

THE COMPETITION BILL
(No. XXV of 2007)

Explanatory Memorandum

The object of this Bill is to safeguard and promote competition in Mauritius by –

- (a) creating a comprehensive competition regime to be administered by an independent Competition Commission;
- (b) prohibiting the most serious anti-competitive restrictive agreements;
- (c) providing for the investigation and control, where necessary, of other types of restrictive agreements, and of monopoly and merger situations;
- (d) promoting the role, and understanding, of competition in enhancing efficiency and adaptability in the economy.

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26 October 2007

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A BILL

To set up a Competition Commission, to make better provisions for the regulation of competition and for matters incidental thereto and connected therewith

ENACTED by the Parliament of Mauritius, as follows –

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Competition Act 2007.

2. Interpretation

(1) In this Act -

“agreement” means any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Mauritius or in a part of Mauritius, and includes an oral agreement, a decision by an association of enterprises, and any concerted practice;

“assets”, in relation to an enterprise, means –

- (a) all the tangible assets of the enterprise, including its shares, other financial securities and brands;
- (b) all the intangible assets of the enterprise, including its goodwill, intellectual property rights and know-how;

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

“collusive agreement” means an agreement referred to in section 41, 42 or 43;

“Commission” means the Competition Commission established under section 4;

“Commissioner” means a person appointed as such under section 7;

“company” means a body corporate incorporated, with or without limited liability, in any part of the world;

“concerted practice” means a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them;

“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 information recorded in written, electronic or any other form, together with access to the technology enabling information in electronic form to be retrieved;

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

“Executive Director” means the person appointed as such under section 20 or a person fulfilling the functions of that office;

“goods” includes buildings and other structures;

“group” in relation to an enterprise that is a company, means that company, any other company that is its holding company or subsidiary and any other company that is a subsidiary of the holding company;

“horizontal agreement” means 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;

“market” means a market for goods or services in Mauritius or part of Mauritius;

“Minister” means the Minister to whom responsibility for the subject of commerce is assigned;

“monopoly situation” means the situation that exists in the circumstance specified in section 46;

“premises” includes land, any building, structure, vehicle, vessel, aircraft or container;

“price” includes any charge or fee;

“prohibited agreement” means an agreement prohibited by virtue of the application of section 41, 42 or 43;

“publish” includes on-line publication;

“regulator” means a regulatory body or agency, or a Government Department that exercises functions of prudential or economic regulation on the basis of statutory powers;

“resale price maintenance” means 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;

“restrictive business practice” means any situation falling within the terms of 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 meaning assigned to it in the Companies Act 2001;

“supply” includes, in relation to -

(a) goods, the supply or re-supply, by way of sale, exchange, lease, hire or hire-purchase; and

(b) services, the provision by way of sale, grant or conferment of the services;

“undertaking” means an obligation or commitment as provided under section 63 given in writing by an enterprise to, and accepted by, the Commissioners, to prevent or terminate a restrictive business practice;

“vertical agreement” means 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) 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 of Act

(1) Any reference in this Act to the supply of –

- (a) goods, shall be construed as the supply of goods in Mauritius;
- (b) services, shall be construed as the supply of services in or from Mauritius.

(2) Save as otherwise provided for in this section or elsewhere in this Act, this Act shall apply to every economic activity within, or having an effect within, Mauritius or a part of Mauritius.

(3) This Act shall bind the State to the extent that the State engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market in Mauritius which is open to participation by other enterprises.

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

PART II – THE COMPETITION COMMISSION

Sub-Part I – Establishment, functions and powers of the Commission

4. Establishment of Commission

(1) There is established for the purposes of this Act, a Commission which shall be known as the Competition Commission.

(2) The Commission shall be impartial and shall perform its functions without fear, favour or prejudice.

(3) Subject to the provisions of this Act, the Commission may regulate its own proceedings.

(4) The Commission shall be a body corporate.

5. Functions of Commission

The Commission shall -

- (a) conduct, as required, any hearings with interested persons or parties;
- (b) determine whether a restrictive business practice is occurring or has occurred;

- (c) determine such penalty or other remedy as it thinks fit to impose in response to an identified anti-competitive practice and what action an enterprise should take to ensure compliance with the penalty or remedy.

