

General rules about applications

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(2) An applicant shall take all reasonable steps to notify all other parties to the agreement of which the applicant is aware, that the application for guidance has been made.

3. Notification under sub-paragraph (2) shall be made in the specified manner.

Procedure on application for guidance

4. When determining an application for guidance, the Commission shall follow such procedure as may be specified.

Publication

5. The Commission shall arrange for an application to be published in such a way as it considers most suitable for bringing it to the attention of those likely to be affected by it, unless it is satisfied that it will be sufficient for it to notify one or more particular persons other than the applicant.

I certify that this is a correct copy of the Bill which was passed by the National Assembly on the 25th September, 2009.

Veronique Bresson
Clerk of the National Assembly

FAIR COMPETITION ACT, 2009

ARRANGEMENT OF SECTIONS

Sections

PART I - PRELIMINARY

1. Short title and commencement
2. Interpretation
3. Application of Act

PART II - FAIR TRADING COMMISSION

4. Administration of Act
5. Functions
6. Powers

PART III - RESTRICTIVE BUSINESS PRACTICE

Sub-Part I - Abuse of Dominant Position

7. Abuse of dominant position
8. Request for Commission to consider conduct
9. Notification for guidance
10. Effect of guidance

Sub-Part II - Agreements etc Preventing, Restricting or Distorting Competition

11. Provisions restricting, preventing or distorting competition
12. Agreements containing exclusionary provision
13. Request for Commission to examine agreement
14. Notification for guidance
15. Effect of guidance

Sub-Part III - Resale Price Maintenance

16. Collective agreements by dealers or suppliers
17. Agreement re minimum resale price void
18. Patented goods

“application” means an application under section 9;

200,000 rupees or to imprisonment for a term not exceeding 2 years or to both.

Transitional
period

55.(1) The Commission shall not take action under this Act if, within 2 months after the commencement of this Act, enterprises notify the Commission of details of any restrictive business practice, and agree with the Commission as to the manner and the period within which that restricted business practice will be amended, terminated or ceased, and have otherwise settled the matter.

(2) Sections 8, 9, 10, 13, 14 and 15 shall apply only to agreements entered into or arrived at by enterprises on or after 7th June 2010.

SCHEDULE 1

(Section 3(3))

AGREEMENTS OR PRACTICES EXCLUDED FROM THE ACT

1. Any practice of employers or agreement by which employers are parties insofar as it relates to the remuneration, terms or conditions or employment of employees.
2. Any practice or agreement approved or required under an international agreement to which Seychelles is a party.

SCHEDULE 2

(Section 8(2))

NOTIFICATION FOR GUIDANCE: PROCEDURE

1. In this Schedule—

“applicant” means the party making an application to which this Schedule applies;

PART VI - DETERMINATION OF CASES BY COMMISSION, PENALTIES AND REMEDIES

41. Directions in relation to conduct falling within scope of Sub-Part I of Part III
42. Directions in relation to agreement falling within scope of Sub-Part II of Part III
43. Consideration of offsetting benefits in determination of remedial measures
44. Directions under Sub-Part IV of Part III
45. Directions in relation to agreement or practice falling within scope of Sub-Parts III and V of Part III
46. Financial penalty
47. Interim measures
48. Undertakings
49. Keeping directions and undertakings under review

PART VII - APPEAL

50. Appeal to Tribunal
51. Prosecution of appeal
52. Appeal to Supreme Court

PART VIII - MISCELLANEOUS

53. Enforcement of directions, undertakings or orC

SCHEDULE 1

SCHEDULE 2

SCHEDULE 3

(2) A direction given under this section shall be in writing.

(3) The Commission shall give an enterprise to which it intends to give a direction the opportunity to make representations before the direction is given.

(1) An enterprise may offer a written undertaking to the Commission to address any concern that has arisen, or is likely

restrictive business practice and has not completed its investigation of the matter, but believes that there is a risk of serious

(3) A direction given under this section shall be in writing.

