



Guide to the
Mauritius Competition
Act 2007

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PREFACE

This is the First Edition of the Guide to the Mauritius Competition Act 2007, which we have produced for the information of our clients and professional colleagues. This Guide is concerned primarily at providing general information for parties wishing to understand the basic tenets of Mauritian competition law taking into account the implementation of a competition policy brought about by the coming into force of the Competition Act 2007 on 24 October 2008.

This Guide is divided into five parts:

- A. Competition Commission
- B. Restrictive Business Practices
- C. Investigations and Hearings before the Commission
- D. Penalties and Remedies
- E. Right to Appeal

All references in this Guide to “dollars” or “\$” are to US dollars, and all references to “rupees” or “Rs” are to Mauritian rupees.

It is recognised that this Guide will not completely answer the detailed questions that clients and their advisers may have. It is intended to provide a sketch of Mauritius’ legal and regulatory environment in relation to competition law. The Guide is, therefore, designed as a starting-point for a more detailed and comprehensive discussion of the issues and should not be used as a substitute for professional advice.

Whilst we have made every effort to ensure the accuracy of the statements made herein, we accept no liability for any errors. In all cases expert legal advice from a qualified practitioner of Mauritius law should be obtained.

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Port Louis, Mauritius
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INTRODUCTION

The Competition Act 2007 (the “Act”) was passed on 20 December 2007. This is the first time that Mauritius has implemented a competition policy aiming to establish certain standards of carrying on business in Mauritius which will be beneficial to the economy and to the population.

Parts I and II of the Act were proclaimed into force on 24 October 2008 to allow the establishment of the Competition Commission (“Commission”). The remainder of the Act will be proclaimed into force once the Commission is fully functional. As yet, the Commission is still in its initial steps of establishment and it is anticipated to be operational by the second half of 2009.

Although the Act is not fully in force, this Guide covers all aspects of the Act including the powers and functions of the Commission; details of the different restrictive business practices set out in the Act; the investigation and hearing process; the possible penalties imposed; and the ways of appeal.

The Act marks the beginning of a new era in the approach to the competition regime in Mauritius.

PART A THE COMPETITION COMMISSION

The Act provides that the Commission is to be set up a body cooperate (§4) consisting of a chairperson, a vice-chairperson and three other commissioners appointed by the President of Mauritius (§7). The Commission will be impartial and the decisions made by it will be independent of the Government or any other local authority (§4).

The role of the Commission is to help cultivate a culture of competition and to ensure that the Act is enforced in a manner which promotes healthy competition between businesses in Mauritius.

In carrying out this role, the Commission will be required to call hearings and investigate enterprises if the need arises so as to determine whether or not a business is engaging restrictive business practices. Should the Commission determine that there is anti-competitive behaviour, it may impose penalties or remedial steps which must be taken by the enterprises to ensure compliance with the Act (§5).

The powers of the Commission include (§6):

- issuing orders and directions in accordance with the Act;
- imposing financial penalties or remedies;
- entering into such contracts as may be necessary or expedient for the purpose of discharging its functions under the Act;
- co-operating with competition authorities in other countries; and
- imposing such charges or fees as may be required under the Act.

To facilitate its disciplinary role, the Commission will be publishing introductory guidance for business and consumers as well as formal guidance notes on the economic and legal analysis which it will use for the determination of cases under the Act, the principles which it will use to determine penalties or remedies and its procedural rules (§38).

Although the Commission acts independent of any other local authority, the Act requires that the Commission enter into memorandums of understanding (“MOU”) with other regulatory authorities such as the Financial Services Commission and the Bank of Mauritius to determine the approach the Commission will take in exercising its powers in regulated sectors (§66). The MOUs must establish the mechanisms for practical co-operation between the authorities and should not restrict the Commission’s powers under the Act within a regulated sector.

PART B RESTRICTIVE BUSINESS PRACTICES

The Commission's main role under the Act is to prevent businesses from engaging in the restrictive business practices. The factors which the Commission will consider when investigating suspected restrictive business practices include the need for competition in the market and the advantages derived in relation to the price, quantity, variety and quality of goods and services. In addition, it will take into account the efficiency with which goods are produced, supplied or distributed or services are supplied or made available versus the effects of the absence, prevention, restriction or distortion of competition taking place on consumers and businesses in general (§50).

The Act defines a restrictive business practice as a situation which falls within the terms of Part III of the Act which are summarised below.

