures specified in the Law on Administrative Liability.

### **Article 24. Resolving the breach**

24.1. State inspectors inspecting the breach shall produce either one of the following decisions:

24.1.1. imposing the administrative penalty on the person whose fault in committing the breach is proven;

24.1.2. exempting from the administrative penalty the relevant person where it is determined that circumstances specified in Article 28 have occurred;

24.1.3. transferring all relevant documents to investigation authorities where the breach is of a criminal nature.

24.2. The Agency for Fair Competition and Consumers may obtain the opinion and conclusion of an independent and outside audit organization where it is considered necessary regarding the review of a complaint on the decision of the state inspector.

24.3. State inspectors shall be prohibited to distribute any data or information harmful to the reputation of the business entity where the final decision and inspection of the breach of the legislation on competition has not completed.

24.4. The Agency for Fair Competition and Consumers shall take actions to obtain the compensation of damages from the perpetrating entity after reviewing the complaint that there have been damages to the reputation and corporate profits of the business entity because of it.

### **Article 25. Supporting the activities of the breach inspection**

25.1. State institutions and officials of all levels shall render necessary assistance to the inspection work implemented by state inspectors within the scope of powers provided by the law and shall ensure possibilities for such inspections.

25.2. The police institution shall protect the chief, members, officials and their families where they experience an actual threat to their lives, health and property in relation to the performance of their duties granted by the law.



## **CHAPTER FIVE. MISCELLANEOUS PROVISIONS**

### **Article 26. Rights and obligations of the business entities, organizations and officials**

26.1. Business entities, organizations and officials shall have the following rights and obligations:

26.1.1. fulfilling on a mandatory basis the lawful decisions of the Agency for Fair Competition and Consumers and state inspectors within the specified time;

26.1.2. providing the data, information, documents and materials necessary for the tasks of creating circumstances for competition, researching the market situation and conducting inspections on a free and undisputed basis truthfully and immediately within the specified time;

26.1.3. entities considering the decision issued by the state inspector illegal shall have the right to complain to the Agency for Fair Competition and Consumers within thirty days since receiving or learning of such decision;

26.2. entities considering the decision issued by the Agency for Fair Competition and Consumers illegal shall have the right to complain to the court within thirty days since receiving or learning of such decision.

### **Article 27. Administrative liability on perpetrators of the legislation on competition**

27.1. State inspectors shall impose the following administrative penalties where the breach of the legislation on competition does not entail criminal responsibility:

27.1.1. business entities which have breached 11.1-11.3 of this law shall be subject to the fine equivalent to up to six percent of the income from the sale of the products in the previous year and confiscation of the illegally obtained income and items;

27.1.2. business entities which have breached 6.2 and 7.1 of this law shall be subject to the fine equivalent to up to four percent of the income from the sale of the products in the previous year and confiscation of the illegally obtained income and items;

27.1.3. business entities which have breached 12.1 of this law shall be subject to the fine of up to ten million MNT and confiscation of the illegally obtained income and items;

27.1.4. business entities which have not reported to the Agency for Fair Competition and Consumers and obtained permission on changes to the quantity, amount and price of products specified in 6.1.1 and 6.1.2 of this law shall be subject to the fine equivalent to up to three percent of the income from the sale of the products in the previous year and confiscation of the illegally obtained income and items;

27.1.5. business entities which have purchased the corporate shares specified in 8.1 of this law and have not reported to the Agency for Fair Competition and Consumers shall be subject to the fine of up to twenty million MNT;

27.1.6. officials breaching 9.1, 13.1 and 13.2 of this law shall be subject to the fine equivalent to the minimum labour wage increased by two-five times;

27.1.7. entities evading the inspections shall be subject to the fine equivalent to the minimum labour wage increased by two to five times;

27.1.8. officials resisting the demands of state inspectors, failing to perform within the specified time and failing to report the implementation of the demand shall be subject to the fine equivalent to the minimum labour wage increased by two-five times;

27.1.9. entities impeding the inspection and attempting to influence the issued decisions and opinions shall be subject to the fine equivalent to the minimum labour wage increased by two-four times;

27.1.10. entities breaching 26.1.2 of this law or providing damaged, destroyed or forged documents shall be subject to the fine equivalent to the minimum labour wage increased by two-five times;

27.1.11. entities evading the report of the required documents or refusing temporarily to provide them shall be subject to the fine equivalent to the minimum labour wage increased by two-five times.

27.2. Where the imposition of the penalties specified in 27.1.1, 27.1.2 and 27.1.4 of this law is impossible due to the impracticality of estimating the income from the sale of the products in the previous and current years or to the absence of the sale, business entities stipulated in 27.1.1, 27.1.2 and 27.1.4 of this law shall be subject to the fine equivalent to up to five percent of their equity.

## **Article 28. Exemption from the administrative penalty**

28.1. Business entities voluntarily disclosing the breach specified in 11.1 and 11.2 of this law may be exempted from the administrative penalties stated in this law.

28.2. Business entities voluntarily disclosing the breach specified in 11.1-11.3 of this law may be exempted by fifty percent from the administrative penalty and business entities voluntarily admitting the breach within thirty days since the day of commencing the inspection activities of the breach specified in 23.1 of this law may be exempted by twenty percent.

28.3. Business entities specified in 28.1 of this law shall submit to the Agency for Fair Competition and Consumers the request on exemption from the administrative penalty on satisfaction of the following requirements:

28.3.1. providing sufficient evidence on the breach;

28.3.2. accepting the obligation to provide necessary documents and materials during the inspection.

28.4. The Agency for Fair Competition and Consumers shall adopt the regulation on exempting the business entities from the administrative penalty as specified in 28.1 of this law.

**THE LAW ON AMENDMENTS TO THE LAW ON PROCURING PRODUCTS,  
WORKS AND SERVICES BY THE STATE AND LOCAL ASSETS**

**Article 1.** Change “central state administrative institution in charge of the budget matters” into “the Agency for Fair Competition and Consumers” in 55.1-55.5 of the Law on Procuring Products, Works and Services by the State and Local Assets.

**Article 2.** This law shall become effectiveness on the date of effectiveness of the Law on Competition (revised version).

**THE LAW ON AMENDMENTS TO THE LAW ON ADVERTISEMENT**

**Article 1.** Add “the Agency for Fair Competition and Consumers on matters specified in the Law on Competition” after “state inspection service on intellectual property” in 24.1-24.3 of this law and “state inspector of the Agency for Fair Competition and Consumers on matters specified in the Law on Competition” after “state inspector on intellectual property” in 24.4 of the Law on Advertisement.

**Article 2.** This law shall become effectiveness on the date of effectiveness of the Law on Competition (revised version).

**THE LAW ON AMENDMENTS TO THE LAW ON STATE AND LOCAL  
PROPERTY**

**Article 1.** Add “obtaining the opinion of the Agency for Fair Competition and Consumers” after “the Government” in 33.1 of the Law on State and Local Property.

**Article 2.** This law shall become effectiveness on the date of effectiveness of the Law on Competition (revised version).

**THE LAW ON ANNULMENT OF THE LAW ON PROHIBITION OF UNFAIR  
COMPETITION**

**Article 1.** Annul the Law on Prohibition of Unfair Competition adopted on May 12, 2000.

**Article 2.** This law shall become effectiveness on the date of effectiveness of the Law on Competition (revised version).

**NAMIBIA**

**GOVERNMENT GAZETTE**

**OF THE  
REPUBLIC OF NAMIBIA**

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N\$7.00

WINDHOEK - 24 April 2003

No.2964

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**Government Notice**

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**OFFICE OF THE PRIME  
MINISTER**

No.  
2003

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**PROMULGATION OF  
ACT OF PARLIAMENT**

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 2 of 2003: Competition Act, 2003.

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# ACT

To safeguard and promote competition in the Namibian market; to establish the Namibian Competition Commission and make provision for its powers, duties and functions; and to provide for incidental matters.

(Signed by the President on 3 April 2003)

## ARRANGEMENT OF SECTIONS

### CHAPTER 1 PRELIMINARY PROVISIONS

#### Section

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### CHAPTER 2 NAMIBIAN COMPETITION COMMISSION

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BE IT ENACTED by the Parliament of the Republic of Namibia as follows:-

CHAPTER 1  
PRELIMINARY PROVISIONS

Definitions

1. In this Act, unless the context otherwise indicates -

“agreement” includes a contract, arrangement or understanding, whether or not legally enforceable;

“chairperson” means the chairperson of the Commission appointed under section 5(1);

“Commission” means the Namibian Competition Commission established by section 4;

“committee” means a committee of the Commission established under section 12;

“concerted practice” means deliberate conjoint conduct between undertakings achieved through direct or indirect contact that replaces their independent actions;

“confidential information” means trade, business or industrial information that belongs to an undertaking, has a particular economic value and is not generally available to or known by others;

“court” means the High Court of Namibia;

“goods” does not include -

- (a) agricultural commodities which have not undergone a process of manufacture; and
- (b) goods exempted under section 3(1)(c);

“historically disadvantaged persons” means persons who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices;

“member” means a member of the Commission appointed under section 5(1);

“Minister” means the Minister of Trade and Industry;

“Ministry” means the Ministry of Trade and Industry;

“Part I prohibition” means the prohibition imposed by Part I of Chapter 3;

“Part II prohibition” means the prohibition imposed by Part II of Chapter 3;

“premises” includes land, any building, structure, vehicle, vessel, aircraft or container;

“prescribed” means prescribed by a rule made under section 22;

“Secretary” means the Secretary to the Commission appointed in terms of section 13(1);

“services” does not include -

- (a) the performance of work under a contract of service; and
- (b) services exempted under section 3(1)(c);

“small undertaking” means an undertaking which falls within a category prescribed;

“this Act” includes the rules made under section 22;

“undertaking” means any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service.

#### Purpose of Act

2. The purpose of this Act is to enhance the promotion and safeguarding of competition in Namibia in order to -

- (a) promote the efficiency, adaptability and development of the Namibian economy;
- (b) provide consumers with competitive prices and product choices;
- (c) promote employment and advance the social and economic welfare of Namibians;
- (d) expand opportunities for Namibian participation in world markets while recognizing the role of foreign competition in Namibia;
- (e) ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and
- (f) promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.

#### Application of Act

3. (1) This Act applies to all economic activity within Namibia or having an effect in Namibia, except -

- (a) collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act, 1992 (Act No. 6 of 1992);
- (b) concerted conduct designed to achieve a non-commercial socio-economic objective;



- (c) in relation to goods or services which the Minister, with the concurrence of the Commission, declares, by notice in the Gazette, to be exempt from the provisions of this Act.

(2) This Act binds the State in so far as the State engages in trade or business for the production, supply or distribution of goods or the provision of any service, but the State is not subject to any provision relating to criminal liability.

(3) This Act applies to the activities of statutory bodies, except in so far as those activities are authorised by any law.

## CHAPTER 2 NAMIBIAN COMPETITION COMMISSION

### Establishment of Commission

4. There is established a juristic person to be known as the Namibian Competition Commission, which -

- (a) has jurisdiction throughout Namibia;
- (b) is independent and subject only to the Namibian Constitution and the law; and
- (c) must be impartial and must perform its functions without fear, favour or prejudice.

### Constitution of Commission

5. (1) The Commission consists of a chairperson and not less than two nor more than four other members all of whom are appointed by the Minister.

(2) When appointing members of the Commission the Minister must select persons who, in the opinion of the Minister, have expertise in industry, commerce, economics, law, accountancy, public administration or consumer affairs.

### Alternate members

6. (1) The Minister may appoint for each member a person to be the alternate of the member.

(2) The alternate to a member may, in the event of the member's absence from a meeting of the Commission, attend the meeting in the capacity of a member.

### Term of office

7. Subject to section 8, a member holds office for a term of three years, and is eligible for reappointment at the expiration of that term, but a member may not hold office for more than two consecutive terms.

### Vacation of office and filling of vacancies

8. (1) A member vacates his or her office, if the member -
- (a) is convicted of an offence and sentenced to imprisonment without the option of a fine;
  - (b) resigns his or her office by giving the Minister one month's notice in writing of his or her intention to resign;

(c) has been absent for three consecutive meetings of the Commission without leave of the Commission; or

(d) is removed from office by the Minister under subsection (2).

(2) The Minister may, by notice in writing, remove a member from office if the Minister, after giving the member a reasonable opportunity to be heard, is satisfied that the member -

(a) has failed to comply with any obligation imposed by section 10;

(b) is guilty of neglect of duty or misconduct; or

(c) is incapable of performing the duties of his or her office, by reason of physical or mental illness.

(3) If the office of a member becomes vacant, the vacancy must be filled by the appointment of another person as member for the unexpired portion of the term of office of the person who ceased to hold office.

### Remuneration

9. The members of the Commission, and members of a committee who are not members of the Commission, must be paid such remuneration or allowances or other benefits as the Minister, with the concurrence of the Minister of Finance, may determine.

### Conduct of members and disclosure of interest

10. (1) A member of the Commission may not -

(a) engage in an activity that may undermine the integrity of the Commission;

(b) participate in any investigation or decision concerning a matter in respect of which the member has a financial or other personal interest; or

(c) use any confidential information obtained in the performance of his or her functions as a member to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person.

(2) Every member of the Commission must in writing disclose to the Minister any direct or indirect financial interest which the member has or acquires in any business carried on in Namibia or elsewhere or in any body corporate carrying on any business in Namibia or elsewhere.

(3) A member who has or acquires any financial or other personal interest, either directly or indirectly, in any matter which is before the Commission for discussion and determination must -

(a) immediately and fully disclose the interest to the Commission; and

(b) withdraw from any further discussion or determination by the Commission of that matter.

### Meetings of Commission

11. (1) The first meeting of the Commission must be held at a place and time that the chairperson determines and any meeting of the Commission thereafter must be held at a place and time that the Commission determines.

(2) If for any reason a meeting determined by the Commission cannot take place, the Secretary, with the concurrence of the chairperson, must convene the next meeting of the Commission.

(3) The chairperson may at any time convene a special meeting of the Commission.

(4) The chairperson presides at all meetings of the Commission at which he or she is present.

(5) In the absence of the chairperson from a meeting, the members present must elect one of their number to preside at that meeting and perform the functions and exercise the powers of the chairperson.

(6) At a meeting of the Commission -

(a) a majority of the members of the Commission forms a quorum;

(b) all questions are decided by a majority of votes of the members present and voting; and

(c) the member presiding has a deliberative vote and, in the event of any equality of votes, also a casting vote.

(7) The Commission may invite any person who has expert knowledge of a matter before the Commission for determination to attend a meeting of the Commission and take part in discussions in relation to that matter, but such person has no vote.

(8) As soon as possible after a meeting of the Commission has taken place, the chairperson must cause a copy of the minutes of that meeting to be submitted to the Minister.

#### Committees of Commission

12. (1) The Commission may establish one or more committees to -

(a) investigate and report to the Commission on any matter which the Commission may refer to the committee for the purpose; or

(b) exercise any power or perform any function of the Commission which the Commission may delegate or assign to the committee, except the power under section 22 to make rules.

(2) A committee may consist of members, or members and other persons, as the Commission may determine.

(3) The Commission must designate a member to be the chairperson of a committee.

(4) The chairperson of the Commission may attend any meeting of a committee of which he or she is not a member and may take part in the proceedings thereof as if he or she were appointed as a member thereof.

(5) The Commission may at any time dissolve or reconstitute a committee.

(6) The Commission is not divested or relieved of a power or function which has been delegated or assigned to a committee.

(7) A decision by a committee in the exercise of a power delegated to the committee, is subject to approval by the Commission, and the Commission may at any time vary or set aside the decision.

(8) Subsections (1) and (3) of section 10, with the changes required by the context, apply to members of a committee who are not members of the Commission.

#### Staff of Commission

13. (1) The Commission must appoint a Secretary to the Commission and may appoint other employees as it deems necessary to assist in the performance of the functions of the Commission.

(2) The Secretary is, subject to the directions of the Commission, responsible for -

- (a) the formation and development of an efficient administration; and
- (b) the organisation, control, management and discipline of the staff of the Commission.

(3) Unless the Commission or a committee directs otherwise, the Secretary must attend the meetings of the Commission and of a committee, but the Secretary has no vote.

(4) The Commission determines the remuneration and other conditions of services and benefits of the Secretary and other employees of the Commission.

#### Inspectors

14. (1) The Commission may -

- (a) designate any of its employees; or
- (b) appoint any other suitable person,

to be an inspector for the purposes of this Act.

(2) The Commission determines the remuneration and other conditions of engagement of an inspector who is not in the full-time service of the Commission.

#### Consultants

15. The Commission may engage persons to give advice to, and perform services for, the Commission on such terms and conditions of engagement as the Commission may determine.

#### Functions, powers and duties of Commission

16. (1) The Commission is responsible for the administration and enforcement of this Act and, in addition to any other functions conferred on the Commission, it has the following powers and functions:

- (a) to disseminate information to persons engaged in trade or commerce and the public with respect to the provisions of this Act and the functions of the Commission;

- (b) to liaise and exchange information, knowledge and expertise with authorities of other countries entrusted with functions similar to those of the Commission;
  - (c) to carry out research into matters referred to the Commission by the Minister;
  - (d) to advise the Minister on matters referred to the Commission by the Minister;
  - (e) to implement measures to increase market transparency;
  - (f) to be responsible for investigating contraventions of this Act by undertakings and for controlling mergers between undertakings;
  - (g) either on its own initiative, or at the request of the Minister, to consult with the Minister on any matter which is of great economic or public interest;
  - (h) to advise the Minister, and any other Minister responsible for a relevant industry, in relation to international agreements concerning competition matters governed by this Act.
- (2) The Commission may -
- (a) acquire or hire such movable or immovable property as may be required for the effective performance of its functions, and dispose of property so acquired or hired; and
  - (b) enter into contracts in connection with the performance of its functions.

#### Funds of Commission

17. (1) The funds of the Commission consist of -
- (a) money appropriated by Parliament for the purposes of the Commission;
  - (b) fees payable to the Commission in terms of this Act;
  - (c) money vesting in or accruing to the Commission from any other source; and
  - (d) interest derived from the investment of funds of the Commission.

(2) The Commission must submit to the Minister annually, at a time determined by the Minister, a statement of the Commission's estimated income and expenditure, and requested appropriation from Parliament, for its next financial year.

(3) Expenditure incurred for the performance of the functions of the Commission, including remuneration, allowances or other benefits payable to members or other persons, must be defrayed from the funds of the Commission.

(4) The Secretary is the accounting officer of the Commission and is responsible for -

- (a) all income and expenditure of the Commission; and
- (b) all assets and the discharging of all liabilities of the Commission.

## Bank accounts

18. (1) The Commission must open and maintain such bank accounts at one or more banking institutions in Namibia, registered in terms of the Banking Institutions Act, 1998 (Act No. 2 of 1998) as are necessary for the performance of the functions of the Commission.

(2) The Commission must ensure that -

- (a) all money received by or on behalf of the Commission is deposited into its bank account as soon as practicable after being received;
- (b) any payment by or on behalf of the Commission is made from its bank account; and
- (c) no money is withdrawn, paid or transferred from its bank account without the Commission's authority.

(3) Cheques drawn on the Commission's bank account, or any other form or document to be completed for the withdrawal, payment or transfer of money from any of the bank accounts of the Commission, must be signed on the Commission's behalf by two persons authorised for that purpose by the Commission.

## Investment of money

19. Any money of the Commission that is not immediately required for expenditure by the Commission may be invested at a banking institution referred to in section 18(1) or a building society registered in terms of the Building Societies Act, 1986 (Act No. 2 of 1986).

## Financial year, accounts and audit

20. (1) The financial year of the Commission is as prescribed.

(2) The Commission must cause such records of account to be kept in accordance with general accepted accounting practices, principles and procedures as are necessary to represent fairly the state of affairs and business of the Commission and to explain the transactions and financial position of the Commission.

(3) Not later than three months after the end of each financial year of the Commission, the Secretary must prepare and submit to the Commission for approval, financial statements, comprising -

- (a) a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Commission during that financial year; and
- (b) a balance sheet showing the state of the Commission's assets, liabilities and financial position as at the end of that financial year.

(4) The accounting records and the financial statements of the Commission must be audited annually by the Auditor-General.

## Annual report

21. (1) The Commission must submit to the Minister an annual report of its activities within six months of the end of each financial year, or such longer period as the Minister may determine, which report must be accompanied by -

- (a) the audited financial statements of the Commission for that financial year; and
- (b) the auditor's report relating to those financial statements.

(2) The Minister must lay upon the Table of the National Assembly the annual report and financial statements submitted to the Minister in terms of subsection (1) within 30 days from the date of their receipt or, if the National Assembly is not then in ordinary session, within 14 days after the commencement of its next ordinary session.

(3) The Commission must, if the Minister at any time so requires, furnish to the Minister a report and particulars relating to the performance of the functions of the Commission in relation to any matter as the Minister may require.

#### Power of Commission to make rules

22. The Commission, with the approval of the Minister, may make rules by notice in the Gazette -

- (a) relating to the administration, organization and operations of the Commission;
- (b) prescribing the procedure to be followed in respect of applications and notices to, and proceedings of, the Commission;
- (c) prescribing forms of applications, notices, certificates and other documents required for the purposes of this Act;
- (d) prescribing fees to be paid for the purposes of this Act;
- (e) the manner for making a submission in relation to the subject matter of any application to, or investigation by, the Commission;
- (f) prescribing the procedures for investigations under this Act;
- (g) prescribing the requirements for a small undertaking;
- (h) relating to any other matter which is required or permitted to be prescribed under this Act, or considered necessary or expedient by the Commission in order to achieve the objects of this Act.

### CHAPTER 3 RESTRICTIVE BUSINESS PRACTICES

#### Part I Restrictive Agreements, Practices and Decisions

##### Restrictive practices prohibited

23. (1) Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions of Part III of this Chapter.

(2) Agreements and concerted practices contemplated in subsection (1), include agreements concluded between -

- (a) parties in a horizontal relationship, being undertakings trading in competition; or
  - (b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.
- (3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which -
- (a) directly or indirectly fixes purchase or selling prices or any other trading conditions;
  - (b) divides markets by allocating customers, suppliers, areas or specific types of goods or services;
  - (c) involves collusive tendering;
  - (d) involves a practice of minimum resale price maintenance;
  - (e) limits or controls production, market outlets or access, technical development or investment;
  - (f) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (g) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.
- (4) Paragraph (d) of subsection (3) does not prevent a supplier or producer of goods or services from recommending a resale price to a reseller of the goods or a provider of the service, provided -
- (a) it is expressly stipulated by the supplier or producer to the reseller or provider that the recommended price is not binding; and
  - (b) if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, the words “recommended price“ appear next to the price so affixed or applied.
- (5) It is presumed that an agreement or a concerted practice of the nature prohibited by subsection (1) exists between two or more undertakings if -
- (a) any one of the undertakings owns a significant interest in the other or they have at least one director or one substantial shareholder in common; and
  - (b) any combination of the undertakings engages in any of the practices mentioned in subsection (3).
- (6) The presumption created by subsection (5) may be rebutted if an undertaking or a director or shareholder concerned establishes that a reasonable basis exists to conclude that any practice in which any of the undertakings engaged was a normal commercial response to conditions prevailing in the market.
- (7) For the purposes of subsection (5), “director” includes -
- (a) a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973);



- (b) a member of a close corporation as defined in the Close Corporations Act, 1988 (Act No. 26 of 1988);
  - (c) a trustee of a trust; or
  - (d) in relation to an undertaking conducted by an individual or a partnership, the owner of the undertaking or a partner of the partnership.
- (8) Subsection (1) does not apply in respect of an agreement entered into between, or a practice engaged in by -
- (a) a company and its wholly owned subsidiary, as contemplated in section 1 of the Companies Act, 1973, or a wholly owned subsidiary of that subsidiary company; or
  - (b) undertakings other than companies, each of which is owned or controlled by the same person or persons.

## Part II Abuse of Dominant Position

### Application of this Part

24. For the purposes of this Part, the Minister, with the concurrence of the Commission, must determine by notice in the Gazette in relation to undertakings in Namibia, either in general or in relation to a specific industry -

- (a) a threshold of annual turnover or value of assets below which this Part does not apply to an undertaking;
- (b) the method for calculating an undertaking's annual turnover or value of assets for the purposes of paragraph (a).

### Criteria for determining dominant position

25. For the purposes of this Part, the Commission must prescribe criteria to be applied for determining whether an undertaking has, or two or more undertakings have, a dominant position in a market, which may be based on any factors which the Commission considers appropriate.

### Abuse of dominant position

26. (1) Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia, or a part of Namibia, is prohibited.

(2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes -

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties; and

- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts.

### Part III Exemption of Certain Restrictive Practices

#### Grant of exemption for certain restrictive practices

27. (1) Any undertaking or association of undertakings may apply to the Commission to be exempted from the provisions of Part I or Part II of this Chapter in respect of -

- (a) any agreement or category of agreements;
- (b) any decision or category of decisions;
- (c) any concerted practice or category of concerted practices.

(2) An application for an exemption under subsection (1) must -

- (a) be made in the prescribed form and manner;
- (b) be accompanied by such information as may be prescribed or as the Commission may reasonably require.

(3) The Commission must give notice in the Gazette of an application received in terms of subsection (1) -

- (a) indicating the nature of the exemption sought by the applicant; and
- (b) calling upon interested persons to submit to the Commission, within 30 days of the publication of the notice, any written representations that they may wish to make in regard to the application.

#### Determination of application for exemption

28. (1) After consideration of an application in terms of section 27 and any representations submitted by interested persons, the Commission must make a determination in respect of the application, and may -

- (a) grant an exemption; or
- (b) refuse to grant an exemption, accompanied by a statement of the reasons for the refusal; or
- (c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the Part I or the Part II prohibition.

(2) The Commission may grant an exemption if the Commission is satisfied that there are exceptional and compelling reasons of public policy why the particular -

- (a) agreement or category of agreements;
- (b) decision or category of decisions; or

- (c) concerted practice or category of concerted practices,

ought to be excluded from the Part I or the Part II prohibition.

(3) In making a decision under subsection (2) the Commission must take into account the extent to which the agreement, decision or concerted practice, or the category of agreements, decisions or concerted practices concerned contributes to or results in, or will be likely to contribute to or result in -

- (a) maintaining or promoting exports;
- (b) enabling small undertakings owned or controlled by historically disadvantaged persons, to become competitive;
- (c) improving, or preventing decline in, the production or distribution of goods or the provision of services;
- (d) promoting technical or economic progress or stability in any industry designated by the Minister, after consultation with the Minister responsible for that industry;
- (e) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

(4) The Commission may grant an exemption subject to such conditions and for such period as the Commission may think fit.

#### Revocation or amendment of exemption

29. (1) If the Commission, at any time after it has granted an exemption or issued a certificate of clearance under section 28, is satisfied that -

- (a) the exemption was granted or the certificate of clearance was issued on materially incorrect or misleading information;
- (b) there has been a material change of circumstances since the exemption was granted or the certificate was issued;
- (c) a condition upon which an exemption was granted has not been complied with,

the Commission may revoke or amend the exemption or revoke the certificate of clearance, as the case may be.

(2) If the Commission proposes to revoke or amend an exemption or to revoke a certificate of clearance under subsection (1), it must -

- (a) give notice in writing of the proposed action to the person to whom the exemption was granted or the certificate of clearance was issued, and to any other person who in the opinion of the Commission is likely to have an interest in the matter; and
- (b) call upon such persons to submit to the Commission, within 30 days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.

(3) In the event of non-compliance with a condition of an exemption, and irrespective whether the Commission revokes or amends the exemption on account of the non-compliance, the Commission may make application to the Court for the imposition of a pecuniary penalty in respect of that non-compliance, either with or without any other order.

#### Exemption in respect of intellectual property rights

30. (1) The Commission may, upon application, and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trade marks, plant varieties or any other intellectual property rights.

(2) Section 29, with the changes required by the context, applies to an exemption under this section.

#### Exemption in respect of professional rules

31. (1) A professional association whose rules contain a restriction that has the effect of preventing or substantially lessening competition in a market may apply in the prescribed manner to the Commission for an exemption in terms of subsection (2).

(2) The Commission may exempt all or part of the rules of a professional association from the provisions of Part I of this Chapter for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of preventing or substantially lessening competition in a market is reasonably required to maintain -

- (a) professional standards; or
- (b) the ordinary function of the profession.

(3) Upon receiving an application in terms of subsection (1), the Commission must -

- (a) publish a notice of the application in the Gazette;
- (b) allow interested parties 30 days from the date of that notice to make representations concerning the application; and
- (c) consult the Minister responsible for the administration of any law governing the profession concerning the application.

(4) After considering the application and any submission or other information received in relation to the application, and consulting with the responsible Minister, the Commission must -

- (a) either grant an exemption or reject the application by issuing a notice in writing to the applicant;
- (b) give written reasons for its decision if it rejects the application; and
- (c) publish a notice of that decision in the Gazette.

(5) If the Commission considers that any rules, either wholly or any part thereof, should no longer be exempt under this section, the Commission, may revoke the exemption in respect of such rules or the relevant part of the rules, at any time after it has -

- (a) given notice in the Gazette of the proposed revocation;
- (b) allowed interested parties 30 days from the date of that notice to make representations concerning the exemption; and
- (c) consulted the responsible Minister referred to in subsection (3)(c).

(6) The exemption of a rule or the revocation of an exemption has effect from such date as may be specified by the Commission.

(7) In this section -

“professional association” means the controlling body established by or registered under any law in respect of the following professions, and includes any other association which the Commission is satisfied represents the interests of members of any of the following professions:

- (a) accountants and auditors;
- (b) architects;
- (c) engineering;
- (d) estate agents;
- (e) legal practitioners;
- (f) quantity surveyors;
- (g) surveyors;
- (h) town and regional planners;
- (i) health services professions governed by -
  - (i) the Medical and Dental Professions Act, 1993 (Act No. 21 of 1993);
  - (ii) the Nursing Professions Act, 1993 (Act No. 30 of 1993);
  - (iii) the Pharmacy Profession Act, 1993 (Act No. 23 of 1993);
  - (iv) the Veterinary and Para-veterinary Professions Proclamation, 1984 (Proclamation No. 14 of 1984);
  - (v) the Allied Health Services Professions Act, 1993 (Act No. 20 of 1993);
- (j) any other profession to which the provisions of this section have been declared applicable by the Minister by notice in the Gazette;

“rules” means rules regulating a professional association that are binding on its members, and includes codes of practice and statements of principle.

Notification of grant, revocation or amendment of exemption

32. The Commission must as soon as is practicable cause to be published in the Gazette notice of every exemption granted, and of every exemption revoked under any provision of this Part.

Part IV  
Investigation Into Prohibited Practices

Investigation by Commission

33. (1) The Commission may, either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of -

- (a) the Part I prohibition; or
- (b) the Part II prohibition.

(2) If the Commission, having received from any person a complaint or a request to investigate an alleged infringement referred to in subsection (1), decides not to conduct an investigation, the Commission must in writing inform that person of the reasons for its decision.

(3) If the Commission decides to conduct an investigation, the Commission must in writing give notice of the proposed investigation to every undertaking the conduct of which is to be investigated and must in the notice -

- (a) indicate the subject-matter and purpose of the investigation; and
- (b) invite the undertaking concerned to submit to the Commission, within a period specified in the notice, any representations which the undertaking may wish to make to the Commission in connection with any matter to be investigated.

(4) For the purpose of an investigation, the Commission may by notice in writing served on any person in the prescribed manner require that person -

- (a) to furnish to the Commission by writing signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation;
- (b) to produce to the Commission, or to a person specified in the notice to act on the Commission's behalf, any document or article, specified in the notice which relates to any matter which the Commission considers relevant to the investigation;
- (c) to appear before the Commission at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice.

Entry and search of premises

34. (1) For the purpose of assisting the Commission to ascertain or establish whether any undertaking has engaged in or is engaging or is about to engage in conduct that constitutes or may constitute an infringement of the Part I or the Part II prohibition, an inspector may -

- (a) enter upon and search any premises;
- (b) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation;

- (c) examine any document or article found on the premises that has a bearing on the investigation;
- (d) request any information about any document or article from -
  - (i) the owner of the premises;
  - (ii) the person in control of the premises;
  - (iii) any person who has control of the document or article; or
  - (iv) any other person who may have the information;
- (e) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;
- (f) 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
- (g) attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

(2) Subject to subsection (8), an inspector may not enter upon and search any premises unless the inspector obtains a warrant authorising such entry and search in accordance with subsection (3).

(3) If a judge of the Court is satisfied, upon application made on oath or affirmation, that there is reasonable ground for believing that it is necessary, in order to ascertain or establish whether any person has engaged in or is engaging or is about to engage in conduct that constitutes or may constitute an infringement of the Part I or the Part II prohibition, for an inspector to exercise the powers conferred by subsection (1), the judge may grant a warrant authorising an inspector to exercise those powers in relation to any premises specified in the warrant.

- (4) A warrant must -
  - (a) identify the premises that may be entered and searched; and
  - (b) authorise an inspector named in the warrant to enter and search the premises and exercise any of the powers conferred by subsection (1).

(5) A warrant continues in force for a period of 30 days from the date it is issued but lapses if -

- (a) the purpose for which it was granted is satisfied; or
- (b) it is cancelled by the judge by whom it was issued or by any other judge of the Court.

(6) A warrant may be executed on any day between 7:00 and 18:00 unless a different time that is reasonable in the circumstances is authorised and specified in the warrant by the judge granting the warrant.

(7) Upon first entering any premises under a warrant the person authorised by the warrant must -

- (a) provide to the owner or person in control of the premises proof of -
  - (i) his or her authority to enter the premises by handing a copy of the warrant to that person; and
  - (ii) his or her identity; or
- (b) if none of the persons mentioned in paragraph (a) is present, affix a copy of the warrant to the premises in a prominent and visible place.

(8) Notwithstanding subsection (2), an inspector may without a warrant enter any premises, other than a private dwelling, to exercise the powers conferred by subsection (1) if -

- (a) the owner, or any other person in control of the premises consents to the entry and search of the premises; or
- (b) the inspector on reasonable grounds believes -
  - (i) that a warrant would be issued under subsection (3) if applied for; and
  - (ii) that the delay in obtaining a warrant would defeat the object of the entry and search.

(9) An inspector who removes anything from any premises under subsection (1)(g) must -

- (a) issue a receipt for that thing to the owner of, or person in control of, the premises; and
- (b) return that thing as soon as practicable after achieving the purpose for which it was removed.

(10) An inspector exercising the powers conferred by subsection (1) by virtue of a warrant or in terms of subsection (8) may be accompanied and be assisted by one or more police officers.

#### Power of Commission to take evidence

35. (1) The Commission may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, whether or not such statement, document, information or matter would otherwise be admissible in a court of law.

(2) The Commission may take evidence on oath or affirmation from any person attending before it, and for that purpose any member of the Commission may administer an oath or affirmation.

(3) The Commission may permit any person appearing as a witness before it to give evidence by tendering and, if the Commission thinks fit, verifying by oath or affirmation, a written statement.

(4) A person attending before the Commission is entitled to the same immunities and privileges as a witness before the High Court.



## Proposed decision of Commission

36. (1) If, upon conclusion of an investigation, the Commission proposes to make a decision -

- (a) that the Part I prohibition has been infringed; or
- (b) that the Part II prohibition has been infringed,

it must give written notice of its proposed decision to each undertaking which may be affected by that decision.

(2) The notice referred to in subsection (1) must -

- (a) state the reasons for the Commission's proposed decision;
- (b) set out details of any relief that the Commission may consider to seek from the Court by way of the institution of proceedings in accordance with section 38;
- (c) inform each undertaking that it may, in relation to the Commission's proposed decision or any of the matters contemplated in paragraph (b), within the period specified in the notice -
  - (i) submit written representations to the Commission; and
  - (ii) indicate whether it requires an opportunity to make oral representations to the Commission.

## Conference to be convened for oral representations

37. (1) If an undertaking indicates in accordance with section 36(2)(c)(ii) that it requires an opportunity to make oral representations to the Commission, the Commission must -

- (a) convene a conference to be held at a date, time and place determined by the Commission; and
- (b) give written notice of the date, time and place to -
  - (i) the undertaking or undertakings concerned;
  - (ii) any person who had lodged a complaint with the Commission concerning the conduct which was the subject-matter of the Commission's investigation; and
  - (iii) any other person whose presence at the conference is considered by the Commission to be desirable.

(2) A person to whom notice has been given of a conference in terms of subsection (1) may be accompanied by any person whose assistance at the conference is required by the person to whom notice has been given.

(3) At a conference the Commission must provide for as little formality and technicality as a proper consideration of the matters raised by persons participating in the conference permits.

(4) The Commission must cause such record of the conference to be kept as is sufficient to set out the matters raised by the persons participating in the conference.

(5) The Commission may terminate the conference if it is satisfied that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

#### Action following investigation

38. After consideration of any written representations made in terms of section 36(2)(c)(i) and of any matters raised at a conference held in accordance with section 37, the Commission may institute proceedings in the Court against the undertaking or undertakings concerned for an order -

- (a) declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the Part I or the Part II prohibition;
- (b) restraining the undertaking or undertakings from engaging in that conduct;
- (c) directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- (d) imposing a pecuniary penalty; or
- (e) granting any other appropriate relief.

#### Interim relief

39. (1) If the Commission on reasonable grounds believes that an undertaking has engaged, is engaging, or is proposing to engage, in conduct that constitutes or may constitute an infringement of the Part I or the Part II prohibition and that it is necessary for the Commission to act as a matter of urgency for the purpose -

- (a) of preventing serious, irreparable damage to any person or category of persons; or
- (b) of protecting the public interest,

the Commission may make application to the Court for an interim order restraining the undertaking or undertakings from engaging in such conduct.

(2) In proceedings under this section, the standard of proof is the same as the standard of proof in the Court on a common law application for an interim interdict.

(3) An interim order granted by the Court pursuant to subsection (1) is of effect until -

- (a) conclusion of any proceedings instituted in terms of section 38; or
- (b) expiry of the period of six months beginning on the date of issue of the interim order,

whichever is the earlier.

(4) Notwithstanding subsection (3), if a hearing in connection with proceedings instituted in terms of section 38 is not concluded within six months after the date of an interim order, the Court may, on good cause shown, extend the interim order for a further period not exceeding six months.

(5) An undertaking affected by an interim order that has a final or irreversible effect may appeal to the Supreme Court against that order.

#### Consent agreement

40. (1) The Commission may at any time, during or after an investigation into an alleged infringement of the Part I or the Part II prohibition, enter into an agreement of settlement with the undertaking or undertakings concerned setting out the terms to be submitted by the Commission by application to the Court for confirmation as an order of the Court.

(2) An agreement referred to in subsection (1) may include -

(a) with the consent of any person who submitted a complaint to the Commission in relation to the alleged infringement, an award of damages to the complainant;

(b) any amount proposed to be imposed as a pecuniary penalty.

(3) After hearing a motion for confirmation of an agreement referred to in subsection (1) as an order of the Court, the Court may -

(a) make the order as agreed to and proposed by the Commission and the undertaking or undertakings concerned;

(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.

#### Publication of decision of Commission

41. (1) The Commission must cause notice to be given in the Gazette of any action to be taken under section 38 and of any consent agreement referred to in section 40 to be submitted to the Court for confirmation as an order of the Court.

(2) The notice referred to in subsection (1) must include -

(a) the name of every undertaking involved; and

(b) the nature of the conduct that is the subject of the action or the consent agreement.

## CHAPTER 4 MERGERS

#### Merger defined

42. (1) For the purposes of this Chapter, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including -

(a) purchase or lease of shares, an interest, or assets of the other undertaking in question; or

(b) amalgamation or other combination with the other undertaking.

- (3) A person controls an undertaking if that person -
- (a) beneficially owns more than one half of the issued share capital of the undertaking;
  - (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
  - (c) is able to appoint, or to veto the appointment, of a majority of the directors of the undertaking;
  - (d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act, 1973 (Act No. 61 of 1973);
  - (e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
  - (f) in the case of the undertaking being a close corporation, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
  - (g) has the ability to materially influence the policy of the undertaking 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).

#### Control of mergers

43. (1) This Chapter applies to every proposed merger not falling within a class which the Minister, with the concurrence of the Commission, has determined and specified by notice in the Gazette to be excluded from the provisions of this Chapter.

(2) The Minister may under subsection (1) determine a class or classes of proposed mergers on any basis which the Minister considers appropriate, including with reference to -

- (a) the aggregate value of the assets of the parties to the proposed merger, or the value of the assets of any one or more of them;
- (b) the aggregate turnover over a specified period of the parties to the proposed merger, or the turnover of any one or more of them;
- (c) specified industries or categories of undertakings;
- (d) the number of parties involved in the proposed merger.

(3) No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless -

- (a) the proposed merger is -
  - (i) approved by the Commission in accordance with the provisions of this Chapter; and
  - (ii) implemented in accordance with any conditions attached to the approval; or

- (b) the relevant period referred to in paragraph (a), (b) or (c) of subsection (1), or subsection (2), of section 45, as the case may be, has elapsed without the Commission having made a determination in relation to the proposed merger.

#### Notice to be given to Commission of proposed merger

44. (1) Where a merger is proposed each of the undertakings involved must notify the Commission of the proposal in the prescribed manner.

(2) If, after receipt of a notification in terms of subsection (1), the Commission is of the opinion that in order to consider the proposed merger it requires further information, it may, within 30 days of the date of receipt of the notification, request such further information in writing from any one or more of the undertakings concerned.

#### Period for making determination in relation to proposed merger

45. (1) Subject to subsection (2), the Commission must consider and make a determination in relation to a proposed merger of which it has received notification in terms of section 44(1) -

- (a) within 30 days after the date on which the Commission receives that notification; or
- (b) if the Commission requests further information under section 44(2), within 30 days after the date of receipt by the Commission of the information; or
- (c) if a conference is convened in accordance with section 46, within 30 days after the date of conclusion of the conference.

(2) If the Commission is of the opinion that the period referred to in paragraph (a), (b) or (c) of subsection (1) should be extended due to the complexity of the issues involved it may, before expiry of that period, by notice in writing to the undertakings involved extend the relevant period for a further period, not exceeding 60 days, specified in the notice.

#### Conference in relation to proposed merger

46. (1) If the Commission considers it appropriate it may determine that a conference be held in relation to a proposed merger.

(2) If the Commission determines that a conference must be held it must, before expiry of the period referred to in paragraph (a) or (b) of subsection (1) of section 45 or subsection (2) of that section, as the case may be, give reasonable notice to the undertakings involved in writing -

- (a) convening the conference;
- (b) specifying the date, time and place for the holding thereof; and
- (c) stipulating the matters to be considered thereat.

#### Determination of proposed merger

47. (1) In making a determination in relation to a proposed merger the Commission may either -

- (a) give approval for the implementation of the merger; or
- (b) decline to give approval for the implementation of the merger.

(2) The Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including -

- (a) the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
- (b) the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- (c) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- (d) the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
- (e) the extent to which the proposed merger would be likely to affect employment;
- (f) the extent to which the proposed merger would be likely to affect the ability of small undertakings, in particular small undertakings owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any market;
- (g) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets;
- (h) any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

(3) For the purpose of considering a proposed merger the Commission may refer the particulars of the proposed merger to an inspector for investigation and a report in relation to the criteria referred to in subsection (2), and must inform the undertakings involved of such referral.

(4) As soon as practicable after a referral in terms of subsection (3), the inspector concerned must -

- (a) investigate the proposal so referred; and
- (b) before the date specified by the Commission, furnish the Commission with a report of the investigation.

(5) Any person, including a person not involved as a party in the proposed merger, may voluntarily submit to an inspector or the Commission any document, affidavit, statement or other relevant information in respect of a proposed merger.

(6) The Commission may give approval for the implementation of a proposed merger on such conditions as the Commission may consider appropriate.

(7) The Commission must -

- (a) give notice of the determination made by the Commission in relation to a proposed merger -
  - (i) to the parties involved in the proposed merger, in writing; and
  - (ii) by notice in the Gazette; and
- (b) issue written reasons for its determination -
  - (i) if it prohibits or conditionally approves a proposed merger; or
  - (ii) if it is requested to do so by any party to the merger.

#### Revocation of approval of proposed merger

48. (1) The Commission may at any time, after consideration of any representations made to it in terms of subsection (2), revoke a decision approving the implementation of a proposed merger if -

- (a) the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or
- (b) any condition attached to the approval of the merger that is material to the implementation is not complied with.

(2) If the Commission proposes to revoke its decision under subsection (1), it must -

- (a) give notice in writing of the proposed action to every undertaking involved in the merger, and to any other person who in the opinion of the Commission is likely to have an interest in the matter; and
- (b) call upon such persons to submit to the Commission, within 30 days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.

#### Review of decisions of Commission on mergers by Minister

49. (1) Not later than 30 days after notice is given by the Commission in the Gazette in terms of section 47(7) of the determination made by the Commission in relation to a proposed merger, a party to the merger may make application to the Minister, in the form determined by the Minister, to review the Commission's decision.

