

THE COMPETITION BILL
(No. VI of 2003)

Explanatory Memorandum

The object of this Bill is to establish the legal framework for the control of restrictive business practices with a view to enhancing competition in Mauritius through measures designed to promote efficiency, adaptability and competitiveness in the economy for the end purpose of widening the range of customer choice in obtaining goods and services at a fairer and more competitive price.

21 March 2003

P. Koonjoo
Minister of Commerce and Cooperatives

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A BILL

**To provide for the control of restrictive business practices
and to promote competition**

ENACTED by the Parliament of Mauritius, as follows -

PART I - Preliminary

1. Short title

This Act may be cited as the Competition Act 2003.

2. Interpretation

(1) In this Act –

“abuse of monopoly situation” means a situation as defined under section 11;

“agreement” means any agreement or arrangement, in whatever way or form it is made;

“anti-competitive agreement” means an agreement defined under section 13;

“authorised officer” means the officer designated under section 4;

“business” includes a professional practice or any other activity which is carried on for gain or reward;

“collusive agreement” means an agreement defined under section 12;

“consumer” means a person to whom goods are supplied or services are rendered;

“Council” means the Competition Advisory Council established under section 8;

“Court” means the District Court of the district where the aggrieved person resides;

“direction” means a direction given by the Tribunal under Section 15;

“Director” means the Director of Fair Trading appointed under section 4;

“document” includes information recorded in any form whatsoever;

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

“goods” includes buildings and other structures;

“member” means a member of the Council or the Tribunal including the Chairperson and the Vice-Chairperson as the case may be;

“Minister” means the Minister responsible for the subject of commerce;

“monopoly situation” means a situation as defined under section 10;

“Office” means the Office of Fair Trading established under section 4;

“price” includes any charge or fee;

“restrictive business practice” means any situation as defined under Part III;

“services” includes the acceptance and performance of any obligation, whether professional or not, for gain or reward, other than the supply of goods, but does not include the rendering of any services under a contract of employment;

“subsidiary” has the same meaning as is assigned to it in the Companies Act 2001;

“supply”, in relation to the supply of goods, includes supply by way of sale, lease, hire or hire-purchase;

“Tribunal” means the Competition Appeal Tribunal established under section 6;

“undertaking” means an obligation or commitment as provided under section 15 given in writing by an enterprise to, and

accepted by, the Director, to prevent or terminate a restrictive business practice.

(2) For the purposes of this Act, any 2 bodies corporate shall be treated as interconnected or as one person if either of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.

3. Application

(1) Any reference in this Act to the supply of goods or services shall be construed as the supply of goods or services in Mauritius.

(2) This Act shall not apply to the matters listed in the First Schedule.

PART II –

INSTITUTIONAL FRAMEWORK

4. Establishment of the Office of Fair Trading

(1) There is established for the purposes of this Act, an Office of Fair Trading.

(2) There shall be a Director of Fair Trading whose office shall be a public office.

(3) The Director shall -

(a) be responsible for the control, operation and management of the day-to-day business of the Office; and

(b) carry out the duties and functions of the Office under this Act.

(4) The Office shall, in the conduct of its business under this Act, be assisted by such public officers as may be required or by such specialized persons as may be appointed by the Office in a temporary capacity under a contract on non pensionable terms.

(5) The officers posted to the Office shall be under the direct administrative control of the Director.

(6) Anything authorised or required to be done by the Director may be done by any officer who is authorised generally or specifically in writing by the Director.

(7) The Office shall establish its own procedures.

5. Functions of Director

(1) The Director shall, subject to the other provisions of the Act, -

(a) investigate any allegation or suspicion of restrictive business practices or any matter relating to such allegation or suspicion -

(i) either on his own initiative; or

(ii) on receiving complaints or information which give rise to such suspicion;

(b) gather, process and evaluate information relating to such allegation or suspicion; and

(c) take such measures as may be necessary to prevent or terminate any restrictive business practices, including the issue of directives and proposals for remedial action.