Financial
penalty

46.(1) The Commission may, in relation to a determination made under this Part, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on an enterprise.

(2) Where the Commission imposes a financial penalty on an enterprise, the financial penalty shall not exceed 10 per cent of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition up to a maximum period of 5 years.

(3) An order imposing a penalty under subsection (1) shall be in writing and shall specify the date before which the penalty is required to be paid.

(4) The date specified under subsection (3) shall not be earlier than the end of the period within which an appeal against the order may be brought under section 50.

(5) Where a penalty has not been paid within the specified date and—

- (a) no appeal against the order was brought under section 50; or
- (b) an appeal was made but dismissed or withdrawn,

the Commission may apply to the Supreme Court for an order to enforce payment of the penalty against an enterprise.

47.(1) Where—

- (a) the Commission has reasonable grounds to suspect that an enterprise is a trader a

“Commission” means the Fair Trading Commission established under section 3(1) of the Fair Trading Commission Act, 2009;

“concerted practice” means co-operative or co-ordinated conduct between enterprises achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement;

“consumer” means any direct or indirect user of a product or service supplied by an enterprise in the course of business, and includes—

- (a) another enterprise that uses the product or service thus supplied as an input to its own business;
- (b) a wholesaler a retailer and a final consumer;

“document” includes—

- (a) anything on which there is writing;
- (b) a map, plan, drawing or photograph;
- (c) anything from which sounds or visual images are capable of being reproduced;
- (d) any record created, stored, generated, received or communicated by electronic or electromagnetic means;

“enterprise” means any person, firm, partnership, corporation, company, association, or other juridical person engaged in commercial activities for gain or reward, and includes its branches, subsidiaries, affiliates or other entities directly or indirectly controlled by it;

such conduct, including conduct in relation to prices, as is specified in the direction as a condition of proceeding with the merger.

(2) Where the Commission determines after investigation that enterprises have, without obtaining the permission of the Commission under section 22(1), structured themselves in such a way as to constitute a merger within the meaning of this Act, it may by notice in writing direct the

- (b) cease or amend a practice or course of conduct in relation to prices;
- (c) supply goods or services or grant access to facilities;
- (d) separate or divest itself of any enterprise or assets; or
- (e) provide the Commission with specified information on a continuing basis,

within such time as may be specified by the Commission.

(3) A direction given under this section shall be in writing.

In determining, in any particular case, the remedial measures required to be taken under sections 41 and 42, the Commission shall have regard to the extent to which any of the offsetting benefits specified in section 40(2) are present in that case.

(1) Where a merger proposed is likely to result in unfair competition, the Commission may—

- (a) direct the enterprises within an agreed period to divest interests or part of their combined businesses or operations, if it is satisfied that such divestment would make the merger less likely to lessen competition or to adversely affect the interests of consumers or the economy;

(b) direct the enterpri(nt) 1 104.127(n)-Tm [(a)-3.9(r1h)-31.2(eo-3.91 ETd-785.2(e)-4.7(t04.127(nnt) 1 104.127(nt)-274.0(o)14.5((

42.(1) Where the Commission determines that an enterprise is a party to a restrictive agreement falling within the scope of Sub-Part II of Part III, that —

- (a) in relation to a restrictive agreement, the agreement has the object or effect of preventing, restricting or distorting competition; or
- (b) in relation to a monopoly situation, any conduct of the enterprise —

has the effect of preventing, restricting or distorting competition, or

in any other way, constitutes exploitation of the monopoly situation,

the Commission shall give the enterprise such directions as it considers necessary, reasonable and practicable to —

- (aa) remedy, mitigate or prevent the unfair or adverse effects on competition that it has identified; or
- (bb) remedy, mitigate or prevent any detrimental effects on users and consumers so far as they have resulted from, or are likely to result from, the adverse or unfair effects on, or the absence of, competition.