6. Powers of Commission

The Commission shall have such powers as are necessary to enable it to effectively discharge its functions and may, in particular -

- (a) issue orders and directions in accordance with this Act;
- (b) impose financial penalties or remedies on any enterprise which conducts its business in breach of this Act;
- (c) enter into such contracts as may be necessary or expedient for the purpose of discharging its functions under this Act;
- (d) co-operate with other competition authorities in other countries entrusted with functions similar to those of the Commission;
- (e) impose such charges or fees as may be required under this Act or regulations made under it.

Sub-Part II – The Commissioners

7. Appointment of Commissioners

(1) The Commission shall consist of a Chairperson, a Vice-Chairperson and 3 other Commissioners who shall be appointed by the President on the advice of the Prime Minister given after consultation with the Leader of the Opposition.

(2) The Commissioners referred to in subsection (1) shall be persons from the public sector, private sector and academia, appointed by virtue of their qualifications and experience in law, economics, accountancy, or commerce.

(3) Subject to the provisions of this Act, the Chairperson, Vice-Chairperson and every other Commissioner shall be appointed on such terms and conditions as the President, on the advice of the Prime Minister, may determine.

8. Term of office

(1) Every Commissioner shall, subject to subsections (2) and (3) hold office for a period of 5 years.

(2) A Commissioner may be re-appointed but shall not serve for more than 2 consecutive terms.

(3) A Commissioner may resign from office at any time by giving not less than one month's written notice to the President.

9. Disclosure of assets and liabilities

A Commissioner shall –

- (a) not later than 30 days after the date of his appointment;
- (b) not later than 30 June in every year until he ceases to be a member of the Commission; and
- (c) not later than 30 days after the termination of his appointment,

deposit with the Independent Commission Against Corruption a declaration of his assets and liabilities in relation to himself, his spouse and children, in such form as may be approved by the Independent Commission Against Corruption.

10. Disqualification

No person shall be appointed or shall continue to hold office as a Commissioner if he -

- (a) has, in terms of any law in any country -
 - (i) been adjudged or otherwise declared insolvent or bankrupt and has not been rehabilitated or discharged;
 - (ii) made an assignment to, or arrangement or composition with, his creditors, which has not been rescinded or set aside;
- (b) has been convicted -
 - (i) in Mauritius, of a criminal offence involving fraud or dishonesty; or
 - (ii) outside Mauritius, of an offence which, if committed in Mauritius, would have been an offence involving fraud or dishonesty;
- (c) is a member of the National Assembly or a local authority.

11. Removal and suspension from office

(1) Subject to subsections (2) to (5), a Commissioner shall be removed from his office where-

- (a) he has acted improperly in the discharge of his functions as Commissioner;
- (b) he becomes disqualified under section 10 to hold office as a Commissioner;
- (c) he has absented himself from 3 consecutive meetings of the Commission without reasonable excuse;
- (d) he becomes physically or mentally incapable of performing his duties as a Commissioner.

(2) Where the Prime Minister considers that the question of removing a Commissioner ought to be investigated, he shall appoint a Disciplinary Committee which shall be presided by a person who holds or has held office as a Judge of the Supreme Court and 2 other members.

(3) The Disciplinary Committee appointed under subsection (2), shall enquire into the matter and shall forward its report to the Prime Minister with a recommendation as to whether a Commissioner ought to be removed under this section.

(4) Where the Disciplinary Committee recommends that a Commissioner ought to be removed, the Commissioner shall be removed from office by the President acting on the advice of the Prime Minister.

(5) The Prime Minister may, in writing, suspend a Commissioner from office where -

- (a) the question of removing a Commissioner has been referred to a Disciplinary Committee under this section; or
- (b) criminal proceedings are instituted or are contemplated against a Commissioner for an offence in respect of which a sentence of imprisonment may be imposed.

12. Vacancy in office of Commissioner

The office of Commissioner shall become vacant where a Commissioner -

- (a) is removed from office under section 11;
- (b) dies or vacates his office.

13. Filling of vacancies

(1) Where a vacancy occurs in the office of Commissioner, the President, on the advice of the Prime Minister given after consultation with

the Leader of the Opposition, shall appoint a person to replace the Commissioner.

(2) Any person appointed under subsection (1) shall hold office for the remainder of the term for which the Commissioner who died or vacated his office was appointed.

14. Employment after vacation of or removal or suspension from office

Where a Commissioner has vacated his office, or has been removed or suspended from office, he shall not take employment in, or be employed by, an enterprise which has been subject to an investigation under Part IV within a period of 3 years from the date of the said vacation of, or removal or suspension from, office, as the case may be.