(2) The Director shall, before starting an investigation into an allegation or suspicion of restrictive business practice, apprise the Minister, in writing, of the matter.

(3) Where the Director has referred any matter under section 15(5) to the Tribunal, he shall provide the Tribunal with any information relating to that matter.

(4) The Director shall arrange for the dissemination of any information and reports that he may consider necessary for the discharge of his duties under this Act.

6. Competition Appeal Tribunal

(1) There is established for the purposes of this Act, a Competition Tribunal which shall consist of –

(a) a Chairperson and a Vice Chairperson, each of whom shall be either a barrister or an attorney-at-law of not less than 10 years' standing, appointed by the Prime Minister after consultation with the Leader of Opposition; and

- (b) 4 other members who shall be persons knowledgeable in consumer affairs, business, finance, economics, or management, appointed by the Minister;

for a period not exceeding 2 years, which shall be renewable, and on such other terms and conditions as the Prime Minister or the Minister, as the case may be, thinks fit.

(2) The Tribunal shall give such directions as it deems fit for the purpose of preventing or terminating such practice, including a direction that any line of business or area of activity of any person engaging in such practice, be separated and carried out by another person.

(3) For the purposes of hearing and determining any matter under this Act, the Tribunal shall consist of the Chairperson or, where the Chairperson is unable to sit, the Vice-Chairperson, and not less than 2 members.

(4) There shall be a Registrar of the Tribunal who shall be a public officer.

(5) The Minister may designate such public officers as he thinks fit to assist in the conduct of the business of the Tribunal.

(6) The members of the Tribunal shall be paid such fees as the Minister may approve.

7. Proceedings of the Tribunal

(1) The Tribunal shall sit at such place and time as the Chairperson shall determine.

(2) Subject to the provisions of this Act, the Tribunal –

- (a) shall establish its own procedures;
- (b) shall act expeditiously, taking into account the interests of the parties;
- (c) may make such orders for requiring the attendance of persons and the production of articles or documents, as it thinks expedient or necessary;
- (d) may act in an informal manner; and
- (e) may take evidence on oath and, for that purpose, administer oaths.

(3) For the purposes of hearing and determining any matter under this Act, the Tribunal may request the Director or any public officer or other person to be present and produce any document or evidence that may be required.

(4) The directions of the Tribunal shall be given in writing together with an account of the reasons for its decision.

(5) The directions of the Tribunal shall be published in the Government Gazette.

(6) Notwithstanding any other enactment, any documents produced before the Tribunal shall be exempt from registration and stamp duties.

8. Competition Advisory Council

(1) There is established for the purposes of this Act, a Competition Advisory Council which shall consist of –

- (a) a Chairperson appointed by the Minister;
- (b) a representative of the Ministry responsible for commerce;
- (c) the Director or his representative;
- (d) a representative of the Attorney-General's Office;
- (e) a representative of the Mauritius Chamber of Commerce and Industry;
- (f) a representative of the Joint Economic Council;
- (g) 2 representatives of consumer organisations; and
- (h) not more than 5 members who shall be persons knowledgeable in consumer affairs, business, finance, law, public affairs or economics appointed by the Minister.

(2) The Chairperson and members of the Council shall be paid such fees as the Minister may approve.

(3) The Council shall establish its own procedures.

(4) The Council shall sit at least 4 times in a year, provided that not more than 3 months shall elapse between any 2 meetings.

- (5) Every member shall hold office for a period of not less than 2 years.

9. Objects of the Council

The objects of the Council shall be to –

- (a) advise the Minister on matters relating to restrictive business practices with emphasis on consumer protection;
- (b) promote activities to raise the awareness of the business community and consumers on competition and related matters;
- (c) maintain effective communication with the business community and consumers' associations; and
- (d) promote research in emerging trends in the field of fair competition and best business practices.