1. Collusive agreements

a. Horizontal agreements

The Act defines a horizontal agreement is defined as “an agreement between enterprises which, for the purpose of that agreement, operate in the same market and are actual or potential competitors in that market” (§2).

Horizontal agreements or any part thereof which are collusive are prohibited and void under the Act. An agreement is said to be collusive if it exists between enterprises that supply goods or services of the same description, or acquires goods or services of the same description; if it, in any way, fixes the selling or purchase prices of the goods or services, shares markets or sources of the supply of the goods or services or restricts the supply of the goods or services to, or the acquisition of them from, any person; and if it significantly prevents, restricts or distorts competition (§41).

b. Bid rigging

Enterprises cannot agree not to submit a bid or tender in response to an invitation for bids or tenders; nor agree on the price, terms or conditions of a bid or tender to be submitted. Any such bid rigging agreement or provisions thereof are collusive and are prohibited and void under the Act (§42). Provided however a bid rigging agreement will not collusive (and accordingly not prohibited and void) if at the time, or before the time, a bid or tender is made the terms of the bid rigging agreement are made known to the person making the invitation for a bid or tender.

c. Vertical agreements involving resale price maintenance

The Act defines a vertical agreement as “an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services” (§2).

A resale price maintenance agreement is “an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers” (§2).

Under the Act, vertical agreements which impose a resale price on a reseller are prohibited and void (§43). Provided however, an agreement whereby the supplier or producer recommends a non-binding, minimum resale price would not be void or prohibited. In such instances, and where the resale price is printed on goods, the words “recommended price” is required to be printed next to the resale price.

2. Other restrictive agreements

a. Non-collusive horizontal agreements

Even though a horizontal agreement may not be considered to be collusive, the Commission reserves the right to review the agreement to determine if there is a restrictive business practice. The agreement may only be reviewed if the parties to the agreement together control 30 per cent of the market share and the Commission has reasonable grounds to believe that the agreement has the object or effect of preventing, restricting or distorting competition (§44).

b. Other vertical agreements

Similarly, the Commission reserves the right to review a vertical agreement which does not go as far as to bind of the resale price on the reseller to determine if there is a restrictive business practice where it has reasonable grounds to believe that the agreement involves a monopoly situation (§45).

3. Monopoly situations

If an enterprise engages in conduct which, according to the Commission, has the object or effect of preventing, restricting or distorting competition or in any way reflects exploitation of a monopoly situation, it will be subject to review by the Commission (§46).

A monopoly situation arises when one enterprise controls 30 per cent or more of the market share or when three or fewer enterprises control 70 per cent or more of the market share (§46).

Factors which the Commission must take into account when reviewing a monopoly situation include (§46):

- the extent to which the enterprise(s) enjoys such a position of dominance in the market as to make it possible for it to operate in the market, and to adjust prices or output, without effective constraint from competitors or potential competitors;
- the availability or non-availability of substitutable goods or services;
- the availability or non-availability of nearby competitors; and
- whether the actions or behaviour of an enterprise in a monopoly situation have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers.

The Commission’s guidance notes on the economic and legal analysis will provide further detail on the actions undertaken by enterprises in a monopoly situation which are likely to be regarded as restrictive business practices by the Commission.

4. Merger situations

Merger situations involving two or more enterprises, at least one of which carries on its activities in Mauritius or through a company incorporated in Mauritius, coming together to be owned and controlled by one enterprise are subject to review by the Commission (§47). The Commission will review such mergers if it is found that the merger is likely to result in a substantial lessening of competition within any market or if, following the merger, the merged parties control 30 per cent or more of the market share or if, prior to the merger, one of the merging parties controlled 30 per cent or more of the market share (§48).

The Commission's guidance notes on the economic and legal analysis will provide further detail on market definition and the Commission's calculation of market share for monopoly and merger situations.

PART C INVESTIGATIONS AND HEARINGS BEFORE THE COMMISSION

1. Investigations by the Executive Director

The role of the Executive Director, as the chief executive officer of the Commission (§20), is to investigate any enterprise which he has reason to believe is conducting a restrictive business practice or will be conducting such a business practice. Upon completion of the investigation of such enterprise, the Executive Director will provide the Commission with a report for further action, if necessary (§51).