15. Conduct of Commissioners

- (1) No Commissioner shall -
 - (a) engage in any activity that may undermine the integrity of the Commission; or
 - (b) participate in any decision concerning any matter in respect of which he has a financial interest, or any other personal interest, whether directly or indirectly.
- (2) Every Commissioner who -
 - (a) has any direct or indirect financial interest in any matter to be considered by the Commission shall, immediately after the relevant facts have come to his knowledge, disclose in writing the nature of the interest to the Minister and shall not be present during any deliberation of, or take part in any decision of, the Commission with respect to that matter;
 - (b) has or acquires, in any enterprise in Mauritius or elsewhere, any direct or indirect financial interest, shall inform the Minister in writing of such fact.

Sub-Part III – Meetings, decisions and advice of the Commission

16. Meetings of Commission

(1) The Commission shall meet as often as is necessary or expedient for the discharge of its functions and, in any case, at least once every month and at such time and place as the Chairperson may determine.

(2) (a) Subject to paragraph (b), every meeting of the Commission shall be called by the Chairperson.

(b) Where at least 3 Commissioners give notice in writing to the Chairperson to convene a meeting of the Commission for any purpose specified in the notice, the Chairperson shall, within 3 days of the receipt of that notice, convene a meeting for that purpose.

(3) At any meeting of the Commission, 3 Commissioners shall constitute a quorum.

(4) In the absence of the Chairperson at a meeting of the Commission, the Vice-Chairperson shall preside, and in the absence of both the Chairperson and the Vice-Chairperson, the Commissioners present shall elect from among themselves a member to preside at that meeting, and the member so elected shall, in relation to that meeting, exercise the functions and have all the powers of the Chairperson.

17. Decisions of Commission

Every decision at a meeting of the Commission shall be by a majority of the members present and voting and, in the event of an equality of votes, the Chairperson shall have a casting vote.

18. Duty to give reasons

The Commission shall prepare and publish its decisions together with the reasons for such decisions.

19. Advice of Commission to Minister

The Commission may advise the Minister on any action taken or proposed to be taken by the State or any public body that may adversely affect competition in the supply of goods and services.

Sub-Part IV – The Executive Director and other staff of the Commission

20. Appointment of Executive Director

(1) There shall be a chief executive officer of the Commission who shall be -

- (a) known as the Executive Director;
- (b) appointed by the President, on the advice of the Prime Minister given after consultation with the Leader of the Opposition.

(2) The terms and conditions of the appointment of the Executive Director shall be determined by the President on the advice of the Prime Minister.

(3) Where there is a vacancy in the post of the Executive Director or the Executive Director is suspended or physically or mentally

incapable of performing his duties, the President, on the advice of the Prime Minister, may appoint another person to act as Executive Director or to perform his duties.

21. Disclosure of assets and liabilities

The Executive Director shall –

- (a) not later than 30 days after the date of his appointment;
- (b) not later than 30 June in every year while he is in office; and
- (c) not later than 30 days after his leaving, or removal from, office,

deposit with the Independent Commission Against Corruption a declaration of his assets and liabilities in relation to himself, his spouse and children, in such form as may be approved by the Independent Commission Against Corruption.

22. Disqualification

(1) No person shall be appointed or shall continue to hold office as Executive Director if he -

- (a) has, in terms of any law in any country -
 - (i) been adjudged or otherwise declared insolvent or bankrupt and has not been rehabilitated or discharged;
 - (ii) made an assignment to, or arrangement or composition with, his creditors, which has not been rescinded or set aside;
- (b) has been convicted -
 - (i) in Mauritius, of a criminal offence involving fraud or dishonesty; or
 - (ii) outside Mauritius, of an offence which, if committed in Mauritius, would have been an offence involving fraud or dishonesty;
- (c) is a member of the National Assembly or a local authority.

23. Removal and suspension from office

(1) Subject to subsections (2) to (5), the Executive Director shall be removed from office where -

- (a) he has acted improperly in the discharge of his functions as Executive Director;
- (b) he becomes disqualified under section 22 to hold office as Executive Director;
- (c) he becomes physically or mentally incapable of performing his duties as Executive Director.

(2) Where the Prime Minister considers that the question of removing the Executive Director ought to be investigated, he shall appoint a Disciplinary Committee which shall be presided by a person who holds or has held office as a Judge of the Supreme Court and 2 other members.