PART III

RESTRICTIVE BUSINESS PRACTICES

10. Monopoly situation

(1) For the purposes of this Act, and subject to subsection (2), a monopoly situation exists in relation to the supply or acquisition of goods or services of any description where competition is non-existent or where the enterprise enjoys a dominant position in a given market.

(2) In determining whether a monopoly situation exists under subsection (1), account shall be taken of the availability of substitutable goods or services and all nearby competitors to which consumers could turn in the short term.

(3) Subsection (1) does not apply to goods and services listed in the Second Schedule.

(4) For the purposes of this Act, a "dominant position" means an ability to influence unilaterally price or output of goods or services in a given market.

11. Abuse of monopoly situation

(1) Subject to subsection (2), an abuse of monopoly situation occurs where an enterprise-

- (a) which is in the position defined under section 10; and

- (b) by itself or together with other enterprises -
 - (i) acts or behaves in such a manner as to unduly limits the ability of other persons to supply or acquire goods or services of the same description; and
 - (ii) such acts or behaviour either have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy, or are, or are likely to be, detrimental to the interests of consumers.

which -

- (2) For the purposes of subsection (1), any act or behaviour
 - (a) directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions such as below-cost pricing;
 - (b) limits supply, production, markets or technical development to the prejudice of consumers;
 - (c) amounts to applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them in a competitive disadvantage; or
 - (a) makes the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of the contracts,

shall be taken into consideration in determining whether an abuse of monopoly situation has arisen.

12. Collusive agreements

- (1) Where, under any agreement-
 - (a) the parties acquire or supply goods or services of the same description, the object of which is, in any way, to -
 - (i) fix the selling or purchase prices of the goods or services; or
 - (ii) share markets or sources of supply; or

- (iii) restrict the supply of the goods or services to, or the acquisition of them from, any person; and
- (b) the effect of which significantly prevents, restricts or distorts competition,

that agreement shall be regarded as a collusive agreement.

(2) Subject to subsection (3), any agreement, or provision thereof, which amounts to a collusive agreement, is prohibited and void.

(3) Any agreement of the classes specified in the Third Schedule shall not be considered as a collusive agreement.

13. Anti-competitive agreements

(1) For the purposes of this Act, and subject to subsection (2), any agreement or part thereof -

- (a) whereby the parties to the agreement or as a result of which such parties may supply or acquire a substantial share of the market of goods or services of same description; and
- (b) the object or effect of which is to significantly prevent, restrict or distort competition.

shall be considered as an anti-competitive agreement.

(2) The Minister may, in the public interest or where he is satisfied that such an agreement is beneficial to the consumers, exempt any agreement from the provisions of this section.

14. Bid-rigging

(1) Subject to subsection (2), no person shall enter into an agreement whereby one party –

- (a) agrees not to submit a bid or tender in response to an invitation for bids or tenders; or
- (b) agrees upon the price, terms or conditions of a bid or tender to be submitted in response to such a call or request.

(2) This section does not apply to –

- (a) an agreement to which the only parties are interconnected bodies corporate; or
- (b) an agreement the terms of which are made known to the person making the invitation for bids or tenders at or before the time when any bid or tender is made by a party to the agreement.

(3) A person who contravenes sub-section (1) shall commit an offence and, on conviction, shall be liable to a fine not exceeding 500,000 rupees or to imprisonment for a term not exceeding 5 years.

(4) Where the Director is satisfied that any person has contravened section 14, he shall refer the matter to the Police.

PART IV

CONTROL OF RESTRICTIVE BUSINESS PRACTICES

15. Undertakings and Directions

(1) Nothing in this section shall be construed as preventing the Director from accepting an undertaking from an entity under investigation in the course of or before the completion of an enquiry.

(2) Where an investigation has revealed -

- (a) the existence of an abuse of a monopoly situation;
- (b) the existence of an anti-competitive agreement; or
- (c) that there has been or is a breach of the prohibition to enter into a collusive agreement,

the Director may accept an undertaking from the person he considers appropriate, on such terms and conditions as he may deem fit, to prevent or terminate such restrictive business practice, including a condition that any line of business or area of activity of any person engaging in such practice, be separated and carried out as provided for in section 6(2).