(2) A benefit shall be considered for the purposes of

whether competition in any market is adversely affected in that,
in the case of—

- (a) a restrictive agreement, the agreement has the object or effect of preventing, restricting or distorting competition;

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information that was false or misleading;

there has been a breach of any terms or conditions, subject to which the authorisation was granted; or

the circumstances that justified the grant of the authorisation no longer exist; or

- (b) amend the authorisation where it is satisfied that the current conditions in the market necessitate an amendment.

(2) The Commission shall, before revoking or amending an authorisation

- (a) serve on the relevant applicant a notice in writing specifying the reason for the proposed revocation or amendment; and
- (b) inform the applicant of its right to revoke or

(2) The Commission upon receipt of an application under subsection (1) may grant an authorisation, where it is satisfied that the agreement or practice, as the case may be, is

the arrangements are related to the introduction or maintenance of—

- (a) standards for products or the quality of service that is reasonably necessary for the protection of the public; and
- (b) standards of competence and integrity that are required—
 - (i) in the practice of a trade or profession relating to the service; or
 - (ii) in the collection and dissemination of information relating to the service.

Bid-rigging

27.(1) Subject to subsection (2), it is unlawful for two or more persons to enter into an agreement whereby—

- (a) one or more of them agree to 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 does not apply in respect of an agreement that is entered into or a submission that is arrived at only by enterprises each of which is, in respect of every one of the others, an affiliate.

Sub-Part VI- Authorisation

Grant of authorisation

28.(1) Notwithstanding this Act, an enterprise that proposes to enter into or carry out an agreement or to engage in a business practice which, in its opinion, is an agreement or practice affected or prohibited by this Act, may apply to the Commission in the prescribed form for an authorisation to do so.

(2) The Commission shall take no further action under this Sub-Part with respect to the conduct to which this section applies, unless—

- (a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its guidance;
- (b) it has a reasonable suspicion that the information on which it based its guidance was incomplete, false or misleading in a material particular; or
- (c) a complaint about the conduct has been made to it.

(3) A penalty may not be imposed under this Sub-Part in respect of any infringement of the prohibition by conduct to which this section applies.

(4) The Commission may, however, remove the immunity given by subsection (3) if—

- (a) it takes action under this Sub-Part with respect to the conduct in one of the circumstances mentioned in subsection (2);
- (b) it considers that it is likely that the conduct will infringe the prohibition; and
- (c) it gives notice in writing to the enterprise on the application of which the guidance was given that it is removing the immunity as from the date specified in the notice.

(5) Where the Commission has a reasonable suspicion that information—

- (a) on which it based its guidance; and

the enterprise in respect of which the attempt to influence is made, are affiliated companies or, as the case may be, principal and agent.

(3) 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 an increase or the maintenance of the selling price of any person in the hands of which the goods come for resale, unless the price is so expressed as to make it clear to any person which becomes aware of the advertisement that the goods may be sold at a lower price.

(1) An enterprise shall not conspire, combine, agree or arrange with another person to —

- (a) limit the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;
- (b) prevent, limit or unduly lessen, the manufacture or production of any goods to enhance unreasonably the price thereof;
- (c) unduly lessen competition in the production, manufacture, purchase, sale, supply, rental or transportation of any goods;
- (d) unduly lessen, limit or prevent competition in the provision of insurance on persons concerned in or property related to the production, storage, transportation or dealing in any goods or the provision of services; or

(2) An application under subsection (1) shall be made in the prescribed form and accompanied by the prescribed information.

(3) Subsection (1) shall apply to any public bid for the control of an enterprise.