(3) The Disciplinary Committee appointed under subsection (2), shall enquire into the matter and shall forward its report to the Prime Minister with a recommendation as to whether the Executive Director ought to be removed under this section.

(4) Where the Disciplinary Committee recommends that the Executive Director ought to be removed, the Executive Director shall be removed from office by the President acting on the advice of the Prime Minister.

(5) The Prime Minister may, in writing, suspend the Executive Director from office where -

- (a) the question of removing the Executive Director has been referred to a Disciplinary Committee under this section; or
- (b) criminal proceedings are instituted or are contemplated against the Executive Director for an offence in respect of which a sentence of imprisonment may be imposed.

24. Vacancy in office of Executive Director

The office of Executive Director shall become vacant where the Executive Director -

- (a) is removed from office under section 23;
- (b) dies or vacates his office.

25. Employment after vacation of, or removal or suspension from, office

Where the Executive Director has vacated his office, or has been removed or suspended from office, he shall not take employment in, or be employed by, an enterprise which has been subject to an investigation

under Part IV within a period of 3 years from the date of the said vacation of, or removal or suspension from, office, as the case may be.

26. Staff of Commission

(1) The Commission may employ on such terms and conditions as it thinks fit, such members of staff as it deems necessary for the proper discharge of the functions of the Commission and of the Executive Director under this Act.

(2) Every member of the staff of the Commission shall be under the administrative control of the Executive Director.

(3) Notwithstanding subsection (1), the Commission may, with the approval of the Public Service Commission, recruit a public officer.

(4) Where the Commission recruits a public officer under subsection (3), that officer shall be granted leave without pay from his service for the duration of his contract of employment with the Commission.

27. Appointment of inspectors and consultants

(1) The Commission may, for the proper discharge of its functions under this Act -

- (a) designate any of its employees or appoint any other suitable person, to be an inspector for the purposes of this Act;
- (b) appoint such other persons to be consultants to advise, or perform services, for the Commission.

(2) The designation or appointment of any person under subsection (1) shall be subject to such terms and conditions as the Commission thinks fit.

(3) Where any person appointed or designated by the Commission under subsection (1) has any interest, whether direct or indirect, in any enterprise in Mauritius or abroad, he shall forthwith or as soon as practicable after the relevant facts have come to his knowledge, disclose in writing the nature of the interest to the Commission.

28. Disclosure of interest

(1) (a) The Executive Director shall, within 7 days of his appointment, submit to the Commission a written statement of any interest he holds or has acquired in any enterprise which is subject to the control of the Commission.

(b) Every member of the staff of the Commission shall, within 7 days of his appointment, submit to the Commission a written

statement of any interest he holds or has acquired in any business or enterprise which is subject to the control of the Commission.

(2) Where the Executive Director or any member of the staff acquires, after his appointment, an interest in any enterprise, he shall, within 7 days of the acquisition, give written notice of the nature of the interest to the Commission.

29. Disclosure of assets and liabilities

A member of the staff of the Commission shall –

- (a) not later than 30 days after the date of his appointment;
- (b) not later than 30 June in every year while he is in office; and
- (c) not later than 30 days after his leaving, or removal from, office ,

deposit with the Independent Commission Against Corruption a declaration of his assets and liabilities in relation to himself, his spouse and children, in such form as may be approved by the Independent Commission Against Corruption.

30. Functions and powers of Executive Director

The Executive Director shall -

- (a) keep the operation of markets in Mauritius and the conditions of competition in those markets under constant review;
- (b) either on his initiative, or on the complaint of any person, open an investigation into a suspected breach of the prohibition of those restrictive agreements that fall within sections 41 to 43;
- (c) either on his initiative or on the complaint of any person open an investigation on a matter that is subject to review under sections 44 to 48;
- (d) gather information required for the assessment of each case on the basis of the powers conferred by Part IV;
- (e) publish the reasoned decisions of the Commission once the latter has made a determination;
- (f) monitor compliance with a penalty or remedy imposed by the Commission and take any step required to enforce compliance with this Act;

- (g) publish and otherwise promote and advertise the provisions of this Act and the activities of the Commission;
- (h) undertake general studies on the effectiveness of competition in individual sectors of the economy in Mauritius;
- (i) liaise and exchange information, knowledge and expertise with competition authorities in other countries entrusted with functions similar to those of the Commission; and
- (j) advise the Minister on international agreements relevant to competition matters and to this Act.

31. Delegation of powers by Executive Director

The Executive Director may delegate to any staff of the Commission, such of his functions and powers under this Act as may be necessary to assist in the effective management of the Commission.