(3) Any undertaking shall set out the manner in which such restrictive business practices will be prevented or terminated.

(4) Any undertaking accepted by the Director shall be binding on the person the Director considers appropriate.

(5) Where, following an investigation, the Director is satisfied that -

- (a) no undertaking has been made;
- (b) any undertaking given does not satisfactorily spell out the manner in which such restrictive business practices is to be prevented or terminated or is not acceptable for any other reasons; or
- (c) an undertaking accepted is not being complied with,

he shall refer the matter to the Tribunal.

(6) Where the Director has referred a matter to the Tribunal, the Tribunal shall, after hearing the parties, give a determination coupled with such directions as may be necessary to resolve the matter.

(7) The Director shall monitor compliance with any undertaking and direction.

(8) Where, after an undertaking or direction made under this section, any person is of the opinion that there has been a material change of circumstances, he may apply to the Director or Tribunal, as the case may be, for a variation of the undertaking or direction.

(9) Where the Director is satisfied that, subsequent to an undertaking or direction, there has been a material change of circumstances, he may -

- (a) accept a variation to an undertaking or release a person from that undertaking; or
- (b) refer the matter the Tribunal for a variation or termination of that direction.

(10) Where a matter is referred to the Tribunal under subsection (8) or (9)(b) it may, where it is satisfied that there has been such a material change in circumstances, vary or terminate the direction.

(11) Where a person fails to comply with a direction, the Tribunal may, on an application by the Director, hear, determine and -

- (a) make such order as it thinks fit to secure compliance with the direction; and
- (b) order that the person shall bear all costs and expenses of the application;

- (c) consider the person as having committed an offence of contempt and refer the matter to the Police.

(12) The Director shall, within 21 days of -

- (i) any undertaking, variation or release thereof;
- (ii) direction, variation or termination thereof,

arrange for its publication.

(13) Any person aggrieved by the decision of the Director under section 5 (1) (c) shall appeal to the Appeal Tribunal within 30 days in such form and manner as may be prescribed.

16. Criteria for control of restrictive business practices

The Director or the Tribunal, as the case may be, shall, for the purposes of section 15, have regard to –

- (a) the desirability of maintaining and encouraging competition and the benefits to be gained in respect of the price, quantity, variety and quality of goods and services;
- (b) whether the effects of any absence, prevention, restriction or distortion of competition are outweighed by any specific benefits in respect of –
 - (i) the safety of goods and services;
 - (ii) the efficiency with which goods are produced, supplied or distributed or services are supplied or made available; or
 - (iii) the development and use of new and improved goods and services and means of production and distribution; and
- (c) the extent to which any benefits have been, are or are likely to be shared by consumers and business in general.

17. Powers of Minister

(1) The Director shall, where he decides to exercise any of his powers under this Act to accept undertakings or to refer any matter to the Tribunal, inform the Minister in writing.

(2) Where the Minister considers that it is not in the public interest that the Director should accept any undertaking or refer any matter to the Tribunal, he may, within 21 days of receiving the information under subsection (1), give such instructions to the Director as he may deem necessary.

(3) Any instruction given by the Minister under this Act shall be in writing.

18. Disclosure of interest

(1) Where any member of the Tribunal or any person assisting the Tribunal has any direct or indirect interest in any matter under consideration at a meeting, he shall, as soon as practicable after the commencement of the meeting, disclose his interest and shall not, unless the Tribunal directs otherwise, take part in the discussion relating to that matter.

(2) Any disclosure of interest made under this section shall be recorded in the minutes of the meeting at which it is made.

19. Appeals

(1) Any person aggrieved by a determination of the Tribunal as being erroneous in point of law may within 21 days of the decision, appeal by way of case stated to the Supreme Court.