(2) Within 30 days after receiving an application in terms of subsection (1), the Minister must by notice in the Gazette -

- (a) give notice of the application for a review; and
- (b) invite interested parties to make submissions to the Minister in regard to any matter to be reviewed within the time and manner stipulated in the notice.

(3) Within 4 months after the date that an application for a review was made, the Minister must make a determination either -

- (a) overturning the decision of the Commission;
- (b) amending the decision of the Commission by ordering restrictions or including conditions; or

- (c) confirming the decision of the Commission.
- (4) The Minister must -
  - (a) give notice of the determination made by the Minister in relation to the review -
    - (i) to the Commission and to the parties involved in the proposed merger, in writing; and
    - (ii) by notice in the Gazette; and
  - (b) issue written reasons for that determination to the Commission and the parties involved.
- (5) The Minister may determine the procedure for a review in terms of this section.

#### Compliance with other laws relating to mergers

50. Approval of a proposed merger granted by the Commission, or by the Minister upon a review, under this Chapter -

- (a) does not relieve an undertaking from complying with any other law which requires that the sanction of the Court be obtained for the merger;
- (b) is not binding on the Court.

#### Merger implemented in contravention of this Chapter

51. If a merger is being, or has been, implemented in contravention of the provisions of this Chapter, the Commission may make application to the Court for -

- (a) an interdict restraining the parties involved from implementing the merger;
- (b) an order directing any party to the merger to sell or dispose of in any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger;
- (c) declaring void any agreement or provision of an agreement to which the merger was subject;
- (d) the imposition of a pecuniary penalty.

## CHAPTER 5 JURISDICTION OF COURT

#### Jurisdiction of court

52. Without prejudice to the powers vested in the Court, the Court has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of this Act.

#### Pecuniary penalties

- 53. (1) The Court may impose a pecuniary penalty -
  - (a) for contravention of the Part I or the Part II prohibition;



- (b) for contravention of, or non-compliance with, a condition attached to an exemption granted under Part III of Chapter 3;
- (c) for contravention of, or non-compliance with, an order of the Court;
- (d) for the implementation of a merger to which Chapter 4 is applicable -
  - (i) without the approval of the Commission as required by that Chapter;
  - (ii) in contravention of a decision of the Commission prohibiting the merger under that Chapter; or
  - (iii) in a manner contrary to a condition under which approval for the merger was given by the Commission under that Chapter.

(2) A pecuniary penalty may be imposed under subsection (1) for any amount which the Court considers appropriate, but not exceeding 10 per cent of the global turnover of the undertaking during its preceding financial year.

(3) In determining an appropriate penalty, the court must have regard to all relevant matters concerning the contravention, including -

- (a) the nature, duration, gravity and extent thereof;
- (b) the nature and extent of any loss or damage suffered by any person as a result thereof;
- (c) the behaviour of any undertaking involved;
- (d) the market circumstances in which it took place;
- (e) the level of profit derived therefrom;
- (f) the degree to which the undertaking involved has co-operated with the Commission and the Court; and
- (g) whether the undertaking has previously been found by the Court to have engaged in conduct in contravention of this Act.

(4) An order imposing a pecuniary penalty, including a pecuniary penalty arising from a consent agreement confirmed as an order of the Court in accordance with section 40, has the effect of, and may be executed as if it were, a civil judgment granted by the Court in favour of the Government of Namibia.

(5) A pecuniary penalty payable in terms of this Act must be paid into the State Revenue Fund.

## CHAPTER 6 GENERAL PROVISIONS

### Civil actions and jurisdiction

54. (1) A person who has suffered damage as a result of an infringement of the Part I or the Part II prohibition may not commence an action in any court for an award of damages or for the assessment of damages if that person has been awarded damages in a consent agreement confirmed in accordance with section 40.

(2) If a person who has not been awarded damages in a consent agreement contemplated in subsection (1) institutes proceedings in a court for an award of damages allegedly suffered as a result of an infringement of the Part I or the Part II prohibition, that person must file with the Registrar of the Court or the Clerk of the Court a notice from the chairperson of the Commission in the prescribed form certifying, either -

- (a) that the conduct on which the action is based has been found by the Court, following proceedings instituted by the Commission in terms of section 38, to be an infringement of the Part I or the Part II prohibition, and stating the date of that finding; or
- (b) that a consent agreement was confirmed in accordance with section 40 in relation to the conduct on which the action is based, and that no award for damages is provided for in that agreement for the benefit of the plaintiff, and stating the reasons therefor; or
- (c) that, following an investigation by the Commission in accordance with Part IV of Chapter 3 into the conduct on which the action is based, the Commission has decided not to take any action contemplated in section 38, and stating the reasons for the Commission's decision; or
- (d) that the Commission, having received a complaint or a request to investigate an alleged infringement of the Part I or the Part II prohibition in respect of the conduct on which the action is based, has in terms of section 33(2) decided not to conduct an investigation, and stating the reasons for the Commission's decision.

#### Prohibition on disclosure of information

55. (1) A member of the Commission or of a committee, the Secretary, any other employee of the Commission and any other person required or permitted to be present at any meeting of the Commission or of a committee or at any investigation in terms of this Act, may not publish or communicate or in any other way disclose any information relating to the affairs of any person or undertaking that has come to such person's knowledge -

- (a) in the exercise of any power or performance of any duty or function under this Act; or
  - (b) as a result of such person's attendance at such meeting or investigation.
- (2) Subsection (1) does not apply to information disclosed -
- (a) for the purpose of the proper administration or enforcement of this Act;
  - (b) for the proper administration of justice; or
  - (c) at the request of an inspector, the chairperson or any other member entitled to receive the information.

#### Disclosure of private interest by staff

56. (1) The Secretary, an inspector or any other person employed by the Commission who has a financial or other personal interest in any matter which is the subject of an investigation by the Commission -

- (a) must disclose that interest to the chairperson; and

- (b) unless the Commission otherwise directs, may not participate or assist in the investigation of that matter.

(2) The Secretary, an inspector or any other person employed by the Commission may not use any confidential information obtained in the performance of their functions to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person.

Time within which investigation may be initiated

57. An investigation into an alleged infringement of the Part I or the Part II prohibition may not be initiated after three years from the date the infringement has ceased.

Limitation of liability

58. Neither the Commission nor any member, the Secretary, any employee of the Commission or any other person engaged by the Commission in connection with any function of the Commission is liable in respect of anything done in good faith in terms of this Act.

Standard of proof

59. In any proceedings in terms of this Act, other than proceedings in terms of section 39(2) or criminal proceedings, the standard of proof is on a balance of probabilities.

## CHAPTER 7 OFFENCES AND PENALTIES

Hindering administration of Act

60. A person commits an offence who hinders, opposes, obstructs or unduly influences any person who is exercising a power or performing a duty conferred or imposed on that person by this Act.

Failure to comply with summons

61. A person commits an offence who -
- (a) having been duly summoned to attend before the Commission, without reasonable excuse fails to do so; or
  - (b) being in attendance as required -
    - (i) refuses to take an oath or affirmation lawfully required by the Commission;
    - (ii) refuses, after having taken the oath or an affirmation, to answer any question to which the Commission may lawfully require an answer or gives evidence which the person knows is false;
    - (iii) fails to produce any document or thing in his or her possession or under his or her control lawfully required by the Commission to be produced to it.

Failure to comply with order of Court

62. A person commits an offence who contravenes or fails to comply with an interim or final order of the Court given in terms of this Act.

## Other offences

63. A person commits an offence who -
- (a) does anything calculated to improperly influence the Commission or any member concerning any matter connected with the exercise of any power or the performance of any function of the Commission;
  - (b) anticipates any decision of the Commission concerning an investigation in a way that is calculated to influence the proceedings or decision;
  - (c) does anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law;
  - (d) knowingly provides false information to the Commission;
  - (e) defames a member in his or her official capacity;
  - (f) contravenes section 10(1) or (3);
  - (g) contravenes section 55;
  - (h) contravenes section 56.

## Penalties

64. A person convicted of an offence in terms of this Act, is liable -
- (a) in the case of a contravention of section 62, to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment;
  - (b) in the case of a contravention of section 55, to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding three years, or to both a fine and imprisonment; or
  - (c) in any other case, to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding one year, or to both a fine and imprisonment.

## Jurisdiction of magistrates' courts

65. Notwithstanding any other law, a magistrate's court has jurisdiction to impose any penalty provided for in section 64.

## CHAPTER 8 APPLICATION OF THIS ACT AND OTHER LEGISLATION RELATING TO COMPETITION

### Definitions for this Chapter

66. (1) In this section -
- (a) "public regulation" means any law, or any licence tariff, directive or similar authorisation issued by a regulating authority or pursuant to any statutory authority; and
  - (b) "regulating authority" means an entity established by or under any law which is responsible for regulating an industry or sector of an industry.

## Relationship with other authorities

67. (1) If a regulatory authority, in terms of any public regulation, has jurisdiction in respect of any conduct regulated in terms of Chapter 3 or 4 within a particular sector, the Commission and that authority -

- (a) must negotiate an agreement to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to secure the consistent application of the principles of this Act; and
- (b) in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.

(2) In addition to the matters contemplated in paragraph (a) of subsection (1), an agreement in terms of that subsection must -

- (a) identify and establish procedures for the management of areas of concurrent jurisdiction;
  - (b) promote co-operation between the regulatory authority and the Commission; and
  - (c) provide for the exchange of information and the protection of confidential information.
- (3) An agreement referred to in subsection (1) must be published in the Gazette.

## CHAPTER 9 TRANSITIONAL

### Transitional provisions

68. (1) For twelve months after the date this Act comes into force, or such longer period as the Minister may determine by notice in the Gazette, and, if an application for exemption under section 27 is submitted to the Commission within that period, until the Commission takes a decision on that application, the Part I prohibition does not apply to any agreement, decision or concerted practice in existence on that date which is of a nature contemplated by the Part I prohibition.

(2) If, during the period between the publication of this Act in the Gazette and the date of its commencement, a transaction is concluded whereby a merger is effected to which Chapter 4 of this Act would have applied had the transaction been concluded after the date of commencement, such merger is regarded for a period of 12 months from the date of commencement to be a merger implemented in contravention of that Chapter, unless the parties to the merger, within three months of the date of commencement of this Act, notify the Commission of the transaction in terms of section 44 as if it were a proposed merger.

(3) Subject to subsection (4), the provisions of Chapter 4, with the changes required by the context, apply to a merger that is notified to the Commission in terms of subsection (2).

(4) The provisions of section 51 do not apply to a transaction referred to in subsection (2) until -

- (a) the period of three months referred to in that subsection expires without notification of the transaction in accordance with the subsection; or

- (b) if notification of the transaction is given in accordance with that subsection, a determination in relation to the merger is made by the Commission pursuant to subsection (3).

#### Repeal of laws

- 69. The following laws are repealed:
  - (a) the Regulation of Monopolistic Conditions Act, 1955 (Act No. 24 of 1955);
  - (b) the Regulation of Monopolistic Conditions Amendment Act, 1958 (Act No. 14 of 1958);
  - (c) the Regulation of Monopolistic Conditions Amendment Act, 1975 (Act No. 48 of 1975); and
  - (d) the Regulation of Monopolistic Conditions Amendment Act, 1976 (Act No. 23 of 1976)

#### Short title and commencement

70. (1) This Act is called the Competition Act, 2003, and comes into operation on a date to be determined by the Minister by notice in the Gazette.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

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# PAPUA NEW GUINEA

## THE INDEPENDENT CONSUMER AND COMPETITION COMMISSION ACT 2002

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## THE INDEPENDENT CONSUMER AND COMPETITION COMMISSION ACT 2002

### PART I :PRELIMINARY

#### 1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS

(1) This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C (qualified rights) of the Constitution, namely

(a) the right to liberty of the person conferred by Section 42 of the Constitution; and

(b) the right to freedom from arbitrary search of person or property and entry of premises, conferred by Section 44 of the Constitution; and



(c) the right to freedom of expression and publication conferred by Section 46 of the Constitution; and

(d) the right to peacefully assemble and associate and to form or belong to, or not belong to, political parties, industrial organizations and other associations conferred by Section 47 of the Constitution; and

(e) the right to freedom of choice of employment in any calling for which a person has the qualifications (if any) lawfully required conferred by Section 48 of the Constitution; and

(f) the right to reasonable privacy in respect of his private and family life, his communications with other persons and his personal papers and effects conferred by Section 49 of the Constitution; and

(g) the right of reasonable access to official documents conferred by Section 51 of the Constitution, is a law that is made (pursuant to Section 38 of the Constitution)

(h) taking account of the National Goals and Directive Principles (including in particular, the goal that Papua New Guinea should, among other things, be economically independent and its economy basically self reliant and to achieve development primarily through the use of Papua New Guinea forms of economic organization) and the Basic Social Obligations (including, in particular, the obligations to protect Papua New Guinea and to safeguard the national wealth, resources and environment in the interests not only of the present generation but also of future generations), for the purpose of giving effect to the public interest in public safety, public order, public welfare, and the development of underprivileged or less advanced groups or areas; and

(i) in order to protect the exercise of the rights and freedom of others; and

(j) to make provision for cases where the exercise of one such right may conflict with the exercise of another.

(2) For the purposes of Section 41 of the Organic Law on Provincial Governments and Local-level Governments, it is declared that this Act relates to a matter of national interest and it is further declared that this Act deals with a matter of urgent national importance and it is in the national interest that this Act be made without delay.

## 2. INTERPRETATION

In this Act, unless the contrary intention appears

"Appeals Panel" means the Appeals Panel constituted under Section 42;

"Appointments Committee" means the Independent Consumer and Competition Commission Appointments Committee referred to in Subsection 9(1);

"Associate Commissioner" means a person appointed as an Associate Commissioner under Section 9;

"Chairman" in relation to a meeting of the Commission, means the Commissioner or (in the Commissioner's absence) such other member as is appointed by the Commissioner to preside at meetings of the Commission in the absence of the Commissioner;

"Commission" means the Independent Consumer and Competition Commission established by Section 4, and includes a member of the Commission performing any function of the Commission;

"Commissioner" means a person appointed as the Commissioner under Section 9;

"Court" means the National Court;

"decision" includes a declaration, determination, order or other decision;

"International Arbitrator" means a member of the Panel of Experts who satisfies the requirements set out in Section 41(3).

"officer of the Commission" means any person engaged by the Commission pursuant to Division II.7;

"Panel of Experts" means the panel of experts appointed under Section 41;

"price" includes a price range;

"regulated entity" means an entity that is declared to be a regulated entity under Section 32 or Section 33;

"regulated goods" means goods that are declared to be regulated goods under Section 32 or Section 33;

"regulated industry" means an industry that is declared to be a regulated industry for the purposes of this Act by another Act;

"regulated services" means services that are declared to be regulated services under Section 32 or Section 33;

"regulatory contract" means a contract issued under Section 34(1) or Section 35(1);

"related corporation" has the meaning in Subsection 2(3) of the Companies Act 1997;

"State owned entity" means

(a) a statutory body established by an Act; or

(b) an entity in relation to which the State, a Department or an office of a Department, the trustee of a trust a beneficiary of which is the State, or another State owned enterprise -

(i) controls the composition of the board of directors of the entity; or

(ii) controls more than 50% of the voting power in the entity; or

(iii) holds more than 50% of the issued share capital of the entity (excluding any part of it that carries no right to participate beyond a specific amount in a distribution of either profits or capital).

### 3. ACT BINDS THE STATE

Except as otherwise provided, this Act binds the State.

## PART II :INDEPENDENT CONSUMER AND COMPETITION COMMISSION

### Division 1 :Establishment, Functions and Powers

#### 4. ESTABLISHMENT OF INDEPENDENT CONSUMER AND COMPETITION COMMISSION.

(1) There is established a body corporate called the Independent Consumer and Competition Commission.

(2) The Commission -

(a) has perpetual succession; and

(b) has a common seal; and

(c) may sue and be sued in its corporate name; and

(d) has the functions assigned to it by or under this or any other Act; and (e) has the powers conferred on it by or under this or any other Act.

(3) All courts and persons acting judicially shall take judicial notice of the seal of the Commission affixed to a document and, until the contrary is proved, shall presume that it was duly affixed.

(4) The common seal of the Commission shall be kept in such custody as the Commission directs and shall not be used except as authorized by the Commission.

## 5. OBJECTIVES OF COMMISSION.

(1) In performing its functions and exercising its powers, the primary objectives of the Commission are -

(a) to enhance the welfare of the people of Papua New Guinea through the promotion of competition, fair trading and the protection of consumers' interests; and

(b) to promote economic efficiency in industry structure, investment and conduct; and

(c) to protect the long term interests of the people of Papua New Guinea with regard to the price, quality and reliability of significant goods and services.

(2) In seeking to achieve its primary objectives, the Commission shall have regard to the following facilitating objectives :-

(a) to promote and protect the bona fide interests of consumers with regard to the price, quality and reliability of goods and services;

(b) to ensure that users and consumers (including low-income or vulnerable consumers) benefit from competition and efficiency;

(c) to facilitate effective competition and promote competitive market conduct;

(d) to prevent the misuse of market power;

(e) to promote and encourage the efficient operation of industries and efficient investment in industries;

(f) to ensure that regulatory decision making has regard to any applicable health, safety, environmental and social legislation;

(g) to promote and encourage fair trading practices and a fair market.

## 6. FUNCTIONS OF COMMISSION.

The functions of the Commission are -

- (a) to perform such functions relating to price regulation, licensing, industry regulation and other matters as are conferred on the Commission by or under this Act or any other Act, including, without limitation, in relation to issuing, administering and enforcing regulatory contracts under Part III; and
- (b) to promote and protect the bona fide interests of consumers in relation to the acquisition and supply of goods and services; and
- (c) to make available information in relation to matters affecting the interests of consumers, including information with respect to the rights and obligations of persons under Papua New Guinea laws that are designed to protect the interest of consumers; and
- (d) to investigate complaints concerning matters affecting or likely to affect the bona fide interests of consumers in relation to the acquisition of goods and services and to enforce compliance with laws relating to such matters; and
- (e) to investigate complaints concerning market conduct and to enforce compliance with laws relating to market conduct in Papua New Guinea; and
- (f) to make, monitor the operation of, and review from time to time, codes and rules relating to the conduct or operation of regulated entities; and
- (g) to advise and make recommendations to the Minister in relation to any matter referred to the Commission by the Minister; and
- (h) to advise and make recommendations to the Minister with respect to any matter connected with this Act or with respect to any matter connected to any other Act which confers functions on the Commission; and
- (i) such other functions as may be conferred on the Commission by any other Act.

## 7. POWERS OF COMMISSIONS.

- (1) The Commission has power to do all things necessary or convenient to be done for or in connection with or otherwise incidental to the performance of its functions and to enable it to achieve its objectives.
- (2) Without limiting Subsection (1), the Commission has such other powers as are conferred on the Commission by any other Act.

(3) Without limiting Subsection (1), the Commission may publish statements, reports and guidelines relating to the performance of its functions.

(4) The Commission shall not exercise any power in a manner that is inconsistent with the requirements of a regulatory contract that is in effect and the exercise of a power in a manner that is inconsistent with a regulatory contract that is in effect is of no effect to the extent of the inconsistency.

## Division 2 :Membership of the Commission

### 8. COMPOSITION OF THE COMMISSION.

(1) The Commission consists of one Commissioner and two Associate Commissioners.

(2) The Commissioner shall be appointed as a full-time member of the Commission.

(3) An Associate Commissioner may be appointed as a full-time or part-time member of the Commission.

### 9. APPOINTMENT OF MEMBERS.

(1) The members of the Commission shall be appointed by the Head of State, acting with, and in accordance with, the advice of the Independent Consumer and Competition Commission Appointments Committee consisting of -

(a) the Prime Minister, who is the Chairman; and

(b) the Leader of the Opposition; and

(c) the Minister or, if the Minister is the Prime Minister, the Attorney General; and

(d) the Governor of the Central Bank.

(2) Before the Appointments Committee advises the Head of State to appoint a person as a member of the Commission, a majority of the members of the Appointments Committee shall be satisfied that the person -

(a) is qualified for appointment to the Commission in accordance with Section 11; and

(b) is not disqualified from appointment to the Commission under Section 12.

(3) A member of the Commission -

(a) subject to Subsection (4), shall be appointed for a period of five years; and

(b) shall hold office on such terms and conditions as are determined by the Parliament in accordance with a recommendation of the Salaries and Remuneration Commission; and

(c) is eligible for re-appointment.

(4) Notwithstanding Subsection (3)(a), in relation to the three first members of the Commission, one shall be appointed for an initial term of three years, one for an initial term of four years and one for an initial term of five years.

(5) The terms and conditions of office of a member of the Commission shall not, without the consent of that member, be varied while that member is in office so as to become less favourable to that member.

#### 10. LEAVE.

If a member of the Commission applies to the Minister for leave of absence, the Minister may grant such leave of absence on such terms and conditions as to remuneration or otherwise as the Minister determines.

#### 11. QUALIFICATIONS FOR APPOINTMENT.

(1) A person is not eligible for appointment as a member of the Commission unless he is a person of integrity, independence of mind and good reputation.

(2) A person is not eligible for appointment as a member of the Commission unless he has knowledge of or experience in industry, commerce, economics, law, public administration or consumer protection.

(3) At least one of the persons appointed as an Associate Commissioner -

(a) shall have international experience in the operation and administration of an economic regulatory regime; and

(b) shall not be a resident of Papua New Guinea.

#### 12. DISQUALIFICATIONS FROM OFFICE.

A person is not qualified to be, or to remain, a member of the Commission if he is -

- (a) a member, or candidate for election as a member, of the National Parliament, a member of a Provincial Government or a member of a Local-level Government or a Local-level Government Special Purposes Authority; or
- (b) an office-holder, or candidate for election as an office-holder, in a registered political party; or
- (c) an undischarged bankrupt or insolvent; or
- (d) of unsound mind within the meaning of any law relating to the protection of the person and property of persons of unsound mind; or
- (e) under sentence of death or imprisonment or has previously been sentenced to death or a term of imprisonment; or
- (f) found guilty of misconduct in office under the Organic Law on the Duties and Responsibilities of Leadership.

### 13. SPECIAL CONDITIONS OF EMPLOYMENT.

(1) A member of the Commission shall not -

- (a) actively engage in politics; or
- (b) absent himself from duty for more than fourteen consecutive days or more than 28 days in any period of 12 months except because of illness or on leave granted by the Minister.

(2) The Commissioner or an Associate Commissioner appointed as a full-time member of the Commission shall not, without the consent in writing of the Minister, directly or indirectly engage in any paid employment outside the duties of their respective offices as a member of the Commission.

### 14. RESIGNATION FROM OFFICE.

(1) A member of the Commission may resign his office by giving to the Head of State three months' notice in writing of his intention to do so.

(2) The period of three months specified in Subsection (1) is deemed to commence on the twenty-second day after the receipt by the Head of State of the notice except where the Head of State, acting with, and in accordance with, the advice of a majority of the



members of the Appointments Committee, by notice in writing to the member, fixes an earlier date for the commencement of that period.

(3) A member of the Commission may withdraw his resignation at any time before the period of three months referred to in Subsection (1) commences.

## 15. VACANCY.

(1) The office of Commissioner or Associate Commissioner becomes vacant if the person holding that office -

(a) dies; or

(b) resigns in accordance with Section 14; or

(c) attains the age of 70 years; or

(d) is not re-appointed at the end of a term of office; or

(e) is removed from office in accordance with Section 16; or

(f) is not qualified to remain a member of the Commission by virtue of Section 12; or

(g) is declared by the Court to have contravened Section 13.

(2) A vacancy in the office of Commissioner or Associate Commissioner shall be filled as soon as possible and, in any event, within 90 days of the vacancy arising.

(3) If -

(a) a vacancy in the office of Commissioner or Associate Commissioner arises as a result of the expiry of the term of office of a member of the Commission; and

(b) the vacancy is not filled within 90 days of the vacancy arising; and

(c) the member of the Commission whose term of office expired

(i) has advised the Head of State in writing that he is willing to be re-appointed; and

(ii) is eligible for re-appointment, then, with effect from the day next following the 90 days after the vacancy arose, the member of the Commission shall be deemed to have been re-appointed to the office of Commissioner or Associate Commissioner, as the case may be, for a further term of five years

## 16. REMOVAL.

(1) The Court, on the application of the Minister, may remove or suspend a member of the Commission from office for -

(a) misconduct; or

(b) incapacity to perform satisfactorily his functions; or

(c) material contravention of or failure to comply with the requirements of this or any other Act conferring functions on the Commission.

(2) The Minister may only bring an application under Subsection (1) acting with, and in accordance with, the advice of the National Executive Council.

(3) A member of the Commission may only be removed or suspended from office as provided in Section 15 or under this section.

## 17. MINISTER TO PERFORM FUNCTIONS OF COMMISSION PENDING APPOINTMENT OF MEMBERS.

The Minister may perform such functions and exercise such powers as are conferred on and exercisable by the Commission under this Act or any other Act but only until the appointment of the first Commissioner and the first two Associate Commissioners pursuant to this Act.

## 18. VALIDITY OF CONDUCT OF COMMISSION.

An act or decision of the Commission is not invalid by reason only of -

(a) a defect or irregularity in, or in connection with, the appointment or removal of a member of the Commission; or

(b) a vacancy in, or absence from, an office of a member of the Commission.

## Division 3 :Procedures of the Commission

## 19. MEETINGS OF COMMISSION.

(1) The Commission shall meet as often as the business of the Commission requires, but in any event at least once in every two months.

(2) A meeting of the Commission may be convened by any member of the Commission.

(3) Notice of a meeting of the Commission shall be provided to each member of the Commission by the member who wishes to convene the meeting.

(4) Meetings of the Commission shall be held at such places and at such times as the Commissioner determines.

(5) At a meeting of the Commission -

(a) a quorum is constituted by two members of the Commission one of whom shall be the Associate Commissioner who satisfies the requirements set out in Section 11(3) unless there is no such member or that member is on leave or is disqualified from taking part in a deliberation of the Commission in accordance with Section 20(4); and

(b) all members present are entitled to vote; and

(c) matters arising shall be decided by a majority of the votes of the members present and voting; and

(d) in the event of an equality of votes on any matter, the Chairman has a casting vote as well as a deliberative vote.

(6) The Commission shall cause minutes of its meetings to be recorded and kept. (7)

Subject to this Act, the procedures of the Commission are as determined by the Commissioner which shall be determined prior to the first meeting of the Commission and may be amended by the Commissioner as required from time to time.

(8) If the Commissioner so determines, a member or members may participate in, and form part of a quorum at, a meeting of the Commission by means of any of the following methods of communication :-

(a) telephone;

(b) closed circuit television;

(c) any other method of communication determined by the Commissioner.

(9) A determination made by the Commissioner under Subsection (8) may be made in respect of a particular meeting or meetings of the Commission or in respect of all meetings of the Commission.

(10) A resolution in writing signed by all of the members of the Commission who are entitled to vote on the resolution (including those members who are necessary to

constitute a quorum) is a valid resolution of the Commission and is effective when signed by the last of those members or at such later time or in such later circumstances as the resolution provides.

(11) A resolution referred to in Subsection (10) may consist of several documents in the same form, each signed by one or more of the relevant members of the Commission.

## 20. DISCLOSURE OF INTERESTS BY MEMBERS.

(1) A member of the Commission shall, as soon as possible after the relevant facts have come to his knowledge, inform the Commission in writing of -

(a) any direct or indirect pecuniary interest that he has or acquires in any business, or in any body corporate carrying on business, in Papua New Guinea or elsewhere; and

(b) any direct or indirect pecuniary interest in a matter being considered or about to be considered by the Commission.

(2) A disclosure under Subsection (1) shall be recorded in the minutes of the Commission.

(3) A disclosure under Subsection 1(b) shall -

(a) be notified by the Commission to the Minister as soon as possible; and

(b) be included in the Commission's annual performance and management report required under Section 63(2) of the Public Finances (Management) Act 1995; and

(c) be notified by the Commission to the persons concerned in the matter.

(4) A member of the Commission to whom Subsection (1)(b) applies -

(a) shall not take part in any deliberation or decision of the Commission in relation to that matter; and

(b) shall be disregarded for the purpose of constituting a quorum of the Commission for any such deliberation or decision.

(5) If the operation of Subsection (4) has the effect that the Commission is unable to proceed with the deliberation or decision of a matter, the Chairman (who shall not be that member) may direct that the member of the Commission who has the relevant interest may take part, after the disclosure of that interest, in a deliberation or decision of the Commission in relation to the matter and may be counted for the purpose of constituting a quorum of the Commission for any such deliberation or decision.

(6) This section does not apply to the extent the interest of a member of the Commission is only as a result of the supply of goods and services that are available to members of the public on the same terms and conditions.

(7) A failure to comply with this section does not affect the validity of an act or decision of the Commission.

## 21. COMMITTEES.

(1) The Commission may, from time to time, establish committees to advise it on such matters related to its objectives or the performance of its functions as it considers necessary.

(2) In establishing a committee under Subsection (1), the Commission may -

(a) appoint such persons, including members of the Commission, as it considers necessary; and

(b) specify the functions and procedures of the committee

(3) If the Commission establishes a committee under this section, the Commission shall notify the Minister, and cause notice to be published in the National Gazette, of the establishment of the committee, the members of the committee, the functions of the committee and the remuneration (if any) payable to the members of the committee.

## 22. DELEGATION.

(1) The Commission may, by unanimous decision of all members of the Commission and subject to any regulations made for the purposes of this section, delegate to any member, officer or committee of the Commission or to any other person any of its functions and powers other than this power of delegation.

(2) A delegation under Subsection (1) -

(a) shall be in writing; and

(b) may be subject to such conditions or restrictions as are specified in the instrument of delegation; and

(c) may be specified to be restricted to a particular matter or class of matters; and

(d) is revocable at will by resolution of the Commission in writing; and

(e) does not affect or prevent the performance of a function or the exercise of a power by the Commission.

#### Division 4 :Independence of the Commission

#### 23. COMMISSION NOT SUBJECT TO DIRECTION.

Subject to Section 25 and Part VIII, the Commission is not subject to direction or control by the Minister or any other person in the performance of its functions.

#### Division 5 :Finance

#### 24. APPLICATION OF MONEY RECEIVED BY COMMISSION.

Fees received by the Commission under this or any other Act shall be retained by the Commission for the purpose of funding its costs.

#### 25. APPLICATION OF PUBLIC FINANCES (MANAGEMENT) ACT 1995.

(1) Part VIII of the Public Finances (Management) Act 1995 applies to and in relation to the Commission.

(2) The Commission's annual performance and management report required under Subsection 63(2) of the Public Finances (Management) Act 1995 shall include, in addition to the matters required under that Act -

- (a) a report on the Commission's operations during the year in question; and
- (b) such other matters as are required under this or any other Act or as are prescribed.

#### 26.TENDERS AND CONTRACTS.

For the purposes of Section 59(1) of the Public Finances (Management) Act 1995, tenders shall be publicly invited and contracts taken by the Commission for all works, supplies and services the estimated cost of which exceeds K100,000.00.

## Division 6 :Agreements with Other Bodies

### 27. AGREEMENTS WITH OTHER BODIES.

(1) The Commission may enter into agreements with other regulatory bodies or authorities, whether in Papua New Guinea or overseas, for the purpose of assisting the Commission to carry out its functions and to meet its objectives under this Act or any other Act.

(2) An agreement referred to in this section -

(a) may deal with -

(i) matters pertaining to joint investigative efforts; and

(ii) reciprocal enforcement regimes; and

(iii) joint prosecution; and

(iv) gathering and sharing of information; and

(v) institutional strengthening and development of knowledge; and

(vi) such further or other matters as are convenient for the performance by the Commission of its functions; and

(b) in the case of an agreement with an overseas regulatory body or authority, shall be made conditional on being approved by the Head of State, acting on advice.

## Division 7 :Staff of the Commission

### 28. PERMANENT EMPLOYEES.

(1) The Commission may engage such persons as it considers necessary as employees of the Commission.

(2) Subject to the Salaries and Conditions Monitoring Committee Act 1988, the terms and conditions of engagement of an employee engaged under Subsection (1) are as determined by the Commission.

(3) Where the employee of the Commission who is engaged under Subsection (1) was, immediately before his engagement, an officer of the Public Service, his service as an

employee of the Commission shall be counted as service in the Public Service for the purpose of determining that his (if any) in respect of -

(a) leave of absence on the grounds of illness; and

(b) furlough or pay in lieu of furlough (including pay to dependants on the death of the employee).

## 29. TEMPORARY AND CASUAL EMPLOYEES.

(1) The Commission may engage such persons as it considers necessary as temporary and casual employees of the Commission.

(2) Employees engaged under Subsection (1) shall be employed on such terms and conditions as the Commission determines.

## 30. OTHER STAFF ARRANGEMENTS.

The Commission may enter into agreements or arrangements for the use of the services of any staff of a Department, statutory or other public body.

## 31. CONSULTANTS.

(1) Subject to Section 26 and to Part VIII of the Public Finances (Management) Act 1995, the Commission may engage persons with suitable qualifications and experience as consultants.

(2) An engagement under Subsection (1) shall be on such terms and conditions as the Commission determines.

## PART III : REGULATED ENTITIES, REGULATED GOODS, REGULATED SERVICES AND REGULATORY CONTRACTS

Division 1 : Regulated Entities, Regulated Goods and Regulated Services.

## 32. DECLARATION OF REGULATED ENTITIES, ETC.



(1) The Minister responsible for treasury matters may, by notice published in the National Gazette, declare an entity that supplies, or is capable of supplying, goods or services in a regulated industry, to be a regulated entity -

(a) where that entity is a State owned entity - at any time when that entity is a State owned entity; or

(b) where that entity was a State owned entity as at the date this section comes into operation but that entity ceases to be a State owned entity - at any time within the period of three months after that entity ceases to be a State owned entity; or

(c) where that entity carries on business using assets transferred to it from an entity that was a State owned entity as at the date this section comes into operation - at any time within the period of three months after that transfer of those assets, with effect from the later of the date of publication of the notice in the National Gazette and the commencement date specified in the notice.

(2) Where the Minister makes a declaration under Subsection (1), he may, by the same notice or by a subsequent notice published in the National Gazette, declare any goods or services supplied or capable of being supplied by the regulated entity to be regulated goods or regulated services, as the case may be, with effect from the later of the date of publication in the National Gazette and the commencement date specified in the notice.

(3) A declaration made under Subsection (2) may identify the relevant goods or services by reference to the persons to whom they are supplied, the location in which they are supplied, the purpose for which they are supplied, the period over which they are supplied or such other factors as the Minister considers appropriate.

(4) The Minister may not vary or revoke a declaration made under Subsection (1) or Subsection (2).

(5) The Minister shall not exercise any power conferred under this section in a manner that is inconsistent with the requirements of a regulatory contract that is in effect, and any exercise of a power in a manner that is inconsistent with a regulatory contract that is in effect is of no effect to the extent of the inconsistency.

### 33. DECLARATION BY COMMISSION.

(1) The Commission may, by notice in the National Gazette, declare -

(a) any entity that supplies or is capable of supplying goods or services in a regulated industry to be a regulated entity; or

(b) any goods or services supplied or capable of being supplied by a regulated entity to be regulated goods or regulated services, as the case may be, with effect from the later of the date of publication of the notice in the National Gazette and the commencement date specified in the notice.

(2) The Commission shall not make a declaration - (a)

under Subsection (1)(a) unless it is satisfied that -

(i) the entity concerned has substantial degree of power in a market; and

(ii) the declaration is appropriate having regard to the Commission's objectives set out in Section 5; or

(b) under Subsection (1)(b) unless it is satisfied that -

(i) the goods or services concerned are supplied or are capable of being supplied by the regulated entity in a market in which the regulated entity concerned has a substantial degree of power in a market; and

(ii) the declaration is appropriate having regard to the Commission's objectives set out in Section 5.

(3) A declaration made under Subsection (1)(b) may identify the relevant goods or services by reference to the persons to whom they are supplied, the location in which they are supplied, the purpose for which they are supplied, the period over which they are supplied or such other factors as the Commission considers appropriate.

(4) The Commission may, by notice published in the National Gazette, with the consent of the regulated entity concerned, revoke, but not vary, part or all of a declaration made under Section 32(1) or (2) or under Subsection (1), with effect from the later of the date of publication of the National Gazette and the commencement date specified in the notice, and -

(a) a revocation of a declaration made under Section 32(1) or Subsection (1)(a) shall terminate any regulatory contract applying to the regulated entity concerned at the time the revocation comes into effect; and

(b) a revocation of part or all of a declaration made under Section 32(2) or Subsection (1)(b) shall vary any regulatory contract applying to the regulated entity concerned by deleting any reference to goods and services that cease to be regulated goods or services at the time the revocation comes into effect.

(5) The Commission shall not revoke -

(a) a declaration made under Section 32(1) or Subsection (1)(a) unless it is satisfied that -

- (i) the entity concerned does not have a substantial degree of power in a market; or
  - (ii) the declaration is not appropriate having regard to the Commission's objectives set out in Section 5; or
- (b) a declaration made under Section 32(2) or Subsection (1)(b) unless it is satisfied that -
- (i) the goods or services in relation to which declaration is to be revoked are not supplied or capable of being supplied by the regulated entity in a market in which the entity concerned has a substantial degree of power in a market; or
  - (ii) the declaration is not appropriate having regard to the Commission's objectives set out in Section 5.
- (6) The Commission shall not make a declaration under Subsection (1) or revoke a declaration under Subsection (4) unless -
- (a) it has given notice of its intention to make or revoke the declaration no later than four weeks prior to doing so to -
    - (i) the Minister;
    - (ii) the relevant entity; and
    - (iii) any other person that the Commission considers appropriate; and
  - (b) it has given each of those persons a reasonable opportunity to make submissions in relation to that matter and has considered any submissions made.
- (7) At least two weeks prior to its decision taking effect, the Commission shall give each of the persons referred to in Subsection (6) written notice of its decision together with written reasons.
- (8) In this section, "market" means a market in the whole or any part of Papua New Guinea 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, including imports.

## Division 2 :Regulatory Contracts

### 34. REGULATORY CONTRACTS ISSUED BY THE MINISTER.

(1) The Minister responsible for treasury matters may issue a regulatory contract in accordance with this section applying to an entity that he declares to be a regulated entity under Section 32(1) in relation to the supply of regulated goods and regulated services and related matters as specified in the regulatory contract, such power to be exercised by the Minister only once in relation to each regulated entity that he declares to be a regulated entity under Subsection 32(1).

(2) A regulatory contract shall -

(a) have a term not exceeding ten years; and

(b) regulate prices for the supply of regulated goods and regulated services by the regulated entity over the term of the regulatory contract; and

(c) specify service standards the relevant regulated entity shall meet, together with payments which the relevant regulated entity shall make to customers and other persons (whether by way of rebate or otherwise), or price reductions which may be imposed, if the relevant regulated entity fails to meet those service standards; and

(d) specify a process for the issue of a new regulatory contract to replace that regulatory contract on the expiry of its term (including the date by which the relevant regulated entity shall provide a draft of the new regulatory contract to the Commission and the date by which the Commission shall issue the new regulatory contract); and

(e) specify pricing policies and principles that are to be adopted in any regulatory contract that is issued in replacement of that regulatory contract on the expiry of its term; and

(f) deal with such other matters as this Act or an Act that declares an industry to be a regulated industry, or a regulation made under such an Act, requires be dealt with in a regulatory contract.

(3) A regulatory contract issued under Subsection (1) may regulate prices in any manner the Minister considers appropriate, including -

(a) fixing a price or the rate of increase or decrease in a price; and

(b) fixing a maximum price or maximum rate of increase or minimum rate of decrease in a maximum price; and

(c) fixing an average price for regulated goods or regulated services or an average rate of increase or decrease in an average price; and

(d) specifying pricing policies or principles; and

(e) specifying an amount determined by reference to a general price index, the cost of production, rate of return on assets employed or any other specified factor; and

(f) specifying an amount determined by reference to quantity, location, period or other specified factor relevant to the supply of regulated goods or regulated services; and

(g) fixing a maximum revenue, or maximum rate of increase or minimum rate of decrease in maximum revenue, in relation to regulated goods or regulated services.

(4) In addition to the matters referred to in Subsection (2), a regulatory contract issued under Subsection (1) may also -

(a) specify conditions relating to prices; and

(b) provide that a calculation is to be performed, or a matter is to be determined, by the Commission in a manner specified by the regulatory contract; and

(c) require the relevant regulated entity to provide information to the Commission, customers or other persons; and

(d) specify restrictions or limitations on how the Commission or any other statutory authority may exercise powers conferred on it by this or any other Act in relation to the regulated entity concerned or other suppliers of regulated goods or services supplied or capable of being supplied by the regulated entity concerned; and

(e) deal with such other matters as this Act or an Act that declares an industry to be a regulated industry, or a regulation made under such an Act, specifies or contemplates may be dealt with in a regulatory contract.

(5) The Minister shall not exercise any power conferred under this section in a manner that is inconsistent with the requirements of a regulatory contract that is in effect and any exercise of a power in a manner that is inconsistent with a regulatory contract that is in effect is of no effect to the extent of the inconsistency.

### 35. REGULATORY CONTRACTS ISSUED BY THE COMMISSION.

(1) Subject to Subsection (2) and Section 36, the Commission may issue a regulatory contract in accordance with this section applying to a regulated entity in relation to the supply of regulated goods and regulated services and related matters as specified in the regulatory contract.

(2) The Commission shall not issue a regulatory contract under Subsection (1) that applies to a regulated entity where the term of that regulatory contract coincides in whole or in part with the term of a regulatory contract issued under Section 34(1) that applies to that regulated entity.

(3) A regulatory contract shall -

- (a) have a term not exceeding 10 years; and
  - (b) regulate prices for the supply of regulated goods and regulated services by the regulated entity over the term of the regulatory contract; and
  - (c) specify service standards the relevant regulated entity shall meet, together with payments which the relevant regulated entity shall make to customers and other persons (whether by way of rebate or otherwise), or price reductions which may be imposed, if the relevant regulated entity fails to meet those service standards; and
  - (d) specify a process for the issue of a new regulatory contract to replace that regulatory contract on the expiry of its term (including the date by which the relevant regulated entity shall provide a draft of the new regulatory contract to the Commission and the date by which the Commission shall issue the new regulatory contract); and
  - (e) specify pricing policies and principles that are to be adopted in any regulatory contract that is issued in replacement of that regulatory contract on the expiry of its term; and
  - (f) deal with such other matters as this Act or an Act that declares an industry to be a regulated industry, or a regulation made under such an Act, requires to be dealt with in a regulatory contract.
- (4) A regulatory contract issued under Subsection (1) may regulate prices in any manner the Commission considers appropriate, including -
- (a) fixing a price or the rate of increase or decrease in a price; and
  - (b) fixing a maximum price or maximum rate of increase or minimum rate of decrease in a maximum price; and
  - (c) fixing an average price for regulated goods or regulated services or an average rate of increase or decrease in an average price; and
  - (d) specifying pricing policies or principles; and
  - (e) specifying an amount determined by reference to a general price index, the cost of production, rate of return on assets employed or any other specified factor; and
  - (f) specifying an amount determined by reference to quantity, location, period or other specified factor relevant to the supply of regulated goods or regulated services; and
  - (g) fixing a maximum revenue, or maximum rate of increase or minimum rate of decrease in maximum revenue, in relation to regulated goods or regulated services.

(5) In addition to the matters referred to in Subsection (3), a regulatory contract issued under Subsection (1) may also -

(a) specify conditions relating to prices; and

(b) provide that a calculation is to be performed, or a matter is to be determined, by the Commission in a matter specified by the regulatory contract; and

(c) require the relevant regulated entity to provide information to the Commission, customers or other persons; and

(d) specify restrictions or limitations on how the Commission or any other statutory authority may exercise powers conferred on it by this or any other Act in relation to the regulated entity concerned or other suppliers of regulated goods or services supplied or capable of being supplied by the regulated entity concerned; and

(e) deal with such other matters as this Act or an Act that declares an industry to be a regulated industry, or a regulation made under such an Act, specifies or contemplates may be dealt with in a regulatory contract.

(6) In issuing a regulatory contract under Subsection (1), the Commission shall, in addition to having regard to its objectives specified in Section 5, have regard to -

(a) the legitimate business interests of the regulated entity to which the regulatory contract applies (the "relevant regulated entity"); and

(b) the legitimate interests of suppliers to, and customers of, the relevant regulated entity; and

(c) the particular circumstances of the industries in which the relevant regulated entity operates for the purpose of making, producing and supplying the regulated goods and regulated services to which the regulatory contract relates; and

(d) the nature and uses of the regulated goods and regulated services to which the regulatory contract relates; and

(e) the costs of making, producing and supplying the regulated goods and regulated services to which the regulatory contract relates; and

(f) the costs of complying with applicable laws and regulatory requirements; and

(g) the return on assets required to sustain past and future investment in the industries in which the relevant regulated entity operates for the purpose of making, producing and supplying the regulated goods and regulated services to which the regulatory contract relates; and

(h) any relevant international benchmarks for prices, costs and return on assets in comparable industries, taking into account the particular circumstances of Papua New Guinea; and

(i) the financial implications of the regulatory contract for the relevant regulated entity and for the industries in which the relevant regulated entity operates for the purpose of making, producing and supplying the regulated goods and regulated services to which the regulatory contract relates; and

(j) any factors specified by another Act or by regulation under this Act or any other Act; and

(k) any other factors that the Commission considers relevant.