32. Independence of Executive Director

Where the Executive Director exercises his power to investigate in a case involving a restrictive business practice, he shall not be subject to the direction, or control of, any other person or authority.

Sub-Part V – Financing and Accountability

33. General Fund

- (1) The Commission shall establish a General Fund -
 - (a) into which all monies received shall be paid; and
 - (b) out of which -
 - (i) all payments required to be paid by the Commission shall be effected;
 - (ii) shall be paid into the Capital Fund established under the Finance and Audit Act, such surplus money not required for the purposes of subparagraph (i).

(2) The Commission may, in furtherance of its objects and in accordance with the terms and conditions upon which its funds may have been obtained or derived, charge to the General Fund all remunerations, allowances, salaries, grants, fees, pensions, superannuation fund attributions, gratuities, working expenses and all other charges properly arising, including any necessary capital expenditure.

- (3) The Commission shall derive its income from -

- (a) any sum appropriated from the Consolidated Fund; and
- (b) any such source as may be approved by the Minister.

34. Accounts and audit

(1) The Commission shall, not later than 3 months before the end of each financial year, make and submit to the Minister for approval, estimates of the income and expenditure of the Commission for the ensuing year.

(2) In signifying his approval, the Minister may make comments of a general policy nature regarding the estimate.

(3) The Commission shall, within 3 months of the end of the preceding financial year, submit to the Director of Audit for auditing, its statements of accounts for that year.

(4) The audited accounts of the Commission together with the report of the Director of Audit shall be submitted to the Minister not later than 9 months after the end of the financial year.

(5) Upon receipt of the audited accounts and the report referred to in subsection (4), the Minister shall, as soon as practicable, lay a copy of the accounts and the report before the National Assembly.

(6) For the purposes of this section, the period extending from the commencement of this Act to 30 June next following shall be deemed to be the first financial year of the Commission.

(7) Subsection (1) shall not apply to the first financial year of the Commission.

35. Annual report

(1) The Commission shall, not later than 3 months after the closure of a financial year, issue an annual report on its activities and audited accounts for that financial year.

(2) The annual report shall, as far as possible, give an account of –

- (a) the investigations that were carried out;
- (b) the outcome of investigations carried out; and
- (c) the decision of the Commission in respect of reports submitted by the Executive Director under section 51(2).

(3) The annual report shall be submitted to the Minister to be laid at the first available opportunity before the Assembly.

36. Execution of documents

(1) Subject to subsection (2), all documents shall be deemed to be executed by or on behalf of the Commission if signed by the Executive Director.

(2) Every cheque of the Commission shall be signed by –

(a) the Executive Director; and

(b) another person designated by the Commission.

37. Powers of Minister

(1) The Minister may give written directions of a general character to the Commission relating to any additional public policy factors to which he wishes the Commission to have regard in reaching its determinations.

(2) The Commission may, upon receipt of directions by the Minister under subsection (1), issue a written reply to the Minister.

(3) The directions given by the Minister under subsection (1) and the reply by the Commission, if any, under subsection (2) shall be published in the *Gazette*.

38. Guidelines and procedural rules

(1) The Commission shall, within a period of 6 months of its establishment, publish -

(a) guidelines on the economic and legal analysis which shall be used for the determination of cases under this Act;

(b) guidelines on the principles which shall be used for the determination of penalties or remedies imposed under the Act, and on the manner in which turnover is to be calculated for the purposes of section 59;

(c) procedural rules specifying the procedures which the Commission shall follow when carrying out its functions under the Act.

(2) The Commission may, from time to time, review and publish the revised versions of, its guidelines and procedural rules.

(3) In formulating and publishing the procedural rules, the Commission shall have regard to -

- (a) the principles of natural justice;
- (b) the need for fairness between parties;
- (c) subject to paragraphs (a) and (b), the need for expeditious determination of any matter before the Commission.

39. Limitation of liability

No liability, civil or criminal, shall attach to a Commissioner, the Executive Director or to any other officer for any act done or omitted to be done, in good faith under this Act.

40. Register of complaints

The Executive Director may keep in such form and manner as he may determine a register of complaints which shall be made available for public inspection.