The enterprise under investigation may be ordered to attend a hearing or may be requested to provide any book, document, record, article or to provide a statement made under oath to the Executive Director (§52). Failure to abide by the request or notice given by the Executive Director without lawful or reasonable excuse will result in an individual being liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 2 years, or a body corporate in being liable to a fine not exceeding 200,000 rupees (§52).

If the Executive Director deems it necessary, he may apply for a warrant to enter and search the premises of any enterprise which he suspects is carrying out restrictive business practices (§53). During such a search, the Executive Director may take copies of such documents as may be required and will be allowed access to all information accessible on the premises including on computers.

Certain privileged documents or information which is protected from disclosure pursuant to any other enactment would remain privileged and confidential in respect of the investigation (§54).

2. Hearings

After the submission of the report by the Executive Director to the Commission, the party under investigation may request that the Commission convene a hearing which must be attended by a minimum of three Commissioners. The purpose of the hearing is for the Commission to hear the views of any enterprise it considers to have a relevant interest in the case. The hearing will be conducted as per the rules, which may be amended from time to time, published by the Commission (§55).

PART D PENALTIES AND REMEDIES

The Commission may impose certain penalties or provide certain directions under the Act upon the completion of a hearing (§56).

1. Directions relating to collusive agreements

If Commission finds that an enterprise has entered into a collusive agreement, it may direct, in writing, that enterprise to cease to be a party to the agreement. Alternatively, the Commission may direct that the agreement be amended in such a way so that it will no longer be considered a collusive agreement (§58).

2. Financial penalty

In addition to, or instead of, giving a direction, the Commission may impose a financial penalty on an enterprise if it is satisfied that the enterprise has committed a breach of the Act intentionally or negligently (§59).

The financial penalty must not exceed ten per cent of the turnover of the enterprise in Mauritius during the period of the breach up to a maximum period of five years (§59).

The Commission may apply to the Judge in Chambers requesting for a mandatory order to enforce payment of the penalty if the enterprise has not paid the penalty within the specified date (§59).

3. Directions relating to monopoly situations

If Commission finds that the conduct of an enterprise in a monopoly situation has the effect of preventing, restricting or distorting competition or in any other way exploits the monopoly situation, it may give directions in order to remedy, mitigate or prevent the adverse effects on competition (§60).

The Commission may, amongst other things, direct the enterprise to (§60):

- terminate or amend an agreement;
- cease or amend a practice or course of conduct, including conduct in relation to prices;
- supply goods or services, or grant access to facilities;
- separate or divest itself of any enterprise or assets; and
- provide the Commission with specified information on a continuing basis.

When giving such directions, the Commission will consider the offsetting benefits such as the safety of goods and services; the efficiency with which goods are produced, supplied or distributed or services are supplied or made available; the development and use of new and improved goods and services and in the means of production and distribution; or the promotion of technological and economic progress and whether the benefits have been or are likely to be shared by consumers and businesses in general (§50).

4. Remedies in merger control

In order to remedy, mitigate or prevent the substantial lessening of competition and any adverse effects that have resulted therefrom in the case of a prospective merger, the Commission may direct the enterprise not to complete or implement the merger insofar as it relates to a market in Mauritius, or to divest certain assets before the merger can be completed or implemented. Alternatively, the Commission may impose other conditions on the enterprise which must be satisfied before the merger can be completed or implemented. For instance, the Commission may direct that the enterprise stops engaging in certain negative conduct in relation to prices (§61).

5. Interim measures

In cases which involve a matter of urgency, the Commission may also take interim measures to prevent serious or irreparable damage to a particular person or category of persons; to protect the public interest; or to prevent pre-emptive action being taken by the enterprise under investigation. In such circumstances, the Commission will allow the enterprise to make representations before the Commission prior to making its application to the Judge in Chambers (§62).

6. Undertakings

An enterprise may offer the Commission a written undertaking addressing all the anti-competitive issues which are or may be subject to an investigation under the Act (§63). If the Commission be satisfied that the undertaking addresses all the issues raised in relation to the prevention, restriction distortion or substantial lessening of competition it may accept the undertaking and publish it in the form of a direction (§63).

PART E RIGHT TO APPEAL

Within 21 days of the date of the order or direction given by the Commission, a party may lodge a notice of appeal at the Registry of the Supreme Court if they are dissatisfied with same (§67). Such an appeal will be prosecuted as per the Court rules. Appeals do not suspend the operation of a direction given by the Commission (§69).

For more specific advice on the Mauritius Competition Act 2007, we invite you to contact one of the following:

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