### 36. PROCESS FOR ISSUE OF REGULATORY CONTRACTS BY COMMISSION.

(1) Where the Commission proposes that a regulatory contract should apply to a regulated entity, the Commission shall, not more than two years and not less than nine months before issuing a regulatory contract under Section 35(1) that applies to that regulated entity, invite the regulated entity to submit to the Commission by a date that is at least two months after the date the invitation was issued -

(a) a draft regulatory contract that applies to that regulated entity and that complies with the requirements of Section 35(3); and

(b) such written submissions as to the form and content of that draft regulatory contract as the regulated entity considers appropriate

(2) After considering any material submitted by a regulated entity on or prior to the date specified in the invitation issued under Subsection (1), the Commission shall -

(a) send to the Minister, the regulated entity and any other person the Commission considers appropriate; and

(b) make available for inspection and purchase by members of the public, a copy of -

(c) the draft regulatory contract and written submissions (if any) submitted to the Commission by the regulated entity under Subsection (1) by the date specified in the invitation issued under Subsection (1); and

(d) an issues paper prepared by the Commission which sets out the Commission's preliminary views in relation to, and identifies any issues which the Commission considers relevant in connection with, the form and content of any regulatory contract that may be issued under Section 35(1) for the purposes of applying to the regulated



entity and that also invites submissions on the matters raised in the issues paper by a date that is at least two months after the issues paper was issued.

(3) At least one month prior to the date it issues any regulatory contract under Section 35(1) and after having considered any submissions received by the Commission on or prior to the date specified in the issues paper, the Commission shall send to the Minister, the regulated entity and any other person who has made submissions as described in this section -

(a) a copy of the regulatory contract that it proposes to issue under Section 35(1) for the purposes of applying to the regulated entity; and

(b) a summary of the information on which the regulatory contract is based; and

(c) a statement of the reasons for making the regulatory contract in that form.

(4) The procedure and time limits set out in this section may be varied, in relation to their application to the issue of a regulatory contract, by the terms of any regulatory contract by which the relevant regulated entity is bound.

(5) Unless the declaration of the relevant entity as a regulated entity has been revoked, the Commission shall ensure that prior to the term of a regulatory contract applying to a regulated entity expiring, the Commission issues under Section 35(1) a replacement regulatory contract that will take effect upon the expiry of the term of the previous regulatory contract.

(6) If the Commission fails to issue a replacement regulatory contract in accordance with Subsection (5), the draft regulatory contract (if any) submitted by the regulated entity under Subsection (1) shall be deemed to be a regulatory contract issued by the Commission under Section 35(1) and shall apply until such time as the Commission issues a regulatory contract under Section 35(1).

### 37. COMPLIANCE WITH REGULATORY CONTRACTS.

(1) Notice of a regulatory contract being issued under Section 34 or Section 35 shall be published in the National Gazette.

(2) A regulatory contract takes effect on the date on which notice is published in the National Gazette or a later date of commencement specified in the regulatory contract.

(3) After publication of the notice in the National Gazette, the Commission shall ensure that copies of the regulatory contract are available for inspection and purchase by members of the public.

(4) A regulated entity shall comply with the terms of any regulatory contract that applies to it.

(5) The Commission shall perform any function that a regulatory contract contemplates will be performed by the Commission for the purposes of the regulatory contract in accordance with the regulatory contract.

(6) A regulatory contract that applies to that regulated entity shall not be varied or revoked except with the agreement of both the Commission and the regulated entity.

(7) A regulatory contract made under this Part -

(a) takes effect as an agreement between the Commission and the regulated entity to which the regulatory contract relates and shall be executed by the Commission and the regulated entity as the parties to the agreement as soon as practicable after it is made; and

(b) is not a subordinate legislative enactment for the purpose of Section 116 of the Constitution and need not be tabled in Parliament; and

(8) If, notwithstanding Subsection (7), a regulatory contract is disallowed in whole or in part pursuant to Section 116 of the Constitution, then -

(a) notwithstanding Section 91 of the Interpretation Act (Chapter 2), the Minister responsible for treasury matters or the Commission, as the case may be, shall remake, as soon as practicable, the regulatory contract in accordance with Part III in substantially the same form as the disallowed regulatory contract; and

(b) any person who has rights and liabilities under the regulatory contract that is disallowed in whole or in part is entitled to rely on the rights, and is obliged to continue to assume the liabilities, under the disallowed regulatory contract, until such time as a further regulatory contract is made under Paragraph (a).

(9) This Act is an Act of Parliament contemplated by Section 116(2) of the Constitution.

### 38. ENFORCEMENT OF REGULATORY CONTRACTS.

(1) If the Commission forms the opinion that, on the balance of probabilities, a regulated entity is contravening or is likely to contravene a regulatory contract and that the contravention is of a material nature, the Commission may, by written order, require the regulated entity to comply with the regulatory contract within a reasonable period as specified in the notice.

(2) An order under Subsection (1) may be a provisional order or a final order.

(3) Unless withdrawn earlier by the Commission, a provisional order has effect for a period of seven days commencing on the day that it is served.

(4) The Commission may serve another provisional order on the expiry of a proceeding provisional order.

(5) If the Commission has made a provisional order, the Commission shall not make a final order if -

(a) the relevant regulated entity has given an undertaking as to compliance with the regulatory contract and the Commission has accepted the undertaking; or

(b) the Commission becomes satisfied that the provisional order should not have been made having regard to the factors to which the Commission is required to have regard under this Act or any other Act.

(6) The Commission shall not make a final order unless the Commission has -

(a) given the relevant regulated entity at least 28 days' notice of its intention to do so; and

(b) given the relevant regulated entity a reasonable opportunity to make a submission in respect of the order; and

(c) considered any submission or other objection to the order received by the Commission.

(7) The Commission shall, as soon as possible after serving a provisional order or a final order on a regulated entity, publish a copy of the order in the National Gazette.

### 39. COMPLIANCE WITH ORDER.

(1) A regulated entity shall comply with -

(a) a provisional order or a final order served on it under Section 38; or

(b) an undertaking given by it and accepted by the Commission under Section 38.  
Penalty: A fine not exceeding K10,000,000.00.

(2) If a person profits from a contravention of Subsection (1), the Commission may recover an amount equal to the profit from the person -

(a) on application to a court convicting the person of an offence under that subsection; or

(b) by action in a court of competent jurisdiction.

(3) Any amount recovered under this section shall be paid into the Consolidated Revenue Fund.

#### PART IV : CODES AND RULES

##### 40. CODES AND RULES.

(1) The Commission may make codes or rules relating to the conduct or operations of a participant in a regulated industry.

(2) The Commission may vary or revoke a code or rule made under Subsection (1). (3)

The Commission shall, before making, varying or revoking a code or rule, consult with the Minister, any regulated entity to which the code or rule applies or is intended to apply and such other persons or representative bodies as the Commission considers appropriate.

(4) A code or rule may apply or incorporate, wholly or partially and with or without modification, a document referred to in the code or rule, as in force from time to time or as in force at a particular time.

(5) The Commission shall -

(a) give a copy of any new code or rule, a copy of any variation to any code or rule and notice of the revocation of any code or rule -

(i) to the Minister; and

(ii) to each regulated entity to which the code or rule applies or is intended to apply; and

(b) ensure that copies of the code or rule (as in force from time to time) are available for inspection and purchase by members of the public.

(6) Notice of the making of a code or rule, or the variation or revocation of a code or rule, shall be published in the National Gazette.

(7) A code or rule, or variation or revocation of a code or rule, takes effect on the date on which it is notified in the National Gazette or a later date specified by the Commission in the code or rule.

(8) The Commission shall keep the contents and operation of codes and rules under review with a view to ensuring their continued relevance and effectiveness.

(9) Nothing in this section permits a code or rule to be made, varied or revoked where that would be inconsistent with the terms of a regulatory contract.

## PART V :PANEL OF EXPERTS, APPEALS PANEL AND APPEALS

### 41. PANEL OF EXPERTS.

(1) The Head of State, acting with, and in accordance with, the advice of a majority of the members of the Appointments Committee, shall -

(a) appoint a panel of experts who may sit as members of the Appeals Panel; and

(b) appoint a member of the panel as the chairman of the panel.

(2) A person is not eligible for appointment to the Panel of Experts unless he -

(a) is a person of integrity, independence of mind and of good reputation; and

(b) has knowledge of or experience in industry, commerce, economics, law, public administration or consumer protection.

(3) At least one of the persons appointed to the Panel of Experts -

(a) shall have international experience in the operation and administration of an economic regulatory regime; and

(b) shall not be a resident of Papua New Guinea; and

(c) shall be known as the 'International Arbitrator'.

(4) A member of the Commission may not be appointed to the Panel of Experts.

(5) A member of the Panel of Experts shall be appointed for a term of office of five years and on the conditions determined by a majority of the members of the Appointments Committee and specified in the instrument of appointment.

(6) A member of the Panel of Experts may resign by giving to the Head of State three months' notice in writing of his intention to resign.

(7) The period of three months specified in Subsection (6) is deemed to commence on the twenty-second day after the receipt by the Head of State of the notice except where the Head of State, acting with, and in accordance with, the advice of a majority of the members of the Appointments Committee, by notice in writing to the member, fixes an earlier date for the commencement of that period.

(8) A member of the Appeals Panel may withdraw his resignation at any time before the period of three months referred to in Subsection (6) commences.

(9) A member of the Panel of Experts ceases to hold that office if he -

(a) dies; or

(b) resigns in accordance with Subsection 6; or

(c) attains the age of 70 years; or

(d) is not re-appointed at the end of a term of office; or

(e) is removed from office under Subsection (10).

(10) The Court, on the application of the Minister, may remove or suspend a member of the Appeals Panel from office for -

(a) misconduct; or

(b) incapacity to perform satisfactorily the member's functions; or

(c) material contravention of or failure to comply with the requirements of this or any other Act conferring functions on the Appeals Panel.

(11) The Minister may only bring an application under Subsection (10) acting with, and in accordance with, the advice of the National Executive Council.

(12) A member of the Appeals Panel may only be removed or suspended from office as provided in this section.

#### 42. APPEALS PANEL.

(1) Subject to this section and the provisions of any other Act, the chairman of the Panel of Experts shall determine the constitution of the Appeals Panel for the purposes of reviewing any decision where an application for review of that decision is made to the Appeals Panel under this or any other Act.

(2) A member of the Panel of Experts who has a direct or indirect pecuniary interest in a matter before the Appeals Panel is disqualified from participating in the hearing of that matter.

(3) Subsection (2) does not apply if the interest is only as a result of the supply of goods or services that are available to members of the public on the same terms and conditions.

(4) The Appeals Panel shall comprise one member of the Panel of Experts.

(5) Where the decision the subject of an application for review is a decision of the Commission referred to in Subsection 43(1), the Appeals Panel shall consist of an International Arbitrator (unless, in the case of a decision of the Commission referred to in Paragraphs 43(1)(c) to (e) inclusive, a regulatory contract applying to the regulated entity concerned at the time of the decision provides that the Appeals Panel need not consist of an International Arbitrator).

(6) Subject to Subsection (7) the Appeals Panel has no power to award costs against a party to a review.

(7) Subject to Subsection 43 (11), the costs of the Appeals Panel shall be borne as determined by the Appeals Panel.

#### 43. APPEALS FROM CERTAIN DECISIONS OF THE COMMISSION.

(1) An application may be made to the Appeals Panel -

(a) by a regulated entity or the Minister for review of a decision of the Commission under Section 33 to declare that entity to be a regulated entity or to revoke a declaration of an entity as a regulated entity; or

(b) by a regulated entity or the Minister for review of a decision of the Commission under Section 33 to declare any goods or services supplied or capable of being supplied by that entity to be regulated goods or regulated services (as the case may be) or to revoke a declaration of goods or services as regulated goods or services; or

(c) by a regulated entity or the Minister for review of a decision of the Commission under Section 35 as to the terms and conditions of any regulatory contract applying to that entity that is issued by the Commission under that section; or

(d) by a regulated entity or the Minister for review of a decision or deemed decision of the Commission under any regulatory contract applying to that entity that is issued under Section 34 or Section 35; or

(e) by a regulated entity for review of a decision made by the Commission under Section 38.

(2) An application for review of a decision of the Commission referred to in Subsection (1) shall -

(a) be in writing; and

(b) set out the decision or part of the decision to which the application relates; and

(c) set out in detail the grounds on which the applicant seeks review and the decision sought on the review; and

(d) be accompanied by any information that the applicant considers should be taken into account by the Appeals Panel on the review; and

(e) be lodged with the Appeals Panel within ten days after written notice of the decision is given to the applicant or in the case of a deemed decision within ten days after the decision is deemed to have been made (or such longer period as the Appeals Panel may allow).

(3) If an application is made for review of a decision of the Commission referred to in Subsection (1) .

(a) the Appeals Panel shall give a copy of the application to the Minister or the relevant regulated entity (as the case requires) and the Commission; and

(b) invite whichever of them is not the applicant to join as a party to the review and make submissions on the matter the subject of the review in a manner and within the period specified by the Appeals Panel.

(4) The Appeals Panel may stay the operation of the decision of the Commission to which the application relates.

(5) If a decision is stayed, the Appeals Panel shall cause notice of the stay of the decision

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(a) to be given to the Minister, the regulated entity to which the decision applies and the Commission; and

(b) to be published in the National Gazette.

(6) A review shall be decided within six weeks of the application being lodged with the Appeals Panel, and, if the Appeals Panel fails to decide a review within this time, the applicant may apply to the National Court for an order that the Appeals Panel decide the review.

(7) On a review, the Appeals Panel -



(a) is only to consider the information that was available to the Commission when it made the decision that is the subject of the application for review; and

(b) is not bound by the rules of evidence; and

(c) may adopt such procedures it sees fit.

(8) After considering the application, the Appeals Panel may either -

(a) confirm the decision of the Commission; or

(b) return the matter to the Commission with such directions as the Appeals Panel considers appropriate and the Commission shall remake its decision in accordance with the Appeals Panel's directions including any directions in relation to the retrospective effect of the remade decision.

(9) In making its decision, the Appeals Panel is to have regard to the need for consistency with previous decisions of the Appeals Panel.

(10) The Appeals Panel shall give the parties to the review written notice of the Appeals Panel's decision, and the reasons for the decision, on the review.

(11) The costs of the Appeals Panel in a review of a decision of the Commission referred to in Subsection (1) shall be borne by the Commission to the extent the application for review is successful and by the applicant to the extent that application for review is unsuccessful, as determined by the Appeals Panel.

## PART VI :COMPETITIVE MARKET CONDUCT

### Division 1 :Interpretation and Application

#### 44. INTERPRETATION.

(1) In this Part, unless the contrary intention appears -"acquire" -

(a) in relation to goods, includes obtain by way of gift, purchase or exchange and take on lease, hire or hire purchase; and

(b) in relation to services, includes accept; and

(c) in relation to interests in land, includes obtain by way of gift, purchase, exchange, lease or licence; "arrive at", in relation to an understanding, includes reach and enter into; "assets" includes intangible assets;"authorization" means an authorization granted by the Commission under Division 4; "business" means any undertaking

(a) that is carried on for gain or reward; or

(b) in the course of which -

(i) goods or services are acquired; or

(ii) any interest in land is acquired or disposed of, otherwise than free of charge;

"clearance" means a clearance given by the Commission under Division 4;

"covenant" means a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether or not for the benefit of other land) and

"proposed covenant" has a corresponding meaning;

"credit instrument" means any agreement, whether in writing or not, acknowledging an obligation to pay a sum or sums of money on demand or at any future time or times;

"document" means a document in any form whether signed or initialed or

otherwise authenticated by its maker or not, and includes -

(a) any writing on any material; and

(b) any information recorded or stored by means of any tape-recorder, computer or other device, and any material subsequently derived from information so recorded or stored; and

(c) any label, marking or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means; and

(d) any book, map, plan, graph or drawing; and

(e) any photograph, film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced;

"give effect to", in relation to a provision of a contract, arrangement or understanding, includes -

(a) do an act or thing in pursuance of or in accordance with that provision; and

(b) enforce or purport to enforce that provision;

"goods" includes -

(a) ships, aircraft and vehicles; and

(b) animals, including fish; and

(c) mineral, trees and crops, whether on, under, or attached to land or not; and

(d) gas and electricity;

"price" includes valuable consideration in any form, whether direct or indirect, and includes any consideration that in effect relates to the acquisition or supply of goods or services or the acquisition or disposition of any interest in land, although ostensibly relating to any other matter or thing;

"provision" in relation to an understanding or arrangement, means any matter forming part of or relating to the understanding or arrangement;

"services" includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are or are to be provided, granted or conferred in trade and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any of the following classes of contract :-

(a) a contract for, or in relation to -

(i) the performance of work (including work of a professional nature), whether with or without the supply of goods; or

(ii) the provision of, or the use or enjoyment of facilities for, accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking or recreation; or

(iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b) a contract of insurance, including life assurance and life reinsurance;

(c) a contract between a bank and a customer of the bank;

(d) a contract for or in relation to the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits, but does not include

rights or benefits in the form of the supply of goods or the performance of work under a contract of service;

"share" means a share in the capital of a body corporate, whether or not it carries the right to vote at general meetings, and includes -

(a) a beneficial interest in any such share; and

(b) a power to exercise, or control the exercise of, a right to vote attaching to any such share that carries the right to vote at meetings of the body corporate; and

(c) a power to acquire or dispose of, or control the acquisition or disposition of, any such share; supply" -

(a) in relation to goods, includes supply (or resupply) by way of gift, sale, exchange, lease, hire or hire purchase; and

(b) in relation to services, includes provide, grant or confer, and "supply" as a noun, "supplied" and "supplier" have corresponding meanings "trade" means any trade, business, industry, profession, occupation, activity of commerce or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

(2)In this Part -

(a) a reference to engaging in conduct is to be read as a reference to doing or refusing to do any act, including -

(i) the entering into, or the giving effect to a provision of, a contract or arrangement; and  
(ii) the arriving at, or the giving effect to a provision of, an understanding; and

(iii) the requiring of the giving of, or the giving of, a covenant; and

(b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in Subsection 2(a), is to be read as a reference to the doing of, or the refusing to do, any act, including -

(i) the entering into, or the giving effect to a provision of, a contract or arrangement; and  
(ii) the arriving at, or the giving effect to a provision of, an understanding; and

(iii) the requiring of the giving of, or the giving of, a covenant; and

(c) a reference to refusing to do an act includes a reference to -

(i) refraining (otherwise than inadvertently) from doing that act; and

(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

(3) Where any provision of this Part is expressed to render a provision of a contract or a covenant unenforceable if the provision of the contract or the covenant has or is likely to have a particular effect, that provision of this Part applies in relation to the provision of the contract or the covenant at any time when the provision of the contract or the covenant has or is likely to have that effect, notwithstanding that -

(a) at an earlier time the provision of the contract or the covenant did not have that effect or was not regarded as likely to have that effect; or

(b) the provision of the contract or the covenant will not or may not have that effect at a later time.

(4) In this Part -

(a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods; and

(b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services; and

(c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services or both; and

(d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services or both; and

(e) a reference to the resupply of goods acquired from a person includes a reference to -

(i) a supply of the goods to another person in an altered form or condition; and

(ii) a supply to another person of other goods in which the goods have been incorporated.

(5) For the purposes of this Part -

(a) a provision of a contract, arrangement or understanding, or a covenant, is deemed to have had, or to have, a particular purpose if -

(i) the provision was or is included in the contract, arrangement or understanding, or the covenant was or is required to be given, for that purpose or purposes that included or include that purpose; and

(ii) that purpose was or is a substantial purpose; and

(b) a person is deemed to have engaged, or to engage, in conduct for a particular purpose or a particular reason if -

(i) that person engaged or engages in that conduct for that purpose or reason or for purposes or reasons that included or include that purpose or reason; and

(ii) that purpose or reason was or is a substantial purpose or reason.

(6) In this Part -

(a) a reference to a contract is to be construed as including a reference to a lease of, or a licence in respect of, any land or a building or part of a building, and is to be so construed notwithstanding any express reference in this Part to any such lease or licence; and

(b) a reference to making or entering into a contract, in relating to such a lease or licence, is to be read as a reference to granting or taking the lease or licence; and

(c) a reference to a party to a contract, in relation to such a lease or licence, is to be read as including a reference to any person bound by, or entitled to the benefit of, any provision contained in the lease or licence.

(7) For the purposes of this Part, any two bodies corporate are to be treated as related if they are related corporations.

(8) For the purpose of this Part -

(a) any contract or arrangement entered into, or understanding arrived at, by an association or body of persons is deemed to have been entered into or arrived at by all the persons who are members of the association or body; and

(b) any recommendation made by an association or body of persons to its members or to any class of its members is deemed, notwithstanding anything to the contrary in the constitution or rules of the association or body of persons, to be an arrangement made between those members or the members of that class and between the association or body of persons and those members or the members of that class.

(9) Nothing in Subsection (8) applies to -

(a) any member of an association or body of persons who expressly notifies the association or body in writing that he disassociates himself from the contract, arrangement or understanding or any provision of it and who does so disassociate himself; or

(b) any member of an association or body of persons who establishes that he had no knowledge and could not reasonably have been expected to have had knowledge of the contract, arrangement or understanding.

#### 45. CERTAIN TERMS DEFINED IN RELATION TO COMPETITION.

(1) In this Part, "competition" means workable or effective competition, including competition from imports and substitutes.

(2) A reference in this Part to the term "market" is a reference to a market in the whole of Papua New Guinea for goods or services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them, including imports.

(3) In this Part, unless the context otherwise requires, a reference to the lessening of competition includes a reference to the hindering or preventing of competition.

(4) For the purposes of this Part, the effect on competition in a market is to be determined by reference to all material factors that affect competition in that market including competition from goods or services supplied or likely to be supplied by persons not resident or not carrying on business in Papua New Guinea.

(5) In Sections 50 and 51, a reference to a market in relation to the purpose or effect in respect of competition of a provision of a contract, arrangement or understanding, or of a covenant, or of conduct, is to be read as including a reference to -

(a) a market in which a person who is a party to the contract, arrangement or understanding or any related corporation, or in which the person or any associated person (within the meaning of Section 51(7)) who requires the giving of or gives the covenant, supplies or acquires or is likely to supply or acquire, or would, but for that provision, covenant or conduct, supply or acquire or be likely to supply or acquire goods or services; and

(b) any other market in which those goods or services may be supplied or acquired.

(6) For the purposes of Section 50, a provision of a contract, arrangement or understanding is deemed to have or to be likely to have the effect of substantially lessening competition in a market if that provision and -

(a) the other provisions of that contract, arrangement or understanding; or

(b) the provisions of any other contract, arrangement or understanding to which that person or any related corporation is a party, taken together, have or are likely to have the effect of substantially lessening competition in that market.

(7) For the purposes of Section 51, a covenant is deemed to have or to be likely to have the effect of substantially lessening competition in a market if -

(a) that covenant; and

(b) any other covenant to the benefit of which that person or an associated person (within the meaning of Section 51(7)) is entitled or would be entitled if the covenant were enforceable, taken together, have or are likely to have the effect of substantially lessening competition in that market.

(8) For the purposes of Sections 50 and 51, the engaging in conduct is deemed to have or to be likely to have the effect of substantially lessening competition in a market if -

(a) the engaging in that conduct; and

(b) the engaging by that person in conduct of the same or a similar kind, taken together, have or are likely to have the effect of substantially lessening competition in that market.

#### 46. COMMISSION TO CONSIDER EFFICIENCY.

Where the Commission is required under this Part to determine whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct.

#### 47. APPLICATION OF PART TO CONDUCT OUTSIDE PAPUA NEW GUINEA.

(1) This Part extends to the engaging in conduct outside Papua New Guinea by any person resident or carrying on business in Papua New Guinea to the extent that such conduct affects a market in Papua New Guinea.

(2) Without limiting Subsection (1), Section 69 extends to the acquisition outside Papua New Guinea by a person (whether or not the person is resident or carries on business in Papua New Guinea) of the assets of a business or shares to the extent that the acquisition affects a market in Papua New Guinea.

#### 48. APPLICATION OF PART TO THE STATE.

(1) Subject to this section, this Part binds the State only in so far as the State engages in trade.

(2) The State is not liable to pay a pecuniary penalty under Section 87.

(3) The State is not liable to be prosecuted for an offence against this Part.



(4) Where it is alleged that the State has contravened any provision of this Part and that contravention constitutes an offence, the Commission or the person directly affected by the contravention may apply to the Court for a declaration that the State has contravened that provision and, if the Court is satisfied beyond a reasonable doubt that the State has contravened that provision, it may make a declaration accordingly.

(5) The protection in Subsections (2) and (3) does not apply to an authority of the State.

#### 49. LAW RELATING TO RESTRAINT OF TRADE AND BREACHES OF CONFIDENCE NOT AFFECTED.

(1) Nothing in this Part limits or affects any rule of law relating to restraint of trade not inconsistent with any of the provisions of this Part.

(2) Nothing in this Part limits or affects any rule of law relating to breaches of confidence.

(3) No rule of law referred to in Subsection (1) or Subsection (2) affects the interpretation of any of the provisions of this Part.

### Division 2 :Market Conduct Rules

#### Subdivision A. - Practices Substantially Lessening Competition.

#### 50. CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS SUBSTANTIALLY LESSENING COMPETITION PROHIBITED.

(1) A person shall not enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) A person shall not give effect to a provision of a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(3) Subsection (2) applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this section.

(4) No provision of a contract, whether made before or after the commencement of this section, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, is enforceable.

51. COVENANTS SUBSTANTIALLY LESSENING COMPETITION PROHIBITED.

(1) A person, either on his own or on behalf of an associated person, shall not -

(a) require the giving of a covenant; or

(b) give a covenant, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) A person, either on his own or on behalf of an associated person, shall not carry out or enforce the terms of a covenant that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(3) Subsection (2) applies to a covenant whether given before or after the commencement of this section.

(4) No covenant, whether given before or after the commencement of this section, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, is enforceable.

(5) A person shall not -

(a) threaten to engage in particular conduct if a person who, but for Subsection (4), would be bound by a covenant, does not comply with the terms of the covenant; or

(b) engage in particular conduct because a person who, but for Subsection (4), would be bound by a covenant, has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(6) Where a person -

(a) issues an invitation to another person to enter into a contract containing a covenant; or

(b) makes an offer to another person to enter into a contract containing a covenant; or

(c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms, that person, by issuing that invitation, making that offer, or making that fact known, is deemed to require the giving of the covenant.

(7) For the purposes of this section, two persons shall be taken to be associated with each other in relation to a covenant or proposed covenant if, but only if -

(a) one person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with the directions, instructions or wishes of the other person in relation to the covenant or proposed covenant; or

(b) the persons are related corporations.

## 52. CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS CONTAINING EXCLUSIONARY PROVISIONS PROHIBITED.

(1) Subject to Subsection (2), for the purposes of this Part, a provision of a contract, arrangement or understanding is an exclusionary provision if -

(a) it is a provision of a contract or arrangement entered into, or understanding arrived at, between persons of whom any two or more are in competition with each other; and

(b) it has the purpose of preventing, restricting or limiting -

(i) the supply of goods or services to; or

(ii) the acquisition of goods or services from, any particular person or class of persons, either generally or in particular circumstances or on particular conditions, by all or any of the parties to the contract, arrangement or understanding, or if a party is a body corporate, by a corporation that is related to that party; and

(c) the particular person or the class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or understanding in relation to the supply or acquisition of those goods or services.

(2) A provision of a contract, arrangement or understanding that would, but for this subsection, be an exclusionary provision under Subsection (1) is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.

(3) For the purpose of Subsections (1)(a) and(c), a person is in competition with another person if that person or any related corporation is, or is likely to be, or, but for the relevant provision, would be or would be likely to be, in competition with the other person, or with a related corporation of that person, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.

(4) A person shall not enter into a contract or arrangement, or arrive at an understanding, that contains an exclusionary provision.

(5) A person shall not give effect to an exclusionary provision of a contract, arrangement or understanding.

(6) Subsection (5) applies to an exclusionary provision of a contract or arrangement made, or understanding arrived at, whether before or after the commencement of this section.

(7) No exclusionary provision of a contract, whether made before or after the commencement of this section, is enforceable.

Subdivision B. - Price Fixing.

**53. CERTAIN PROVISIONS OF CONTRACTS, ETC., WITH RESPECT TO PRICES DEEMED TO SUBSTANTIALLY LESSEN COMPETITION.**

(1) Without limiting the generality of Section 50, a provision of a contract, arrangement or understanding is deemed for the purposes of that section to have the purpose, or to have or to be likely to have effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of, the price for goods or services, or any discount, allowance, rebate or credit in relation to goods or services, that are -

(a) supplied or acquired by the parties to the contract, arrangement or understanding, or by any of them, or by any corporations that are related to any of them, in competition with each other; or

(b) resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement or understanding, or by any of them, or by any corporations that are related to any them, in competition with each other.

(2) The reference in Subsection (1)(a) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

**54. JOINT VENTURE PRICING EXEMPT FROM APPLICATION OF SECTION 53.**

(1) For the purposes of this section -

(a) "joint venture" means an activity in trade -

(i) carried on by two or more persons, whether or not in partnership; or

(ii) carried on by a body corporate for the purpose of enabling two or more persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate or a related corporation; and

(b) a reference to a contract or arrangement entered into, or an understanding arrived at, for the purposes of a joint venture is, in relation to a joint venture by way of an activity

carried on by a body corporate in terms of Subsection (1)(a)(ii), to be read as including a reference to the constitution, memorandum and articles of association, rules, or other document that constitute or constitutes, or is or are to constitute, that body corporate.

(2) Nothing in Section 53 applies to a provision of a contract or arrangement entered into, or an understanding arrived at, for the purposes of a joint venture, to the extent that the provision relates to -

(a) the joint supply by two or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties to the joint venture in pursuance of the joint venture; or

(b) the joint supply by two or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate in terms of Subsection (1)(a)(ii) -

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by a person who is the owner of shares in the capital of the body corporate or in the capital of a corporation that is related to such a person.

#### **55. CERTAIN RECOMMENDATIONS AS TO PRICES FOR GOODS AND SERVICES EXEMPT FROM APPLICATION OF SECTION 53.**

Nothing in Section 53 applies to a provision of a contract, arrangement or understanding to the extent that the provision recommends or provides for the recommending of the price for, or a discount, allowance, rebate or credit in relation to, goods or services where the parties to the contract, arrangement or understanding include not less than 50 persons (corporations that are related to each other being counted as a single person) who supply or acquire, in trade, goods or services to which the provision applies.

#### **56. JOINT BUYING AND PROMOTION ARRANGEMENTS EXEMPT FROM APPLICATION OF SECTION 53.**

Nothing in Section 53 applies to a provision of a contract, arrangement or understanding that -

(a) relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding; or

(b) provides for joint advertising of the price for the resupply of goods or services so acquired.

#### 57. CERTAIN PROVISIONS OF COVENANTS WITH RESPECT TO PRICES DEEMED TO SUBSTANTIALLY LESSEN COMPETITION.

(1) Without limiting the generality of Section 51, a covenant is deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the covenant has the purpose, or has or is likely to have the effect, of fixing, controlling, or maintaining, or providing for the fixing, controlling or maintain of, the price for goods or services, or any discount, allowance, rebate or credit in relation to goods or services, that are -

(a) supplied or acquired by the persons giving the covenant or the persons entitled to the benefit of the covenant, or by any of them, or by any corporations that are related to any of them, in competition with each other; or

(b) resupplied by persons to whom the goods are supplied by the persons giving the covenant or the persons entitled to the benefit of the covenant, or by any of them, or by any corporations that are related to any of them, in competition with each other.

(2) The reference in Subsection (1)(a) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for the covenant, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

Subdivision C. - Taking Advantage of Market Power.

#### 58. TAKING ADVANTAGE OF MARKET POWER.

(1) Nothing in this section applies to any practice or conduct to which this Part applies that has been authorized under Division 3 of this Part.

(2) A person that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -

(a) restricting the entry of a person into that or any other market; or

(b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or

(c) eliminating a person from that or any other market.

(3) For the purposes of this section, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of Section 67(2), in Papua New Guinea.

(4) For the purposes of this section, a reference to a person includes two or more persons that are related corporations.

(5) The existence of any of the purposes specified in Subsection (2) may be inferred from the conduct of any relevant person or from any other relevant circumstances.

Subdivision D. - Resale Price Maintenance.

#### 59. RESALE PRICE MAINTENANCE BY SUPPLIERS PROHIBITED.

(1) A person shall not engage in the practice of resale price maintenance.

(2) For the purposes of this section, a person engages in the practice of resale price maintenance if that person (in this section referred to as the "supplier") does any of the following acts: -

(a) the supplier makes it known to another person that the supplier will not supply goods or services to the other person unless the other person agrees not to sell or resupply those goods or services at a price less than a price specified by the supplier;

(b) the supplier induces, or attempts to induce, another person not to sell or resupply, at a price less than a price specified by the supplier, goods or services supplied to the other person by the supplier or by a third person who, directly or indirectly, has obtained the goods or services from the supplier;

(c) the supplier enters, or offers to enter into an agreement, for the supply of goods or services to another person where one of the terms is or would be that the other person will not sell or resupply the goods or services at a price less than a price specified, or that would be specified, by the supplier;

(d) the supplier withholds the supply of goods or services to another person for the reason that the other person -

(i) has not agreed to the condition referred to in Paragraph (a); or

(ii) has sold or resupplied, or is likely to sell or resupply, goods or services supplied to him by the supplier, or goods or services supplied to him by a third person who, directly or indirectly, has obtained the goods or services from the supplier, at a price less than a price specified by the supplier as the price below which the goods or services are not to be sold or resupplied;

(e) the supplier withholds the supply of goods or services to another person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods or services from the other person -

(i) has not agreed not to sell or resupply those goods or services at a price less than a price specified by the supplier; or

(ii) has sold or resupplied or is likely to sell or resupply goods or services supplied or to be supplied to that third person by the other person at a price less than a price specified by the supplier as the price below which the goods or services are not to be sold or resupplied.

(3) For the purposes of Subsection (2) -

(a) where the supplier makes it known, in respect of any goods or services, that the price below which those goods or services are not to be sold or resupplied is a price specified by another person in respect of those goods or services, or in respect of goods or services of a like description, that price is deemed to have been specified, in respect of the first-mentioned goods or services, by the supplier; and

(b) where a set form, method or formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that set form, method or formula, that price is deemed to have been specified by the supplier; and

(c) where the supplier makes it known, in respect of any goods or services, that the price below which those goods or services are not to be sold or resupplied is a price ascertained by calculation from or by reference to a set form, method or formula specified by another person in respect of those goods or services, or in respect of goods or service of a like description, that price is deemed to have been specified, in respect of the first-mentioned goods or services, by the supplier; and

(d) where the supplier makes a statement to another person of a price that is likely to be understood by that person as the price below which goods or services are not to be sold or resupplied, that price is deemed to have been specified by the supplier as the price below which the goods or services are not to be sold; and

(e) anything done by a person acting on behalf of, or by arrangement with, the supplier is deemed to have been done by the supplier.



(4) For the purposes of this section, sale and resupply includes advertise for sale or resupply, display for sale or resupply and offer for sale or resupply, and sell, selling and sold and resupplying and resupplied have corresponding meanings.

#### 60. RESALE PRICE MAINTENANCE BY OTHERS PROHIBITED.

(1) A person (in this section referred to as the "third party") shall not -

(a) make it known to another person that the third party proposes to engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of any goods or services to, or the acquisition of any goods or services from, that person unless that person agrees not to sell or resupply those goods or services at a price less than the price specified by the third party; or

(b) engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of goods or services to, or the acquisition of goods or services from, another person for the purpose of inducing that person not to sell or resupply those goods or services at a price less than a price specified by the third party.

(2) For the purposes of Subsection (1) -

(a) where the third party makes it known, in respect of any goods or services, that the price below which those goods or services are not to be sold or resupplied is a price specified by another person in respect of those goods or services, or in respect of goods or services of a like description, that price is deemed to have been specified in respect of the first-mentioned goods or services by the third party; and

(b) where a set form, method or formula is specified by or on behalf of the third party and a price may be ascertained by calculation from, or by reference to, that set form, method or formula, that price is deemed to have been specified by the third party; and

(c) where the third party makes it known, in respect of any goods or services, that the price below which those goods or services are not to be sold or resupplied is a price ascertained by calculation from or by reference to a set form, method or formula specified by another person in respect of those goods or services, or in respect of goods or services of a like description, that price is deemed to have been specified, in respect of the first-mentioned goods or services, by the third party; and

(d) where the third party makes a statement to another person of a price that is likely to be understood by that person as the price below which goods or services are not to be sold or resupplied, that price is deemed to have been specified by the third party as the price below which the goods or services are not to be sold; and

(e) anything done by a person acting on behalf of, or by arrangement with, the third party is deemed to have been done by the third party.

(3) For the purposes of this section, sale and resupply includes advertise for sale or resupply, display for sale or resupply and offer for sale or resupply, and sell, selling and sold and resupplying and resupplied have corresponding meanings.

#### 61. RECOMMENDED PRICES.

For the purposes of Section 59(2)(b) a supplier of any goods or services is not to be taken as inducing, or attempting to induce, another person not to sell or resupply those goods or services at a price less than a price specified by the supplier merely because -

(a) a statement of a price is applied or used in relation to the goods or services or is applied to a covering, label, reel or thing if the statement is preceded by the words "recommended price"; or

(b) the supplier has given notification in writing to the other person (not being a notification in the form of a statement applied to the goods or services or to any covering, label, reel or thing as mentioned in Paragraph (a)) of the price that the supplier recommends as appropriate for the sale or resupply of those goods or services, if the notification, and each writing that refers, whether expressly or by implication, to the notification, includes a statement to the effect that the price is a recommended price only and there is no obligation to comply with the recommendation.

#### 62. WITHHOLDING THE SUPPLY OF GOODS OR SERVICES.

For the purposes of Section 59(2)(d) and (e), the supplier is deemed to withhold the supply of goods or services to another person if -

(a) the supplier refuses or fails to supply those goods or services to, or as requested by, the other person; or

(b) the supplier refuses to supply those goods or services except on terms that are disadvantageous to the other person; or

(c) in supplying those goods or services to the other person, the supplier treats that person less favourably, whether in respect of time, method, place of delivery or otherwise, than the supplier treats other persons to whom the supplier supplies the same or similar goods or services; or

(d) the supplier causes or procures a person to act in relation to the supply of goods or services in the manner specified in Paragraphs (a), (b) or (c).

#### 63. PREVENTING THE SUPPLY OF GOODS OR SERVICES.

For the purposes of Section 60 -

(a) the supply of goods or services is deemed to be prevented if -

(i) the supply of those goods or services is refused except on terms that are disadvantageous to the person acquiring the goods or services; or

(ii) the supply of those goods or services is on terms which are less favourable, whether in respect of time, method, place of delivery or otherwise, than the person who supplies the goods or services treats other persons to whom the same or similar goods or services are supplied; and

(b) the acquisition of goods or services is deemed to be prevented if -

(i) the acquisition of those goods or services is refused except on terms that are disadvantageous to the person supplying the goods or services; or

(ii) the acquisition of those goods or services is on terms which are less favourable, whether in respect of time, method, place of delivery or otherwise, than the person who acquires the goods or services treats other persons from whom the same or similar goods or services are acquired.

#### 64. SPECIAL EVIDENTIARY PROVISIONS IN RESPECT OF CERTAIN RESALE PRICE MAINTENANCE PRACTICES.

(1) Where, in proceedings under this Act against a supplier for a contravention of Section 59(2)(b) or (e), it is proved that -

(a) the supplier has acted in a manner referred to in Section 62; and

(b) during a period ending immediately before the supplier so acted, the supplier had been supplying goods or services of the kind withheld either to -

(i) the person in respect of whom the contravention is alleged; or

(ii) a person carrying on a similar business to that person; and

(c) during a period of six months immediately before the supplier so acted, the supplier became aware of a matter or circumstance capable of constituting a reason referred to in Section 59(2)(d) or (e), it must be presumed, in the absence of evidence to the contrary, that the supplier so acted on account of that matter or circumstance.

(2) Nothing in Subsection (1) applies in respect of terms imposed by a supplier that are disadvantageous or treatment that is less favourable than the supplier accords other

persons if the terms or treatment consists only of a requirement by the supplier as to the time at which, or the form in which, payment was to be made or as to the giving of security to secure payment.

Subdivision E -Exceptions.

#### 65. STATUTORY EXCEPTIONS.

(1) Nothing in this Division applies in respect of any act, matter or thing that is, or is of a kind, specifically authorized by any Act or regulation made under this or any Act.

(2) For the purposes of Subsection (1), an Act or regulation does not provide specific authority for an act, matter or thing if it provides in general terms for that act, matter or thing, notwithstanding that the act, matter or thing requires or may be subject to approval or authorization by a Minister, statutory body or a person holding any particular office.

#### 66. OTHER EXCEPTIONS.

(1) Nothing in this Division applies to -

(a) the entering into of a contract or arrangement, or arriving at an understanding, between partners none of whom is a body corporate in so far as it contains a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while that party is, or after that party ceases to be, a partner; or

(b) the entering into of a contract of service or a contract for the provision of services in so far as it contains a provision by which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which that person may engage during, or after the termination of, the contract; or

(c) the entering into of a contract for, or the giving or requiring the giving of a covenant in connection with, the sale of a business or shares in the capital of a body corporate carrying on a business in so far as it contains a provision that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(d) the entering into of a contract or arrangement, or arriving at an understanding, in so far as it contains a provision obligating a person to comply with or apply standards of dimension, design, quality, or performance prepared or approved by any association or body as prescribed for the purpose of this paragraph; or

(e) the entering into of a contract or arrangement, or arriving at an understanding, in so far as it contains a provision that relates to the remuneration, conditions of employment, hours of work or working conditions of employees; or

(f) the entering into of a contract or arrangement, or arriving at an understanding, in so far as it contains a provision that relates exclusively to the export of goods from Papua New Guinea or exclusively to the supply of services wholly outside Papua New Guinea, if full and accurate particulars of the provision (not including particulars of prices for goods or service but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 15 days after the date on which the contract or arrangement was made or the understanding was arrived at, or 60 days after the commencement of this Section 66, whichever is the later; or

(g) any act done, otherwise than in trade, in concert by users of goods or services against the suppliers of those goods or services; or

(h) any act done to give effect to a provision of a contract, arrangement or understanding, or to a covenant, referred to in Paragraphs (a) to (f) inclusive.

(2) Except for Section 58, nothing in this Division applies to -

(a) the entering into of a contract or arrangement, or arriving at an understanding, or the giving or requiring the giving of a covenant, if the only parties, or (in the case of a covenant or proposed covenant) the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant, are, or would be, related corporations; or

(b) any act done to give effect to a provision of a contract, arrangement or understanding, or to a covenant, referred to in Paragraph (a).

(3) Nothing in this Division applies to -

(a) the entering into of a contract or arrangement, or arriving at an understanding, in so far as it contains a provision exclusively for the carriage of goods by sea from a place in Papua New Guinea to a place outside Papua New Guinea or from a place outside Papua New Guinea to a place in Papua New Guinea; or

(b) any act done to give effect to a provision of a contract, arrangement or understanding is not a provision exclusively for the carriage of goods by sea if it relates to the carriage of goods to or from a ship or the loading or unloading of a ship.

(4) For the purposes of Subsection (3), a provision of a contract, arrangement or understanding is not a provision exclusively for the carriage of goods by sea if it relates to the carriage of goods to or from a ship or the loading or unloading of a ship.

## 67. EXCEPTIONS IN RELATION TO INTELLECTUAL PROPERTY RIGHTS.

(1) Nothing in this Division, except Section 58, 59 or 60, applies to -

(a) the entering into of a contract or arrangement, or arriving at an understanding, in so far as it contains a provision authorizing any act that would otherwise be prohibited by reason of the existence of a statutory intellectual property right; or

(b) any act done to give effect to a provision of a contract, arrangement or understanding referred to in Paragraph (a).

(2) For the purposes of Subsection (1), a statutory intellectual property right means a right, privilege or entitlement that is conferred, or acknowledged as valid, by or under -

(a) the Patents and Industrial Designs Act 2000; or

(b) the Trade Marks Act (Chapter 385); or

(c) the Copyright and Neighboring Rights Act 2000.