(2) An appeal under this section shall be prosecuted in the manner provided by rules made by the Chief Justice under section 198 of the Courts Act.

PART V

INVESTIGATIONS AND INQUIRIES

20. Investigation powers of Director

- (1) The Director may, in writing, require -
- (a) any person whose business is being investigated to attend, at a specified time and place, and answer questions or otherwise furnish information or produce such documents as may be required with respect to any matter relevant to an investigation by him;
 - (b) any public officer to furnish information or to produce any document in his custody or under his control which he is not prevented by any other law from disclosing.

(2) The Director may take copies or extracts from any document produced under subsection (1) and may require the person producing it to give any necessary explanation relating to such document.

(3) Where material to which an investigation relates consists of information stored in a computer, disc, cassette, or on microfilm, or preserved by any mechanical or electronic device, the request from the Director shall be deemed to require the person named therein to produce or give access to it in a form in which it can be taken away and in which it is visible and legible

(4) A person required to attend and answer questions or otherwise furnish information or to produce any specified documents or any documents of a specified class shall not, without reasonable excuse, refuse or fail to answer a question or furnish information or produce a document or class of documents.

(5) Subject to subsection (6), it shall be a reasonable excuse, for the purposes of subsection (4), for a person to refuse or fail to answer a question put to him or to refuse or fail to produce a document or a class of documents that he was required to produce, where the answer to the question or the production of the document or class of documents might tend to incriminate him.

(6) It shall not be a reasonable excuse, for the purposes of subsection (4), for a person to refuse or fail to answer a question put to him or to refuse or fail to produce a document or a class of documents that he was required to produce, where the answer to the question or the production of the document or class of documents might tend to incriminate him and where the Director of Public Prosecutions has given to the person an undertaking in writing that any answer given or document or class of documents produced will not be used in evidence in any proceedings against him for an offence other than proceedings in respect of falsity of evidence given by the person.

21. Entry and search

(1) Subject to subsection (2), the Director may, for the purposes of this Act, designate any officer to –

- (a) enter and search any premises and take possession of any specified documents;
- (b) take copies of any such documents;
- (c) require any person to provide an explanation of any such documents or to state where they may be found;

- (d) require any information which is in a computer and is accessible from the premises, to be produced in a form in which it is legible and in which it can be taken away;
 - (e) seize and detain item which may be required as evidence.
- (2) No person referred to in subsection (1) shall enter and search any premises without a warrant signed by a magistrate.
- (3) A magistrate may issue a warrant if he is satisfied –
- (a) that the Director has reasonable grounds for suspecting that there are on any premises documents which he or the Tribunal has power to require to be produced and that those documents have not been produced following a request; or
 - (b) that the Director has reasonable grounds for suspecting that if they were required to be produced, they would be altered, suppressed or disposed of.
- (4) Where a magistrate is satisfied that the Director has reasonable grounds to believe that a person, in executing the warrant, has been or will be refused access to any premises or document, the magistrate may direct a police officer to take such steps as are reasonably necessary to enter the premises and to enable the warrant to be executed.
- (5) The owner, occupier or person in charge of any premises where an authorised officer enters pursuant to a warrant under this section shall provide the officer with all reasonable facilities and assistance in the exercise of his powers.

PART VI

MISCELLANEOUS

22. Annual reports by Director

(1) The Director shall, not later than 6 months after the end of each calendar year, make a report to the Minister on his activities and the activities of the Council during that year.

(2) The Minister shall lay a copy of the report before the National Assembly.

23. Disclosure of information

(1) Subject to subsection (2), no information with respect to any particular business or to the affairs of an individual, which has been obtained under or by virtue of any of the provisions of this Act, shall be disclosed so long as that business continues to be carried on or during the lifetime of that individual.