(1) An enterprise seeking permission to effect a merger under section 22(1) shall —

- (a) demonstrate that if the merger was not completed it is not likely that the relevant efficiency gains would be realised by means that would limit competition to a lesser degree than the merger; or
- (b) demonstrate that reasonable steps have been taken within the recent past to identify

- (a) supplies of goods were withheld from a dealer;
- (b) 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
- (c) the dealer, to the knowledge of the supplier, had within the preceding 6 months acted as described in section 19(1)(a) or had indicated its intention to act as described in section 19(1)(b) in relation to the goods in question.

(5) Subsections (3) and (4) do 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.

Sub-Part IV - Control of Merger Situation by Commission

Merger

21. All mergers involving an enterprise that—

- (a) by itself controls; or
- (b) together with any other enterprise with which it intends to effect the merger is likely to control,

40 per cent of a market or such other amounts as the Minister may prescribe are prohibited unless permitted by the Commission in accordance with this Sub-Part.

Application to
Commission for
merger

22.(1) Where an enterprise referred to in subsection (1) is desirous of effecting a merger, it shall apply to the Commission for permission to effect the merger.

(2) Schedule 3 provides for the procedure to be followed—

- (a) by a party making such an application; and
- (b) by the Commission, in considering such an application.

14.(1) A party to an agreement which applies for the agreement to be examined under this section shall — notification for guidance

- (a) notify the Commission of it; and
- (b) apply to it for guidance.

(2) On an application under this section, the Commission may give the applicant guidance as to whether or not, in its view, the agreement is likely to infringe the prohibition in section 11(1) if it is not excluded, or 12(1).

(3) Where an agreement to which a prohibition ~~has~~ has been notified to the Commission under this section, no penalty is to be imposed under this Sub-Part in respect of any infringement of the prohibition by the agreement which occurs during the period—

- (a) beginning with the date on which notification was given; and
- (b) ending with such date as may be specified in a notice in writing given to the applicant by the Commission when the application has been determined.

(4) The date specified in the notice under subsection (3)(b) may not be earlier than the date on which the notice is given.

15.(1) This section applies to an agreement if the Commission has determined an application under section 14(2) by giving guidance that the agreement is unlikely to infringe effect of guidance

the prohibition in section 11(1) regardless of whether or not it is excluded, or 12(1).

(2) The Commission shall take no further action under this Sub-Part with respect to an agreement to which this section applies, unless —

- (a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its guidance;
- (b) it has a reasonable suspicion that the information on which it based its guidance was incomplete, false or misleading in a material particular; or
- (c) a complaint about the agreement has been made to it by a person which is not a party to it.

(3) A penalty may not be imposed under this Sub-Part in respect of any infringement of a prohibition by an agreement to which this Sub-Part applies.

(4) The Commission, however, may remove the

goods shall be treated as withholding supplies from a dealer, where —

- (a) the supplier refuses or fails to supply those goods to the order of the dealer;
- (b) the supplier refuses to supply those goods to the 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 that supplier normally supplies those goods to other dealers carrying on business in similar circumstances; or
- (c) the supplier enters into an agreement to supply goods to the dealer and treats it in a manner significantly less favourable than that in which the supplier normally treats other dealers in the goods supplied 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 19(1) if, in addition to that ground, the supplier has other grounds which, standing alone, would justify the withholding of those supplies.

(3) Subject to subsection (5), where in proceedings brought against a supplier of goods in respect of a contravention of section 19, the matters specified in ~~section~~ (4) are proved, it shall be presumed, unless the contrary is proved, that the supplies were withheld on the ground that the dealer had acted or was likely to act as described in that section.

(4) For the purposes of subsection (3), the following are required to be proved —

insofar as it regulates the price at which goods produced or processed by the licensee or assignee may be sold by the dealer.

(1) It is unlawful for a supplier to withhold supplies of any goods from a dealer seeking to obtain them for resale on the ground that the dealer —

- (a) has sold goods obtained either directly or indirectly from that supplier at a price below the resale price or has by other means supplied such goods either directly or indirectly to a third party which had done so; or
- (b) is likely, if the goods are supplied to it, to sell them at a price below that price, or supply

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