(3) For the purposes of Subsection (2) -

(a) a person who has applied for a patent in accordance with Section 19 of the Patents and Industrial Designs Act 2000 and filed the complete specification in relation to the application is deemed, until the application is determined, to have been granted the patent to which the application relates; and

(b) a person who has made an application for the registration of a design in accordance with Section 43 of the Patents and Industrial Designs Act 2000 is deemed, until the application is determined, to be the registered proprietor of the design; and

(c) a person who has made an application in accordance with Section 32 of the Trade Marks Act (Ch. 385) for registration of a trade mark is deemed, until the application is determined, to be the registered proprietor of the trade mark.

## 68. SAVING IN RESPECT OF BUSINESS ACQUISITIONS.

Nothing in this Division applies to -

(a) the entering into of a contract or arrangement, or the arriving at of an understanding, in so far as the contract, arrangement or understanding contains a provision that provides for the acquisition or disposition of assets of a business or shares; or

(b) any act done to give effect to a provision of a contract, arrangement or understanding that provides for the acquisition or disposition of assets of a business or shares.

### Division 3 :Business Acquisitions

#### 69. CERTAIN ACQUISITIONS PROHIBITED.

(1) A person shall not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

(2) For the purposes of this section, a reference to a person includes two or more persons that are related corporations or are associated.

(3) For the purposes of this section, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other.

(4) A person is not able to exert a substantial degree of influence over the activities of another person for the purposes of Subsection (3) by reason only of the fact that -

(a) those persons are in competition in the same market; or

(b) one of them supplies goods or services to the other.

(5) Without limiting the matters that may be taken into account for the purpose of Subsection (1) in determining whether the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market, the following matters shall be taken into account:-

(a) the actual and potential level of import competition in the market;

(b) the nature and effect of barriers to entry to the market;

(c) the number of buyers and sellers in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available, or are likely to become available, in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a sustainable, vigorous and effective competitor;

(i) the nature and extent of vertical integration in the market.

#### Division 4 :Authorizations and Clearances

### 70. COMMISSION MAY GRANT AUTHORIZATION FOR RESTRICTIVE TRADE PRACTICES.

(1) A person who wishes to enter into a contract or arrangement or arrive at an understanding, to which he considers Section 50 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to enter into the contract or arrangement or arrive at the understanding.

(2) A person who wishes to give effect to a provision of a contract, arrangement or understanding to which he considers Section 50 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to give effect to the provision of the contract, arrangement or understanding.

(3) A person who wishes to carry out or enforce a covenant to which he considers Section 51 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to carry out or enforce the covenant.

(4) A person who wishes to require the giving of, or to give, a covenant to which he considers Section 51 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to require the giving of, or to give, the covenant.

(5) A person who wishes to enter into a contract or arrangement, or arrive at an understanding, to which he considers Section 52 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to enter into the contract or arrangement or arrive at the understanding.

(6) A person who wishes to give effect to an exclusionary provision of a contract, agreement or understanding to which he considers Section 52 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission



may grant an authorization for that person to give effect to the exclusionary provision of the contract, arrangement or understanding.

(7) A person who wishes to engage in the practice of resale price maintenance to which he considers Section 59 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to engage in the practice.

(8) A person who wishes to do an act or to engage in conduct to which he considers Section 60 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to do the act or engage in the conduct.

#### 71. EFFECT OF AUTHORIZATION.

(1) While an authorization under Section 70(1) or (5) remains in force, as the case may be, nothing in Section 50 or Section 52, as the case may be, shall prevent the applicant from -

(a) entering into or, in accordance with the authorization, giving effect to or enforcing, any provision of the contract to which the authorization relates; or

(b) entering into or, in accordance with the authorization, giving effect to, the arrangement to which the authorization relates; or

(c) arriving at or, in accordance with the authorization, giving effect to, the understanding to which the authorization relates.

(2) While an authorization under Section 70(2) or (6) remains in force, as the case may be, nothing in Section 50 or Section 52, as the case may be, shall prevent the applicant from -

(a) in accordance with the authorization, giving effect to or enforcing the contract to which the authorization relates; or

(b) in accordance with the authorization, giving effect to the arrangement or understanding to which the authorization relates.

(3) While an authorization under Section 70(3) remains in force, nothing in Section 51 shall prevent the applicant from -

(a) requiring the giving of, or giving, the covenant to which the authorization relates; or

(b) carrying out or enforcing the terms of the covenant to which the authorization relates in accordance with the authorization.

(4) While an authorization under Section 70(4) remains in force, nothing in Section 51 shall prevent the applicant from carrying out or enforcing the terms of the covenant to which the authorization relates in accordance with the authorization.

(5) While an authorization under Section 70(7) remains in force, nothing in Section 59 shall prevent the applicant from engaging in the practice to which the authorization relates in accordance with the authorization.

(6) While an authorization under Section 70(8) remains in force, nothing in Section 60 shall prevent the applicant from doing the act or engaging in the conduct to which the authorization relates in accordance with the authorization.

## 72. ADDITIONAL PROVISIONS RELATING TO AUTHORIZATIONS.

(1) An authorization granted by the Commission to a person under Section 70 to -

(a) enter into a contract or arrangement or arrive at an understanding; or

(b) give effect to a provision of a contract, arrangement or understanding; or

(c) require the giving of, or give, a covenant; or

(d) carry out or enforce the terms of a covenant; or

(e) engage in the practice of resale price maintenance; or

(f) do any act or engage in any conduct referred to in Section 60, shall have effect as if it were also an authorization in the same terms to every other person named or referred to in the application for the authorization as a party to the contract, arrangement or understanding, or the practice, act or conduct or as a person who is or would be bound by, or entitled to the benefit of, the covenant, as the case may be.

(2) An authorization granted to a person under Section 70 may be expressed to apply to or in relation to another person who -

(a) in the case of an authorization to enter into a contract or arrangement or arrive at an understanding, becomes a party to the proposed contract or arrangement at a time after it is entered into or becomes a party to the proposed understanding at a time after it is arrived at; and

(b) in the case of an authorization to give effect to a provision of a contract, arrangement or understanding, becomes a party to the contract, arrangement or understanding at a time after the authorization is granted; and

(c) in the case of an authorization to require the giving of, or to give, a covenant, becomes bound by, or entitled to the benefit of, the covenant at a time after the covenant is given; and

(d) in the case of an authorization to carry out or enforce the terms of a covenant, becomes bound by, or entitled to the benefit of, the covenant at a time after the authorization is granted.

### 73. CONTRACTS OR COVENANTS SUBJECT TO AUTHORIZATION NOT PROHIBITED UNDER CERTAIN CONDITIONS.

(1) Notwithstanding anything in this Part, but subject to Section 75 -

(a) a contract to which Section 50 or Section 52 applies may be entered into if the requirements of Subsection (2) are complied with; and

(b) a covenant to which Section 51 applies may be required to be given, or may be given, if the requirements of Subsection (2) are complied with.

(2) For the purposes of Subsection (1), the requirements that must be met are -

(a) in the case of a contract to which Section 50 or Section 52 applies -

(i) that the contract is subject to a condition that the provision, or exclusionary provision, as the case may be, does not come into force unless and until authorization is granted to give effect to the provision or exclusionary provision; and

(ii) that application has been made for that authorization within 15 days after the contract is entered into; and

(b) in the case of a covenant to which Section 51 applies -

(i) that the covenant is subject to the condition that it does not have effect unless and until authorization is granted to give effect to it; and

(ii) that application has been made for that authorization within 15 days after the covenant is made.

### 74. WHEN COMMISSION MAY GRANT AUTHORIZATION.

(1) The Commission may grant an authorization to a person -

(a) to enter into a contract or arrangement, or to arrive at an understanding, even though the contract or arrangement has been entered into, or the understanding has been arrived

at, before the Commission makes a determination in respect of the application for that authorization; or

(b) to give effect to a provision of a contract or arrangement entered into, or an understanding arrived at, even though the applicant has already given, or is already giving, effect to the provision before the Commission makes a determination in respect of the application for that authorization; or

(c) to require the giving of, or to give a covenant even though the covenant has been given before the Commission makes a determination in respect of the application for that authorization; or

(d) to do an act or engage in conduct referred to in Section 59 or Section 60 even though the applicant has already done the act or is already engaging in the conduct before the Commission makes a determination in respect of the application for that authorization.

(2) Subject to Subsection (3), all of the parties to the contract, arrangement or understanding shall, unless and until authorization is granted, discontinue -

(a) giving effect to the provision of the contract, arrangement or understanding; or

(b) engaging in conduct referred to in Section 59 or Section 60.

(3) The parties to a contract, arrangement or understanding may do any of the things set out in Subsection (2) if any of the parties establishes to the satisfaction of the Commission that discontinuing any of those things would, or would be likely to, result in exceptional hardship to any of the parties.

#### 75. CONTRAVENTIONS NOT PREVENTED BY GRANTING OF AUTHORIZATION UNDER SECTION 73 OR SECTION 74.

Nothing in Section 73 or Section 74 prevents conduct that occurred before an authorization was granted in respect of it and that would otherwise have constituted a contravention of this Part from continuing to constitute a contravention.

#### 76. PROCEDURE FOR APPLICATIONS FOR AUTHORIZATION OF RESTRICTIVE TRADE PRACTICES.

(1) If a form has been prescribed for this purpose, an application for an authorization under Section 70 shall -

(a) be made in the prescribed form; and

(b) contain such particulars as may be specified in the form; and

(c) be accompanied by the prescribed application fee, if any.

(2) On the receipt of an application (that complies with Subsection (1) if applicable), the Commission shall immediately -

(a) record the application in the register to be kept by the Commission for the purpose;  
and

(b) give written notice of the date of registration to the person by or on whose behalf the application was made; and

(c) give notice of the application to any other person who, in the Commission's opinion, is likely to have an interest in the application; and

(d) give public notice of the application in such manner as the Commission thinks fit. (3)

A person who has an interest in any application in respect of which a notice is given under Subsection (2)(d) may give written notice to the Commission of his interest and the reason for that interest.

(4) On the receipt of an application that does not comply with Subsection (1), the Commission may, at its discretion -

(a) accept the application and take the steps referred to in Subsection (2) in respect of that application; or

(b) return the application to the person by or on whose behalf it was made; or

(c) decline to register the application until it complies with Subsection (1).

(5) Where the Commission declines to register an application under Subsection (4)(c), it shall immediately notify the person by or on whose behalf the application was made.

(6) The person making the application under Subsection (1), and any person on whose behalf it was made, and any person to whom the application relates, shall from time to time produce, or, as the case may be, furnish to the Commission, within such time as the Commission may specify, such further documents or information in relation to the application as may be required by the Commission for the purpose of enabling it to exercise its functions under this Part.

(7) Notwithstanding anything in Subsection (2) or Subsection (4), where the Commission is of the opinion that the matters to which an application relates, are for reasons other than arising from the application of any provision of this Part, unlikely to be proceeded with, the Commission may, in its discretion, return the application to the person by or on whose behalf the application was made. A person who has made an application to the

Commission for an authorization may at any time, by notice in writing to the Commission, withdraw the application.

#### 77. DETERMINATION OF APPLICATIONS FOR AUTHORIZATION OF RESTRICTIVE TRADE PRACTICES.

(1) The Commission shall, in respect of an application for an authorization under Section 70, make a determination in writing -

(a) granting such authorization as it considers appropriate; or

(b) declining the application.

(2) Any authorization granted pursuant to Section 70 may be granted subject to such conditions not inconsistent with this Part and for such period as the Commission thinks fit.

(3) The Commission shall take into account any submissions in relation to the application made to it by the applicant or by any other person.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorization, the Commission shall comply with the requirements of Section 78.

(6) The Commission shall not make a determination granting an authorization pursuant to an application under Section 70(1), (2), (3) or (4) unless it is satisfied that -

(a) the entering into of the contract or arrangement or the arriving at the understanding; or

(b) the giving effect to the provision of the contract, arrangement or understanding; or

(c) the giving or the requiring of the giving of the covenant; or

(d) the carrying out or enforcing of the terms of the covenant, as the case may be, to which the application relates, will in the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result, from it.

(7) The Commission shall not make a determination granting an authorization pursuant to an application under Section 70(5) or (6) unless it is satisfied that -

(a) the entering into of the contract or arrangement or the arriving at the understanding; or

(b) the giving effect to the exclusionary provision of the contract, arrangement or understanding, as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in such a benefit to the public that -

(c) the contract, arrangement or understanding should be permitted to be entered into or arrived at; or

(d) the exclusionary provision should be permitted to be given effect to.

(8) The Commission shall not make a determination granting an authorization pursuant to an application under Section 70(7) or (8) unless it is satisfied that -

(a) the engaging in the practice of resale price maintenance to which the application relates; or

(b) the act or conduct to which the application relates, as the case may be, will in all the circumstances result, or be likely to result, in such a benefit to the public that -

(c) the engaging in the practice should be permitted; or

(d) the act or conduct should be permitted.

#### 78. COMMISSION TO PREPARE DRAFT DETERMINATION IN RELATION TO RESTRICTIVE TRADE PRACTICES.

(1) Before determining an application for an authorization under Section 70, the Commission shall prepare a draft determination in relation to the application.

(2) The Commission shall send a copy of the draft determination and a summary of the reasons for it to -

(a) the applicant; and

(b) any person to whom a notice has been given pursuant to Section 76(2)(c); and

(c) any person who has given a notice pursuant to Section 76(3) and who, in the opinion of the Commission has such an interest in the application as to justify the Commission sending a copy of the draft determination to him; and

(d) any other person who in the opinion of the Commission may assist the Commission in its determination of the application.

(3) The applicant and each other person to whom a copy of the draft determination is sent shall notify the Commission within 10 days after a date fixed by the Commission (not being a date earlier than the day on which the notice is sent) whether the applicant or

other person wishes the Commission to hold a conference in relation to the draft determination.

(4) If each of the persons to whom a draft determination was sent under Subsection (2) - (a)

notifies the Commission within the period of 10 days referred to in Subsection (3) that the person does not wish the Commission to hold a conference in relation to the draft determination; or

(b) does not notify the Commission within that period that the person wishes the Commission to hold such a conference, the Commission may make the determination at any time after the expiration of that period.

(5) If any of the persons to whom a draft determination was sent under Subsection (2) notifies the Commission, in writing, within the period of 10 days referred to in Subsection (3) that he wishes the Commission to hold a conference in relation to the draft determination, the Commission shall -

(a) appoint a date (not being a date later than 20 days after the expiration of that period) time and place for the holding of the conference; and

(b) give notice of the date, time and place so appointed to each of the persons to whom a draft determination was sent under Subsection (2).

(6) The Commission may, of its own motion, determine to hold a conference in relation to the draft determination and shall appoint a date (not being a date later than 20 days after the expiration of the period referred to in Subsection (3)), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom the draft determination was sent under Subsection (2).

(7) Where the Commission is of the opinion that two or more applications for authorizations that are made by the same person, or by corporations that are related to each other, involve the same or substantially similar issues, the Commission may treat the applications as if they constitute a single application, and may prepare a single draft determination in relation to the applications and hold a single conference in relation to that draft determination.

## 79. PROCEDURE AT CONFERENCE.

(1) At a conference called under Section 78 -

(a) the Commission shall be represented by a member or members nominated by the Commissioner; and



(b) each person to whom a draft determination was sent under Section 78(2) and any other person whose presence at the conference is considered by the Commission to be desirable, is entitled to attend and participate personally or, in the case of a body corporate, be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate; and

(c) a person participating in the conference in accordance with Paragraph (b) is entitled to have another person or other persons present to assist him; and

(d) no other person is entitled to be present.

(2) The Commission may require any officer of the Commission to attend a conference called under Section 78 where, in the opinion of the Commission, that officer may assist the Commission in the determination of the application.

(3) At a conference called under Section 78, the Commission shall provide for as little formality and technicality as the requirements of this Part and a proper consideration of the application permit.

(4) The Commission shall cause such record of the conference to be made as is sufficient to set out the matters raised by the persons participating in the conference.

(5) Any member of the Commission attending the conference may terminate the conference when that member is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

(6) The Commission shall have regard to all matters raised at the conference, and may, at any time after the termination of the conference, make a determination in respect of the application.

#### 80. COMMISSION MAY VARY OR REVOKE AUTHORIZATION.

(1) Subject to Subsection (2), if at any time after the Commission has granted an authorization under Section 70, the Commission is satisfied that -

(a) the authorization was granted on information that was false or misleading in a material particular; or

(b) there has been a material change of circumstances since the authorization was granted; or

(c) a condition upon which the authorization was granted has not been complied with, the Commission may revoke or amend the authorization or revoke the authorization and grant a further authorization in substitution for it.

(2) The Commission shall not revoke or amend an authorization or an authorization and substitute a further authorization pursuant to Subsection (1) unless the person to whom the authorization was granted and any other person who in the opinion of the Commission is likely to have an interest in the matter is given a reasonable opportunity to make submissions to the Commission and the Commission has had regard to those submissions.

#### 81. COMMISSION MAY GIVE CLEARANCES FOR BUSINESS ACQUISITIONS.

(1) A person who proposes to acquire assets of a business or shares may give the Commission a notice seeking clearance for the acquisition.

(2) Section 76(1), (2)(a) and (b), (4) and (5) apply in respect of every notice given under Subsection (1) as if the notice were an application under Section 70.

(3) Subject to Subsection (5), within 20 days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall either -

(a) if it is satisfied that the acquisition will not have, and will not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or

(b) if it is not satisfied that the acquisition will not have, and will not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance for the acquisition.

(4) If the period specified in Subsection (3), and any extension thereof in accordance with Subsection (5), expires without the Commission having given a clearance for the acquisition and without having given a notice under Subsection (3)(b), the Commission is deemed to have given a clearance for the acquisition.

(5) If the Commission requires a person who gives notice under this section to produce or furnish to the Commission documents and information in relation to the acquisition for the purpose of enabling it to exercise its functions under this section, the period specified in Subsection (3) is extended by the duration of the period commencing on the date the person is notified of that requirement and expiring on the date on which the relevant documents and information are produced and furnished to the Commission.

(6) A clearance given under Subsection (3) and a clearance deemed to be given under Subsection (4) expires 12 months after the date on which it was given.

## 82. COMMISSION MAY GRANT AUTHORIZATIONS FOR BUSINESS ACQUISITIONS.

- (1) A person who proposes to acquire assets of a business or shares may give the Commission a notice seeking an authorization for the acquisition.
- (2) Section 76(1), (2)(a) and (b), (4) and (5) apply in respect of every notice given under Subsection (1) as if the notice were an application under Section 70.
- (3) Subject to Subsection (6), within 72 days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall -
  - (a) if it is satisfied that the acquisition will not have, and will not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or
  - (b) if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted, by notice in writing to the person by or on whose behalf the notice was given, grant an authorization for the acquisition; or
  - (c) if it is not satisfied as to the matters referred to in Paragraphs (a) or (b), by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance or grant an authorization for the acquisition.
- (4) If the period specified in Subsection (3), and any extension thereof in accordance with Subsection (6), expires without the Commission having given a clearance or having granted an authorization or having declined to do so, the Commission is deemed to have granted an authorization for the acquisition.
- (5) The Commission shall state in writing its reasons for a determination made by it under Subsection (3).
- (6) If the Commission requires a person who gives notice under this section to produce or furnish to the Commission documents and information in relation to the acquisition for the purpose of enabling it to exercise its functions under this section, the period specified in Subsection (3) is extended by the duration of the period commencing on the date the person is notified of that requirement and expiring on the date on which the relevant documents and information are produced and furnished to the Commission.
- (7) A clearance given or an authorization granted under Subsection (3) and an authorization deemed to be granted under Subsection (4) expires 12 months after the date on which it was given or granted.

### 83. PROVISIONS APPLYING TO APPLICATIONS FOR CLEARANCES AND AUTHORIZATIONS FOR BUSINESS ACQUISITIONS.

(1) A person who gives a notice under Section 81 or Section 82 shall from time to time produce or furnish to the Commission, within such time as the Commission may specify, such documents and information in relation to the acquisition as may be required by the Commission for the purpose of enabling it to exercise its functions under this section, Section 81 or Section 82.

(2) Notwithstanding Section 81 or Section 82, where the Commission is of the opinion that a proposed acquisition is, for reasons other than arising from the application of any provision of this Part, unlikely to be proceeded with, the Commission may, in its discretion, decline to give a clearance or grant an authorization for that acquisition.

(3) The Commission shall state in writing its reasons for declining to give a clearance or grant an authorization under Subsection (2).

(4) A person who has given a notice in respect of an acquisition under Section 81 or Section 82 may at any time, by notice in writing to the Commission, advise the Commission that he does not wish the Commission to give a clearance or grant an authorization and the Commission shall accordingly not give a clearance or grant an authorization in respect of that acquisition.

(5) The Commission may consult with any person who, in its opinion, is able to assist it in making a determination under Section 81 or Section 82, as the case may be.

### 84. EFFECT OF CLEARANCE OR AUTHORIZATION.

Nothing in Section 50 or Section 69 applies to the acquisition of assets of a business or shares if the assets or shares are acquired in accordance with a clearance or an authorization under this Division and while the clearance or authorization is in force.

### 85. COMMISSION MAY ACCEPT UNDERTAKINGS.

(1) In giving a clearance or granting an authorization under Section 81 or Section 82, the Commission may accept a written undertaking given by or on behalf of the person who gave a notice under Section 81(1) or Section 82(1), as the case may be, to dispose of assets or shares specified in the undertaking.

(2) The Commission shall not accept an undertaking in relation to the giving of a clearance or the granting of an authorization under Section 81 or Section 82, other than an undertaking given under Subsection (1).

(3) An undertaking given to the Commission under Subsection (1) is deemed to form part of the clearance given or the authorization granted in relation to the acquisition to which the undertaking relates.

#### 86. CONFERENCES IN RELATION TO BUSINESS ACQUISITIONS.

(1) Before making a determination under Section 81(3) or Section 82(3) in relation to an acquisition, the Commission may determine to hold a conference and shall appoint a date, time and place for the holding of the conference and give notice of the date, time and place so appointed and of the matters to be considered at the conference to the persons entitled to be present at the conference.

(2) The provisions of Section 79 apply to a conference held under this section as if -

(a) every reference in Section 79 to a conference called under Section 78 were a reference to a conference held under this Section; and

(b) the reference in Section 79(1)(b) to a person to whom a draft determination was sent under Section 78(2) were a reference to the person by or on whose behalf a notice was given under Section 81(1) or Section 82(1), as the case may be; and

(c) the reference in Subsection (6) of that section to a determination in respect of an application were a reference to a determination under Section 81(3) or Section 82(3), as the case may be.

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Division 5 : Enforcement, Remedies and Appeals

Subdivision A - Restrictive Trade Practices.

#### 87. PECUNIARY PENALTIES.

(1) If the Court is satisfied on the application of the Commission that a person -

(a) has contravened any of the provisions of Sections 50 to 67 inclusive; or

(b) has attempted to contravene such a provision; or

(c) has aided, abetted, counselled or procured any other person to contravene such a provision; or

(d) has induced, or attempted to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision; or

(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or

(f) has conspired with any other person to contravene such a provision, the Court may order the person to pay such pecuniary penalty as the Court determines to be appropriate.

(2) In determining an appropriate penalty under this section, the Court shall have regard to all relevant matters, including the nature and extent of any commercial gain arising from engaging in the conduct referred to in Subsection (1).

(3) The amount of any pecuniary penalty shall not, in respect of each act or omission, exceed -

(a) in the case of an individual, K500,000.00; or

(b) in the case of a body corporate, K10,000,000.00.

(4) The standard of proof in proceedings under this section is the standard of proof applying in civil proceedings.

(5) Proceedings under this section may only be commenced within three years after the occurrence of the matter giving rise to the contravention.

(6) Where conduct by any person constitutes a contravention of two or more provisions of Sections 50 to 67 (inclusive), proceedings may be instituted under this Part against that person in relation to the contravention of any one or more of the provisions, but a person shall not be liable to more than one pecuniary penalty under this section in respect of the same conduct.

## 88. BODY CORPORATE NOT TO INDEMNIFY CERTAIN PERSONS IN RESPECT OF PECUNIARY PENALTIES.

(1) A body corporate shall not indemnify a director, employee or agent of the body corporate or a related corporation in respect of -

(a) liability for payment of a pecuniary penalty under Section 87 that arises out of a provision of a contract, arrangement or understanding that is deemed, under Section 53, to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market; or

(b) costs incurred by that director, employee or agent in defending or settling any proceeding relating to that liability.

(2) An indemnity given in contravention of Subsection (1) is void.

(3) In this Section -

"agent" includes a former agent; and "director"

includes a former director; and "employee"

includes a former employee; and

"indemnify" includes relieve or excuse from liability, whether before or after the liability arises, and "indemnity" has a corresponding meaning.

#### 89. PECUNIARY PENALTIES FOR CONTRAVENTION OF SECTION 88.

(1) If the Court is satisfied on the application of the Commission that a body corporate has acted in contravention of Section 88, the Court may order the body corporate to pay any pecuniary penalty that the Court determines to be appropriate.

(2) The amount of any pecuniary penalty shall not, in respect of each act or omission, exceed twice the value of any indemnity given in contravention of Section 88.

(3) The standard of proof in proceedings under this section is the standard of proof applying in civil proceedings.

(4) Proceedings under this section may only be commenced within three years after the occurrence of the matter giving rise to the contravention.

#### 90. COURT MAY ORDER CERTAIN PERSONS TO BE EXCLUDED FROM MANAGEMENT OF BODY CORPORATE.

The Court may make an order that a person shall not, without the leave of the Court, be a director or promoter of, or in any way, either directly or indirectly, be concerned or take part in the management of, a body corporate for a period not exceeding five years as may be specified in the order, if the Court is satisfied on the application of the Commission that

-

(a) the person has entered into a contract or arrangement, or arrived at an understanding, containing a provision that is deemed by Section 53 to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market; or

(b) the person has given effect to a provision of a contract, arrangement or understanding that is deemed by Section 53 to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market; or

(c) the person has entered into a contract or arrangement, or arrived at an understanding, that contains an exclusionary provision; or

(d) the person has given effect to an exclusionary provision of a contract, arrangement or understanding.

#### 91. APPLICATION FOR ORDER UNDER SECTION 90.

(1) The Commission shall give not less than ten days notice of its intention to apply for an order under Section 90 to the person against whom the order is sought.

(2) On the hearing of the Commission's application or an application by a person against whom an order under Section 90 has been made -

(a) the Commission shall appear and call the attention of the Court to any matter that seems to it to be relevant, and may give evidence or call witnesses; and

(b) the person against whom the order is sought or has been made may appear and give evidence or call witnesses.

(3) An officer of the Court shall, as soon as practicable after the making of an order under Section 90 -

(a) give notice of the order to the person against whom the order has been made; and

(b) give notice in the National Gazette of the name of the person against whom the order is made.

#### 92. OFFENCE TO ACT IN CONTRAVENTION OF ORDER MADE UNDER SECTION 90.

(1) A person who acts in contravention of an order made under Section 90 is guilty of an offence.

(2) A person, who commits an offence under Subsection (1), is liable on conviction to imprisonment for a term not exceeding five years or a fine not exceeding K500,000.00.

#### 93. INJUNCTIONS.



The Court may, on the application of the Commission or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute any of the following:-

- (a) a contravention of any of the provisions of Sections 50 to 67 inclusive;
- (b) any attempt to contravene such a provision;
- (c) aiding, abetting, counseling or procuring any other person to contravene such a provision;
- (d) inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision;
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision;
- (f) conspiring with any other person to contravene such a provision.

#### 94. ACTIONS FOR DAMAGES.

(1) A person is liable in damages for any loss or damage caused by that person engaging in conduct that constitutes any of the following :-

- (a) a contravention of any of the provisions of Sections 50 to 67;
- (b) aiding, abetting, counseling or procuring a contravention of such a provision;
- (c) inducing, by threats, promises or otherwise, a contravention of such a provision;
- (d) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of such a provision;
- (e) conspiring with any other person in a contravention of such a provision.

(2) An action under Subsection (1) may only be commenced within three years after the occurrence of the matter giving rise to the contravention.

#### Subdivision B - Business Acquisitions.

#### 95. PECUNIARY PENALTIES.

(1) If the Court is satisfied on the application of the Commission that a person -

- (a) has contravened Section 69; or
  - (b) has attempted to contravene Section 69; or
  - (c) has aided, abetted, counseled, or procured any other person to contravene Section 69;  
or
  - (d) has induced, or attempted to induce, any other person, whether by threats, promises or otherwise, to contravene Section 69; or
  - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of Section 69; or
  - (f) has conspired with any other person to contravene Section 69, the Court may order the person to pay to such pecuniary penalty as the Court determines to be appropriate.
- (2) In determining an appropriate penalty under this section, the Court shall have regard to all relevant matters, including -
- (a) the nature and extent of the act or omission; and
  - (b) the nature and extent of any loss or damage suffered by any person as a result of the act or omission; and
  - (c) the circumstances in which the act or omission took place; and
  - (d) whether or not the person has previously been found by the Court in proceedings under this Division to have engaged in any similar conduct.
- (3) The amount of any pecuniary penalty shall not, in respect of each act or omission, exceed -
- (a) in the case of an individual, K500,000.00; or
  - (b) in the case of a body corporate, K10,000,000.00.
- (4) The standard of proof in proceedings under this section is the standard of proof applying in civil proceedings.
- (5) Proceedings under this section may only be commenced within three years after the occurrence of the matter giving rise to the contravention.
- (6) A person is not liable to a pecuniary penalty under both Section 87 and this section in respect of the same conduct.

## 96. INJUNCTIONS.

Where it appears to the Court, on the application of the Commission, that a person intends to engage, or is engaging, or has engaged, in conduct that constitutes or would constitute a contravention of Section 69, the Court may, by order, do all or any of the following things :-

(a) grant an injunction restraining any person from engaging in conduct that constitutes or would constitute

(i) a contravention of Section 69; or

(ii) an attempt to contravene Section 69; or

(iii) aiding, abetting, counseling or procuring any other person to contravene Section 69; or

(iv) inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to contravene Section 69; or

(v) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of Section 69; or

(vi) conspiring with any other person to contravene Section 69;

(b) impose on any person obligations to be observed in the carrying on of any business or the safeguarding of any business or any assets of any business;

(c) provide for the carrying on of any business or the safeguarding of any business or assets of any business, either by the appointment of a person to conduct or supervise the conduct of any business (on such terms and with such powers as may be specified or described in the order), or in any other manner, as it thinks necessary in the circumstances of the case.

## 97. ACTIONS FOR DAMAGES.

(1) A person is liable in damages for any loss or damage caused by him engaging in conduct that constitutes any of the following:-

(a) a contravention of Section 69; and

(b) aiding, abetting, counseling or procuring a contravention of Section 69; and

(c) inducing, by threats, promises or otherwise, a contravention of Section 69; and

(d) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of Section 69; and

(e) conspiring with any other person in a contravention of Section 69.

(2) An action under Subsection (1) may only be commenced within three years after the occurrence of the matter giving rise to the contravention.

#### 98. COURT MAY ORDER DIVESTITURE OF ASSETS OR SHARES.

(1) In any case where the Court, on the application of the Commission, is satisfied that any person -

(a) has contravened Section 69; or

(b) has been found in any other proceedings under this Division to have contravened Section 69, it may, by order -

(c) give directions for the disposal by that person of such assets or shares as are specified in the order; or

(d) give directions for the disposal by that person of such assets or shares in accordance with an undertaking given by the person under Section 85.

(2) An application under Subsection (1) may only be made within two years after the occurrence of the matter giving rise to the contravention.

#### Subdivision C - Injunctions Generally.

#### 99. GENERAL PROVISIONS RELATING TO GRANTING OF INJUNCTIONS.

(1) The Court may at any time rescind or vary an injunction granted under this Division.

(2) Where an application is made to the Court under this Division for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the Court may -

(a) if it is satisfied that the person has engaged in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or

(b) if in the opinion of the Court it is desirable to do so, grant an interim injunction restraining the person from engaging in conduct of that kind, whether or not it appears to

the Court that the person intends to engage again, or to continue to engage, in conduct of that kind.

(3) Where an application is made to the Court under this Division for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the Court may -

(a) if it appears to the Court that, in the event that an injunction is not granted, it is likely that the person will engage in conduct of that kind - grant an injunction restraining the person from engaging in conduct of that kind; or

(b) if in the opinion of the Court it is desirable to do so - grant an interim injunction restraining the person from engaging in conduct of that kind, whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(4) In determining whether to grant an interim injunction under this section, the Court shall have regard to all relevant matters, including the interests of consumers.

#### 100. WHEN UNDERTAKING AS TO DAMAGES NOT REQUIRED BY COMMISSION.

(1) If the Commission applies to the Court for the grant of an interim injunction under this Division, the Court shall not, as a condition of granting an interim injunction, require the Commission to give an undertaking as to damages.

(2) In determining the Commission's application for the grant of an interim injunction, the Court shall not take into account that the Commission is not required to give an undertaking as to damages.

Subdivision D - Other Matters.

#### 101. OTHER ORDERS.

(1) Where, in any proceedings under this Division, the Court finds that a person who is a party to the proceedings has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in contravention of any of the provisions of Sections 50 to 67 inclusive, the Court may, whether or not it grants an injunction or makes any other order under this Division, make such order or orders as it thinks appropriate against the person who engaged in the conduct or any other person who in relation to the contravention did any act referred to in Section 87(1)(b) to (f) inclusive.

(2) Where a contract is entered into in contravention of this Part, or a contract contains a provision which if given effect to would contravene this Part, the Court may, in any proceedings under this Division, or on application made for the purpose by a party to the contract or any person claiming through or under any party to the contract, make an order -

(a) varying the contract, in such manner as it thinks fit, not being a manner inconsistent with the provisions of this Part; or

(b) cancelling the contract; or

(c) requiring any person who is a party to the contract to make restitution or pay compensation to any other person who is a party to the contract.

(3) Where a covenant is given in contravention of this Part, or the enforcement of the terms of a covenant would contravene this Part, the Court may, in any proceedings under this Division, or on application made for the purpose by a person who, but for Section 51(4), would be bound by or entitled to the benefit of the covenant or any person claiming through or under any such person, make an order -

(a) varying the covenant, in such manner as it thinks fit, not being a manner inconsistent with the provisions of this Part; or

(b) requiring any person who, but for Section 51(4), would be bound by or entitled to the benefit of the covenant, to make restitution or pay compensation to any other person who, but for Section 51(4), would be bound by or entitled to the benefit of the covenant.

(4) Nothing in Subsection (2) or Subsection (3) prevents any proceedings being instituted or commenced under this Division.

(5) Notwithstanding any enactment or rule of law, where a contract is entered into in contravention of this Part by reason that the contract contains a particular provision, or the contract contains a provision which, if given effect to, would contravene this Part, the enforceability of any other provision of the contract is not affected by the existence of that provision.

## 102. CONDUCT BY EMPLOYEES OR AGENTS.

(1) Where, in proceedings under this Division in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Part applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, employee or agent of the body corporate, acting within the scope of his actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate -

(a) by a director, employee or agent of the body corporate, acting within the scope of his actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, given within the scope of the actual or apparent authority of the director, employee or agent, is deemed, for the purposes of this Part, to have been engaged in also by the body corporate.

(3) Where, in a proceedings under this Division in respect of any conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of this Part applies, it is necessary to establish the state of mind of the person, it is sufficient to show that an employee or agent of the person, acting within the scope of his actual or apparent authority, had that state of mind.

(4) Any conduct engaged in on behalf of a person other than a body corporate - (a)

by an employee or agent of the person acting within the scope of his actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, given within the scope of the actual or apparent authority of the servant or agent, is deemed, for the purposes of this Part, to have been engaged in also by the first-mentioned person.

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose.

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## PART VII :CONSUMER PROTECTION

### Division 1 :Interpretation

#### 103. INTERPRETATION.

In this Part, unless the contrary intention appears - "consumer" means any person who acquires or uses goods or services for personal, domestic or household use or consumption;"service" means -

(a) any service supplied or carried on by any person or body of persons, incorporated or unincorporated, engaged in an industrial, commercial, business, profit-making or remunerative undertaking or enterprise (including a professional practice); or

(b) any right or privilege for which remuneration is payable in the form of royalty, stumpage, tribute or other levy based on volume or value of goods produced; or

(c) any right under an agreement -

(i) for the hiring of goods; or

(ii) for the hire, use or occupation of any wharf or dock; or

(iii) for the provision of lodging; or

(d) any right under an agreement (not being a lease) or licence for the hiring of a hall; or (e) any benefit under a contract of work and labour, or of work and labour and the supply of materials.

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Division 2 :Declaration of Policy and Rights

#### 104. DECLARATION OF STATE CONSUMER POLICY.

It is the policy of the State to protect the rights and interests of consumers and to monitor standards for the ethical conduct of those engaged in the production and distribution of goods and services.

#### 105. CONSUMER'S RIGHTS.

(1) The State recognizes that consumers, in their capacity as consumers, have the following rights :-

(a) right to safety;

(b) right to choice;

(c) right to consumer education;

(d) right to information;

(e) right to representation;

(f) right to redress.

(2) The recognition of the rights under Subsection (1) does not confer or imply any liability on the State in respect of these rights or the enforcement of these rights.

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Division 3 :Consumer Affairs Functions



#### 106. CONSUMER AFFAIRS FUNCTIONS OF THE COMMISSION.

In addition to the functions specified in Section 6 of this Act, the Commission has the following functions :-

(a) to formulate and submit to the Minister policies in the interests of consumers; (b) to consider and examine and, where necessary, advise the Minister on the consolidation or updating of legislation providing protection to the consumer in the following areas:-

- (i) public health;
- (ii) trade and commerce;
- (iii) motor vehicles and motor vehicle insurance;
- (iv) price surveillance and control;
- (v) services;
- (vi) such other areas as may be relevant;

(c) to liaise with Departments and other agencies of Government on matters relating to consumer protection legislation; and

(d) to receive and consider complaints from consumers on matters relating to the supply of goods and services;

(e) to investigate any complaint received under Paragraph (d) or, where appropriate, refer the complaint to the appropriate authority and ensure that action is taken by the Commission or by the authority to whom the complaint was referred;

(f) to make available to consumers general information affecting the interests of consumers;

(g) to liaise with business, commercial and professional bodies and associations in order to establish codes of practice to regulate the activities of their members in their dealings with consumers;

(h) to advise consumers of their rights and responsibilities under laws relating to consumer protection;

(i) to promote and participate in consumer education activities; and

(j) to research into issues affecting consumers and propose appropriate measures to address such issues;

(k) to encourage the development of organizations and associations established for the purpose of furthering the interests of consumers, and to liaise and consult with them on the development of consumer policy and on issues of consumer interest;

(l) to establish appropriate systems whereby consumer claims can be considered and redressed;

(m) to liaise with consumer organizations, consumer affairs authorities and consumer protection groups overseas and to exchange information on consumer issues with those bodies;

(n) to arrange for the representation of consumers in court proceedings relating to consumer matters;

(o) to do all other things relating to consumer affairs.

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Division 4 :Product Safety and Product Information

#### 107. WARNING NOTICE TO PUBLIC.

(1) The Commission may, by notice in the National Gazette, issue -

(a) a statement that goods of a kind specified in the notice are under 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 -

(a) an investigation referred to in Subsection (1) has been completed; and

(b) neither a notice under Section 114 inviting a supplier to notify the Commission whether the supplier wishes the Commission to hold a conference nor a notice under Section 116 has been published in relation to the goods since the commencement of the investigation,

the Commission shall, as soon as practicable after the investigation has been completed, by notice in the National 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 Division.

#### 108. PRODUCT SAFETY STANDARDS AND UNSAFE GOODS.

(1) A person shall not 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; or

(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 the 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; and

(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) A person shall not export goods the supply in Papua New Guinea of which is prohibited by Subsection (1) unless the Minister has, by notice in writing given to the person, approved the export of those goods.

(4) Where the Minister approves the export of goods under Subsection (3), the Minister shall cause the statement to be tabled in Parliament within seven sitting days after the approval is given.

(5) Subject to Section 114, where it appears to the Commission that goods of a particular kind will or may cause injury to any person, the Commission may, by notice in the National Gazette, declare the goods to be unsafe goods.

(6) A notice under Subsection (5) remains in force until the end of 18 months after the date of publication of the notice in the National Gazette, unless it is revoked by notice in the National Gazette before the end of that period.

(7) Subject to Section 114, where -

(a) a period of 18 months has elapsed after the date of publication of a notice in the National Gazette declaring goods to be unsafe goods; and

(b) there is not a prescribed consumer product safety standard in respect of the goods, the Commission may, by notice in the Gazette, impose a permanent ban on the goods.

#### 109. PRODUCT INFORMATION STANDARDS.

(1) A person shall not 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 the person 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) Subsection (1) does not apply to goods that are intended to be used outside Papua New Guinea.

(4) If there is applied to goods -

(a) a statement that the goods are for export only; or

(b) a statement indicating by the use of words authorized by the regulations to be used for the purposes of this subsection that the goods are intended to be used outside Papua New Guinea, it shall be presumed for the purposes of this section, unless the contrary is established, that the goods are intended to be so used.

(5) For the purposes of Subsection (4), a statement shall be deemed to be applied to goods if -

(a) the statement is woven in, impressed on, worked into or annexed or affixed to the goods; or

(b) the statement is applied to a covering, label, reel or thing in or with which the goods are supplied.

(6) A reference in Subsection (5) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and a reference in that subsection to a label includes a reference to a band or ticket.

#### 110. POWER OF MINISTER TO DECLARE PRODUCT SAFETY OR INFORMATION STANDARDS.

(1) The Minister may, after consulting with the Commission, by notice in the National 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 National Institute of Standards and Industrial Technology 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 108 or a consumer product information standard for the purposes of Section 109.

(2) Where a notice is published in accordance with Subsection (1), 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, will be

deemed to be a prescribed consumer product safety standard for the purposes of Section 108 or a prescribed consumer product information standard for the purposes of Section 109, as the case may be.

(3) Subsection (1) does not authorize 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 108 or Section 109.

#### 111. COMPULSORY PRODUCT RECALL.

(1) Subject to Section 114, where -

(a) a person (in this section referred to as "the supplier") supplies goods that are intended to be used, or are of a kind likely to be used, by a consumer; and

(b) one of the following subparagraphs applies :-

(i) it appears to the Commission that the goods are 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;

(iii) the goods are goods of a kind in relation to which there is in force a notice under Section 108(5) or Section 108(7); and

(c) it appears to the Commission that the supplier has not taken satisfactory action to prevent the goods causing injury to any person, the Commission may, by notice in the National Gazette, require the supplier to do one or more of the following:-

(d) take action within the period specified in the notice to recall the goods;

(e) 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 in the notice;

(ii) the circumstances, being circumstances identified in the notice, in which the use of the goods is dangerous;

(iii) procedures of disposing of the goods specified in the notice;

(f) subject to Subsection (2), 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 Subsection (1)(f)(iii), where the Commission, in a notice under Subsection (1), requires the supplier to take action under Subsection (1)(f), the Commission 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 Commission may, by notice in the National Gazette, give directions as to the manner in which the supplier is to carry out a recall of goods required under Subsection (1).

(4) Where the supplier, under Subsection (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 Subsection (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 Subsection (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 Subsection (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 Subsection (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 Commission under Subsection (1)(d), a person who has supplied or supplies any of the recalled goods to another person outside Papua New Guinea 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; and

(b) if the goods contain a defect or 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 Subsection (7) to give a notice in writing to another person, the first-mentioned person shall, within 10 days after giving that notice, provide the Commission with a copy of that notice.

(9) A person who contravenes Subsection (8) is guilty of an offence.

(10) For the purposes of this section, things that are goods at the time they are supplied are taken to be goods at all times after the supply, even if they become fixtures.

(11) Subsection (9) is an offence of strict liability.

#### 112. COMPLIANCE WITH PRODUCT RECALL ORDER.

Where a notice under Section 111(1) is in force in relation to a person, the person shall comply with the requirements and directions in the notice.

#### 113. NO SUPPLY IF PRODUCT RECALL ORDER ISSUED. Where a notice under Section 111(1) is in force in relation to a person, the person shall not -

(a) where the notice identifies a defect in, or a dangerous characteristic of, the goods - supply goods of the kind to which the notice relates which contain that defect or have that characteristic; or

(b) in any other case - supply goods of the kind to which the notice relates.

#### 114. OPPORTUNITY FOR CONFERENCE TO BE AFFORDED BEFORE CERTAIN POWERS EXERCISED.

(1) Subject to Section 116, where the Commission proposes to publish a notice under Section 108(5), Section 108(7) or Section 111(1) in relation to goods of a particular kind, the Commission shall prepare-

(a) a draft of the notice proposed to be published; and

(b) a summary of the reasons for the proposed publication of the notice, and shall, by notice in the National Gazette, invite any person (in this section referred to as "a supplier") who supplied or proposed to supply goods of that kind to notify the Commission, within the period (in this section referred to as "the relevant period") of 10 days of publication of the last-mentioned notice in the National Gazette, whether the

supplier wishes the Commission to hold a conference in relation to the proposed publication of the first-mentioned notice.