- (2) Subsection (1) does not apply to any disclosure of information –
- (a) made with the consent of the person carrying on the business or the individual concerned;
 - (b) made for the purpose of facilitating the performance of any functions of the Director, the Tribunal, or the Minister under this Act or for the purpose of any proceedings under this Act;
 - (c) made in connection with the investigation of any criminal offence; or
 - (d) made for the purpose of facilitating the performance of any functions which the Minister may, after consulting the Director and the Council, specify in regulations.

(3) A person who contravenes subsection (1) shall commit an offence and, on conviction, be liable to a fine not exceeding 200,000 rupees.

24. Protection of members and officers

No liability, civil or criminal, shall attach to any member or officer in respect of any act which any one of them has done or has omitted to do in good faith in the execution or purported execution of his functions under this Act.

25. Offences

- (1) Any person who –
- (a) fails without reasonable excuse to comply with a requirement imposed on him under this Act;
 - (b) in response to a requirement, or otherwise in connection with any of the functions of the Director or the Tribunal under this Act, gives to the Director or Tribunal information which he knows is false or misleading in a material particular, or recklessly gives to the Director or the Tribunal information which is false or misleading in a material particular;

- (c) knowing of the making of a requirement for the production of a document, alters, suppresses or disposes of it, or causes it to be altered, suppressed or disposed of;
- (d) obstructs the execution of a warrant issued under section 21;
- (e) refuses to take an oath before the Tribunal;
- (f) fails to answer fully and satisfactorily to the best of his knowledge and belief any question put to him by the Director or the Tribunal in the exercise of powers under sections 7 and 20; or
- (g) insults, interrupts or otherwise commits any contempt of the Tribunal,

shall commit an offence.

(2) Any person guilty of an offence under this section is liable on conviction to a fine not exceeding 500,000 rupees or to imprisonment for a term not exceeding 2 years or both.

(3) Notwithstanding -

- (a) section 114(2) of the Courts Act; and
- (b) section 72(5) of the District and Intermediate Courts (Criminal Jurisdiction) Act, a Magistrate shall have jurisdiction to try an offence under this Act or any regulations made thereunder and may impose any penalty provided under this Act.

26. Regulations

(1) The Minister may make such regulations as he deems necessary for the purpose of this Act.

(2) Any regulations made under this section may provide for -

- (i) the amendment of the Schedules;
- (ii) the share of supply or acquisition provided for under sections 10(1) and 13.

(3) Any regulation made under subsection (1) may provide that any person contravening them shall commit an offence and shall, on conviction be

liable to a fine not exceeding 500,000 rupees or to imprisonment for a term not exceeding 2 years.

27. Consequential amendments

Section 6 of the Fair Trading Act is repealed.

28. Commencement

This Act shall come into force on a day to be fixed by Proclamation and different days may be fixed for the coming into operation of different sections.

FIRST SCHEDULE
(section 3(2))

MATTERS EXCLUDED FROM THE ACT

1. Any practice of employers or agreement to which employers are party in so far as it relates to the remuneration, terms or conditions of employment of employees.
2. Any practice or agreement in so far as it relates to the export of goods from Mauritius or the supply of services outside Mauritius.
3. Any agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of laws relating to copyright, design rights, patents or trade marks.
4. Any practice or agreement approved or required under an international agreement to which the State of Mauritius is party.
5. Any practice or agreement expressly required or authorised by an enactment or by any scheme or other instrument made under an enactment.

SECOND SCHEDULE

(section 10)

**GOODS AND SERVICES EXCLUDED FROM PROVISIONS RELATING
TO MONOPOLY SITUATIONS**

1. Aviation and harbour services
2. Broadcasting services
3. Electricity services
4. Financial services
5. Freeport services
6. Information and Communications Technologies services
7. Postal Services other than courier services
8. Goods and services supplied by State enterprises
9. Water, other than water for retail sale

THIRD SCHEDULE

(section 12)

**CLASSES OF AGREEMENT EXCLUDED FROM PROVISIONS
RELATING TO COLLUSIVE AGREEMENTS**

Agreements between members of, and recommendations to members by, a professional or trade association.