(2) A notice published under Subsection (1) shall set out a copy of the draft notice under Section 108(5), Section 108(7) or Section 111(1) and a copy of the summary of the reasons for the proposed publication of the notice.

(3) If a supplier notifies the Commission in writing within the relevant period or within such longer period as the Commission allows that the supplier wishes the Commission to hold a conference in relation to the proposed publication of a notice under Section 108(5), Section 108(7) or Section 111(1), the Commission shall appoint a day (being not later than 14 days after the end of that period), time and place for the holding of the conference, and give notice of the day, time and place so appointed to the Minister and to each supplier who so notified the Commission.

(4) At a conference under this section -

(a) the Commission shall be represented by a member or members or employee or employees nominated by the Commissioner; and

(b) each supplier who notified the Commission in accordance with Subsection (3) is entitled to be present or to be represented; and

(c) any other person whose presence at the conference is considered by the Commission to be appropriate is entitled to be present or to be represented; and

(d) the Minister or a person or persons nominated in writing by the Minister is or are entitled to be present; and

(e) the procedure to be followed shall be as determined by the Commission.

(5) The Commission shall cause a record of proceedings at a conference under this section to be kept.

(6) The Commission shall, as far as is practicable, ensure that each person who, in accordance with Subsection (4), is entitled to be present or who is representing such a person at a conference is given a reasonable opportunity at the conference to present his case and, in particular, to inspect any documents which the Commission proposes to consider for the purpose of making a decision after the conclusion of the conference, other than any document that contains particulars of a secret formula or process, and to make submissions in relation to those documents.

#### 115. DECISION AFTER CONCLUSION OF CONFERENCE.

As soon as is practicable after the conclusion of a conference in relation to the proposed publication of a notice under Section 108(5), Section 108(7) or Section 111(1), the Commission shall -



(a) decide, by resolution in writing -

(i) to publish the first-mentioned notice in the same terms as the draft notice referred to in Section 114(1); or

(ii) to publish the first-mentioned notice with such modifications as are specified by the Commission; or

(iii) not to publish the first-mentioned notice; and

(b) cause a copy of the resolution in writing to be given to each supplier who was present or represented at the conference.

#### 116. EXCEPTION IN CASE OF DANGER TO PUBLIC.

(1) Where it appears to the Commission that goods of a particular kind create an imminent risk of death, serious illness or serious injury, the Commission may, by notice in the National Gazette, certify that a notice in relation to the goods under Section 108(5), Section 108(7) or Section 111(1), should be published without delay.

(2) Where the Commission publishes a notice in the National Gazette under Subsection (1) -

(a) in a case where the notice is published before the Commission takes any action under Section 114(1) in relation to goods of a particular kind - Section 114 does not apply in relation to the action that the Commission may take under Section 108(5) or Section 111(1) in relation to goods of that kind; or

(b) in any other case - any action taken by the Commission under Section 114(1) in relation to goods of a particular kind ceases to have effect and, if a conference had, under Section 114, been arranged or such a conference had commenced or been completed without the Commission making a decision under Section 115, the Commission may publish the notice under Section 108(5) or Section 111(1) without regard to the action taken under Section 114(1).

#### 117. CONFERENCE AFTER GOODS BANNED.

(1) Where -

(a) a notice has been published under Section 108(5) in relation to goods of a particular kind; and

(b) the Commission publishes a notice under Section 116 in relation to goods of that kind, the Commission shall, by notice in the National Gazette, invite any person (in this section referred to as "a supplier") who supplied or proposes to supply goods of that kind to notify the Commission within the period (in this section referred to as "the relevant period") of 10 days of publication of that notice in the National Gazette, to notify the Commission whether the supplier wishes the Commission to hold a conference in relation to the notice referred to in Paragraph (a).

(2) If a supplier notifies the Commission in writing within the relevant period, or within such longer period as the Commission allows, that the supplier wishes the Commission to hold a conference in relation to the notice under Section 108(5), the Commission shall appoint a day (being not later than 10 days after the end of that period), time and place for the holding of the conference and give notice of the day, time and place so appointed to the Minister and to each supplier who so notified the Commission.

(3) Section 114(4), Section 114(5) and Section 114(6) apply in relation to a conference held under this section.

#### 118. DECISION AFTER CONCLUSION OF CONFERENCE.

As soon as is practicable after the conclusion of a conference in relation to a notice that has been published under Section 108(5), the Commission shall -

(a) decide that the notice under Section 108(5) shall-

(i) remain in force; or

(ii) be varied; or

(iii) be revoked; and

(b) cause a copy of the notice in writing given to each supplier who was present or represented at the conference.

#### 119. NOTIFICATION OF VOLUNTARY RECALL.

(1) Where a person voluntarily takes action to recall goods because the goods will or may cause injury to any person, the person 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 characteristic of, the goods.

(2) A person who contravenes Subsection (1) is guilty of an offence.

(3) For the purposes of this section, goods includes things that were goods at the time they were supplied but became fixtures after the supply.

(4) Subsection (2) is an offence of strict liability.

#### 120. COPIES OF CERTAIN NOTICES TO BE GIVEN TO SUPPLIERS OR PUBLISHED IN CERTAIN NEWSPAPERS.

(1) Where the Commission publishes a notice in the National Gazette under Section 107(1), Section 114(1), Section 116(1) or Section 117(1), the Commission shall, within two days after the publication of that notice in the National Gazette or, if it is not practicable to do so within that period, as soon as practicable after the end of that period 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 Papua New Guinea where goods of the kind to which the notice relates are, to the knowledge of the Commission, supplied.

(2) Any failure to comply with Subsection (1) in relation to a notice does not invalidate the notice.

#### 121. CERTAIN ACTION NOT TO AFFECT INSURANCE CONTRACTS.

The liability of an insurer under a contract of insurance with a person, being a contract relating to the recall of goods supplied or proposed to be supplied by the person or to the liability of the person with respect to possible defects in goods supplied or proposed to be supplied by the person, shall not be affected by reason only that the person gives to the Minister, to the Commission or to an officer of the Commission information relating to any goods supplied or proposed to be supplied by the corporation.

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### PART VIII :INQUIRIES AND REPORTS

#### 122. INQUIRY BY COMMISSION.

The Commission may conduct an inquiry if the Commission considers an inquiry is necessary or desirable for the purpose of carrying out the Commission's functions.

#### 123. MINISTER OR PARLIAMENT MAY REFER MATTER FOR INQUIRY.

- (1) The Commission shall conduct an inquiry into any matter that the Minister or Parliament, by written notice, refers to the Commission.
- (2) The notice under Subsection (1) shall specify the terms of reference for the inquiry.
- (3) The Minister or Parliament may -
  - (a) require that a report on the inquiry be delivered to the Minister within a specified period; and

- (b) require the Commission to make a draft report publicly available or available to specified persons or bodies during the inquiry; and
  - (c) require the Commission to consider specified matters; and
  - (d) give the Commission specific directions in respect of the conduct of the inquiry.
- (4) The Minister or Parliament may, by written notice, vary the terms of reference or a requirement or direction given by it under Subsection (3).

#### 124. NOTICE OF INQUIRY.

- (1) The Commission shall publish notice of an inquiry in a newspaper circulating generally in the country.
- (2) A notice under Subsection (1) shall specify -
- (a) the purpose of the inquiry; and
  - (b) the period during which the inquiry is to be held; and
  - (c) the period within which, and the form in which members of the public may make submissions, including details of public hearings; and
  - (d) the matters that the Commission would like submissions to deal with.
- (3) If the inquiry relates to a matter referred to the Commission by the Minister or Parliament, the notice shall include the terms of reference and any requirements or directions of the Minister or Parliament relating to the inquiry.
- (4) The Commission shall publish a further notice if the Minister or Parliament varies the terms of reference or any requirement or direction relating to the inquiry.

#### 125. CONDUCT OF INQUIRY.

- (1) Subject to any requirement or direction of the Minister or Parliament under this Part, an inquiry -
- (a) may be conducted in such manner as the Commission considers appropriate; and
  - (b) may (but need not) involve public hearings.
- (2) The Commission is not, in the conduct of an inquiry, bound by the rules of evidence.

## 126. REPORTS.

- (1) The Commission shall deliver a copy of the Commission's final report on an inquiry to the Minister.
- (2) The Commission may, during the course of an inquiry, deliver a special report to the Minister on any matter that the Commission considers should be the subject of such a report.
- (3) The Commission shall identify in a report any information contained in the report that the Commission considers is confidential information.
- (4) The Minister shall cause a copy of a report (excluding any information identified under Subsection (3) as confidential information) to be tabled in Parliament within 12 sitting days after receipt of the report.
- (5) The Minister shall, after a report has been tabled in Parliament or, if Parliament is not sitting, within 28 days after receiving a report, ensure that copies of the report (excluding any information identified under Subsection (3) as confidential information), are available for public inspection.
- (6) After the Minister has made a report publicly available, the Commission shall ensure that copies (excluding any information identified under Subsection (3) as confidential information) are available for purchase by members of the public.
- (7) If information is excluded from a report as being confidential information, a note to that effect shall be included in the report at the place in the report from which the information is excluded.

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## PART IX :GENERAL POWERS OF COMMISSION, ETC

### Division 1 :Information Gathering

## 127. SUMMONING WITNESSES, ETC.,

- (1) The Commission or an officer authorized in writing by the Commission for the purpose may -
  - (a) summon witnesses; and
  - (b) take evidence on oath; and

(c) require the production of documents, books and papers, where the Commission reasonably believes it is necessary or desirable to do so for or in connection with the performance of the Commission's functions.

(2) Witnesses summoned under Subsection (1) may be paid such fees and allowances as are fixed by the Minister or as are prescribed.

(3) A person who, having been summoned as a witness under Subsection (1), fails, without lawful excuse, to appear in obedience to the summons is guilty of an offence.

(4) A witness before the Commission or an officer authorized in writing by the Commission, whether summoned to appear or not, who, without lawful excuse, refuses -

(a) to be sworn or to make an affirmation; or

(b) to produce documents, books and papers; or

(c) to answer questions that he or she is lawfully required to answer, is guilty of an offence.

#### 128. OBTAINING INFORMATION GENERALLY.

(1) The Commission or an officer authorized in writing for the purposes by the Commission may require a person -

(a) to furnish such information as the Commission or authorized officer, as the case may be, requires; or

(b) to answer any question put to him, where the Commission reasonably believes the information or answer will assist in connection with the performance of the Commission's functions.

(2) The Commission or an officer authorized in writing for the purpose by the Commission may require the information to be given, or the question to be answered, on oath, and orally or in writing, and for that purpose may administer an oath.

(3) The Commission or an officer authorized in writing for the purpose by the Commission may, by written notice, require the information to be given, or the question to be answered, in writing and at the place specified in the notice.

(4) A person who, when required under this section to furnish information or answer a question

(a) refuses or fails to furnish the information or to answer the question; or

(b) gives information or makes an answer that is false in any particular,

is guilty of an offence.

(5) A person is not obliged to answer orally any question unless he or she has first been informed by the Commission or an officer authorized in writing for the purpose by the Commission asking the question that he or she is required to answer by virtue of this section.

## 129. ENTRY AND SEARCH.

(1) An officer of the Commission authorized in writing for the purpose by the Commission may, under warrant issued under Subsection (2) -

(a) enter and search any premises; and

(b) inspect any documents, books and papers; and

(c) inspect and take samples of any stocks of any goods, where the Commission reasonably believes it is necessary or desirable to do so for or in connection with the performance of the Commission's functions.

(2) Where an information on oath is laid before a Magistrate alleging that there are reasonable grounds for suspecting that there may be on or in any premises particular documents, books, papers or goods that may be necessary or desirable for the Commission to obtain for or in connection with the performance of its functions and the information sets out those grounds, the Magistrate may issue a search warrant authorizing the officer of the Commission named in the warrant, with such assistance, and by such force, as are necessary and reasonable, to enter the premises and exercise the powers referred to in Subsection (1) in respect of the thing.

(3) A Magistrate may not issue a warrant under Subsection (2) unless -

(a) the informant or some other person has given to the Magistrate, either orally or by affidavit, such further information (if any) as the Magistrate requires concerning the grounds on which the issue of the warrant is being sought; and

(b) the Magistrate is satisfied that there are reasonable grounds for issuing the warrant.

(4) There shall be stated in a warrant issued under Subsection (2) -

(a) the purpose for which the warrant is issued, and the nature of the matter in relation to which the entry, search and seizure are authorized; and

(b) whether entry is authorized to be made at any time of the day or night or during specified hours of the day or night; and

(c) a description of the kind of things to be inspected or impounded; and

(d) a day, not being later than one week after the day of issue of the warrant, upon which the warrant ceases to have effect.

(5) The Commission or an officer authorized in writing for the purpose by the Commission may -

(a) impound or retain any documents, books or papers produced to, or inspected by, the Commission or the authorized officer, as the case may be, under Subsection (1); and

(b) make copies or abstracts of them, or of entries in them, but the person entitled to them is entitled within a reasonable time, to a copy certified as correct by the Commission.

(6) A copy certificated in accordance with Subsection (2) shall be received in all courts as evidence having equal validity to the original.

(7) A person who prevents or attempts to prevent the Commission or an officer authorized in writing for the purpose by the Commission from -

(a) entering any premises; or

(b) inspecting any documents, books and papers; or

(c) inspecting or taking samples of any stocks or any goods; or

(d) making copies or abstracts of, or of entries in, any documents, books and papers, is guilty of an offence.

### 130. REGULATED ENTITIES TO RETAIN RECORDS.

(1) The Commission may, by order published in the National Gazette or served on the regulated entity or entities to whom it applies, require a regulated entity which sells or has for sale any regulated goods, or which supplies any regulated services -

(a) to prepare and keep such accounting or other records as are specified in the order; and

(b) to retain any or all of the accounting or other records specified in the order for the period specified in the order.



(2) The Commission may, in any order made under Subsection (1), require all or any of the accounting or other records to be prepared in accordance with guidelines made by the Commission.

(3) Any guidelines made under Subsection (2) shall be made available by the Commission, on reasonable terms, to any regulated entity to which they apply.

(4) The Commission may, if it has made an order under Subsection (1), by notice served on a regulated entity to which the order applies, require that regulated entity to make all or any of the accounting or other records required to be retained by that entity available, without charge, to the Commission or an authorized officer.

(5) A regulated entity may comply with a notice under Subsection (4) by providing either

-

(a) the original accounting or other records; or

(b) true copies of those accounting or other records, to the Commission within 14 days of receipt of that notice.

(6) A regulated entity which -

(a) refuses or fails to comply with a notice under Subsection (4) in accordance with Subsection (5); or

(b) willfully furnishes false or misleading records in response to a notice under Subsection (4), is guilty of an offence.

### 131. ACCESS TO INFORMATION.

(1) Subject to Subsection (2), the Commission shall make available for public inspection information submitted to it in the course of the performance of its functions except information that is designated "confidential" by the person who submits it.

(2) A member of or person employed by the Commission, shall not knowingly or recklessly disclose or knowingly or recklessly allow to be disclosed information designated "confidential" to any person in any manner that is calculated or likely to make it available for the use of any person who may benefit from such information or use such information to the detriment of the person to whose business or affairs the information relates, and the provisions of this subsection shall apply whether or not the person who discloses such information has ceased to be a member or employee of the Commission.

(3) Where information designated "confidential" is submitted to the Commission, the Commission may disclose or require its disclosure if it determines, after considering any representation from interested persons, that the disclosure is in the public interest.

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Division 2 :Enforcement and Penalties

### 132. COMMISSION TO PROSECUTE OFFENCES.

With respect to offences created by this Act, the Commission may, in consultation with and with the approval of the Public Prosecutor -

- (a) control and exercise the prosecution function of the State; and
- (b) provide counsel -
  - (i) to prosecute persons charged with any offence; and
  - (ii) to appear on behalf of the State in any appeal before the National or Supreme Court.

### 133. PROSECUTION OF OFFENCES.

- (1) An offence against this Act may be prosecuted summarily or on indictment, but an offender is not liable to be punished more than once in respect of the same offence.
- (2) For the purpose of the trial of a person for an offence against this Act, the offence will be deemed to have been committed
  - (a) at the place in which it was actually committed; or
  - (b) at any place in which the person may be.

### 134. GENERAL PENALTY, ETC.,

- (1) Unless otherwise specified in this Act, the penalty for an offence against this Act is -
  - (a) if the offence is prosecuted summarily - a fine not exceeding K50,000.00 or imprisonment for a term not exceeding six months; or
  - (b) if the offence is prosecuted on indictment - a fine not exceeding K100,000.00 or imprisonment for a term not exceeding two years.
- (2) In addition to any other punishment that it may impose, a court may, if it thinks fit, order the forfeiture of any money or goods in respect of which an offence against this Act has been committed.

### 135. OFFENCES BY CORPORATIONS.

Where a person is convicted of an offence against this Act is a corporation, every person who at the time of the commission of the offence, was a director or officer of the corporation shall be deemed to be guilty of the offence, unless he proves that the offence was committed without his knowledge, or that he used all due diligence to prevent the commission of the offence.

#### 136. RECOGNIZANCES.

(1) Where a person is convicted of an offence against this Act, in addition to or in lieu of any punishment provided for the offence, the court before which he is convicted may require him to enter into recognizances, with or without sureties, to comply with this Act, or with the order, notice, direction or requirement in relation to which the offence was committed.

(2) If a person fails to comply with an order of the court requiring him to enter into a recognizance, the court may order him to be imprisoned for a term not exceeding six months.

#### 137. EVIDENCE BY CERTIFICATES.

In a prosecution for an offence against this Act, a certificate under the hand of any person that a document annexed to the certificate is a true copy of a letter or notice sent by him to the defendant is prima facie evidence -

(a) of the matters certified; and

(b) that the original letter or notice of which the document purports to be a copy was received by the defendant on or about the time at which it would be delivered in the ordinary course of post if it had been sent on the date borne by the document; and

(c) that the signature on the certificate is the signature of the person by whom it purports to have been signed.

#### 138. EVIDENCE OF ORDERS, ETC.,

For the purposes of this Act -

(a) the production of the National Gazette purporting to contain an instrument is prima facie evidence that the instrument was duly made, given or issued in the terms set out in the National Gazette and that the instrument is in force; and

- (b) the production of a document purporting -
  - (i) to be an extract from the National Gazette; and
  - (ii) to be printed or published by the Government Printer; and
  - (iii) to contain an instrument, is prima facie evidence that the instrument -
    - (iv) was duly made, given or issued to the effect of or in the terms set out in the extract; and
    - (v) was published in the National Gazette; and
    - (vi) is in force.

#### 139. EVIDENCE OF CERTAIN INSTRUMENTS.

(1) A document purporting to be an instrument made or issued by the Minister, the Commission or any other person under this Act, or of an order made under this Act, and to be signed by or on behalf of the Minister, the Commission or the person, shall

- (a) be received in evidence; and
- (b) until the contrary is proved, be deemed to be an instrument made or issued by the Minister, the Commission or the person.

(2) In any legal proceedings, prima facie evidence of an instrument referred to in Subsection (1) may be given by the production of a document purporting to be certified to be a true copy of the instrument by, or on behalf of, the Minister, the Commission or the other person having power to make or issue the instrument.

#### 140. EVIDENCE GIVEN UNDER COMPULSION.

Where by this Act a person is obliged to answer questions orally, he shall not refuse to answer any question on the ground that the answer might tend to incriminate him or make him liable to a penalty, but the answer given by him is not admissible in evidence in any proceedings against him other than proceedings in respect of -

- (a) the falsity of the answer; or
- (b) the refusal or failure to answer any question.

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**PART X : REPEAL, AMENDMENT, SAVING, TRANSITIONAL AND MISCELLANEOUS PROVISIONS**

**Division 1 : Repeals, Amendments, Savings and Transitional**

**141. REPEAL OF CONSUMER AFFAIRS COUNCIL ACT 1993.**

The Consumer Affairs Council Act 1993 is repealed with effect from the commencement of Part II of this Act.

**142. AMENDMENT OF PRICES REGULATION ACT 1986.**

(1) The Prices Regulation Act 1986 is amended as set out in Schedule 1 of this Act with effect from the commencement of Part II of this Act.

(2) The amendment of the Prices Regulation Act 1986 shall not disturb the continuity of, status, operation or effect of any declaration, order, notice, approval, summons, right or other matter or thing made, issued or granted, existing or continuing before the commencement of the amendment.

**143. AMENDMENTS OF OTHER ACTS.**

Each Act that is specified in Schedule 2 to this Act is amended as set out in Schedule 2 to this Act with effect from the commencement of Part II of this Act.

**144. COMMISSION IS SUCCESSOR IN LAW.**

(1) In this Section 144 -

(a) Price Controller means the Price Controller appointed under the Prices Regulation Act 1986; and

(b) Consumer Affairs Council means the Consumer Affairs Council established under the Consumer Affairs Council Act 1993.

(2) On the commencement of Part II of this Act -

(a) all property, rights and assets of the Price Controller and the Consumer Affairs Council vest in the Commission; and

(b) all liabilities of the Price Controller and the Consumer Affairs Council become liabilities of the Commission; and

(c) the Commission becomes the successor in law of the Price Controller and the Consumer Affairs Council.

(3) A person who was an employee of the Price Controller or the Consumer Affairs Council immediately before the commencement of Part II of this Act is taken -

(a) to have been engaged by the Commission as an employee of the Commission with effect from the commencement of Part II of this Act; and

(b) to have been so engaged on the same terms and conditions as those that applied to the person, immediately before the commencement of Part II of this Act as an employee of the Price Controller or the Consumer Affairs Council; and

(c) to have accrued an entitlement to benefits, in connection with that engagement by the Commission, that is equivalent to the entitlement that the person had accrued, as an employee of the Price Controller or the Consumer Affairs Council, immediately before the commencement of Part II of this Act, as an employee of the Price Controller or the Consumer Affairs Council.

(4) The service of a transferred employee as an employee of the Commission is taken for all purposes to have been continuous with the service of the employee, immediately before the commencement of Part II of this Act.

(5) A transferred employee is not entitled to receive any payment or other benefit merely because he or she ceased to be an employee of the Price Controller or the Consumer Affairs Council by virtue of this Act or the repeal of the Consumer Affairs Council Act 1993.

(6) A Price Controller or a Deputy Price Controller under the Prices Regulation Act 1986 or a director, secretary or auditor of the Consumer Affairs Council does not, because of the operation of this Act, become a director, secretary, auditor or employee of the Commission.

(7) Where, immediately before the commencement of Part II of this Act, proceedings in respect of which the Price Controller or the Consumer Affairs Council was a party were pending or existing in any court or tribunal, then, on and after that commencement, the Commission is substituted for the Price Controller or the Consumer Affairs Council, as the case may be, as a party to the proceedings and has the same rights and obligations in the proceedings as the Price Controller or the Consumer Affairs Council, as the case may be.

(8) On and after the commencement of Part II of this Act, any reference in any Act (other than this Act), regulation, subordinate instrument or other document whatsoever to -

(a) the Price Controller or the Consumer Affairs Council is to be construed as a reference to the Commission, unless the contrary intention appears; or

(b) the Consumer Affairs Council Act 1993 is to be construed as a reference to this Act, unless the contrary intention appears.

(9) No stamp duty or other tax is payable under any Act in respect of anything done under this section.

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Division 2 :Miscellaneous

#### 145. IMMUNITY.

A member, officer or agent of the Commission is not personally liable for any thing done or omitted to be done in good faith in the performance or exercise, or purported performance or exercise, of a function or power under this or any other Act.

#### 146. HEAD OFFICE.

(1) The Head Office of the Commission shall be at such place in the country as the Commission from time to time decides.

(2) Until the Commission decides the place at which the Head Office shall be situated, the Head Office shall be within the National Capital District.

#### 147. SYMBOL OF THE COMMISSION.

(1) The Commission shall have the exclusive right to the use of any symbol or representation it may select or devise and thereafter display or exhibit in connection with its activities or affairs.

(2) A person who uses a symbol or representation identical with that of the Commission, or which so resembles the symbol or representation of the Commission so as to deceive or cause confusion, or to be likely to deceive or to cause confusion, is guilty of an offence.

#### 148. PRESERVATION OF SECRECY.

(1) Except for the purpose of the performance of his duties or the exercise of his function or when lawfully required to do so by any court or under the provisions of any written law, a member, officer, employee, staff or agent of the Commission and or a member of a Committee shall not disclose any information relating to the affairs of the Commission or of any person which has been obtained by him in the performance of his duties or the exercise of his functions.

(2) A person who contravenes Subsection (1) is guilty of an offence.

#### 149. ATTORNEY.

The Commission may, by instrument, appoint a person (whether within or outside the country) to be its attorney and, subject to the instrument, a person so appointed may do any act or exercise or perform any power or function which he or she is authorized by the instrument to do, exercise or perform.

#### 150. SERVICE OF PROCESS.

Any notice, summons, writ or other process required to be served to the Commission may be served by being left at the head office of the Commission or, in the case of notice, by post.

#### 151. REGULATIONS.

The Head of State, acting on advice, may make regulations, not inconsistent with this Act or any relevant regulatory contract, prescribing all matters that by this Act are required or permitted to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, for prescribing penalties or fines not exceeding K5,000.00 for offences against the regulations.

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### SCHEDULES SCHEDULE 1

#### Amendments to the Prices Regulation Act (Chapter 320)

##### 1. REPEAL AND REPLACEMENT OF LONG TITLE.

The Long Title of the Prices Regulation Act (Chapter 320) is repealed and is replaced with the following:-"Being an Act to make provision for the monitoring and regulation of



prices for the sale of certain goods and for the supply of certain services, and for related purposes,".

## 2. AMENDMENT OF SECTION 1.

Section 1 of the Prices Regulation Act (Chapter 320) is amended -

(a) by inserting after the definition of "authorized officer" the following new definition: -

"Commission" means the Independent Consumer and Competition Commission established by the Independent Consumer and Competition Commission Act 2002;" and

(b) by repealing the definition of "the Controller"; and

(c) by inserting after the definition of "declared goods" the following new definitions: -

"declared monitored goods" means any goods declared under Section 32A to be declared monitored goods for the purposes of this Act;"declared monitored services" means any services declared under Section 32A to be declared monitored services for the purposes of this Act;" and

(d) by repealing the definition of "Deputy Controller"; and

(e) in Paragraph (c) of the definition of "service", by repealing at the end of Subparagraph (iii) the word "and" and replacing it with the following:-

"or".

3. AMENDMENT OF SECTION 2. Section 2(2) of the Prices Regulation Act (Chapter 320) is amended by repealing the word "affixed" and replacing it with following: - "fixed".

## 4 AMENDMENT OF SECTION 3.

Subsection 3(1) of the Prices Regulation Act (Chapter 320) is amended by repealing the word "proposed" and replacing it with the following: - "purported".

## 5. REPEAL OF DIVISION II.1.

Division II.1 of the Prices Regulation Act (Chapter 320) is repealed.

## 6. AMENDMENT OF SECTION 10.

Section 10 of the Prices Regulation Act (Chapter 320) is amended -

(a) in Subsection (1)(a), by inserting after the words "any goods" the following:-

"other than goods declared to be regulated goods for the purposes of the Independent Consumer and Competition Commission Act 2002;" and

(b) in Subsection (1)(b), by inserting after the words "any service" the following:-

", other than a service declared to be a regulated service for the purposes of the Independent Consumer and Competition Commission Act 2002;".

#### 7. AMENDMENT OF SECTION 12.

Section 12 of the Prices Regulation Act (Chapter 320) is amended -

- (a) in Subsection (1) - (i) by repealing the words "authorized officer" and replacing them with the following: - "officer authorized in writing for the purposes by the Commission"; and (ii) in Paragraph (a), by repealing the words "him with such information as he requires" and replacing them with the following: - "such information as the Commission or authorized officer, as the case may be, requires"; and
- (b) in Subsection (5), by repealing the words "authorized officer" and replacing them with the following: - "officer authorized in writing for the purposes by the Commission".

#### 8. AMENDMENT OF SECTION 13.

Section 13 of Prices Regulation Act (Chapter 320) Act is amended -

(a) in Subsection (1) -

- (i) in Paragraph (c), by repealing the words ", as the case may be"; and
- (ii) in Paragraph (d) -

(A) by repealing the words ", as the case may be"; and

(B) by repealing the word "him" and replacing it with the following: - "the Commission"; and

(b) in Subsection (2)-

(i) by repealing the words ", as the case may be"; and

(ii) by repealing the word "him" and replacing it with the following: - "the Commission" and

(c) in Subsection (3), by repealing the word "him" and replacing it with the following: - "the Commission".

#### 9. AMENDMENT OF SECTION 14.

Section 14 of the Prices Regulation Act (Chapter 320) is amended -

(a) in Subsection (1), by repealing the words "furnish to him" and replacing it with the following: -

"furnish to the Commission"; and

(b) in Subsection (2)-

(A) by repealing the words "or carrying on"; and  
(B) by repealing the words "furnish to him" and replacing them with the following:-  
"furnish to the Commission".

#### 10. AMENDMENT OF SECTION 15.

Section 15 of the Prices Regulation Act (Chapter 320) is amended-

- (a) in Subsection (2)(a), by inserting after the words "prescribed form" the following:-  
"(if any)"; and
- (b) in Subsection (4), by repealing the word "he" and replacing it with the following:-  
"it"; and
- (c) in Subsection (6), by repealing the word "him" and replacing it with the following:-  
"the Commission".

#### 11. AMENDMENT OF SECTION 16.

Section 16 (2)(a) of the Prices Regulation Act (Chapter 320) is amended by repealing the words "him or inspected by him" and replacing them with the following:- "or inspected by the Commission or the authorized officer, as the case may be".

#### 12. AMENDMENT OF SECTION 17. Subsection 17 of the Prices Regulation Act (Chapter 320) is amended -

- (a) by inserting after the words "by order" the following:-  
"in the National Gazette or served on the person to whom it applies" ; and
- (b) by inserting after the words "sells any" the following :-  
"declared".

#### 13. AMENDMENT OF SECTION 18.

Section 18 of the Prices Regulation Act (Chapter 320) is amended -

- (a) by inserting after the word "selling" the following:-  
"declared" ; and
- (b) by inserting after the word "supplying" the following:-  
"declared".

#### 14. AMENDMENT OF SECTION 19.

Section 19(1) of the Prices Regulation Act (Chapter 320) is amended by repealing the words "or rate".

#### 15. AMENDMENT OF HEADING OF PART III.

Part III of the Prices Regulation Act (Chapter 320) is amended by repealing the heading and replacing it with the following: -"PART III - PRICE CONTROL".

#### 16. NEW SECTION 20A.

Division III.1 of the Prices Regulation Act (Chapter 320) is amended by inserting immediately before Section 21 the following new sections: -"20A. INTENTION TO DETERMINE MAXIMUM PRICES.

(1) Where the Commission intends to make an order under Section 21(1), the Commission shall, at least 30 days prior to making the proposed order, publish a notice in a daily newspaper generally circulating in Papua New Guinea -

(a) specifying that the Commission intends to make an order under Section 21(1); and  
(b) specifying in reasonable detail the declared goods or declared services to which the order is intended to apply; and

(c) specifying in reasonable detail the proposed terms of the order; and

(d) specifying the manner in which further details in relation to the proposed order may be obtained; and

(e) inviting interested persons to make submissions to the Commission with respect to the proposed order, within the period and in the manner specified in the notice.

(2) Prior to making and publishing an order under Section 21(1), the Commission shall consider any submissions received from interested persons with respect to the proposed order."20B.

DUTY TO PUBLISH REASONS.(1) The Commission shall publish a statement of reasons for any order made and published by the Commission under Section 21(1).(2) A statement of reasons published under Subsection (1) shall-

(a) be published on the same date as the order to which it relates; and

(b) specify in reasonable detail the reasons for which the Commission made the order."

#### 17. AMENDMENT OF SECTION 21.

Section 21 of the Prices Regulation Act (Chapter 320) is amended -

(a) in Subsection (1) -

(i) by inserting after the words "National Gazette" the following: -

"prior to the expiration of the Price Declaration Period"; and

(ii) in Paragraph (b) -

(A) by repealing the words "supplied to" and replacing them with the following:-  
"supplied by"; and

(B) by adding at the end of that Paragraph the following:-

"prior to the expiration of the Price Declaration Period."; and

(b) in Subsection (2)-

(i) in Paragraph (a)(i), by repealing the words "or carried"; and (ii) in Paragraph (h), by repealing the word "he" and replacing it with the following:-  
"the Commission"; and

(c) by inserting after Subsection (2) the following new subsection:-

(2A) When making an order under Subsection (1), the Commission shall have regard to -

(a) the need to protect consumers and users of the declared goods or services from misuse of market power in terms of prices, pricing policies (including policies relating to the level or structure of prices) and the standard of the declared goods or services; and

(b) the cost of making, producing or supplying the declared goods or services; and

(c) the desirability of encouraging greater efficiency in relation to making, producing or supplying the declared goods or services; and

(d) the need to ensure an appropriate rate of return on any investment in relation to the declared goods or services; and

(e) the borrowing, capital and cash flow requirements of persons making, producing or supplying the declared goods or services; and

(f) considerations of demand management and least-cost planning; and

(g) existing standards of quality, reliability and safety of the declared goods or services, and the desirability of encouraging improvements in those standards; and

(h) the effect any proposed order on general price inflation over the medium term; and

(i) the economic and social impact of any proposed order; and

(j) any other matters the Commission considers relevant."; and

(d) in Subsection (3), by repealing the words "or carried on"; and (e) in Subsection (3)(c) -

(i) by repealing the words "or carrying on"; and(ii)by repealing the words "or carry on"; and

(f) in Subsection (4), by repealing the words "or carries on"; and(g)in Subsection (5), by repealing the words "or carry on" (twice occurring); and(h)in Subsection (6), by repealing the words "or carry on"; and(i)in Subsection (8) -

(i) by repealing the words "or carried on"; and(ii)in Paragraph (c), by repealing the words "or carry on"; and

(j) by inserting after Subsection (9) the following new subsections:-

(10) In this section, "Price Declaration Period" means the period of 90 days immediately following publication in the National Gazette of the notice which declared the goods or services to be declared services for the purposes of this Act, as extended from time to time by the Commission in accordance with Subsection (11).(11) The Commission may, from time to time, by notice in the National Gazette prior to the expiration of the Price Declaration Period, extend the Price Declaration Period for a further period of 30 days from the date on which the Price Declaration Period would otherwise have expired".

#### 18. AMENDMENT OF SECTION 22.

Section 22 of the Prices Regulation Act (Chapter 320) is amended-

(a) in Subsection (1)-

(i) by repealing the words "the maximum rate"; and(ii)by repealing the words "or carried on"; and

(b) in Subsection (2)(b), by repealing the word "rate" and replacing it with the following:- "price"; and

(c) in Subsection (3) -

(i) in Paragraph (a), by repealing the words "and carrying on"; and(ii)in Paragraph (b), by repealing the words "or carrying on"; and

(d) in Subsection (4)-

(i) by repealing the words "or carrying on"; and(ii)in Paragraph (c), by repealing the word "rate" and replacing it with the following:-

"price"; and

(iii) in Paragraph (d), by repealing the word "rate" and replacing it with the following:- "price".

#### 19. AMENDMENT OF SECTION 23.

Section 23(3)(b) of the Prices Regulation Act (Chapter 320) is repealed and is replaced with the following:-"(b)by order in the National Gazette, confirm, amend, vary or revoke the suspended order or part of the suspended order in conformity with its report to the Minister,".

## 20. NEW DIVISION III.1A.

Part III of the Prices Regulation Act (Chapter 320) is amended by inserting after Section 25 the following new division:- "Division 1A. - Review of Price Control.

### "20A. DECISION TO REVIEW PRICE CONTROL ORDER.

(1) In this Division, "reviewable order" means an order made under Section 21(1) that has not expired or been terminated.

(2) At any time after a reviewable order is made, the Minister or a supplier of the declared goods or services concerned may apply to the Commission for the order to be reviewed.

(3) An application under Subsection (2) shall state, with reasons, the variation that the applicant proposes should be made to the reviewable order, including the proposed new maximum price.

(4) Prior to the expiration of 12 months from the later of the date on which a reviewable order took effect and the date on which the outcome of the last review of the reviewable order was published under Section 25C(3), the Commission may, in its discretion, following an application under Subsection (2)-

(a)decide to conduct a review of that order; or(b)decide not to conduct a review of that order.

(5) On or after the expiration of 12 months from the later of the date on which a reviewable order took effect and the date on which the outcome of the last review of the reviewable order was published under Section 25C(3), the Commission shall, following an application under Subsection (2), conduct a review of that order in accordance with Section 25B.

(6) The Commission may at any time, on its own motion, decide to conduct a review of a reviewable order.

(7) If the Commission has received more than one application under Subsection (2) in respect of the same reviewable order, the Commission may treat the applications as a single application and such application shall be deemed for the purposes of Section 25C(1) to have been received by the Commission on the date that the Commission received the first application..

### 20B. REVIEW OF PRICE CONTROL ORDER.

(1) If the Commission has decided, or been required by Section 25A(5), to conduct a review of a reviewable order, the Commission shall publish a notice in a daily newspaper generally circulating in Papua New Guinea -

(a) specifying in reasonable detail the order to which the notice relates; and

(b) specifying that the Commission intends to conduct a review of that order generally or in respect of particular matters, in the later case specifying in reasonable detail those matters; and

(c) inviting interested persons to make submissions to the Commission with respect to the review of the order, within the period and in the manner specified in the notice.

(2) When conducting a review of a reviewable order, the Commission shall consider any submissions received from interested persons with respect to the review of that order.

#### 20C. REVIEW PERIOD.

(1) In this section, "review period", in respect of a reviewable order, means the period of 90 days immediately following the date on which the Commission received an application under Section 25A(2), as extended from time to time by the Commission in accordance with Subsection (2).

(2) The Commission may, from time to time, by notice published in the National Gazette prior to the expiration of the review period, extend the review period for a further period of 30 days from the date on which the review period would otherwise have expired.

(3) If the Commission has decided, or been required by Section 25A(5), to conduct a review of a reviewable order, the Commission shall, prior to the expiration of the review period, by notice in the National Gazette, determine that the order should -

(a) continue to operate in its present form; or (b) be varied; or (c) be terminated.

(4) An order made under this section takes effect on the date specified in the order or, if no date is specified, on the date of publication of the notice in the National Gazette. (5) If, on the expiration of the review period, the Commission has failed to make a decision required by Subsection (3), the reviewable order shall be varied in the manner proposed by the applicant and the new maximum price shall be as proposed by the applicant or, if there is more than one applicant, the maximum price proposed by the first applicant.

#### 21. AMENDMENT OF SECTION 27.

Section 27(1) of the Prices Regulation Act (Chapter 320) is amended-

(a) in Paragraph (c), by repealing the words "or rate"; and

(b) by repealing the words "in his opinion" and replacing them with the following:-  
"in the Commission's opinion".



## 22. AMENDMENT OF SECTION 28.

Section 28 of the Prices Regulation Act (Chapter 320) is amended-

(a) in Paragraph (b), by repealing the words "or carry on"; and (b) by repealing the words "or carried on".

## 23. AMENDMENT OF SECTION 29.

Section 29(1) of the Prices Regulation Act (Chapter 320) is amended by repealing the word "he" and replacing it with the following: - "the Commission".

## 24. AMENDMENT OF SECTION 30.

Section 30 of the Prices Regulation Act (Chapter 320) is amended -

(a) in the heading, by inserting after the word "of" the following: -

"declared"; and

(b) in Subsection (1) - (i) by inserting after the words "distribution of" the following: -

"declared"; and

(ii) by inserting after the words "any specified" the following: -

"declared".

## 25. AMENDMENT OF SECTION 31.

Section 31 of the Prices Regulation Act (Chapter 320) is amended -

(a) in the heading, by inserting after the word "in" the following:

"declared"; and

(b) in Subsection (1), by repealing the words "any goods" (twice occurring) and replacing them in each case with the following: -

"any declared goods"; and

(c) in Subsection (2), -

(i) by repealing the words "had not" and replacing them with the following: -

"did not have"; and

(ii) by repealing the words "price of the goods" and replacing them with the following: -

"price of the declared goods"; and

(d) in Subsection (3), by repealing the words "acquisition of goods" and replacing them with the following: -

"acquisition of declared goods".

## 26. AMENDMENT OF SECTION 32.

Section 32 of the Prices Regulation Act (Chapter 320) is amended -

(a) in the heading, by inserting after the word "of" the following: -

"declared"; and

(b)in Subsection (1), by repealing the words "buys up goods" and replacing them with the following:-  
"buys up declared goods".

## 27. NEW PART IVA.

The Prices Regulation Act (Chapter 320) is amended by inserting after Part IV the following new part:-"PART IVA. - DECLARED MONITORED GOODS AND SERVICES.

### 27A. DECLARED MONITORED GOODS AND SERVICES.

(1) The Minister may, by notice in the National Gazette, declare -

(a) any goods, other than goods declared by any other Act or by a regulation made under any other Act to be regulated goods for the purposes of the Independent Consumer and Competition Commission Act 2002, to be declared monitored goods; or

(b) any service, other than a service declared by any other Act or by a regulation made under any other Act to be a regulated service for the purposes of the Independent Consumer and Competition Commission Act 2002, to be a declared monitored service, for the purposes of this Act.

(2) A declaration under Subsection (1) may be made-

(a)generally; or(b)in respect of-

(i)any part of the country or any proclaimed area; or(ii)a person, body or association of persons.

(3) The Commission shall monitor the prices of declared monitored goods and declared monitored services, and matters connected with those prices, for the purpose of reporting to the Minister as required from time to time by the Minister on -

(a)the prices at which those goods are sold or those services are supplied; and(b)the desirability or otherwise, having regard to the matters specified in Section 21(2A), of declaring those goods or services to be declared goods or services."

## 28. AMENDMENT OF SECTION 37.

Section 37 of the Prices Regulation Act (Chapter 320) is amended-

(a)in Subsection (1)(b), by repealing the words "or carried on"; and(b)Subsection (2)(b), by inserting after the word "manufacturer" the following:-  
"of;"

## 29. AMENDMENT OF SECTION 38.

Section 38(1) of the Prices Regulation Act (Chapter 320) is amended by repealing the words "delivers of" and replacing them with the following:-"knowingly delivers or".

### 30. NEW SECTIONS 41A AND 41B.

Division V.2 of the Prices Regulation Act (Chapter 320) is amended by inserting after the heading of Division 2 the following new sections.

#### 30A. INTERPRETATION.

In this Division, unless the contrary intention appears-"Counsel" means a lawyer who is entitled, as of right, to appear before the Supreme Court or the National Court; "the State" includes statutory authorities, and instrumentalities of the State.

#### 30B. COMMISSION TO PROSECUTE OFFENCES.

(1) With respect to all offences created by this Act, the Commission - (a) may control and exercise the prosecution function of the State; and

(b) may provide Counsel -

(i) to prosecute persons charged with any offence; and (ii) to appear on behalf of the State in any appeal before the National or Supreme Court; and

(c) may advise the National Executive Council, through the Minister, to exercise its power under Section 151(2) (grant of pardon, etc.,) of the Constitution to advise the Head of State to grant pardons, free or conditional, to accomplices who give evidence leading to the conviction of principal offenders.

(2) Notwithstanding the provisions of any other Act, the Commission may prosecute offences under this Act without the consent of the Public Prosecutor."

### 31. AMENDMENT OF SECTION 42.

Section 42 of the Prices Regulation Act (Chapter 320) is amended by repealing Subsection (2).

### 32. AMENDMENT OF SECTION 49.

Section 49(5) of the Prices Regulation Act (Chapter 320) is amended by repealing the word "Public Prosecutor" and replacing it with the following:-"Commission".

### 33. AMENDMENT OF SECTION 51.

Section 51 of the Prices Regulation Act (Chapter 320) is amended-

(a) by inserting after the words "has been a" the following:-  
"member of the" ; and

(b) by repealing the words "or an advisor appointed under Section 6"; and(c)in Paragraph (b), by inserting after the word "officer" the following:-  
"of the Commission" .

#### 34. AMENDMENT OF SECTION 54.

Section 54 of the Prices Regulation Act (Chapter 320) is amended -

(a) by repealing Subsection (1) and replacing it with the following:-

(1) A document purporting to be an instrument made or issued by the Minister, the Commission or any other person under this Act, or of an order made under this Act, and to be signed by or on behalf of the Minister or person shall-

(a) be received in evidence; and(b)until the contrary is proved, be deemed to be an instrument made or issued by the Minister, Commission or person."; and

(b) in Subsection (2)-

(i) by inserting after the word "Minister" the following:-  
"the Commission" ; and

(ii) by repealing the words "authority or".

#### 35. AMENDMENT OF SECTION 58.

Section 58(1) of the Prices Regulation Act (Chapter 320) is amended-

(a) in Paragraph (b), by repealing the words "or carries on"; and(b)in Paragraph (d), by repealing the words "or carried on".

#### 36. FURTHER AMENDMENTS

The Prices Regulation Act (Chapter 320) is further amended-

(a) by repealing the words "the Controller" wherever they appear in the Act and replacing them with the following:-

"the Commission"; and

(b) by repealing the following words wherever they appear in the Act:-

(i) "a Deputy Controller"; and(ii)"or a Deputy Controller"; and(iii)"or the Deputy Controller".

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#### SCHEDULE 2 : Amendments to other Acts

##### 1. INDUSTRIAL DEVELOPMENT (WAGE SUBSIDY) ACT (CHAPTER 110B).

Section 1 of the Industrial Development (Wage Subsidy) Act (Chapter 110B) is amended-

(a) by inserting after the definition of "Certificate" the following new definition:-

"Commission" means the Independent Competition and Consumer Commission established under the Independent Competition and Consumer Commission Act 2002"; and

(b) in the definition of "import quota", by repealing the words "Price Controller" and replacing them with the following:-

"Commission"; and

(c) by repealing the definition of "Price Controller".

## 2. LICENSING OF HEAVY VEHICLES ACT (CHAPTER

367). The Licensing of Heavy Vehicles Act (Chapter 367)

is amended-

(a) in Section 1-

(i) by repealing the definition of "the Controller"; and(ii)by inserting after the definition of "the Chairman" the following new definition:-

"the Commission" means the Independent Competition and Consumer Commission established under the Independent Competition and Consumer Commission Act 2002"; and

(b) in Section 22(1), by repealing the word "Controller" and replacing it with the following:-

"Commission".

## 3. NATIONAL AGRICULTURE QUARANTINE AND INSPECTION AUTHORITY ACT 1997.

Section 8(1)(d) of the National Agriculture Quarantine and Inspection Authority Act 1997 is amended by repealing the words "the Executive Head of the Consumer Affairs Council" and replacing them with the following:-

"the Commissioner of the Independent Consumer and Competition Commission established under the Independent Consumer and Competition Commission Act 2002".

## 4. PACKAGING ACT (CHAPTER 285).

Section 1(1) of the Packaging Act (Chapter 285) is amended in the definition of "authorized officer" by repealing the words "the Price Controller, a Deputy Price Controller" and replacing them with the following:-

"the Commissioner, an Associate Commissioner".

## PERU

- Inmigrante y Rentista: Con plazo de residencia indefinido.

**Artículo 36°.-** Los extranjeros admitidos al país, podrán solicitar cambio de calidad migratoria y de visa ante la Dirección General de Migraciones y Naturalización del Ministerio del Interior, y los extranjeros con status diplomático, consular, oficial, periodista, cooperante, intercambio, asilado político y refugiado lo harán ante el Ministerio de Relaciones Exteriores o ante la Dirección General de Migraciones y Naturalización cuando haya cesado dicho status.

**Artículo 38°.-** Los extranjeros admitidos en el país con la calidad de turista podrán obtener el cambio de calidad migratoria dentro del territorio nacional debiendo realizar el trámite correspondiente ante la Dirección General de Migraciones del Ministerio del Interior.

**Artículo 42°.-** Los extranjeros residentes pueden salir y reingresar al país con su misma calidad migratoria y visa, siempre y cuando cumplan con los requisitos y plazos que determinen el Reglamento de Extranjería o las normas especiales.

La cancelación de la permanencia o residencia, salida obligatoria o definitiva y el reingreso son autorizados por el Ministerio de Relaciones Exteriores cuando se trate de residentes con status Diplomático, Oficial, Consular, Cooperante, Intercambio, Periodista, Asilado Político y Refugiado; y por la Dirección General de Migraciones y Naturalización del Ministerio del Interior, en los demás casos.

El residente Religioso, Estudiante, Trabajador, Independiente, Familiar Oficial, Familiar Residente y Rentista pierde su condición migratoria si su ausencia excediera de ciento ochenta y tres (183) días calendario consecutivos o acumulados dentro de un periodo cualquiera de doce (12) meses, salvo por razones de fuerza mayor, laborales o de salud debidamente comprobadas, en cuyo caso el plazo de ausencia se puede extender hasta los doce (12) meses, previa autorización de la Dirección General de Migraciones y Naturalización con opinión favorable de la Comisión de Extranjería.

**Artículo 72°.-** El Ministerio de Relaciones Exteriores, por ser de su exclusiva competencia, determinará en el Reglamento de Extranjería el contenido y el alcance de los artículos que se refieren a los extranjeros con status Diplomático, Consular, Oficial, Cooperante, Intercambio, Periodista, Familiar Oficial, Asilo Político, Refugio, Turista, Negocios y Negocios ABTC así como cualquier modificación sobre los mismos.

**ARTÍCULO 3°.-** El presente Decreto Legislativo entrará en vigencia a partir del día siguiente de su publicación en el Diario Oficial “El Peruano”, siendo de aplicación inmediata sin necesidad de norma adicional alguna.

**DISPOSICIÓN COMPLEMENTARIA Y FINAL Única.-** Adécuese toda norma que se oponga al presente Decreto Legislativo.

POR TANTO:

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Mando se publique y cumpla, dando cuenta al Congreso de la República.

Dado en la Casa de Gobierno, en Lima a los veinticinco días del mes de junio del año  
dos  
mil ocho.

ALAN GARCÍA PÉREZ

Presidente Constitucional de la República

JORGE DEL CASTILLO GÁLVEZ Presidente del Consejo de Ministros

JOSÉ ANTONIO GARCÍA BELAÚNDE Ministro de Relaciones  
Exteriores

LUIS ALVA CASTRO Ministro del Interior

**218542-5**

## DECRETO LEGISLATIVO N° 1044

### EL PRESIDENTE DE LA REPÚBLICA: CONSIDERANDO:

Que, de conformidad con lo establecido en el Artículo 104° de la Constitución Política del Perú, mediante Ley N° 29157, Ley que delega en el Poder Ejecutivo la facultad de legislar sobre diversas materias relacionadas con la implementación del Acuerdo de Promoción Comercial Perú - Estados Unidos de América, y con el apoyo a la competitividad económica para su aprovechamiento, publicada el 20 de diciembre de 2007, el Congreso de la República ha delegado en el Poder Ejecutivo la facultad de legislar, entre otras materias, para lograr la mejora del marco regulatorio;

Que, luego de más de quince años de aplicación del Decreto Legislativo N° 691 y el Decreto Ley N° 26122, el diagnóstico realizado evidencia la necesidad de unificar dichos cuerpos legales a fin de evitar la falta de claridad de un régimen dual, así como una serie de deficiencias y vacíos existentes en cada uno de ellos, requiriéndose por ello una reforma integral;

Que, en ese sentido, resulta pertinente la dación de una nueva Ley de Represión de la Competencia Desleal que precise su finalidad en consonancia con el objetivo previsto en el acuerdo de promoción comercial antes mencionado; clarifique su ámbito de aplicación (subjeto, objetivo y territorial); destaque el principio de primacía de la realidad; establezca conceptos claros y criterios de análisis que generen mayor predictibilidad en su aplicación al establecer las conductas consideradas como desleales, incluso si han sido realizadas a través de publicidad comercial; redefina y mejore sustancialmente el procedimiento administrativo, incorporando plazos razonables, la preclusión en el ofrecimiento de pruebas pero sin afectar el derecho de defensa, un mejor tratamiento de las medidas cautelares y una diferenciación más clara entre el rol instructor y el resolutorio de la autoridad; dote de mayor capacidad disuasiva al esquema de sanciones, mejorando los criterios para establecerlas, incrementando el tope para casos de infracciones muy graves y desarrollando la facultad de la autoridad de competencia para dictar medidas correctivas; entre otros.

Que, sobre la base de dicho contenido, una nueva ley que prohíba y sancione los actos de competencia desleal, así como infracciones específicas de publicidad comercial fortalecerá sustancialmente el marco regulatorio de defensa de la leal competencia, lo que, a su vez, incentivará la eficiencia económica en el mercado nacional, promoverá la competitividad económica del país y mejorará el bienestar de los consumidores, estableciendo un ambiente apropiado para las inversiones;

Con el voto aprobatorio del Consejo de Ministros y con cargo a dar cuenta al Congreso de la República;

Ha dado el Decreto Legislativo siguiente:

### DECRETO LEGISLATIVO QUE APRUEBA LA LEY DE REPRESIÓN DE LA COMPETENCIA DESLEAL

#### TÍTULO I DISPOSICIONES GENERALES

##### **Artículo 1°.- Finalidad de la Ley.-**

La presente Ley reprime todo acto o conducta de competencia desleal que tenga por efecto, real o potencial, afectar o impedir el adecuado funcionamiento del proceso competitivo.

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##### **Artículo 2°.- Ámbito de aplicación objetivo.-**

La presente Ley se aplica a actos cuyo efecto o finalidad,



de modo directo o indirecto, sea concurrir en el mercado. Se incluyen bajo la aplicación de esta Ley los actos realizados a través de publicidad. En ningún caso es necesario determinar habitualidad en quien desarrolla dichos actos.

### **Artículo 3°.- Ámbito de aplicación subjetivo.-**

3.1.- La presente Ley se aplica a todas las personas naturales o jurídicas, sociedades irregulares, patrimonios autónomos u otras entidades, de derecho público o privado, estatales o no estatales, con o sin fines de lucro, que oferten o demanden bienes o servicios o cuyos asociados, afiliados o agremiados realicen actividad económica en el mercado. En el caso de organizaciones de hecho o sociedades irregulares, se aplica sobre sus gestores.

3.2.- Las personas naturales que actúan en nombre de las personas jurídicas, sociedades irregulares, patrimonios autónomos o entidades mencionadas en el párrafo anterior, por encargo de éstas, les generan con sus actos responsabilidad sin que sea exigible para tal efecto condiciones de representación civil.

### **Artículo 4°.- Ámbito de aplicación territorial.-**

La presente Ley es de aplicación sobre cualquier acto de competencia desleal que produzca o pueda producir efectos en todo o en parte del territorio nacional, **aun cuando dicho acto se haya originado en el extranjero.**

### **Artículo 5°.- Primacía de la realidad.-**

La autoridad administrativa determinará la verdadera naturaleza de las conductas investigadas, atendiendo a las situaciones y relaciones económicas que se pretendan, desarrollen o establezcan en la realidad. La forma de los actos jurídicos utilizados por los contratantes no enerva el análisis que la autoridad efectúe sobre la verdadera naturaleza de las conductas subyacentes a dichos actos.

## **TÍTULO II DE LOS ACTOS DE COMPETENCIA DESLEAL**

### **Capítulo I Prohibición general de los actos de competencia desleal**

### **Artículo 6°.- Cláusula general.-**

6.1.- Están prohibidos y serán sancionados los actos de competencia desleal, cualquiera sea la forma que adopten y cualquiera sea el medio que permita su realización, incluida la actividad publicitaria, sin importar el sector de la actividad económica en la que se manifiesten.

6.2.- Un acto de competencia desleal es aquél que resulte objetivamente contrario a las exigencias de la buena fe empresarial que deben orientar la concurrencia en una economía social de mercado.

## **Artículo 7°.- Condición de ilicitud.-**

7.1.- La determinación de la existencia de un acto de competencia desleal no requiere acreditar conciencia o voluntad sobre su realización.

7.2.- Tampoco será necesario acreditar que dicho acto genere un daño efectivo en perjuicio de otro concurrente, los consumidores o el orden público económico, bastando constatar que la generación de dicho daño sea potencial.

## **Capítulo II Listado enunciativo de actos de competencia desleal**

### **Subcapítulo I Actos que afectan la transparencia del mercado**

## **Artículo 8°.- Actos de engaño.-**

8.1.- Consisten en la realización de actos que tengan como efecto, real o potencial, inducir a error a otros agentes en el mercado sobre la naturaleza, modo de fabricación o distribución, características, aptitud para el uso, calidad, cantidad, precio, condiciones de venta o adquisición y, en general, sobre los atributos, beneficios o condiciones que corresponden a los bienes, servicios, establecimientos o transacciones que el agente económico que desarrolla tales actos pone a disposición en el mercado; o, inducir a error sobre los atributos que posee dicho agente, incluido todo aquello que representa su actividad empresarial.

8.2.- Configuran actos de engaño la difusión de publicidad testimonial no sustentada en experiencias auténticas y recientes de un testigo.

8.3.- La carga de acreditar la veracidad y exactitud de las afirmaciones objetivas sobre los bienes o servicios anunciados corresponde a quien las haya comunicado en su calidad de anunciante.

8.4.- En particular, para la difusión de cualquier mensaje referido a características comprobables de un bien o un servicio anunciado, el anunciante debe contar previamente con las pruebas que sustenten la veracidad de dicho mensaje.

## **Artículo 9°.- Actos de confusión.-**

9.1.- Consisten en la realización de actos que tengan como efecto, real o potencial, inducir a error a otros agentes en el mercado respecto del origen empresarial de la actividad, el establecimiento, las prestaciones o los productos propios, de manera tal que se considere que estos poseen un origen empresarial distinto al que realmente les corresponde.

9.2.- Los actos de confusión pueden materializarse mediante la utilización indebida de bienes protegidos por las normas de propiedad intelectual.

### **Subcapítulo II Actos indebidos vinculados con la reputación de otro agente económico**

### **Artículo 10°.- Actos de explotación indebida de la reputación ajena.-**

10.1.- Consisten en la realización de actos que, no configurando actos de confusión, tienen como efecto, real o potencial, el aprovechamiento indebido de la imagen, el crédito, la fama, el prestigio o la reputación empresarial o profesional que corresponde a otro agente económico, incluidos los actos capaces de generar un riesgo de asociación con un tercero.

10.2.- Los actos de explotación indebida de la reputación ajena pueden materializarse mediante la utilización de bienes protegidos por las normas de propiedad intelectual.

### **Artículo 11°.- Actos de denigración.-**

11.1.- Consisten en la realización de actos que tengan como efecto, real o potencial, directamente o por implicación, menoscabar la imagen, el crédito, la fama, el prestigio o la reputación empresarial o profesional de otro u otros agentes económicos.

11.2.- Sin perjuicio de lo indicado en el párrafo anterior, estos actos se reputan lícitos siempre que:

- a) Constituyan información verdadera por su condición objetiva, verificable y ajustada a la realidad;
- b) Constituyan información exacta por su condición clara y actual, presentándose de modo tal que se evite la ambigüedad o la imprecisión sobre la realidad que corresponde al agente económico aludido o a su oferta;
- c) Se ejecuten con pertinencia en la forma por evitarse, entre otros, la ironía, la sátira, la burla o el sarcasmo injustificado en atención a las circunstancias; y,
- d) Se ejecuten con pertinencia en el fondo por evitarse alusiones sobre la nacionalidad, las creencias, la intimidación o cualesquiera otras circunstancias estrictamente personales de los titulares o representantes de otra empresa, entre otras alusiones que no transmiten información que permita al consumidor evaluar al agente económico aludido o a su oferta sobre parámetros de eficiencia.

### **Artículo 12°.- Actos de comparación y equiparación indebida.-**

12.1.- Los actos de comparación consisten en la presentación de las ventajas de la oferta propia frente a la oferta competidora; mientras que los actos de equiparación consisten en presentar únicamente una adhesión de la oferta propia sobre los atributos de la oferta ajena. Para verificar la existencia de un acto de comparación o de

equiparación se requiere percibir una alusión inequívoca, directa o indirecta, sobre la oferta de otro agente económico, incluso mediante la utilización de signos distintivos ajenos.

12.2.- Estos actos se reputan lícitos siempre que cumplan con lo indicado en el párrafo 11.2 de la presente Ley, caso contrario configurarían actos de competencia desleal.

### **Artículo 13°.- Actos de violación de secretos empresariales.-**

Consisten en la realización de actos que tengan como efecto, real o potencial, lo siguiente:

- a) Divulgar o explotar, sin autorización de su titular, secretos empresariales ajenos a los que se haya tenido acceso legítimamente con deber de reserva o ilegítimamente;
- b) Adquirir secretos empresariales ajenos por medio de espionaje, inducción al incumplimiento de deber de reserva o procedimiento análogo.

### **Artículo 14°.- Actos de violación de normas.-**

14.1.- Consisten en la realización de actos que tengan como efecto, real o potencial, valerse en el mercado de una ventaja significativa derivada de la concurrencia en el mercado mediante la infracción de normas imperativas. A fin de determinar la existencia de una ventaja significativa se evaluará la mejor posición competitiva obtenida mediante la infracción de normas.

14.2.- La infracción de normas imperativas quedará acreditada:

a) Cuando se pruebe la existencia de una decisión previa y firme de la autoridad competente en la materia que determine dicha infracción, siempre que en la vía contencioso administrativa no se encuentre pendiente la revisión de dicha decisión; o,

b) Cuando la persona concurrente obligada a contar con autorizaciones, contratos o títulos que se requieren obligatoriamente para desarrollar determinada actividad empresarial, no acredite documentalmente su tenencia. En caso sea necesario, la autoridad requerirá a la autoridad competente un informe con el fin de evaluar la existencia o no de la autorización correspondiente.

14.3.- La actividad empresarial desarrollada por una entidad pública o empresa estatal con infracción al artículo 60° de la Constitución Política del Perú configura un acto de violación de normas que será determinado por las autoridades que aplican la presente Ley. En este caso, no se requerirá acreditar la adquisición de una ventaja significativa por quien desarrolle dicha actividad empresarial.

### **Artículo 15°.- Actos de sabotaje empresarial.-**

15.1.- Consisten en la realización de actos que tengan como efecto, real o potencial, perjudicar injustificadamente el proceso productivo, la actividad comercial o empresarial en general de otro agente económico mediante la interferencia en la relación contractual que mantiene con sus trabajadores, proveedores, clientes y demás obligados, y que tengan como efecto inducir a estos a incumplir alguna prestación esencial o mediante una intromisión de cualquier otra índole en sus procesos o actividades.

15.2.- Los actos que impliquen ofrecer mejores condiciones de contratación a los trabajadores, proveedores, clientes o demás obligados con otro agente económico, como parte del proceso competitivo por eficiencia, no constituyen actos de sabotaje empresarial.

## **mediante la actividad publicitaria**

### **Artículo 16°.- Actos contra el principio de autenticidad.-**

16.1.- Consisten en la realización de actos que tengan como efecto, real o potencial, impedir que el destinatario de la publicidad la reconozca claramente como tal.

16.2.- Constituye una inobservancia a este principio difundir publicidad encubierta bajo la apariencia de noticias, opiniones periodísticas o material recreativo, sin advertir de manera clara su naturaleza publicitaria. Es decir, sin consignar expresa y destacadamente que se trata de un publirreportaje o un anuncio contratado.

### **Artículo 17°.- Actos contra el principio de legalidad.-**

17.1.- Consisten en la difusión de publicidad que no respete las normas imperativas del ordenamiento jurídico que se aplican a la actividad publicitaria.

17.2.- Constituye una inobservancia de este principio el incumplimiento de cualquier disposición sectorial que regule la realización de la actividad publicitaria respecto de su contenido, difusión o alcance.

17.3.- En particular, en publicidad constituyen actos contra el principio de legalidad los siguientes:

- a) Omitir la advertencia a los consumidores sobre los principales riesgos que implica el uso o consumo de productos peligrosos anunciados;
- b) Omitir la presentación del precio total de un bien o servicio sin incluir los tributos aplicables y todo cargo adicional indispensable para su adquisición, cuando el precio es anunciado;
- c) Omitir el equivalente del precio en moneda nacional en caracteres idénticos y de tamaño equivalente a los que presenten el precio de un bien o servicio en moneda extranjera, cuando éste es anunciado;

d) Omitir en aquellos anuncios que ofrezcan directamente, presentando tasas de interés, la realización de operaciones financieras pasivas o activas, la consignación de la tasa de interés efectiva anual aplicable y del monto y detalle de cualquier cargo adicional aplicable;

e) Omitir en aquellos anuncios que ofrezcan directamente productos con precios de venta al crédito, la consignación del importe de la cuota inicial si es aplicable al caso, del monto total de los intereses, de la tasa de interés efectiva anual aplicable al producto anunciado y del monto y detalle de cualquier cargo adicional aplicables;

f) Omitir, en cada uno de los anuncios que difundan publicidad de promociones de ventas, la indicación clara de su duración y la cantidad mínima de unidades disponibles de

g) Omitir en el caso de anuncios de servicios telefónicos de valor añadido la indicación clara del destino de la llamada, la tarifa y el horario en que dicha tarifa es aplicable.

En el caso de los literales d) y e), los anunciantes deben consignar en el anuncio de que se trate, según corresponda, la tasa de costo efectivo anual

aplicable a: i) la operación financiera activa si ésta ha sido anunciada bajo sistema de cuotas, utilizando un ejemplo explicativo; o, ii) la venta al crédito anunciada. Asimismo, deberán consignar el número de cuotas o pagos a realizar y su periodicidad si ello fuera aplicable al caso. Los anunciantes, sin embargo, podrán poner a disposición de los consumidores a los que se dirige el anuncio la información complementaria indicada en este párrafo mediante un servicio gratuito de fácil acceso que les permita informarse, de manera pronta y suficiente. En los anuncios debe indicarse clara y expresamente la existencia de esta información y las referencias de localización de dicho servicio.

#### **Artículo 18°.- Actos contra el principio de adecuación social.-**

Consisten en la difusión de publicidad que tenga por efecto:

- a) Inducir a los destinatarios del mensaje publicitario a cometer un acto ilegal o un acto de discriminación u ofensa por motivo de origen, raza, sexo, idioma, religión, opinión, condición económica o de cualquier otra índole;
- b) Promocionar servicios de contenido erótico a un público distinto al adulto. La difusión de este tipo de publicidad solamente está permitida en prensa escrita de circulación restringida para adultos y, en el caso de radio y/o televisión, dentro del horario de una (1:00) a cinco (5:00) horas.

### **TÍTULO III DISPOSICIONES QUE ORIENTAN LA EVALUACIÓN DE LOS ACTOS DE COMPETENCIA DESLEAL DESARROLLADOS MEDIANTE LA ACTIVIDAD PUBLICITARIA**

#### **Capítulo I**

#### **Libertad de expresión empresarial**

#### **Artículo 19°.- Ejercicio de la libertad de expresión empresarial y sus límites.-**

19.1.- El desarrollo de actividad publicitaria permite el ejercicio de la libertad de expresión en la actividad empresarial y es vehículo de la libre iniciativa privada que garantiza la Constitución Política del Perú.

19.2.- El ejercicio de la libertad de expresión empresarial no debe significar la realización de actos de competencia desleal que afecten o limiten el adecuado funcionamiento del proceso competitivo en una economía social de mercado, ni que afecten el derecho a la información sobre los bienes y servicios que corresponde a los consumidores, conforme a lo garantizado por la Constitución Política del Perú.

#### **Artículo 20°.- Uso de licencias publicitarias.-**

En el ejercicio de la actividad publicitaria se encuentra permitido el uso del humor, la fantasía y la exageración, en la medida en que tales recursos no configuren actos de competencia desleal.

#### **Capítulo II**

#### **Criterios para la determinación de responsabilidad**

#### **Artículo 21°.- Interpretación de la publicidad.-**

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21.1.- La publicidad es evaluada por la autoridad teniendo en cuenta que es un

instrumento para promover en el destinatario de su mensaje, de forma directa o indirecta, la contratación o el consumo de bienes o servicios.

21.2.- Dicha evaluación se realiza sobre todo el contenido de un anuncio, incluyendo las palabras y los números, hablados y escritos, las presentaciones visuales, musicales y efectos sonoros, considerando que el destinatario de la publicidad realiza un análisis integral y superficial de cada anuncio publicitario que percibe. En el caso de campañas publicitarias, éstas son analizadas en su conjunto, considerando las particularidades de los anuncios que las conforman.

#### **Artículo 22°.- Control posterior.-**

La publicidad no requiere de autorización o supervisión previa a su difusión por parte de autoridad alguna. La supervisión para el cumplimiento de esta Ley se efectúa únicamente sobre publicidad que ha sido difundida en el mercado.

#### **Artículo 23°.- Asignación de responsabilidad.-**

23.1.- La responsabilidad administrativa que se deriva de la comisión de actos de competencia desleal a través de la publicidad corresponde, en todos los casos, al anunciante.

23.2.- Es también responsable administrativamente, en cuanto le corresponde y de manera individual, el medio de comunicación social, por la comisión de actos de competencia desleal que infringen normas de difusión que regulan, condicionan o prohíben la comunicación de determinados contenidos o la publicidad de determinados tipos de productos. Esta responsabilidad es independiente de aquella que corresponde al anunciante.

23.3.- Adicionalmente, corresponde responsabilidad administrativa a la agencia de publicidad cuando la comisión de actos de competencia desleal se genere por un contenido publicitario distinto de las características propias del bien o servicio anunciado. Esta responsabilidad es independiente de aquella que corresponde al anunciante.

### **TÍTULO IV DE LAS AUTORIDADES DE FISCALIZACIÓN DE LA COMPETENCIA DESLEAL**

#### **Artículo 24°.- Las autoridades.-**

24.1.- En primera instancia administrativa la autoridad es la Comisión, entendiéndose por ésta a la Comisión de Fiscalización de la Competencia Desleal y a las Comisiones de las Oficinas Regionales del INDECOPI en las que se desconcentren las funciones de aquélla, según la competencia territorial que sea determinada. Las Comisiones de las Oficinas Regionales serán competentes únicamente respecto de actos que se originen y tengan efectos, reales o potenciales, exclusivamente dentro de su respectiva circunscripción de competencia territorial.

24.2.- En segunda instancia administrativa la autoridad es el Tribunal, entendiéndose por éste al Tribunal de Defensa de la Competencia y de la Protección de la Propiedad Intelectual del INDECOPI.

24.3.- Cualquier otra autoridad del Estado queda impedida de realizar supervisión o aplicar sanciones en materia publicitaria.

#### **Artículo 25°.- La Comisión.-**

25.1.- La Comisión es el órgano con autonomía técnica y funcional encargado de la aplicación de la presente Ley con competencia exclusiva a nivel nacional, salvo que dicha competencia haya sido asignada o se asigne por norma expresa con rango legal a otro organismo público.

25.2.- Son atribuciones de la Comisión:

- a) Ordenar a la Secretaría Técnica el inicio de un procedimiento sancionador de investigación y sanción de actos de competencia desleal;
- b) Declarar la existencia de un acto de competencia desleal e imponer la sanción correspondiente;
- c) Decidir la continuación de oficio del procedimiento, en caso de acuerdo conciliatorio entre las partes, si del análisis de los hechos denunciados se advierte la posible afectación del interés público;
- d) Dictar medidas cautelares;
- e) Dictar medidas correctivas sobre actos de competencia desleal;
- f) Expedir lineamientos que orienten a los agentes del mercado sobre la correcta interpretación de las normas de la presente Ley;
- g) En sus procedimientos, emitir opinión, exhortar o recomendar a las autoridades legislativas, políticas o administrativas sobre la implementación de medidas que aseguren la leal competencia; y,
- h) Las demás que le asignen las disposiciones legales vigentes.

#### **Artículo 26°.- La Secretaría Técnica.-**

26.1.- La Secretaría Técnica de la Comisión es el órgano con autonomía técnica que realiza la labor de instructor del procedimiento de investigación y sanción de actos de competencia desleal. Emite opinión sobre la existencia o no de un acto infractor objeto de procedimiento siempre que la Comisión lo requiera por considerarlo necesario para resolver sobre el fondo del asunto.

26.2.- Son atribuciones de la Secretaría Técnica:

- a) Efectuar investigaciones preliminares;
- b) Iniciar de oficio el procedimiento de investigación y sanción de actos de competencia desleal;
- c) Tratándose de una denuncia de parte, decidir la admisión a trámite del procedimiento de investigación y sanción de actos de competencia desleal, pudiendo declarar inadmisibile o improcedente la denuncia, según corresponda;
- d) Instruir el procedimiento sancionador, realizando investigaciones y actuando medios probatorios, ejerciendo para tal efecto las facultades y competencias que las leyes han atribuido a las Comisiones del INDECOPI;
- e) Excepcionalmente y con previo acuerdo de la Comisión, podrá inmovilizar por un plazo no mayor de diez (10) días hábiles prorrogables por otro igual, libros, archivos, documentos, correspondencia y registros en general de la persona natural o jurídica investigada, tomando copia de los mismos. En iguales circunstancias, podrá retirarlos del local en que se encuentren, hasta por quince (15) días hábiles, requiriéndose de una orden judicial para proceder al retiro. La solicitud de retiro deberá ser motivada y



será resuelta en el término de veinticuatro (24) horas por un Juez Penal, sin correr traslado a la otra parte;

- f) Realizar estudios y publicar informes;
- g) Elaborar propuestas de lineamientos;
- h) Canalizar el apoyo administrativo que requiera la Comisión;
- i) Realizar actividades de capacitación y difusión de la aplicación de las disposiciones que contiene la presente Ley; y,
- j) Otras que le asignen las disposiciones legales vigentes.

26.3.- Para el desarrollo de sus investigaciones, la Secretaría Técnica se encuentra facultada para:

- a) Exigir a las personas naturales o jurídicas, sociedades irregulares y patrimonios autónomos, la exhibición de todo tipo de documentos, incluyendo los libros contables y societarios, los comprobantes de pago, la correspondencia interna o externa y los registros magnéticos incluyendo, en este caso, los programas que fueran necesarios para su lectura; así como solicitar información referida a la organización, los negocios, el accionariado y la estructura de propiedad de las empresas.
- b) Citar e interrogar, a través de los funcionarios que se designe para el efecto, a las personas materia de investigación o a sus representantes, empleados, funcionarios, asesores y a terceros, utilizando los medios técnicos que considere necesarios para generar un registro completo y fidedigno de sus declaraciones, pudiendo para ello utilizar grabaciones magnetofónicas, en vídeo, disco compacto o cualquier otro tipo de instrumento electrónico.
- c) Realizar inspecciones, con o sin previa notificación, en los locales de las personas naturales o jurídicas, sociedades irregulares y patrimonios autónomos y examinar los libros, registros, documentación y bienes, pudiendo comprobar el desarrollo de procesos productivos y tomar la declaración de las personas que en ellos se encuentren. En el acto de la inspección podrá tomarse copia de los archivos físicos, magnéticos o electrónicos, así como de cualquier documento que se estime pertinente o tomar las fotografías o filmaciones que se estimen necesarias. Para ingresar podrá solicitarse el apoyo de la fuerza pública.

La Secretaría Técnica deberá obtener autorización judicial previa para proceder al descerraje en caso hubiera negativa a la entrada en los locales o estos estuvieran cerrados, así como para copiar correspondencia privada que pudiera estar contenida en archivos físicos o electrónicos, conforme al proceso especial que a continuación se detalla:

- i) La Secretaría Técnica solicitará al Juez Penal de Turno una cita para obtener una autorización especial de descerraje y/o copia de correspondencia privada, sin mencionar el nombre de la persona natural o jurídica, sociedad irregular o patrimonio autónomo que será materia de inspección sin previo aviso.
- ii) Recibida la solicitud, el Juez programará, en un plazo no mayor de tres (3) días hábiles, y bajo responsabilidad, una reunión con la Secretaría Técnica, en la que podrá estar presente un Fiscal.
- iii) En el despacho del Juez, y en la hora programada, el Secretario Técnico explicará al Juez y, de ser el caso, también al Fiscal, las razones de su solicitud de autorización especial de descerraje y/o copia de correspondencia privada, presentando la información o exhibiendo los documentos que evidencian la existencia de indicios razonables de la comisión de una infracción administrativa por parte de la persona o empresa que será materia de inspección, la que será identificada en el acto así como el lugar donde se realizará la inspección. En dicha reunión, si el Juez estima que la solicitud resulta justificada, la declarará procedente, emitiendo en el acto la resolución

correspondiente, levantándose un Acta suscrita por todos los presentes.

iv) En la resolución mencionada en el párrafo anterior se señalará el nombre, denominación o razón social de la persona o empresa que será inspeccionada por la Secretaría Técnica así como el lugar donde se encuentra ubicado el local o locales materia de inspección, y se motivará y especificará los alcances de la autorización correspondiente, la que podrá comprender, entre otros, la revisión y copia de los correos electrónicos recibidos o remitidos por los directivos, administradores o representantes de la persona o empresa materia de investigación.

v) En un plazo no mayor de tres (3) días hábiles de culminada la visita inspectiva, la Secretaría Técnica elaborará un informe dando cuenta de los pormenores de la diligencia, la que será remitida al Juez y, de ser el caso, al Fiscal que estuvo en la reunión.

vi) Tanto el Juez como el Fiscal antes mencionados deberán guardar reserva absoluta del presente proceso especial, bajo responsabilidad, desde el inicio de la reunión en la que se evalúe la solicitud de autorización especial de descerraje y/o copia de correspondencia privada presentada por la Secretaría Técnica hasta el momento en que reciban de ésta el informe a que se refiere el párrafo anterior.

vii) En caso de negativa, la Secretaría Técnica se encuentra habilitada para formular una segunda solicitud de autorización especial de descerraje y/o copia de correspondencia privada.

#### **Artículo 27º- El Tribunal.-**

27.1 El Tribunal es el órgano encargado de revisar en segunda y última instancia los actos impugnables emitidos por la Comisión o la Secretaría Técnica.

27.2 El Tribunal, a través de su Secretaría Técnica, está facultado para, de oficio, actuar medios probatorios que permitan esclarecer los hechos imputados a título de infracción.

## **TÍTULO V DEL PROCEDIMIENTO ADMINISTRATIVO SANCIONADOR**

### **Capítulo I De la Postulación**

#### **Artículo 28º.- Formas de iniciación del procedimiento.-**

28.1.- El procedimiento sancionador de investigación y sanción de actos de competencia desleal

se inicia siempre de oficio por iniciativa de la Secretaría Técnica.

28.2.- En el procedimiento trilateral sancionador promovido por una denuncia de parte, el denunciante es un colaborador en el procedimiento, conservando la Secretaría Técnica la titularidad de la acción de oficio. Quien presente una denuncia de parte no requerirá acreditar la condición de competidor o consumidor vinculado al denunciado, bastando únicamente que se repute afectado efectiva o potencialmente por el acto de competencia desleal que denuncia.

28.3.- El procedimiento sancionador podrá ser iniciado cuando el acto denunciado se está ejecutando, cuando exista amenaza de que se produzca e, inclusive, cuando ya hubiera cesado sus efectos.

### **Artículo 29°.- Requisitos de la denuncia de parte.-**

La denuncia de parte que imputa la realización de actos de competencia desleal, deberá contener:

- a) Nombre, denominación o razón social del denunciante, su domicilio y los poderes correspondientes, de ser el caso;
- b) Indicios razonables de la presunta existencia de uno o más actos de competencia desleal;
- c) Identificación de los presuntos responsables, siempre que sea posible; y,
- d) El comprobante de pago de la tasa por derecho de tramitación del procedimiento sancionador.

### **Artículo 30°.- Actuaciones previas a la admisión a trámite por denuncia de parte.-**

Presentada la denuncia de parte y con anterioridad a la resolución de inicio del procedimiento de identificación y sanción de actos de competencia desleal, la Secretaría Técnica podrá realizar actuaciones previas con el fin de reunir información y/o identificar indicios razonables de la existencia de actos de competencia desleal. Estas actuaciones previas se desarrollarán en un plazo no mayor de treinta (30) días hábiles, contados desde la presentación de la denuncia.

### **Artículo 31°.- Resolución de inicio del procedimiento.-**

31.1.- La Secretaría Técnica se pronunciará sobre la admisión a trámite de una denuncia de parte luego de verificar el cumplimiento de los requisitos formales exigidos en el Texto Único de Procedimientos Administrativos - TUPA del INDECOPI -, la competencia de la Comisión y la existencia de indicios razonables de infracción a la presente Ley.

31.2.- La resolución de imputación de cargos o de inicio del procedimiento deberá contener:

- a) La identificación de la persona o personas a las que se imputa la presunta infracción;
- b) Una sucinta exposición de los hechos que motivan la instauración del procedimiento, la calificación jurídica de la posible infracción y, en su caso, las sanciones que pudieran corresponder;
- c) La identificación del órgano competente para la resolución del caso, indicando la norma que le atribuya dicha competencia; y,
- d) La indicación del derecho a formular descargos y el plazo para su ejercicio.

31.3.- La resolución de inicio del procedimiento se informará a la Comisión en un plazo no mayor de cinco (5) días hábiles y, en este mismo plazo se notificará a los agentes económicos denunciados y a quienes presentaron la denuncia de parte, que se consideran apersonados al procedimiento por dicha presentación, de ser el caso.

31.4.- La resolución que declare inadmisibles o improcedentes la denuncia es impugnables ante el Tribunal en el plazo de cinco (5) días hábiles.

### **Artículo 32°.- Plazo para la presentación de descargos.-**

El imputado podrá defenderse sobre los cargos imputados por la resolución de inicio del procedimiento en un plazo máximo de diez (10) días hábiles, presentando los argumentos y consideraciones que estime convenientes y ofreciendo las pruebas correspondientes. Este plazo podrá ser prorrogado por el Secretario Técnico por una

sola vez y por un término máximo de cinco (5) días hábiles, únicamente si se verifica la necesidad de dicha prórroga.

## **Capítulo II De las Medidas Cautelares**

### **Artículo 33°.- Medidas cautelares.-**

33.1.- En cualquier etapa del procedimiento, la Comisión podrá, de oficio o a pedido de quien haya presentado una denuncia de parte o de terceros con interés legítimo que también se hayan apersonado al procedimiento, dictar una medida cautelar destinada a asegurar la eficacia de la decisión definitiva, lo cual incluye asegurar el cumplimiento de las medidas correctivas y el cobro de las sanciones que se pudieran imponer. Tratándose de este último supuesto, una vez declarada la infracción mediante resolución firme, la medida cautelar relativa al cobro de la sanción se mantendrá bajo responsabilidad del ejecutor coactivo.

33.2.- La Comisión podrá adoptar la medida cautelar, innovativa o no innovativa, genérica o específica, que considere pertinente, en especial la orden de cesación de un acto o la prohibición del mismo si todavía no se ha puesto en práctica, la imposición de condiciones, el comiso, el depósito o la inmovilización de los productos, etiquetas, envases y material publicitario materia de denuncia, la adopción de las medidas necesarias para que las autoridades aduaneras impidan el ingreso al país de los productos materia de denuncia, las que deberán ser coordinadas con las autoridades competentes de acuerdo a la legislación vigente, el cierre temporal del establecimiento del denunciado, la adopción de comportamientos positivos y cualesquiera otras que contribuyan a preservar la leal competencia afectada y evitar el daño que pudieran causar los actos materia del procedimiento.

33.3.- Las medidas cautelares deberán ajustarse a la intensidad, proporcionalidad y necesidades del daño que se pretenda evitar.

33.4.- En caso de urgencia, por la necesidad de los hechos, el Presidente de la Comisión podrá dictar una medida cautelar destinada a evitar un daño irreparable, con cargo a informar a la Comisión, en la siguiente sesión de ésta, para que decida ratificar la medida impuesta.

33.5.- Tratándose de solicitudes de quien haya presentado una denuncia de parte o de terceros con interés legítimo que también se hayan apersonado al procedimiento, la Comisión podrá concederlas o denegarlas en un plazo no mayor de quince (15) días hábiles. No son exigibles, a quien presente la solicitud, medidas de aseguramiento civil como la contra cautela o similares. La Comisión podrá conceder medidas cautelares distintas a las solicitadas, siempre que considere que se ajusten de mejor manera a la intensidad, proporcionalidad y necesidad del daño que se pretende evitar.

33.6.- En cualquier momento del procedimiento, de oficio o a instancia de parte, se podrá acordar la suspensión, modificación o revocación de las medidas cautelares.

33.7.- Las resoluciones que imponen medidas cautelares son apelables ante el Tribunal en el plazo de cinco (5) días hábiles. La apelación de medidas cautelares se concederá sin efecto suspensivo, tramitándose en cuaderno separado, y sin perjuicio de lo establecido en el artículo 216° de la Ley del Procedimiento Administrativo General. El Tribunal se pronunciará sobre la apelación en un plazo no mayor de diez (10) días hábiles.

33.8.- El Tribunal tiene las mismas facultades atribuidas a la Comisión para el dictado de medidas cautelares.

### **Artículo 34°.- Requisitos para el dictado de medidas cautelares.-**

Para el otorgamiento de una medida cautelar, la Comisión deberá verificar la existencia concurrente de: i) verosimilitud en la existencia de un acto de competencia desleal; y, ii) peligro en la demora del pronunciamiento final.

## **Capítulo III De la Instrucción**

### **Artículo 35°.- Período de prueba.-**

El período de prueba no será menor de treinta (30) días hábiles y no podrá exceder de cien días (100) hábiles contados a partir del vencimiento del plazo para la contestación.

Los

gastos de actuación de las pruebas son de cargo de las partes que las ofrecen y no tienen naturaleza tributaria.

### **Artículo 36°.- Medios de prueba.-**

36.1.- Las partes podrán ofrecer, entre otros, los siguientes medios probatorios:

- a) Documentos;
- b) Inspecciones; y,
- c) Pericias.

36.2.- Procederá la actuación de pruebas distintas a las mencionadas en el numeral anterior, tales como testimoniales o interrogatorios, si a criterio de la Comisión éstas revisten especial necesidad para la resolución del caso.

36.3.- En caso fuera necesario realizar una inspección, ésta será efectuada por el Secretario Técnico o por la persona designada por éste para dicho efecto. Siempre que se realice una inspección deberá levantarse un acta que será firmada por quien se encuentre a cargo de la misma, así como por los interesados que ejercen su representación por quienes se encuentren a cargo del almacén, oficina o establecimiento correspondiente.

36.4.- Tanto para la actuación de las pruebas como para la realización de las diligencias, incluidas las inspecciones, testimoniales e interrogatorios, el Secretario Técnico o la persona designada por éste podrá requerir la intervención inmediata de la Policía Nacional, sin necesidad de notificación previa, a fin de garantizar el cumplimiento de sus funciones.

36.5.- Los medios probatorios deberán ser costeados por quien los ofrezca. Los costos de aquellos que sean ordenados por la autoridad podrán ser distribuidos entre el imputado y quien haya presentado la denuncia de parte, de ser el caso.

36.6.- Los hechos constatados por el Secretario Técnico, la persona designada por éste o por funcionarios a los que se reconoce la condición de autoridad y que se formalicen en documento público, observando los requisitos legales pertinentes, tendrán valor probatorio pleno, sin perjuicio de las pruebas que, en defensa de sus derechos o intereses, pudieran aportar los administrados.

### **Artículo 37°.- Improcedencia de medios probatorios.-**

La Comisión podrá rechazar los medios probatorios propuestos por el imputado, por quienes hayan presentado la denuncia de parte o por terceros con interés legítimo que también se hayan apersonado al procedimiento, cuando sean manifiestamente impertinentes o innecesarios, mediante resolución motivada.

### **Artículo 38°.- Actuaciones de instrucción.-**

38.1.- La Secretaría Técnica está facultada, en razón de su competencia, a realizar de oficio cuantas actuaciones probatorias resulten necesarias para el examen de los hechos, recabando los documentos, información u objetos que sean relevantes para determinar, en su caso, la existencia o no de la infracción administrativa que se imputa.

38.2.- Si, como consecuencia de la instrucción del procedimiento, resultase modificada la determinación inicial de los hechos, de su posible calificación o de las sanciones a imponer, la Secretaría Técnica emitirá una nueva resolución de imputación que sustituirá como pliego de cargos a la resolución de inicio del procedimiento, informando de ello a la Comisión y notificando a las personas imputadas, así como a las personas que hayan presentado la denuncia de parte, si fuera el caso. En caso de emitirse esta nueva resolución, se inicia un nuevo cómputo de plazos para la formulación de los descargos y un nuevo cómputo del plazo legal que corresponde a la tramitación del procedimiento

38.3.- Antes de finalizar el período de prueba, cuando la Secretaría Técnica considere que en el procedimiento se han actuado los medios probatorios y sucedáneos suficientes para la resolución del caso informará a las partes que concluyó su actuación instructiva y que el procedimiento se encuentra en conocimiento de la Comisión para que pueda resolver sobre el fondo del asunto.

## **Capítulo IV De la Información Pública y Confidencial**

### **Artículo 39°.- Acceso al expediente.-**

En cualquier momento del procedimiento, y hasta que éste concluya en sede administrativa, únicamente la

parte imputada, quien haya presentado una denuncia de parte o terceros con interés legítimo que también se hayan a personado al procedimiento, tienen derecho a conocer el estado de tramitación del expediente, acceder a éste y obtener copias de los actuados, siempre que la Comisión no hubiere aprobado su reserva por constituir información confidencial.

### **Artículo 40°.- Información confidencial.-**

40.1.- A solicitud de parte o tercero con interés legítimo, incluyendo a una entidad pública, la Comisión declarará la reserva de aquella información que tenga carácter confidencial, ya sea que se trate de un secreto empresarial, información que afecte la intimidad personal o familiar, aquella cuya divulgación podría perjudicar a su titular y, en general, la prevista como tal en la Ley de Transparencia y Acceso a la Información Pública.

40.2.- De conformidad con la Ley de Transparencia y Acceso a la Información Pública, la solicitud de declaración de reserva sobre un secreto comercial, industrial, tecnológico o, en general, empresarial será concedida por la Comisión o el Tribunal, siempre que dicha información:

- a) Se trate de un conocimiento que tenga carácter de reservado o privado sobre un objeto determinado;
- b) Que quienes tengan acceso a dicho conocimiento posean voluntad e interés

consciente de mantenerlo reservado, adoptando las medidas necesarias para mantener dicha información como tal; y,

c) Que la información tenga un valor comercial, efectivo o potencial.

40.3.- Sólo podrán acceder a la información declarada bajo reserva los miembros de la Comisión y los vocales del Tribunal, sus Secretarios Técnicos y las personas debidamente autorizadas por estos que laboren o mantengan una relación contractual con el INDECOPI.

40.4.- En los casos en que la Comisión o el Tribunal concedan el pedido de reserva formulado, tomarán todas las medidas que sean necesarias para garantizar la reserva y confidencialidad de la información.

40.5.- Para que proceda la solicitud de declaración de reserva, el interesado deberá precisar cuál es la información confidencial, justificar su solicitud y presentar un resumen no confidencial sobre dicha información. Para evaluar si la información tiene carácter confidencial, la Comisión evaluará la pertinencia de la información, su no divulgación previa y la eventual afectación que podría causar su divulgación.

40.6.- Tratándose de una visita de inspección o una entrevista, y en el momento de realizarse esta diligencia, el interesado podrá solicitar la reserva genérica de toda la información o documentación que esté declarando o suministrando a la Secretaría Técnica. Ésta, con posterioridad, deberá informar al interesado qué información o documentación resulta pertinente para la investigación, otorgando un plazo razonable para que el interesado individualice, respecto de la información pertinente, la solicitud de confidencialidad conforme a lo establecido en el párrafo anterior.

40.7.- La autoridad podrá declarar de oficio la reserva de información vinculada a la intimidad personal o familiar o que ponga en riesgo la integridad física de éstas.

40.8.- Los procedimientos y plazos para la declaración de reserva de información confidencial será establecida por Directiva conforme lo prevé la Ley de Organización y Funciones del INDECOPI.

## **Capítulo V**

### **De la Conclusión del Procedimiento en Primera Instancia**

#### **Artículo 41°.- Conclusión del período de prueba.-**

41.1.- El período de prueba concluirá diez (10) días hábiles después de que la Secretaría Técnica ponga en conocimiento de la Comisión todo lo actuado, por considerar que en el procedimiento obran los medios probatorios y sucedáneos suficientes para la resolución del caso.

41.2.- Si de la revisión de los actuados, la Comisión considera necesario contar con mayores elementos de juicio, le indicará a la Secretaría Técnica que notifique a las partes a fin de que éstas absuelvan lo que ordene la Comisión en un plazo no menor de cinco (5) días hábiles, conforme se determine según la complejidad de lo solicitado. Las partes deberán presentar dicha absolución por escrito, acompañando los medios probatorios que consideren convenientes o que le hayan sido requeridos.

#### **Artículo 42°.- El Informe Técnico.-**

42.1.- Una vez puesto en conocimiento de la Comisión lo actuado, ésta podrá solicitar a la Secretaría Técnica, en caso de considerarlo necesario, un Informe Técnico que en el plazo máximo de quince (15) días hábiles dictamine sobre lo siguiente:

- a) Referencia sobre los hechos que considera probados;
- b) Consideración sobre la existencia o no de la infracción administrativa imputada; y,
- c) Propuesta de medidas correctivas que considere necesarias, de ser el caso.

42.2.- El Informe Técnico señalado en el numeral precedente será notificado a las partes del procedimiento, quienes contarán con un plazo de diez (10) días hábiles para formular alegatos a conocimiento de la Comisión.

42.3.- En caso de que la Secretaría Técnica no encuentre prueba de la existencia de un acto de competencia desleal, propondrá a la Comisión la declaración de no existencia de infracción administrativa.

#### **Artículo 43°.- La Audiencia de Informe Oral.-**

Una vez puesto en conocimiento de la Comisión lo actuado, de considerarlo necesario, ésta, a solicitud de parte, podrá citar a audiencia de informe oral. En todo caso, la Comisión, de oficio, podrá citar a audiencia de informe oral. La correspondiente citación deberá realizarse con no menos de cinco (5) días hábiles de anticipación.

#### **Artículo 44°.- Preclusión en la presentación de pruebas.-**

44.1.- Las partes podrán presentar escritos, argumentar y ofrecer medios de prueba solamente hasta antes de concluir el período de prueba. La Comisión podrá disponer con posterioridad, de oficio o a pedido de parte, la actuación de medios probatorios adicionales si, a su juicio, resultan necesarios para el esclarecimiento de los hechos denunciados.

44.2.- Concluido el período de prueba, las partes únicamente podrán presentar escritos y argumentar cuando la Secretaría Técnica las notifique a fin de que absuelvan lo que ordene la Comisión o cuando les corresponda absolver el contenido del Informe Técnico de la Secretaría Técnica, de ser el caso. Asimismo, las partes podrán presentar alegatos finales durante los diez (10) días hábiles siguientes de realizado el informe oral que hubiera ordenado la Comisión.

Las partes no podrán presentar pruebas adicionales en sus alegatos finales.

#### **Artículo 45°.- Resolución final.-**

45.1.- Para emitir su pronunciamiento, la Comisión tendrá un plazo de quince (15) días hábiles contados a partir de la finalización del período de prueba, de la absolución del contenido del Informe Técnico de la Secretaría Técnica o del vencimiento del plazo que tienen las partes para presentar alegatos finales, lo que ocurra al final.

45.2.- La resolución de la Comisión será motivada y decidirá todas las cuestiones que se deriven del expediente. En la resolución no se podrá atribuir responsabilidad a los involucrados por hechos que no hayan sido adecuadamente imputados en la instrucción del procedimiento.

45.3.- La resolución se notificará a las partes comprendidas en el procedimiento en un plazo máximo de diez (10) días hábiles contados desde su expedición.



#### **Artículo 46°.- Recurso de apelación.-**

46.1.- La resolución final de la Comisión es apelable por el imputado, por quien haya presentado la denuncia de parte y por los terceros con interés legítimo que se hayan apersonado al procedimiento, en el plazo de diez (10) días hábiles.

46.2.- Asimismo, son apelables, en el mismo plazo, los siguientes actos de la Secretaría Técnica o la Comisión, según corresponda:

- a) Los que determinen la imposibilidad de continuar un procedimiento; y,
- b) Los que puedan producir indefensión o perjuicio irreparable a derechos o intereses legítimos.

46.3.- Contra las resoluciones y actos de la Secretaría Técnica o de la Comisión no cabe el recurso de reconsideración.

46.4.- El recurso de apelación se tramita en un plazo no mayor de ciento veinte (120) días hábiles. La resolución del Tribunal se notificará a las partes del procedimiento y a los terceros que se hayan apersonado en un plazo máximo de diez (10) días hábiles desde su expedición.

#### **Artículo 47°.- Interposición del recurso de apelación.-**

47.1.- El recurso se presentará ante el órgano que expidió la resolución que se apela, el que lo remitirá al Tribunal, junto con el expediente principal, o en cuaderno por cuerda separada, según corresponda, y una vez comprobado que reúne los requisitos de admisibilidad y procedencia, en el plazo de quince (15) días hábiles. La declaración como inadmisibles o improcedentes que se determine sobre una apelación permite la interposición del recurso de queja ante el Tribunal.

47.2.- Las partes interesadas en la determinación de la existencia de un acto infractor y la imposición de una sanción sólo podrán apelar la resolución final cuando ésta haya exculpado al denunciado.

#### **Artículo 48°.- Tramitación del recurso de apelación.-**

48.1.- El Tribunal notificará a los interesados, en un plazo de quince (15) días hábiles contados a partir de la recepción del expediente, el arribo de éste y el inicio del trámite del recurso de apelación.

48.2.- Los apelantes podrán presentar las alegatos, documentos y justificaciones que estimen pertinentes, en un plazo de quince (15) días hábiles contados a partir de la notificación señalada en el numeral anterior.

48.3.- A pedido de parte, o de oficio, el Tribunal citará a audiencia de informe oral a las partes para que expongan sus alegatos finales, con no menos de cinco (5) días de anticipación.

48.4.- Las partes podrán presentar alegatos finales sólo hasta los cinco (5) días hábiles siguientes de realizado el informe oral. Cualquier documento presentado con posterioridad no será tomado en consideración por el Tribunal.

#### **Artículo 49°.- Resolución del Tribunal.-**

La resolución del Tribunal no podrá suponer la imposición de sanciones más graves para el infractor sancionado, cuando éste recurra o impugne la resolución de la Comisión.

#### **Artículo 50°.- Cuestionamiento a las resoluciones del Tribunal.-**

Las resoluciones definitivas del Tribunal agotan la vía administrativa. No cabe la interposición de recurso alguno en la vía administrativa y únicamente podrá interponerse contra éstas una demanda contenciosa administrativa en los términos fijados en la legislación de la materia.

## **Capítulo VII Prescripción de la Infracción**

### **Artículo 51º.- Plazo de prescripción de la infracción administrativa.-**

Las infracciones a la presente Ley prescribirán a los cinco (5) años de ejecutado el último acto imputado como infractor. La prescripción se interrumpe por cualquier acto de la Secretaría

Técnica relacionado con la investigación de la infracción que sea puesto en conocimiento del presunto responsable.

El cómputo del plazo se volverá a iniciar si el procedimiento permaneciera paralizado durante más de sesenta (60) días hábiles por causa no imputable al investigado.

## **TÍTULO VI SANCIÓN Y ELIMINACIÓN DE ACTOS DE COMPETENCIA DESLEAL**

### **Capítulo I De la Sanciones por la Infracción Administrativa**

#### **Artículo 52º.- Parámetros de la sanción.-**

52.1.- La realización de actos de competencia desleal constituye una infracción a las disposiciones de la presente Ley y será sancionada por la Comisión bajo los siguientes parámetros:

- a) Si la infracción fuera calificada como leve y no hubiera producido una afectación real en el mercado, con una amonestación;
- b) Si la infracción fuera calificada como leve, con una multa de hasta cincuenta (50) Unidades Impositivas Tributarias (UIT) y que no supere el diez por ciento (10%) de los ingresos brutos percibidos por el infractor, relativos a todas sus actividades económicas, correspondientes al ejercicio inmediato anterior al de la expedición de la resolución de la Comisión;
- c) Si la infracción fuera calificada como grave, una multa de hasta doscientas cincuenta (250) UIT y que no supere el diez por ciento (10%) de los ingresos brutos percibidos por el infractor, relativos a todas sus actividades económicas, correspondientes al ejercicio inmediato anterior al de la expedición de la resolución de la Comisión; y,
- d) Si la infracción fuera calificada como muy grave, una multa de hasta setecientas (700) UIT y que no supere el diez por ciento (10%) de los ingresos brutos percibidos por el infractor, relativos a todas sus actividades económicas, correspondientes al ejercicio inmediato anterior al de la expedición de la resolución de la Comisión. 141

52.2.- Los porcentajes sobre los ingresos brutos percibidos por el infractor, relativos a todas sus actividades económicas, correspondientes al ejercicio inmediato anterior

al de la resolución de la Comisión indicados en el numeral precedente no serán considerados como parámetro para determinar el nivel de multa correspondiente en los casos en que el infractor: i) no haya acreditado el monto de ingresos brutos percibidos relativos a todas sus actividades económicas, correspondientes a dicho ejercicio; o, ii) se encuentre en situación de reincidencia.

52.3.- La reincidencia se considerará circunstancia agravante, por lo que la sanción aplicable no deberá ser menor que la sanción precedente.

52.4.- Para calcularse el monto de las multas a aplicarse de acuerdo a la presente Ley, se utilizará la UIT vigente a la fecha de pago efectivo.

52.5.- La multa aplicable será rebajada en un veinticinco por ciento (25%) cuando el infractor cancele el monto de la misma con anterioridad a la culminación del término para impugnar la resolución de la Comisión que puso fin a la instancia y en tanto no interponga recurso impugnativo alguno contra dicha resolución.

#### **Artículo 53°.- Criterios para determinar la gravedad de la infracción y graduar la sanción.-**

La Comisión podrá tener en consideración para determinar la gravedad de la infracción y la aplicación de las multas correspondientes, entre otros, los siguientes criterios:

- a) El beneficio ilícito resultante de la comisión de la infracción;
- b) La probabilidad de detección de la infracción;
- c) La modalidad y el alcance del acto de competencia desleal;
- d) La dimensión del mercado afectado;
- e) La cuota de mercado del infractor;
- f) El efecto del acto de competencia desleal sobre los competidores efectivos o potenciales, sobre otros agentes que participan del proceso competitivo y sobre los consumidores o usuarios;
- g) La duración en el tiempo del acto de competencia desleal; y,
- h) La reincidencia o la reiteración en la comisión de un acto de competencia desleal.

#### **Artículo 54°.- Prescripción de la sanción.-**

54.1.- La acción para exigir el cumplimiento de las sanciones prescribe a los tres (3) años, contados desde el día siguiente a aquél en que la resolución por la que se impone la sanción quede firme.

54.2.- Interrumpirá la prescripción de la sanción, la iniciación, con conocimiento del interesado, del procedimiento de ejecución coactiva. El cómputo del plazo se volverá a iniciar si el procedimiento de ejecución coactiva permaneciera paralizado durante más de treinta (30) días hábiles por causa no imputable al infractor.

### **Capítulo II Medidas Correctivas**

#### **Artículo 55°.- Medidas correctivas.-**

55.1.- Además de la sanción que se imponga por la realización de un acto de competencia desleal, la Comisión podrá dictar medidas correctivas conducentes a restablecer la leal competencia en el mercado, las mismas que, entre otras, podrán consistir en:

- a) El cese del acto o la prohibición del mismo si todavía no se ha puesto en práctica;
- b) La remoción de los efectos producidos por el acto, mediante la realización de actividades, inclusive bajo condiciones determinadas;

- c) El comiso y/o la destrucción de los productos, etiquetas, envases, material infractor y demás elementos de falsa identificación;
- d) El cierre temporal del establecimiento infractor;
- e) La rectificación de las informaciones engañosas, incorrectas o falsas;
- f) La adopción de las medidas necesarias para que las autoridades aduaneras impidan el ingreso al país de los productos materia de infracción, las que deberán ser coordinadas con las autoridades competentes, de acuerdo a la legislación vigente;
- o,
- g) La publicación de la resolución condenatoria.

55.2.- El Tribunal tiene las mismas facultades atribuidas a la Comisión para el dictado de medidas correctivas.

### **Capítulo III Multas coercitivas**

#### **Artículo 56°.- Multas coercitivas por incumplimiento de medidas cautelares.-**

56.1.- Si el obligado a cumplir una medida cautelar ordenada por la Comisión o el Tribunal no lo hiciera, se le impondrá automáticamente una multa no menor de diez (10) UIT ni mayor de ciento veinticinco (125) UIT, para cuya graduación se tomará en cuenta los criterios señalados para determinar gravedad de infracción y graduar la sanción. La multa que corresponda deberá ser pagada dentro del plazo de cinco (5) días hábiles, vencidos los cuales se ordenará su cobranza coactiva.

56.2.- En caso de persistir el incumplimiento a que se refiere el párrafo anterior, la Comisión podrá imponer una nueva multa, duplicando sucesivamente el monto de la última multa impuesta, hasta el límite de setecientos (700) UIT. Las multas impuestas no impiden a la Comisión imponer una sanción distinta al final del procedimiento.

#### **Artículo 57°.- Multas coercitivas por incumplimiento de medidas correctivas.-**

57.1.- Si el obligado a cumplir una medida correctiva ordenada por la Comisión en su resolución final no lo hiciera, se le impondrá una multa coercitiva equivalente al veinticinco por ciento (25%) de la multa impuesta por la realización del acto de competencia desleal declarado. La multa coercitiva impuesta deberá ser pagada dentro del plazo de cinco (5) días hábiles, vencidos los cuales se ordenará su cobranza coactiva.

57.2.- En caso de persistir el incumplimiento a que se refiere el párrafo anterior, la Comisión podrá imponer una nueva multa coercitiva, duplicando sucesivamente el monto de la última multa coercitiva impuesta, hasta que se cumpla la medida correctiva ordenada y hasta el límite de dieciséis (16) veces el monto de la multa coercitiva originalmente impuesta.

57.3.- Las multas coercitivas impuestas no tienen naturaleza de sanción por la realización de un acto de competencia desleal.

### **TÍTULO VII PRETENSIÓN DE INDEMNIZACIÓN**

#### **Artículo 58°.- Indemnización por daños y perjuicios.-**

58.1.- Cualquier perjudicado por actos de competencia desleal declarados por la Comisión o, en su caso, por el Tribunal, podrá demandar ante el Poder Judicial la pretensión civil de indemnización por daños y perjuicios contra los responsables identificados por el INDECOPI.

58.2.- Quienes hayan sido denunciados temeraria o falsamente, con dolo o negligencia, también podrán ejercitar dicha acción.

### **TÍTULO VIII GLOSARIO**

#### **Artículo 59°.- De niciones.-**

Para efectos de esta Ley se entenderá por:

a) Agencia de publicidad: a toda persona, natural o jurídica, que brinde servicios de diseño, confección, organización y/o ejecución de anuncios y otras prestaciones publicitarias;

- b) Anuncio: a la unidad de difusión publicitaria;
- c) Anunciante: a toda persona, natural o jurídica que desarrolla actos cuyo efecto o finalidad directa o indirecta sea concurrir en el mercado y que, por medio de la difusión de publicidad, se propone: i) ilustrar al público, entre otros, acerca de la naturaleza, características, propiedades o atributos de los bienes o servicios cuya producción, intermediación o prestación constituye el objeto de su actividad; o, ii) motivar transacciones para satisfacer sus intereses empresariales;
- d) Publicidad: a toda forma de comunicación difundida a través de cualquier medio o soporte, y objetivamente apta o dirigida a promover, directa o indirectamente, la imagen, marcas, productos o servicios de una persona, empresa o entidad en el ejercicio de su actividad comercial, industrial o profesional, en el marco de una actividad de concurrencia, promoviendo la contratación o la realización de transacciones para satisfacer sus intereses empresariales;
- e) Campaña publicitaria: a los anuncios difundidos, en un mismo espacio geográfico y temporal, por el mismo anunciante, a través de diversos medios tales como televisión, radio, catálogos de ventas, folletos, diarios, revistas, paneles e Internet, entre otros, respecto de los mismos productos y presentando el mismo mensaje publicitario principal;
- f) Medio de comunicación social: a toda persona, natural o jurídica, que brinde servicios en cualquiera de las formas a través de las cuales es factible difundir publicidad, ya sea de manera personalizada o impersonal, en el territorio nacional, por medios tales como correspondencia, televisión, radio, teléfono, Internet, facsímil, diarios, revistas, afiches, paneles, volantes o cualquier otro medio que produzca un efecto de comunicación similar;
- g) Norma de difusión: a toda norma referida a las características, modalidades y prohibiciones de la divulgación al público de la publicidad, con excepción de aquellas referidas a la ubicación física de anuncios, las cuales tienen finalidad de orden urbanístico y no de regulación del mensaje publicitario;
- h) Promoción de ventas: a toda aquella acción destinada a incentivar la transacción sobre bienes o servicios en condiciones de oferta excepcionales y temporales, que aparecen como más ventajosas respecto de las condiciones de la oferta ordinaria o estándar. Puede consistir en reducción de precios, incremento de cantidad, concursos, sorteos, canjes u otros similares;
- i) Publicidad en producto: a toda publicidad fijada en el empaque, en el envase o en el cuerpo del producto. El rotulado no tiene naturaleza publicitaria, por lo que al no considerarse publicidad en producto está fuera del ámbito de aplicación de esta Ley;
- j) Publicidad testimonial: a toda publicidad que puede ser percibida por el consumidor como una manifestación de las opiniones, creencias, descubrimientos o experiencias de un testigo, a causa de que se identifique el nombre de la persona que realiza el testimonial o ésta sea identificable por su fama o notoriedad pública;
- k) Rotulado: a la información básica comercial, consistente en los datos, instructivos, antecedentes o indicaciones que el proveedor suministra al consumidor, en cumplimiento de una norma jurídica o en virtud a estándares de calidad recomendables, expresados en términos neutros o meramente descriptivos, sin valoraciones o apreciaciones sobre las características o beneficios que la información aporta al producto, es decir, sin la finalidad de promover su adquisición o consumo; y,
- l) Testigo: a toda persona natural o jurídica, de derecho público o privado, distinta del anunciante, cuyas opiniones, creencias, descubrimientos o experiencias son presentadas en publicidad.

## **DISPOSICIONES COMPLEMENTARIAS FINALES**

### **PRIMERA.- Competencia primaria.-**

El control de las conductas desleales se encuentra regido por el principio de competencia primaria, el cual corresponde al INDECOPI y al Organismo Supervisor de la Inversión Privada en Telecomunicaciones - OSIPTEL, según lo establecido en las leyes respectivas. No podrá recurrirse al Poder Judicial sin antes haber agotado las instancias administrativas ante dichos organismos.

### **SEGUNDA.- Derechos de los consumidores.-**

Los actos de competencia desleal prohibidos por esta Ley son sancionados independientemente de la afectación directa que pudieran producir en perjuicio de los derechos de los consumidores. En caso existan consumidores corresponderá a la autoridad competente en materia de protección al consumidor, aplicar las disposiciones que tutelan tales derechos según la ley de la materia.

### **TERCERA.- Investigación de conductas con efectos fuera del país.-**

En el marco exclusivo de un acuerdo internacional, y en aplicación del principio de reciprocidad, la Comisión podrá investigar, de conformidad con la presente Ley, actos de competencia desleal desarrollados en el territorio nacional pero con efectos en uno o más países que forman parte del referido acuerdo.

### **CUARTA.- Exclusividad de competencia administrativa y alcance de las excepciones.-**

Los órganos competentes para la aplicación de esta Ley conforme a lo dispuesto en el Título IV tienen competencia exclusiva a nivel nacional para la determinación y sanción de actos de competencia desleal.

La competencia administrativa para la aplicación de esta Ley podrá ser asumida por órgano administrativo distinto únicamente cuando una norma expresa con rango legal lo disponga.

La aplicación de la presente Ley al mercado de los servicios públicos de telecomunicaciones estará a cargo del Organismo Supervisor de la Inversión Privada en Telecomunicaciones - OSIPTEL de conformidad con lo dispuesto en la Ley N° 27336 - Ley de Desarrollo de las Funciones y Facultades del OSIPTEL. En tal sentido, las instancias competentes, las facultades de las mismas y los procedimientos que rigen su actuación serán los establecidos en su marco normativo. Cuando el acto de competencia desleal que se determina y sanciona es uno que se ha desarrollado mediante la actividad publicitaria, la competencia administrativa únicamente corresponde a los órganos competentes para la aplicación de esta Ley, conforme a lo dispuesto en el Título IV, sin excepción alguna.

### **QUINTA.- Actos de competencia desleal vinculados a la afectación de derechos de propiedad intelectual.-** La competencia administrativa para la aplicación

de esta Ley en la determinación y sanción de actos de competencia desleal en la modalidad de actos de confusión y actos de explotación indebida de la reputación ajena que se encuentren vinculados a la afectación de derechos de propiedad intelectual se encuentra asignada a la Comisión de Propiedad Intelectual correspondiente, conforme lo indique la legislación especial en dicha materia, y únicamente si la denuncia de parte fuera presentada por el titular del derecho o por

quien éste hubiera facultado para ello.

#### **SEXTA.- Normas supranacionales.-**

Las normas comunitarias o supranacionales que tipifican actos de competencia desleal serán aplicadas por los órganos competentes que indica la presente Ley, siempre que no exista conflicto con la distribución de competencias que estas normas puedan determinar. La interpretación de dichas normas comunitarias o supranacionales reconocerá la preeminencia que les corresponda.

#### **SÉPTIMA.- Vigencia y aplicación.-**

La presente Ley entrará en vigencia luego de treinta (30) días calendario de la fecha de su publicación en el Diario Oficial El Peruano y será aplicable inmediatamente en todas sus disposiciones, salvo en las que ordenan el procedimiento administrativo, incluidas las que determinan la escala de sanciones, las que serán aplicables únicamente a los procedimientos iniciados con posterioridad a su vigencia.

#### **OCTAVA.- Aplicación de la presente ley a los servicios financieros**

La presente Ley no afecta la vigencia ni la aplicabilidad de la Ley Complementaria a la Ley de Protección al Consumidor en materia de servicios financieros, aprobada mediante Ley N° 28587, ni a sus normas reglamentarias emitidas conforme a su única disposición transitoria, las que continúan en pleno vigor y prevalecen sobre la presente Ley. Por tanto, las disposiciones de la presente Ley que alcancen al sistema financiero, sólo serán aplicables en concordancia con la Ley N° 28587 y sus normas reglamentarias.

Lo dispuesto en los incisos d), e) y f) del artículo 17° de la presente Ley únicamente resultará aplicable para los servicios prestados o publicitados por empresas no sujetas a la supervisión de la Superintendencia de Banca, Seguros y Administradoras Privadas de Fondos de Pensiones.

#### **DISPOSICIONES DEROGATORIAS PRIMERA.- Derogación genérica.-**

Esta Ley es de orden público y deroga todas las disposiciones legales o administrativas, de igual o inferior rango, que se le opongan o contradigan.

#### **SEGUNDA.- Derogación expresa.-**

Quedan derogadas expresamente a partir de la vigencia de la presente Ley, las siguientes normas:

- a) El Decreto Ley N° 26122 y sus normas modificatorias, complementarias y sustitutorias;
- b) El Decreto Legislativo N° 691 y sus normas modificatorias, complementarias y sustitutorias;
- c) El Decreto Supremo N° 039-2000-ITINCI en cuanto aprueba el texto único ordenado de los instrumentos normativos indicados en los literales a) y b) precedentes;
- d) El Decreto Supremo N° 20-94-ITINCI y sus normas modificatorias, complementarias y sustitutorias; y,
- e) Los artículos 238°, 239° y 240° del Código Penal.



Toda referencia legal o administrativa a las materias reguladas por disposiciones contenidas en el Decreto Ley N° 26122, el Decreto Legislativo N° 691 y el Decreto Supremo N° 20-94-ITINCI, así como de sus normas modificatorias, complementarias o sustitutorias se entienden efectuadas a la presente Ley en lo que sea aplicable, según corresponda.

**POR TANTO:**

Mando se publique y cumpla, dando cuenta al Congreso de la República.

Dado en la Casa de Gobierno, en Lima a los veinticinco días del mes de junio del año dos mil ocho.

**ALAN GARCÍA PÉREZ**  
Presidente Constitucional de la República

**JORGE DEL CASTILLO GÁLVEZ** Presidente del Consejo de Ministros

**218542-6**

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DECRETO LEGISLATIVO N° 1045

**EL PRESIDENTE DE LA REPÚBLICA CONSIDERANDO:**

Que, de conformidad con lo establecido en el Artículo 104° de la Constitución Política del Perú, mediante Ley N° 29157, Ley que delega en el Poder Ejecutivo la facultad

de legislar sobre diversas materias relacionadas con la implementación del Acuerdo de Promoción Comercial Perú - Estados Unidos de América, y con el apoyo a la competitividad económica para su aprovechamiento, publicada el 20 de diciembre de 2007, el Congreso de la República ha delegado en el Poder Ejecutivo la facultad de legislar, entre otras materias, sobre fortalecimiento institucional y modernización del Estado;

Que, es necesario perfeccionar el marco normativo vigente en materia de protección al consumidor, fortaleciendo la norma vigente a efectos de consolidar la adecuada protección de los intereses de los consumidores en el país;

Que, la propuesta de reforma de la actual Ley de Protección al Consumidor obedece a la urgente necesidad de dotar al país de un marco institucional que garantice una tutela efectiva de los derechos de los consumidores, en el nuevo entorno de relaciones de consumo que se derivará de la pronta implementación del Acuerdo de Promoción Comercial Perú - Estados Unidos de América. Por ello, a fin de asegurar un impacto positivo de dicho tratado sobre el bienestar social, y en desarrollo de una mejora del marco.

## PHILIPPINES

### COMPETITION POLICY

#### **(Observation: These codes are not enacted legislations)**

Republic of the Philippines

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### EXISTING COMPETITION LAWS

Philippine Constitution (1987)- The Philippine Constitution of 1987 prohibits anti-competitive practices. Monopolies are not prohibited "per se", but only when public interest so requires. It also prohibits combinations in restraint of trade or unfair competition. However, the 1987 Constitution provides no imposable sanctions for violations of these provisions. Article 186 of the Revised Penal Code R.A. 3815 (1930)- Similar to Section 2 of the Sherman Act (1890) which was the major legislation that ushered competition law into the limelight in the U.S. It describes the acts punishable, such as monopolies and combinations in restraints of trade, and the penalties imposable on such. Republic Act 3247 (An Act to Prohibit Monopolies and Combinations in Restraint of Trade) (1961) provides for recovery of treble damages for civil liability arising from anti-competitive behavior. Republic Act 165 (1947) (Patent Law) and Republic Act 166 (1971) (Trademark Law) describes the appropriate civil action which can be resorted to, and the penalties imposable. Presidential Decree 49 (1972) (Copyright Law) penalizes copyright infringement. Republic Act 8293 (1997) An Act prescribing the Intellectual Property Code and establishing the Intellectual Property Office Republic Act 386 (1949) (Civil Code of the Philippines) stipulates the collection of damages arising from unfair competition. Republic Act 7581 (1991) (The Price Act) protects the consumers by stipulating price manipulation (hoarding, profiteering and cartels) as illegal acts. Republic Act 7394 (1932) (The Consumer Act of the Philippines) imposes penalties for such behavior as deceptive, unfair and unconscionable sales practices in both goods and credit transactions. The Philippine Corporation Code Batas Pambansa Blg. 68 (1980) provides for rules and procedures to approve all combinations, mergers and consolidations. Revised Securities Act, Batas Pambansa Blg. 178 (1982) Republic Act No. 337 regulates Banks and Banking Institutions and for other purposes (General Banking Act) (1948)

In recent years, there were already a number of laws passed by Congress and various Executive Orders signed by the President to strengthen the Competition policy framework. 1. Trade and Investment Liberalization To liberalize trade and in compliance with international commitments, tariffs on numerous industrial and agricultural products have been reduced and/or modified through various executive orders. These are the following: Republic Act No. 8178 (1996) - An Act Replacing Quantitative Import Restrictions on Agricultural Products, Except Rice, with Tariffs, Creating the Agricultural Competitiveness Enhancement Fund, and for other Purpose.<sup>149</sup> Republic Act 7650 (1993) - An Act Repealing Section 1404 and amending Sections 1401 and 1403 of the Tariff and Customs Code of the Philippines, as amended,

relative to the Physical Examination of Imported Articles. Republic Act 8181 (1996) to shift the basis for the computation of duties from home consumption value to transaction value to address some of the leakages in collections. Republic Act 7843 (1994) also known as the Anti-Dumping Act of 1994, was enacted to rationalize and strengthen the provisions on anti-dumping in the Tariff and Customs Code. Executive Order No. 264: (1995) Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464) as amended. Executive Order No. 287: (1995) Modifying the Rates of Duty on Certain Imported Articles as Provided for under the Tariff and Customs Code of 1978, as amended, in Order to Implement the 1996 Philippine Schedule of Tariff Reduction under the New Time Frame of the Accelerated Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA). Executive Order No. 288: (1995) Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended. Executive Order No. 313: (1996) Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended Executive Order No. 328: (1996) Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended. Executive Order No. 365: (1996) Modifying the Nomenclature and the Rates of Import Duties on Certain Imported Articles under Republic Act Nos. 8180 and 8184. Executive Order No. 388: (1996) Modifying the Nomenclature and the Rates of Import Duties on Certain Imported Articles under Section 104 of the Tariff and Customs Code, as amended. Executive Order No. 390: Modifying the Nomenclature and the Rates of Import Duties on Certain Imported Articles under Section 104 of the TCC of 1978 (P.D. No. 1464) as amended. Public Utilities

- a. **Maritime Industry** Executive Order No. 185 (1994) was adopted to foster competition through more liberalized rules on the entry of new operators for existing routes, the deregulation of the entry of newly-acquired vessels into routes already served by franchised operators, and vessel rerouting or amendment of authorized route and change in sailing schedules and frequency. Executive Order No. 213 (1994) provides for the deregulation of domestic shipping rates in the following areas: a) first and second class passage rate for passenger-carrying domestic vessels, b) passage rates for vessels catering to tourism as certified by the Department of Tourism or those serving DOT-certified tourist priority links/areas, c) freight rates for all commodities classified as Class "A" and "B" and "C", except for non-containerized basic commodities, and where the route/link is still being serviced by only one operator.
- b. **Civil Aviation Executive** Order No. 219 (1995), international civil aviation was sought to be liberalized through the designation of at least two official carriers for the Philippines, and the possibility of designating other carriers as official carriers when the total frequency requirements of the Philippines under its various Air Services Agreement cannot be fully serviced by the first two designated official carriers.
- c. **Port Services** Executive Order No. 212 (1994) - In order to accelerate the demonopolization and privatization program for government ports.

Competition is encouraged in the provision of cargo handling and other port services. Under the government's demonopolization program, ship owners, operators, charterers or other users have the option to contract or engage the services of the Philippine Port Authority (PPA) authorized handler or port service contractor of their choice.

- d. **Telecommunications** The most successful efforts expended in breaking up monopolies and cartels were undertaken in the telecommunications industry. Executive Order No. 59 (1993) required mandatory interconnection for other telecommunications firms with the Philippine Long Distance Telephone Company (PLDT) backbone. Executive Order No. 109 (1993) laid down the government's policy to improve the Local Exchange Carrier Service. Authorized international gateway operators were required to provide local exchange service in served and unserved areas, including Metro Manila, within three years from the grant of authority from the National Telecommunication Commission. Republic Act NO. 7925 (1995), entitled "An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunications Services" was enacted to provide a comprehensive guideline regulating the public telecommunications industry in the Philippines.
- e. **Energy** Executive Order No. 215 (1987) was issued to promote private sector participation in the business of generating electricity. Republic Act No. 8180 (1996), which provides for the deregulation of the oil industry, was also recently enacted. Executive Order No. 377, Providing the Institutional Framework for the Administration of the Deregulated Local Downstream Oil Industry, Series of 1996
- f. **Water** Executive Order No. 311 (1996) was issued to encourage private sector participation in the operation and facilities of the MWSS.
- g. **Privatization of State Enterprises** Executive Order No. 298 (1996) - issued by the President to provide for alternative and/or intermediate modes of privatization through joint ventures, B-O-T schemes, management contracts, lease purchase arrangements and securitization.
  
- h. **Taxation, Monetary and Fiscal Reforms** Republic Act No. 7660 - rationalization of the documentary tax system. Republic Act No. 7717 - the imposition of taxes for sale of shares of stock through the stock exchange or through initial public offerings. Republic Act No. 7716 - Expanded Value-Added Tax. Republic Act No. 7642 was also enacted to increase the penalties for tax evasion and violation of the provisions of the National Internal Revenue Code. Still pending deliberations in Congress is the Comprehensive Tax Reform Package endorsed by the Ramos Administration. Under Central Bank Circular No. 1389 (Consolidated Foreign Exchange Rules and Regulations), as amended, foreign exchange restrictions were lifted thereby allowing the market to freely trade in foreign currencies. Republic Act No. 8183 was passed expressly repealing the Uniform Currency Law (Republic Act No. 529) which restricted parties to a contract to deal only in Philippine Peso in order to settle monetary obligations.

## SENEGAL

### LOI N° 94 – 63 du 22 août 1994 sur les prix, la concurrence et le contentieux économique

#### EXPOSE DES MOTIFS

Le présent projet de loi fait partie des mesures prises en application des recommandations formulées par le Chef de l'Etat lors des concertations avec les opérateurs économiques.

Entre autres constats ces assises ont retenu le déphasage entre l'évolution du tissu économique et son environnement juridique qu'il faut améliorer.

Le projet de loi sur la concurrence, les prix et le contentieux économique abroge la loi n° 65-25 du 4 mars 1965 sur les prix et les infractions à la législation économique.

Il institue la Commission nationale de la Concurrence chargée d'arbitrer le libre jeu de la concurrence qui est un pendant du libéralisme.

En marge de l'organisation de la concurrence dont le destinataire final est le consommateur, des règles de protection de celui-ci sont posées pour permettre à l'autorité administrative de faire face aux insuffisances du marché et aux fraudes.

Enfin, les rapports entre les agents d'exécution de cette loi et les opérateurs économiques ont été précisés pour permettre une application efficace des nouvelles mesures.

Telle est l'économie du présent projet de loi que je sou mets à votre approbation. L'assemblée

nationale a délibéré et adopté en sa séance du mercredi 3 août 1994 ;

#### **Le Président de la République promulgue la loi dont la teneur suit :**

**Article premier :** - La présente loi vise à définir les dispositions régissant la libre concurrence, la liberté des prix et les obligations mises à la charge des producteurs, commerçants prestataires de services et tous autres intermédiaires et tend à prévenir toutes pratiques anticoncurrentielles, à assurer la loyauté et la régularité des transactions et notamment la transparence des prix, la lutte contre les pratiques restrictives et la hausse des prix.

#### **TITRE PREMIER : DE LA CONCURRENCE**

**Art : 2** – Les prix des biens, produits et services sont librement déterminés par le jeu de la concurrence.

## **Chapitre premier- De la commission de la concurrence.**

**Art. 3** – Il est créé une commission de la concurrence comprenant six membres nommés pour une durée de cinq ans par décret.

La commission de la concurrence se compose de :

1. Deux membres ou anciens membres, de la cour de Cassation ou de la Cour d'Appel ;
2. Deux personnalités exerçant ou ayant exercé lors des activités dans les secteurs de la production, de la distribution, de l'artisanat des services ou des professions libérales.
3. Deux personnalités choisies en raison de leur compétence en matière économique ou en matière de concurrence et de consommation.

Trois suppléants sont choisis dans les mêmes conditions et les mêmes proportions.

Un commissaire du Gouvernement nommé par le Ministre chargé du Commerce parmi les fonctionnaires de la hiérarchie A de son département représente l'Administration.

Le mandat des membres de la commission de la concurrence est renouvelable.

**Art. 4** - La présidence de la commission est assurée par un magistrat choisi parmi les membres cités au 2<sup>ème</sup>, et au 3<sup>ème</sup> de l'article 3.

**Art. 5** - Est déclaré démissionnaire d'office par le Ministre chargé du Commerce tout membre de la commission qui n'a pas participé sans motif valable, à trois séances consécutives ou qui ne remplit pas les obligations prévues aux deux alinéas ci- dessous.

Tout membre de la commission doit informer le président des intérêts qu'il détient ou vient à acquérir et des fonctions qu'il exerce dans une activité économique.

Aucun membre de la commission ne peut délibérer dans une affaire ou il a intérêt ou s'il représente ou a représenté une des parties intéressées.

**Art. 6** – La commission de la concurrence siège en plénière au moins une fois tous les trois mois.

Le quorum de quatre membres est requis. Toutefois, la commission peut valablement se réunir à la troisième convocation si au moins trois des membres dont le président sont présents.

En cas de partage égal des voix, celle du président est prépondérante. Sur

chaque affaire, la commission désigne en son sein un rapporteur.

**Art. 7** – Lorsque la matière à traiter relève d'une spécialité technique ou concerne particulièrement un produit ou une profession, la commission peut s'adjoindre toute personne compétente ou requérir l'avis d'un expert.

**Art. 8** – Tout membre de la commission sauf le président peut être récusé. Les cas

de réservations sont notamment :

- les agissements de nature à compromettre la crédibilité de la commission ;
- les intérêts personnels ou professionnels dans une affaire.

La commission statue en premier et dernier ressort sur la récusation.

**Art. 9** – La commission de la concurrence connaît de toutes les affaires relatives aux pratiques anticoncurrentielles définies dans la présente loi.

De même elle est obligatoirement consultée par le Gouvernement sur tout projet de texte réglementaire instituant un régime nouveau ayant directement pour effet :

- 1° de soumettre l'exercice d'une profession ou l'accès à un marché à des restrictions
- 2° d'imposer des pratiques uniformes en matière de prix ou de conditions de vente.

**Art. 10** – La commission peut être saisie par le Ministre chargé du Commerce intérieur.

Elle peut se saisir d'office ou, pour toutes affaire qui concerne les intérêts dont elles ont la charge, par les organisations de consommateurs agréées par le Ministre chargé du Commerce dans les conditions fixées par décret.

**Art. 11** – La commission de la concurrence examine si les pratiques dont elle est saisie sont prohibées par la présente loi ou peuvent se trouver justifiées en vertu de celle-ci.

Elle prononce, le cas échéant, des sanctions et des injonctions.

**Art. 12** – L'instruction et la procédure devant la commission de la concurrence sont contradictoires.

**Art. 13** – La commission de la concurrence peut ordonner aux intéressés de mettre fin aux pratiques anticoncurrentielles dans un délai déterminé.

Elle peut infliger une sanction pécuniaire applicable en cas d'inexécution des injonctions.

Le montant de l'amende est compris entre 100.000 francs CFA et 20.000.000 de franc CFA.

La commission de la concurrence peut ordonner la publication de sa décision dans les journaux ou publications qu'elle désigne, l'affichage dans les lieux qu'elle indique.

Les frais sont supportés par la personne intéressée.

**Art. 14** – Les décisions de la commission de la concurrence mentionnées au présent chapitre sont notifiées aux parties en cause et au Ministre chargé du Commerce qui peuvent dans un délai d'un mois introduire un recours en annulation devant le Conseil d'Etat .

Le Ministre chargé du Commerce veille à l'exécution des décisions de la commission. Le recours n'est pas suspensif. Toutefois, le Premier Président du Conseil d'Etat peut ordonner qu'il soit sursis à l'exécution des décisions si celle-ci est susceptible des conséquences manifestement excessives ou s'il est intervenu, postérieurement à sa notification des faits nouveaux d'une exceptionnelle gravité.

**Art. 15** - Les amendes sont recouvrées avec les mêmes sûretés que les créances fiscales. Leur affectation est fixée par décret.

**Art. 16** – La commission de la concurrence peut déclarer, par décision motivée, la saisine irrecevable et si elle estime que les faits invoqués n'entrent pas dans le champ de sa compétence ou ne sont pas appuyés d'éléments suffisamment probants.

Elle peut également décider après que de l'auteur de la saisine et le commissaire du gouvernement ont été mis à même de consulter le dossier et de faire valoir leurs observations, qu'il n'y a pas lieu de poursuivre la procédure.

**Art. 17** – la commission notifie les griefs aux intéressés ainsi qu'au commissaire du Gouvernement qui peuvent consulter le dossier et de présenter leurs observations dans un délai d'un mois.

Le rapport est ensuite notifié aux parties, au commissaire du Gouvernement qui ont un délai d'un mois pour préparer un mémoire en réponse qui peut être consulté dans les quinze jours qui précèdent la séance par les personnes visées à l'alinéa précédent.

**Art. 18** – le président de la commission ne peut communiquer les pièces 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.

**Art. 19** – Est punie des peines prévues par l'article 363 du code pénal, la divulgation par l'une des parties des informations concernant l'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.

**Art. 20** –Les séances de la commission de la concurrence ne sont pas publiques. Seules les parties et le commissaire du gouvernement peuvent y assister

Les parties peuvent se faire représenter ou assister.



La commission peut entendre toute personne dont l'audition lui paraît susceptible de contribuer à in information.

Le commissaire du gouvernement assiste au délibéré sans voix délibérative.

**Art. 21** – Les juridictions d'instruction et de jugement communiquent à la commission de la concurrence, sur demande, les procès- verbaux ou rapports d'enquête ayant un lien direct avec des faits dont la commission est saisie.

La commission peut être consultée par des juridictions sur les pratiques anticoncurrentielles relevées dans les affaires dont elles sont saisies.

L'avis de la commission peut être publié après le non lieu ou le jugement.

**Art. 22** – La commission de la concurrence ne peut être saisie du fait remontant à plus de trois ans s'il n'a été fait aucun acte tendant à leur recherche, leur constatation ou leur sanction.

Les conditions d'application des articles 3 à 21 sont fixées par décret.

### ***Chapitre II – Des pratiques anticoncurrentielles***

**Art. 23-** Il est fait obligation à tout opérateur économique de respecter les règles du libre jeu de la concurrence afin que celle-ci soit saine et loyale.

Sont donc considérés comme des infractions toutes pratiques tendant à faire obstacle sous diverses formes à l'évolution positive des lois du marché.

Les pratiques dites anticoncurrentielles peuvent revêtir un caractère individuel ou collectif tel que défini dans les dispositions ci-après.

#### ***Paragraphe I. - Des pratiques anticoncurrentielles collectives***

**Art. 24** – Sont prohibées, sous réserve des dispositions législatives et réglementaires particulières, toute action, convention, coalition, entente expresse ou tacite sous quelque forme et pour quelque motif que ce soit, ayant pour objet ou pouvant avoir pour effet d'empêcher, de restreindre ou de fausser le libre jeu de la concurrence, notamment celles :

- faisant obstacle à l'abaissement des prix de revient, de vente ou de revente ;
- favorisant la hausse ou la baisse artificielle des prix ;
- entravant le progrès technique ;
- limitant l'exercice de la libre concurrence.

**Art. 25** - Tout engagement ou concertation pris en rapport aux pratiques prohibées par l'article 24 est nul de plein droit.

Cette nullité peut être invoquée par les parties ou par les tiers, mais n'est pas opposable au tiers par les parties.

Elle est éventuellement constatée par les tribunaux de droit commun auxquels l'avis de la commission prévue à l'article 3 doit être communiqué.

### **Paragraphe 2. - Des pratiques anticoncurrentielles individuelles**

**Art. 26** – Il est interdit à tout producteur, commerçant, industriel, isolé ou en groupe :

- de refuser de satisfaire aux demandes des acheteurs de produits ou aux demandes de prestations de services, lorsque ces demandes ne présentent aucun caractère anormal, qu'elles émanent des demandeurs présentant la garantie technique, commerciale nécessaire ou de solvabilité nécessaire et que la vente de produits ou la prestation de services n'est pas interdite par les lois et règlements en vigueur.

Le refus de vente peut être constaté par tout moyen et notamment par une mise en demeure sous forme de lettre recommandée ou par procès-verbal dressé par tout agent habilité requis à cet effet.

Le retrait de la plainte par la partie lésée ne peut, en aucun cas, faire obstacle à la poursuite de la procédure par l'Administration.

**Art. 27** – Est prohibée dans les mêmes conditions 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 ;  
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.

**Art. 28** – Il est interdit à tout producteur, commerçant industriel isolé ou en groupe, de pratiquer des conditions discriminatoires de vente qui ne sont pas justifiées par des différences de prix de revient de la fourniture ou du service.

Le caractère non discriminatoire des réductions commerciales ou des prestations de services est réputé acquis lorsqu'elles figurent dans les conditions générales de vente.

Tout producteur, grossiste ou importateur est tenu de communiquer, à tout revendeur qui en fait la demande, son barème de prix et des conditions générales de vente. Celle-ci comprennent les conditions de règlement et le cas échéant, les rabais et ristournes accordés.

Cette communication s'effectue conformément aux dispositions de l'article 33.

**Art. 29** – il est interdit à tout producteur, commerçant, industriel, de conférer, maintenir ou imposer un caractère minimum aux prix des produits des prestations de services ou aux marges commerciales, soit au moyen de tarif ou barème, soit en vertu de pratiques collectives ou individuelles qu'elle qu'en soit la nature ou la forme.

**Art. 30** – Est interdite la revente de tout produit à un prix inférieur à son prix de revient, déduction faite des réductions commerciales consenties par le fournisseur au moment de l'achat.

**Art. 31** – Les dispositions de l'article 30 ne sont pas applicables, notamment :

- aux produits périssables à partir du moment où ils sont menacés d'altération rapide ;
- aux ventes volontaires motivées ou forcées par la cessation ou le changement d'une activité commerciale ;
- aux produits qui ne répondent plus à la demande générale en raison notamment de l'évolution de la mode ou de l'apparition de perfectionnements techniques ;
- aux ventes promotionnelles autorisées par le Ministre chargé du Commerce.

## ***TITRE II – DE L'INFORMATION COMMERCIALE***

**Art. 32** - Pour garantir le pouvoir des consommateurs et leur liberté de choix entre les produits et services offerts, il est fait d'obligation aux opérateurs économiques d'avoir une attitude loyale vis-à-vis d'eux, notamment par une communication correcte des conditions de vente mais aussi et surtout par une bonne information sur les prix pratiqués.

### ***Paragraphe 1 - Obligation à l'égard des consommateurs***

**Art. 33** – Au regard de la présente loi constituent les règles d'information commerciale, notamment la publicité de prix, l'affichage, le marquage, l'étiquetage, la communication des barèmes de prix et des conditions générales de vente ou tout autre procédé approprié. Il est également exigé le respect des règles en matière de facturation.

Les modalités d'application des règles de publicité des prix et de l'identification des produits et entreprises sont fixées par décret.

**Art. 34** – Constituent des infractions aux règles de publicité des prix toute violation des dispositions réglementaires organisant l'affichage, le marquage, l'étiquetage et la communication des barèmes.

Elles sont punies après une mise en demeure non suivie d'effets dans les quinze jours.

L'amende est de 10.000 à 500.000 francs assortie d'une astreinte de 500 francs par produit et par jour.

**Art. 35** – Est qualifié de fausse publication d'informations le fait par quiconque de :

1 – publier d'une manière quelconque :

a) des informations sciemment inexactes sur les prix de tout produit ou service ayant fait l'objet d'une décision en conformité avec les dispositions de l'article 3 de la présente loi.

b) de mauvaise foi, des informations de toute nature touchant aux conditions actuelles ou futures des marchés locaux ou autres, susceptibles de troubler la politique des prix ou de l'approvisionnement ;

**Art. 36** – La charge de la preuve des allégations, indications ou prestations publicitaires incombe à l'annonceur ou à l'agence de publicité.

**Art. 37** – Les infractions prévues à l'article 35 sont punies d'une amende de 50.000 à 5.000.000 francs.

Les personnes poursuivies qui ont été condamnés en vertu du présent article, en outre, tenues de faire cesser la fausse publicité, notamment par le retrait de tout document ou support ayant servi à la publicité, sous les peines de l'astreinte.

### **Paragraphe 2 – *Des règles de facturation***

**Art 38** – Tout achat de produits destinés à la vente en l'état ou après transformation, tout achat effectué pour le compte ou au profit d'un industriel ou d'un commerçant pour les besoins de son exploitation doit faire l'objet d'une facturation dont les mentions obligatoires sont fixées par décret.

Toute prestation de service effectuée par un professionnel pour les besoins d'un commerçant ou d'un industrie doit également faire l'objet d'une facture.

Le vendeur est tenu de délivrer facture dès que la vente ou la prestation de service est devenue définitive : l'acheteur professionnel est tenu de réclamer ladite facture.

Pour certains secteurs ou branches dont la liste est fixée par arrêté du Ministre chargé du Commerce, et à la demande de l'acheteur non professionnel, le vendeur est tenu de délivrer facture.

Le bordereau de livraison peut tenir lieu de facture pour autant qu'il en comporte les mentions obligatoires.

Un arrêté peut dispenser certains produits des obligations résultant des alinéas précédents ou prévoir pour eux certaines modalités particulières d'application.

**Art. 39** – Les originaux, ainsi que les copies des factures revêtues des mentions obligatoires doivent être réunies en liasses, par ordre de date, et conservés par le commerçant pendant un délai de trois ans à compter du jour de la transaction.

**Art. 40** – Constituent des infractions aux règles de facturation, la violation des dispositions des articles 38 et 39.

Elles sont punies d'une amende de 10.000 à 3.000.000 de francs CFA.

Si le produit objet de l'infraction est d'origine frauduleuse, la saisie est prononcée.

**Art 41** – Les contentieux sur la facturation et la publicité suivent les règles définies ci- après concernant la réglementation des prix.

### **TITRE III : DE LA REGLEMENTAION DES PRIX**

**Art. 42** – Lorsque les circonstances l'exigent pour des raisons économiques et sociales certains biens, produits et services peuvent faire l'objet de fixation de prix par voie législative ou réglementaire.

**Art. 43** – Nonobstant les dispositions de l'article 42 de la présente loi, des mesures temporaires contre les hausses excessives des prix, motivés par une situation de calamité ou se crise, par des circonstances exceptionnelles ou par une situation du marché manifestement anormale dans un secteur déterminé peuvent être prises par arrêté du Ministre du Commerce et dont la durée d'application ne peut excéder 2 mois renouvelables une fois.

**Art. 44** – Un décret fixera les conditions d'application des articles 42 et 43 de la présente loi.

#### **Paragraphe 1. Des pratiques de prix illicites**

**Art. 45** – Est considéré comme prix illicite :

- 1 - le prix supérieur au prix plafond fixé par l'autorité administrative en application des articles 42 et 43 de la présente loi. ;
- 2 - le prix inférieur au prix plancher fixé dans les mêmes conditions qu'au 1<sup>er</sup>.
- 3 - le prix obtenu en fournissant à l'autorité administrative de fausses informations ou en maintenant à leur niveau antérieur des éléments de prix de revient qui ont fait l'objet d'une baisse si ces éléments ont servi de base homologation.

**Art. 46** – Sont qualifiées de pratiques de prix illicites :

- 1.- toute vente de produits, toute prestation de service ou toute demande de prestation contractée sciemment à un prix illicite.
- 2.- tout achat ou offre d'achat de produits ou toute demande de prestation de services contractés sciemment à un prix illicite.  
Est présumé avoir contracté sciemment tout achat assorti d'une facture contenant des indications manifestement inexactes. ;
- 3.- toute vente ou offre de vente, tout achat ou offre d'achat comportant la livraison de produits inférieurs en qualité ou en quantité à ceux facturés ou à facturer, retenus ou proposés ;
- 4.- les prestations de service, les offres de prestations de services, les demandes de prestation de service comportant la fourniture de travaux de services inférieurs en importance ou en qualité à ceux retenus ou proposés pour le calcul du prix de ces prestations de services sciemment acceptées dans les conditions ci dessus visées.

5.- les ventes ou offres de prestations de service, les achats ou offres d'achat, les prestations et les demandes de prestation de service comportant sous quelque forme que ce soit, une rémunération occulte ;

6.- la rétention de stocks ou la subordination à la vente d'autres produits ou services les ventes ou offres de vente et les prestations de services.

**Art. 47** – Sont assimilés à la pratique de prix illicite.

1.- le fait pour tout vendeur qui effectue des ventes de détail à tempérament ou à crédit, sous quelque forme que ce soit, de ne pas remettre à l'acheteur bénéficiaire une attestation des clauses de l'opération établie dans les formes déterminées par l'autorité administrative compétente.

Le double de cette attestation, revêtu de la signature de l'acheteur doit être conservé par le vendeur dans les conditions prévues par l'article 40 de la présente loi.

Les dispositions qui précèdent sont également applicables aux vendeurs qui effectuent des ventes visées ci-dessus par l'entremise des banques et des établissements financiers ;

2. le fait pour tout producteur, commerçant ou industriel d'effectuer des actes de commerce sans inscription au registre du commerce.

## **Paragraphe 2 - Dispositions annexes**

**Art. 48** – Constituent des délits incidents :

1) le refus de communication des documents visés à l'art 75 ;

2) la fraude ou la dissimulation portant sur tout document ;

3) l'opposition à l'action des agents visés à l'art 51 et des experts visés à l'art 81 et ainsi que les injures et voies de fait, invectives à leur égard, à l'occasion de l'exercice de leurs fonctions.

## **TITRE IV – DE LA CONSTATION DE LA SAISIE ET DE LA REPRESSION DES INFRACTIONS A LA REGLEMENTATION DES PRIX ET A LA REPRESSION DES FRAUDES**

### **Chapitre premier – De la constatation des infractions et de saisie**

#### **Section 1- De la consultation des infractions**

**Art. 49** – Les infractions visées aux articles 34, 35, 40, 46, 47 et 48 sont constatées au moyen de procès verbaux ou par information judiciaire. Les procès verbaux sont signés et datés.

**Art. 50** – Les saisies des produits sont constatées au moyen de procès – verbaux de saisie.

**Art. 51** – Les procès – verbaux de constatation et de saisie sont dressés :

- 1- par les agents assermentés des services du commerce intérieur munis de leur carte professionnelle ;
- 2- par les autres fonctionnaires et agents de l'Etat habilités et assermentés à cet effet.

**Art. 52** – Les agents de l'Etat visés à l'art 51alinéa 2 doivent, dès la fin de la rédaction du procès - verbal se dessaisir de la procédure et transmettre immédiatement l'affaire contentieuse aux services du Commerce intérieur territorialement compétent.

Tout manquement à ces obligations est passible de poursuites, sans préjudice des sanctions pénales.

**Art. 53** – Les procès-verbaux de constatation ont rédigés en trois exemplaires. Ils énoncent la nature, la date et le lieu des constatations ou des contrôles effectués.

Les procès-verbaux indiquent que le prévenu a été informé de la date et du lieu de la rédaction et que la sommation lui a été faite d'y assister

Dans le cas où le prévenu n'a pu être identifié, le procès – verbal est dressé contre inconnu.

Ils sont dispensés des formalités et des droits de timbre d'enregistrement.

Ils font foi jusqu'à inscription de faux des constatations matérielles qu'ils relatent.

A la demande du prévenu dont mention est faite au procès – verbal, copie lui est remise. Il dispose d'un délai qui ne peut excéder soixante douze heures (72 heures) pour apposer ou non sa signature sur le procès – verbal.

**Art. 54** – Les procès – verbaux de saisie sont rédigés en trois exemplaires séance tenante.

Ils doivent mentionner la nature, la description et l'estimation des biens saisis. Dans le

cas où le prévenu n'a pu être identifié, ils sont dressés contre inconnu.

### **Section 2 – De la saisie**

**Art. 55** – Il ne peut être concédé à la saisie que des marchandises ayant été l'objet des infractions, prévues aux articles 46 et 47 ainsi que celles des instruments qui ont servi ou ont été destinés à commettre celles-ci.

L'énumération et la valeur des produits saisis doivent figurer sur les procès – verbaux de constatation et de saisie.

**Art. 56** – Lorsque la saisie porte atteinte au fonctionnement normal et régulier d’une entreprise, l’industriel ou le commerçant est fondé à saisir par un rapport circonstancié le Directeur du Commerce intérieur ou le Ministre du commerce.

En cas de silence de l’autorité saisie, la main levée est de droit.

En cas de contestation, le juge des référés est saisi dans les (8) jours suivant la décision de l’autorité administrative.

**Art. 57** – La saisie est réelle ou fictive.

Elle est fictive lorsque les biens visés à l’art 55 ne peuvent être appréhendés, et il est procédé à une estimation dont le montant est égal au produit de la vente.

**Art. 58** – Lorsque la saisie est réelle, les biens saisis peuvent être laissés à la disposition du prévenu à charge pour lui, s’il ne les représente pas en nature, d’en verser la valeur approximative au procès – verbal.

L’octroi de cette faculté peut être subordonné à la fourniture de garanties suffisantes, notamment au dépôt d’une caution.

**Art. 59** – Lorsque les biens saisis n’ont pas été laissés à la disposition du prévenu, la saisie réelle donne lieu à gardiennage en tout lieu désigné par l’Administrateur du Commerce intérieur.

Lorsque les circonstances de l’affaire peuvent faire craindre la disparition des produits ou biens saisis lorsqu’ils sont périssables ou lorsque les nécessités de l’approvisionnement l’exigent, lesdits produits ou biens sont vendus conformément à la procédure fixée par décret.

**Art. 60** – Les agents visés à l’art 51 peuvent exiger communication en quelques mains qu’ils se trouvent, des documents de tout nature ou leurs copies reconnues conformes, notamment éléments de comptabilités, copies de lettres, carnets de chèques, traites, relevés de compte en banque propres à faciliter l’accomplissement de leur mission.

Ces documents ne peuvent être emportés que dans les conditions prévues à l’art 84.

## **Chapitre II – De la répression des infractions à la réglementation des prix et des fraudes.**

### **Section 1. De la procédure**

**Art. 61** – Sous réserve des dispositions prévues à l’art 54, les procès – verbaux dressés par les agents visés à l’art 51 sont transmis dans le délai d’un mois au Directeur du Commerce intérieur pour suite à donner.

Lorsqu’il n’y a pas transaction, le Procureur de la République saisi par le Directeur du Commerce intérieur doit aviser celui – ci de la décision qu’il a prise dans les deux mois à compter de la date de réception du dossier.



**Art. 62** – Les procès – verbaux dressés en application de l'article 54 sont transmis au Directeur du Commerce intérieur immédiatement après leur rédaction.

**Art. 63** – En cas de flagrant délit, le Procureur de la République informe immédiatement le Directeur du Commerce intérieur afin que celui-ci donne, dans le délai de trois jours, un avis sur les infractions constatées.

**Art. 64** – Les administratives compétentes peuvent accorder le bénéfice de la transaction dans les conditions fixées par décret.

Le même décret détermine la procédure de la réalisation, ainsi que les modalités de versement.

Le paiement de la transaction doit être effectué dans un délai de 2 mois, à compter de la notification de l'effet de transaction à l'intéressé, faute de quoi, le dossier est transmis au parquet.

La réalisation définitive de la transaction éteint l'action publique.

**Art. 65** – Le Directeur du Commerce intérieur, outre le dossier qu'il transmet au parquet, peut également déposer des conclusions qui sont jointes à celles du Ministère public et les faire développer oralement à l'audience par un fonctionnaire dûment habilité, le cas échéant, par un avocat.

**Art. 66** – Le Procureur de la République, le Juge d'Instruction ou le Tribunal, peut, tant qu'une décision statuant au fond, contradictoirement ou par défaut, n'est pas devenue irrévocable, faire droit à la requête des personnes poursuivies ou de l'une d'entre elles, demandant le bénéfice d'une transaction.

Dans ce cas, le dossier est transmis à l'autorité administrative compétente aux fins de règlement transactionnel.

L'octroi de cette facilité peut être subordonné à la fixation d'une consignation dont le montant est déterminé par l'autorité judiciaire.

L'autorité administrative compétente dispose, pour conclure, la transaction, d'un délai fixé par l'autorité judiciaire qui a été saisie. Ce délai qui court du jour de la transmission du dossier ne peut être inférieur à un mois ni excéder trois mois.

Après réalisation définitive de la transaction, le dossier est renvoyé au Procureur de la République, au Juge d'Instruction ou au Tribunal qui constate que l'action publique est éteinte.

La transaction est réalisée et recouvrée suivant les modalités fixées par instruction ministérielle. En cas de non réalisation de la transaction, l'instance judiciaire reprend son cours. La procédure est suivie conformément au droit commun.

Le juge statue en référé sur les contestations et difficultés nées de l'application du présent article.

## **Section 2 - Des Pénalités.**

**Art. 67** - Les infractions prévues aux articles 46 et 47 sont punies d'une amende de 25.000 à 50.000.000 de francs. En cas de manœuvres frauduleuses, une peine de 3 mois à 3 ans d'emprisonnement peut être prononcée.

Sont considérées comme manœuvres frauduleuses la non tenue de comptabilités occultes, l'établissement de fausses factures, la remise ou la perception de soultes occultes ainsi que toutes autres manœuvres tendant à dissimuler soit l'opération incriminée soit son caractère soit ses conditions véritables.

**Art. 68** - Les infractions prévues à l'article 48 sont punies d'une amende de 50 000 à 5.000.000 de francs.

En cas de refus de communication ou de dissimulation de documents, le délinquant est en outre condamné à représenter les pièces sous astreinte de 5 000 francs au moins par jour de retard à compter de la date du jugement s'il est contradictoire et de sa signification s'il a été rendu par défaut.

Cette astreinte cesse de courir après constatation de la remise des pièces au moyen d'un procès-verbal.

**Art. 69** - En cas de condamnation et conformément à l'article 11 du Code pénal le tribunal peut ordonner la confiscation au profit de l'Etat de tout ou partie des biens saisis visés aux articles 55 et 57

**Art. 70** - Le tribunal peut prononcer, à titre temporaire ou définitif la fermeture des magasins, bureaux ou usines du délinquant dans les cas prévus à l'article 67 alinéas 2.

Il peut aussi interdire au délinquant, à titre temporaire ou définitif, l'exercice de sa profession.

L'exercice de sa profession peut également être interdit à une personne morale de droit privé si l'infraction a été commise pour son compte et que ses dirigeants en étaient conscients.

Toute infraction aux dispositions du jugement prononçant la fermeture ou l'interdiction est punie des peines de l'astreinte.

**Art. 71** - La juridiction compétente peut ordonner que sa décision soit publiée, intégralement ou par extraits, par tout moyen approprié, ou affichée en caractère très apparents dans les lieux qu'elle indique, le tout au frais du délinquant.

**Art. 72** - La suppression, la dissimulation ou la lacération totale ou partielle des affiches apposées conformément aux dispositions de l'article 71 opérées volontairement, entraîne l'application d'une peine d'emprisonnement de 6 à 15 jours ou d'une amende, et il est procédé de nouveau à l'exécution intégrale des dispositions relatives à l'affichage aux frais du délinquant.

**Art. 73** - Au cas où le délinquant ayant fait l'objet depuis moins de deux ans de poursuites ayant abouti soit à une transaction, soit une condamnation pour une des infractions visées à l'article 49, comme une nouvelle infraction visée au même article, les peines peuvent être portées au double de la peine encourue.

**Art. 74** - La prescription de l'action publique est interrompue suivant les règles du droit commun, y compris par la rédaction des procès-verbaux dressés en application de l'article 49.

## **TITRE V : DES POUVOIRS ET OBLIGATIONS DES AGENTS Chapitre**

### **premier – Des pouvoirs des agents et experts**

**Art. 75** - Les agents habilités à procéder aux enquêtes relatives à l'établissement des prix peuvent, sur présentation de leur commission et de l'ordre de mission et ce en présence du représentant désigné par l'entreprise :

1° - demander communication à toutes entreprises commerciale, industrielle ou artisanale, à toutes sociétés, coopérative, à toute exploitation agricole ainsi qu'à tout organisme professionnel, des documents ou copies reconnues conformes qu'ils estiment nécessaires à l'accomplissement de leur mission ;

2° - procéder à toutes visites d'établissements industriels, commerciaux, agricoles, coopératifs ou artisanaux.

**Art. 76** - Les autorités civiles, militaires et paramilitaires sont tenues, à la première réquisition, de prêter main forte aux agents du commerce intérieur pour l'accomplissement de leur mission suffit à cet effet.

**Art. 77** - Sous réserve des pouvoirs propres des officiers de Police judiciaire en cas de flagrant délit, l'agent verbalisateur habilité en vertu de l'article 51, ayant au moins le grade de contrôleur ou un grade équivalent, peut requérir la détention du mis en cause.

**Art. 78** - Les agents visés à l'article 51, accompagnés d'un représentant désigné par l'entreprise, ont libre accès dans les magasins, bureaux, annexes, dépôts exploitations, lieux de production, de vente, d'expédition ou de stockage et, d'une façon générale, en quelque lieu que ce soit, sous réserves des dispositions prévues à l'art 80 en ce qui concerne les locaux d'habitation.

En cas de refus ou d'absence volontaire d'un représentant désigné par l'entreprise d'accompagner les agents dans les lieux visés à l'alinéa précédent, les agents consigneront dans un procès verbal ces différents obstacles au libre accès et pourront passer outre.

**Art. 79** - Sous réserve des dispositions du Code de Procédure pénale, les agents habilités en vertu de l'art 51 peuvent faire des visites à l'intérieur des habitations en se faisant assister d'un officier de Police judiciaire préalablement réquisitionné conformément à l'art 76 et nanti d'un mandat de perquisition. La visite domiciliaire se fait de jour.

**Art. 80** - Les fonctionnaires de la hiérarchie A en service à la Direction et du Commerce intérieur et spécialement habilités à cet effet par le Garde des Sceaux Ministre de la justice, sur proposition de l'autorité administrative compétente, peuvent par commission rogatoire du Juge d'instruction, exécuter les actes d'information nécessaires dans les conditions et sous réserves des articles 72, 143 et 144 du Code de Procédure pénale.

**Art. 81** - Le ministre chargé du commerce ou le Directeur du Commerce intérieur peuvent donner mandat à tout expert pour procéder à l'examen de tous documents visés à l'art 75 et faire un rapport sur ses constatations.

Les experts ainsi mandatés jouiront des prérogatives prévues à l'art 78. Ils sont tenus au secret professionnel.

**Art. 82** - Lorsqu'ils sont accompagnés de l'un des agents visés à l'art 51, les experts peuvent, à l'exclusion des visites domiciliaires, exercer le droit de visite tel qu'il est défini à l'art 75.

Le mode de désignation de experts, le déroulement des opérations d'expertise, le dépôt des rapports et le règlement des frais feront l'objet de textes réglementaires de l'autorité administrative compétente.

## **Chapitre II. DES OBLIGATIONS DES AGENTS**

**Art. 83** - Tout agent qui, pour un motif quelconque, outrepassé ses pouvoirs ou utilise des méthodes non réglementaires à cet effet ou tente de le faire, s'expose à des sanctions disciplinaires, sans préjudice de poursuites judiciaires.

Les manquements ou obligations résultant des pouvoirs de recherche, de constatation et de poursuites des infractions à la législation économiques sont passibles de sanctions disciplinaires, sans préjudice de sanctions pénales.

**Art. 84** - Les agents habilités à procéder aux enquêtes relatives à l'établissement des prix sont tenus au secret professionnel.

Les documents dont ils ont obtenu communication en vertu de l'art 75 doivent être consultés sur place et en pareil cas, l'opérateur économique concerné devra mettre à leur disposition un local adéquat pour la consultation des dossiers requis.

En cas de non disposition d'un local adéquat ou lorsqu'il est constaté une mauvaise volonté manifeste de coopérer de la part de l'opérateur économique, les agents concernés pourront alors emporter les dossiers ou copies reconnues conformes contre décharge, après décision de l'autorité supérieure.

Dans tous les cas, les documents devront être consultés dans un délai maximum de 3 semaines. Passé ce délai, les documents devront être restitués à leur propriétaire.

Toutefois s'il est constaté l'existence d'une infraction à la législation économique, un délai supplémentaire de 3 semaines sera accordé par l'autorité supérieure aux agents concernés pour faire leurs conclusions définitives.

## **TITRE VI : DISPOSITIONS DIVERSES**

**Art. 85** - Sous peine des sanctions visées à l'art 363 du Code pénal, les agents visés aux articles 51 et 81 sont tenus au secret professionnel; conformément aux textes en vigueur.

**Art. 86** - En cas de pluralité d'infractions, la procédure définie par la présente loi s'applique pour l'ensemble de l'affaire à l'exception de celles relevant de la compétence des administrations douanière fiscale et forestière.

**Art. 87** - Sont passibles de peines et sanctions prévues à la présente loi tous ceux qui, chargés à un titre quelconque de la Direction de l'Administration de toute entreprise, société, association collectivité, ont contrevenu ou laissé contrevenir par tout personne relevant de leur autorité aux dispositions de la présente loi.

Sont également passibles des mêmes peines et sanctions tous ceux qui, chargés à un titre quelconque de la Direction de l'Administration de toute entreprise, société, association collectivité, et ont contrevenu à l'occasion de cette participation aux dispositions de la présente loi par un fait personnel ou en exécution d'ordres qu'ils savaient contraires à la loi.

L'entreprise, l'établissement, la société, l'association ou la collectivité répond solidairement du montant des confiscations, amendes et frais que ces délinquants ont encourus.

**Art. 88** - Lorsque plusieurs personnes ont été condamnées pour une même infraction, elles répondent solidairement pour le paiement des amendes et confiscations.

**Art. 89** - Faute d'être réclamée par son propriétaire dans le délai de 3 mois à compter du jour où la décision est ordonnée, la partie non confisquée de la partie est réputée propriété de l'Etat.

**Art. 90** - Il est prélevé une partie des produits issus des transactions, confiscations, amendes analyses effectuées par le laboratoire de la Direction du Commerce intérieur et des vérifications d'instruments de mesures dont l'affectation est fixée par décret.

**Art. 91** - Les dispositions de la loi 65-25 du 4 Mars 1965 ainsi que toutes autres dispositions contraires à la présente loi sont abrogées.

Toutefois, jusqu'à leur modification ou leur abrogation, les règlements pris en application et pour l'exécution de ladite loi demeurent en vigueur en leurs dispositions qui ne seraient pas contraires à celle de la présente loi sous les sanctions aux règlements correspondants qu'elle prévoit.

La présente loi sera exécutée comme loi de l'Etat.

Fait à Dakar, le 22 Août 1994.

Abdou Diouf.

**Par le Président de la République.**

*Le premier ministre*

**Habib Thiam**

**REPUBLIC OF ZAMBIA**

**THE COMPETITION AND FAIR TRADING ACT**

**CHAPTER 417 OF THE LAWS OF ZAMBIA**

# THE COMPETITION AND FAIR TRADING ACT 1994

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## ARRANGEMENT OF SECTIONS

### PART I PRELIMINARY

#### Section

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### PART II ZAMBIA COMPETITION COMMISSION

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### PART III ANTI-COMPETITIVE TRADE PRACTICES, ETC.

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- SCHEDULE-Zambia Competition Commission



GOVERNMENT OF ZAMBIA

ACT

No. 18 of 1994

Date of Assent: 11<sup>th</sup> May, 1994

An Act to encourage competition in the economy by prohibiting Anti-competitive trade practices; to regulate monopolies and concentrations of economic power; to protect consumer welfare; to strengthen the efficiency of production and distribution of services; to secure the best possible conditions for the freedom of trade, to expand the base of entrepreneurship; and to provide for matters connected with or incidental to the foregoing.

3<sup>rd</sup> June, 1994

ENACTED by the Parliament of Zambia.

Enactment

PART I  
PRELIMINARY

1. This Act may be cited as the Competition and Fair Trading Act, 1994, and shall come into operation on such date as the Minister may, by statutory instrument, appoint. Short title  
and  
Commencement  
Interpretation
2. In this Act, unless the context otherwise requires -
  - "affiliated" means associated with each other, formally or informally, by shareholding or otherwise;
  - "anti-competitive trade practices" means the trade practices enumerated in sections seven, eight, nine and ten;
  - "Chairman" means the Chairman of the Commission, elected under paragraph 1 of the Schedule;
  - "Committee" means a committee of the Commission, established under paragraph 5 of the Schedule;
  - "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;
  - "customer" means a person who purchases goods or services;
  - "distribution" includes any act by which goods are sold or services supplied for consideration;

"distributor" means a person who engages in distribution;

"Executive Director" means the Executive Director appointed under paragraph 7 of the Schedule;

"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;

"monopoly undertaking" means a dominant undertaking or an undertaking which together with not more than two independent undertakings –

(a) produces, supplies, distributes or otherwise controls not less than one half of the total goods of any description that are produced, supplied or distributed throughout Zambia or any substantial part of Zambia; or

(b) provides or otherwise controls not less than one-half of the services that are rendered in Zambia or any substantial part thereof;

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

"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;

"Secretary" means the person appointed as such under paragraph 8 of the Schedule;

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

"supply", in relation to goods, includes supply or re-supply by way of sale, exchange, lease, hire or hire purchase;

"trade association" means a body of persons which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members; and

"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 of any trader or class of traders or the production, supply or price in the course of trade of any goods, whether real or personal, or of any service.

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;

Non-application

- (c) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
- (d) the entering into an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trade mark;
- (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 the Republic of Zambia is a party;
- (g) activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public; and
- (h) such business or activity as the Minister may, by statutory instrument, specify.

## PART II

### ZAMBIA COMPETITION COMMISSION

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                        |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|
| <p>4. (1) There is hereby established the Zambia Competition 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 the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform.</p> <p>(2) The provisions of the Schedule shall apply as at to the constitution of the Commission and otherwise in relation thereto.</p>                                                                                                                                                        | <p>Establishment<br/>of Commission</p> |
| <p>5. (1) The seal of the Commission shall be such device as may be determined by the Commission and shall be kept by the Secretary.</p> <p>(2) The affixing of the seal shall be authenticated by the Chairman or any other person authorised in that behalf by a resolution of the Commission</p> <p>(3) Any contract or instrument which if entered into or executed by a person not being a body corporate would not be required to be under seal may be entered into or executed without seal on behalf of the Commission by the Secretary or any other person generally or specifically authorised by the Commission in that behalf.</p> | <p>Seal of<br/>Commission</p>          |
| <p>6. (1) It shall be the function of the Council to monitor, control and prohibit acts or behaviour which are likely to adversely affect competition and fair trading in Zambia.</p> <p>(2) Without limiting the generality of subsection (1), the functions of the Council shall be-</p>                                                                                                                                                                                                                                                                                                                                                     | <p>Functions of<br/>Council</p>        |

- (a) to carry out, on its own initiative or at the request of any person, investigations in relation to the conduct of business, including the abuse of a dominant position, so as to determine whether any enterprise is carrying on anti-competitive trade practices and the extent of such practices, if any;
- (b) 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 actions 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;
- (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 to the public reports regarding the operation of the Act;
- (g) to co-operate 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; and
- (h) to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.

### PART III

#### ANTI-COMPETITIVE TRADE PRACTICES, ETC.

7. (1) Any category of agreements, decisions and concerted practices which have as their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia or in any substantial part of it are declared anti-competitive trade practices and are hereby prohibited. Enumeration of anti-competitive trade practices
- (2) Subject to the provisions of subsection (1), enterprises shall refrain from the following acts or behaviour if through abuse or acquisition of a dominant position of market power, 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 competition including the use of cost pricing to eliminate competitors;
  - (b) discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods or 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 dependant upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
  - (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) mergers, takeovers, joint ventures or other acquisitions of control whether of horizontal, vertical or conglomerate nature; or
  - (g) colluding, in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors, or suppliers of services, in setting a uniform price in order to eliminate competition.
8. (1) Any persons 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-
- Control of  
mergers and  
takeovers
- (a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;
  - (b) a takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise;
- shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding ten million Kwacha or imprisonment not exceeding five years or to both.
- (2) No merger or takeover made in contravention of 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.
9. (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 (2) where such practices limit access to markets or otherwise unduly restrain competition:
- Trade  
agreements
- 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 applies to formal, informal, written and unwritten agreements and arrangements.
- (3) For the purposes of subsection (1), the following are prohibited:
  - (a) 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 persons engaged in the sale of purchased goods or services.
  - (b) collusive tendering;
  - (c) market or customer allocation agreements;
  - (d) subject to the Coffee Act, 1989, allocation by quota as to sales and production;
  - (e) collective action to enforce arrangements;
  - (f) concerted refusals to supply goods and services to potential purchasers; or
  - (g) collective denials of access to an arrangement or association which is crucial to competition.

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- 10. The following practices conducted by or on behalf of a trade association are declared to be anti-competitive trade practices:
  - (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 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 the pricing formula used or to be used in the calculation 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.

Anti-competitive  
trade practices  
by associations

11. (1) The Commission shall keep the structure of production of goods and services in Zambia under review to determine where concentration of economic power exist whose detrimental impact on the economy outweigh the efficiency advantages, if any.
- Criteria for controlling monopolies and concentrations of economic power
- (2) For the purposes of subsection (1) but without limiting the generality thereof, the Commission shall consider whether-
- (a) a person controls a chain of distributing units the value of whose sales accounts for a significant portion of the relevant market;
  - (b) a person, by virtue of controlling two or more physically distinct enterprises which manufacture substantially similar goods, supplies a significant portion of the domestic market at unreasonably low prices; or
  - (c) a person has substantial shares in a manufacturing enterprise and whether he simultaneously has a beneficial interest, however small, of outstanding shares in one or two wholesale or retail enterprises which distribute products of the manufacturing enterprise.
12. A person shall not-
- Unfair trading
- (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 represent that products are of a particular style, model or origin;
    - (iii) falsely represent that the goods are new or of specified age; or
    - (iv) represent 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 the public as to the nature, price, availability, characteristics, suitability for a given purpose, quantity or quality of any products or services; or
  - (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 law.

13. (1) The Commission may authorise any act which is not prohibited outright by this Act, that is, an act which is not necessarily illegal unless abused if that act is considered by the Commission as being consistent with the objectives of this Act. Authorisation of allowable acts
- (2) The Minister may, on the recommendations of the Commission, by statutory instrument, make regulations prescribing the particulars to be furnished to the Commission for the purposes of subsection (1).

#### PART IV GENERAL

14. (1) Where the Executive Director or any officer has reasonable cause to believe that an offence under this Act or any regulations made hereunder has been or is being committed, he may seek from a court a warrant granting- Powers of the Executive Director

- (a) authority to enter any premises;
- (b) access to, or production of, any books, accounts or other documents relating to the trade or business of any person and the taking of copies of any such books, accounts or other documents:

Provided that any books, accounts or other documents produced shall be returned forthwith if they are found to be irrelevant.

- (2) In the exercise of the powers contained in subsection (1), the Executive Director or other officer of the Council may be accompanied or assisted by any such police officers as he thinks necessary to assist him to enter into or upon any premises.

15. Any person aggrieved by a decision of the Commission made under this Act or under any regulations made hereunder may, within thirty days after the date on which a notice of that decision is served on him, appeal to the High Court subject to a further appeal to the Supreme Court. Appeals

16. (1) Any person who- Offences and penalties
- (a) contravenes or fails to comply with any provisions of this Act or any regulations made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made hereunder, for which no penalty is provided;
  - (b) omits or refuses-
    - (i) to furnish any information when required by the Commission to do so; or



(ii) to produce any documents 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 and shall be liable upon conviction to a fine not exceeding ten million Kwacha or imprisonment for a term not exceeding five years or to both.

(2) If the offence is committed by a body corporate, every director and officer of such body corporate, or if the body of persons is a firm, every partner of that firm, shall be guilty of that offence provided that o such director, officer or partner shall be guilty of the offence is he proves on a balance of probability that such offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence.

17. The Commission may, with the approval of the Minister, by statutory instrument, make regulations governing -

Regulations

- (a) anything which under this Act is required or permitted to be prescribed;
- (b) any forms necessary or expedient for purposes of this Act;
- (c) any fees payable in respect of any service provided by the Commission; or
- (d) such other matters as are necessary or expedient for the better carrying out of the purposes of this Act.

#### SCHEDULE (Section 4)

#### ZAMBIA COMPETITION COMMISSION

(1) The Commission shall consist of-

Composition of  
Commission

- (a) a representative from each of the Ministries responsible for finance, and commerce, and industry;
- (b) a representative of the Zambia Bureau of Standards;
- (c) two representatives from the Zambia Council of Commerce and Industry, each representing different sections of that body;
- (d) a representative of the Law Association of Zambia;
- (e) a representative of the Zambia Federation of Employers; (f) a representative of the Zambia Congress of Trade Unions;
- (g) two persons representing consumer interests and appointed by the Minister;
- (h) a representative of the Engineering Institution of Zambia;
- (i) a representative of the accounting profession; and
- (j) the Economics Association of Zambia.

(2) All members shall be nominated by their respective institutions and shall be appointed by the Minister.

(3) The Chairman and the Vice-Chairman shall be elected by the Commission from amongst its members;

Provided that the members appointed under items (a) and (b) of sub-paragraph (1) shall not be elected as Chairman or Vice-Chairman.

2. (1) The members shall hold office for a period of three years from the date of appointment and may, upon the expiration of that term, be re-appointed for a like term and, for this purpose, paragraph 1 (2) of this Schedule shall apply. Tenure of Office  
and vacancy

(2) A member referred to in items (b), (c), (d), (e), (f), (g) and (h) of paragraph 1 (1) of this Schedule may resign upon giving one month's notice in writing to the organisation which nominated him and to the Minister and shall be removed by the Minister at any time if the body which nominated him withdraws its recognition and so informs the Minister in writing.

(3) The office of a member shall become vacant-

(a) upon his death;

(b) if he is absent without reasonable excuse from three consecutive meetings of the Commission of which he has had notice; or

(c) if he is lawfully detained or his freedom of movement is restricted for a period exceeding six months;

(d) if he becomes an undischarged bankrupt;

(e) if he becomes of unsound mind; or

(f) by operation sub-paragraph (2).

3. A member shall be paid such remuneration or allowances as the Council may, subject to the approval of the Minister, determine. Remuneration  
and allowances

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

(2) The Commission shall meet as often as necessary or expedient for discharge of its business and such meeting shall be held at such places, times and days as the Commission may determine.

(3) The Chairman may at any time call a meeting of the Commission and shall call a special meeting to be held within ten days of receipt of a written request for that purpose addressed to him by at least one-third of the members of the Commission.

(4) Seven members shall form a quorum at any meeting of the Commission.

- (5) There shall preside at any meeting of the Commission-
- (a) the Chairman;
  - (b) in the absence of the Chairman, the Vice-Chairman; or
  - (c) in the absence of both the Chairman and Vice-Chairman, such members as the members present may elect for the purpose of the meeting.

(6) The decision of the Commission shall be by a majority of members present and voting at the meeting and, in the event of an equality of votes, the Chairman or other person presiding at the meeting shall have a casting vote in addition to his deliberative vote.

(7) The Commission may invite any person, whose presence is in its opinion desirable, to attend and to participate in the deliberation of a meeting of the Commission but such person shall have no vote.

(8) The validity of any proceedings, act or decision of the Commission shall not be affected by any vacancy in the membership of the Commission or by any defect in the appointment of any member or by reason that any person not entitled to do so took part in the proceedings.

(9) The Commission shall cause minutes to be kept of every meeting of the Commission and of every meeting of any committee established by the Commission.

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

(2) The Commission may appoint as members of a committee established under sub-paragraph (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 sub-paragraph regulate its procedure.

6. (1) If any person is present at a meeting the Commission or committee of the Commission at which any matter is the subject of consideration and in which matter that person is directly or indirectly interested, he shall as soon as it practicable after the commencement of the meeting disclose such interest and shall not, unless the Commission or the Committee otherwise directly, take part in any consideration or discussion of, or vote on any question touching such matter. Disclosure of interest

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

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|
| <p>7. (1) The Commission shall appoint, on such terms and conditions as it may determine, an Executive Director who shall be the chief executive officer of the Commission.</p> <p>(2) The Executive Director shall be responsible for the day-to-day administration of the Commission.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <p>Executive Director of Commission</p>                                                |
| <p>8. (1) There shall be a Secretary to the Commission, who shall be appointed by the Commission on such terms and conditions as the Commission may determine.</p> <p>(2) The Secretary shall, under the general supervision of the Executive Director, carry out corporate secretarial duties.</p> <p>(3) The Commission may appoint, on such terms and conditions as it may determine, such other staff as it considers necessary for the performance of its functions under this Act.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <p>Secretary and other staff</p>                                                       |
| <p>9. (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, the contents of any document, communication or information which relates to and which has come to his knowledge in the course of his duties under this Act.</p> <p>(2) Any person who knowingly contravenes the provisions of sub-paragraph (1) shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding six hundred thousand Kwacha or to imprisonment for a term not exceeding three years or to both.</p> <p>(3) If any person having information which to his knowledge has been published or disclosed in contravention of sub-paragraph (1) unlawfully publishes or communicates any such information to any other person he shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding six hundred thousand Kwacha or to imprisonment for a term not exceeding three years or to both.</p> | <p>Prohibition of publication or disclosure of information to unauthorised persons</p> |
| <p>10. No action or other proceeding shall lie against any member, member of staff, servant, agent or representative of the Commission for or in respect of any act done or omitted to be done in good faith in the exercise or purported exercise of his functions under this Act.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <p>Immunity</p>                                                                        |
| <p>11. (1) The funds of the Commission shall consist of such moneys as may-</p> <p>(a) be appropriated by Parliament for the purposes of the commission;</p> <p>(b) be paid to the Commission by way of grants or donations; and</p> <p>(c) vest in or accrue to the Commission.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <p>Funds of Commission</p>                                                             |

- (2) The Commission may-
- (a) accept money by way of grants or donations;
  - (b) raise by way of loans or otherwise from any source in Zambia and, subject to the approval of the Minister, from any source outside Zambia, such money as it may require for the discharge of its functions; and
  - (c) charge and collect fees in respect of programmes, publications, seminars, consultancy and other services provided by the Commission.
- (3) There shall be paid from the funds of the Commission-
- (a) the salaries, allowances, loan, gratuities and pensions of the staff of the Commission and other payments for the recruitment and retention of staff;
  - (b) such reasonable travelling and subsistence allowances for members of any committee of the Commission when engaged on the business of the Commission and at such rates as the Commission may determine; and
  - (c) any other expenses incurred by the Commission in the performance of its functions.
- (4) The Commission may after the approval of the Minister, invest in such manner as it thinks fit such of its funds as it does not immediately require for the discharge of its functions.

12. The financial year of the Commission shall be the period of twelve months ending on 31<sup>st</sup> December in each year. Financial Year
13. (1) The Commission shall cause to be kept proper books of account and other records relating to its accounts. Accounts  
 (2) The Accounts of the Commission shall be audited annually by independent auditors appointed by the Minister.  
 (3) The auditors' fees shall be paid by the Commission.
14. (1) As soon as practicable but not later than six months after the expiry of the financial year, the Commission shall submit to the Minister a report concerning its activities during the financial year. Annual Of reports  
 (2) The report referred to in sub-section (1) 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 Minister may require.
 (3) The Minister shall, not later than seven days after the first sitting of the National Assembly next after receipt of the report referred to in sub-section (1), lay it before the National Assembly.
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