PART III - RESTRICTIVE BUSINESS PRACTICES

Sub-Part I - Collusive agreements

41. Horizontal agreements

(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if -

- (a) it exists between enterprises that supply goods or services of the same description, or acquire goods or services of the same description;
- (b) it has the object or effect of, in any way -
 - (i) fixing the selling or purchase prices of the goods or services;
 - (ii) sharing markets or sources of the supply of the goods or services; or
 - (iii) restricting the supply of the goods or services to, or the acquisition of them from, any person; and
- (c) significantly prevents, restricts or distorts competition.

(2) Any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.

42. Bid rigging

(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if one party to the agreement -

- (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) Subject to subsection (3), any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.

(3) This section shall not apply to 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.

43. Vertical agreements involving resale price maintenance

(1) Subject to subsections (2) and (3), a vertical agreement between enterprises shall, to the extent that it involves resale price maintenance, be prohibited and void.

(2) A supplier or producer may recommend a minimum resale price to a reseller of goods or services provided that the recommendation is not binding.

(3) Where a supplier or producer has recommended a minimum resale price to a reseller of goods and the resale price appears on the goods, the words "recommended price" shall appear next to the resale price.

Sub-Part II – Other restrictive agreements

44. Non-collusive horizontal agreements

A horizontal agreement that is not collusive under section 41 may be reviewed by the Commission where -

- (a) the parties to the agreement together supply 30 per cent or more, or acquire 30 per cent or more, of goods and services of any description on the market; and
- (b) the Commission has reasonable grounds to believe that the agreement has the object or effect of preventing, restricting or distorting competition.

45. Other vertical agreements

A vertical agreement that does not involve resale price maintenance may be reviewed where the Commission has reasonable grounds to believe that one or more parties to the agreement is or are in a monopoly situation that is subject to review under section 46.

Sub-Part III – Monopoly situations

46. Existence of monopoly situation

(1) A monopoly situation shall exist in relation to the supply of goods or services of any description where -

- (a) 30 per cent or more of those goods or services are supplied, or acquired on the market, by one enterprise; or
- (b) 70 per cent or more of those goods or services are supplied, or acquired on the market, by 3 or fewer enterprises.

(2) A monopoly situation shall be subject to review by the Commission where the Commission has reasonable grounds to believe that an enterprise in the monopoly situation is engaging in conduct that -

- (a) has the object or effect of preventing, restricting or distorting competition; or
- (b) in any other way constitutes exploitation of the monopoly situation.

(3) In reviewing a monopoly situation, the Commission shall take into account -

- (a) the extent to which an enterprise enjoys or a group of enterprises enjoy, such a position of dominance in the market as to make it possible for that enterprise or those enterprises to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;
- (b) the availability or non-availability of substitutable goods or services to consumers in the short term;
- (c) the availability or non-availability of nearby competitors to whom consumers could turn in the short term; and
- (d) evidence of actions or behaviour by an enterprise that is, or a group of enterprises that are, a party to the monopoly situation where such actions or behaviour

that 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.

Sub-Part IV – Control of merger situations by the Commission

47. Merger situation

(1) For the purposes of this Act and subject to subsection (2), a merger situation means the bringing together under common ownership and control of 2 or more enterprises of which one at least carries its activities, in Mauritius, or through a company incorporated in Mauritius.

(2) For the purpose of subsection (1), enterprises shall be regarded as being under common control where they are -

- (a) enterprises of interconnected bodies corporate;
- (b) enterprises carried on by 2 or more bodies corporate of which one person has or groups of persons have control; or
- (c) 2 distinct enterprises, one carried on by a body corporate and the other carried on by a person having control of that body corporate.

(3) Any person may be treated as bringing an enterprise under his control where -

- (a) he becomes able to control or materially to influence the policy of the enterprise, but without having a controlling interest in it;
- (b) being already able to control or materially to influence the policy of the enterprise, he acquires a controlling interest in it; or
- (c) being already able materially to influence the policy of the enterprise, he becomes able to control that policy.

(4) Where 2 or more enterprises intend to be in a merger situation, any one of the enterprises may apply to the Commission for guidance as to whether the proposed merger situation is likely to result in a substantial lessening of competition within any market for goods or services.

48. Merger situations subject to review by Commission

A merger situation shall be subject to review by the Commission where -

- (a) all the parties to the merger, supply or acquire goods or services of any description, and will following the merger, together supply or acquire 30 per cent or more of all those goods or services on the market; or
- (b) one of the parties to the merger alone supplies or acquires prior to the merger, 30 per cent or more of goods or services of any description on the market; and
- (c) the Commission has reasonable grounds to believe that the creation of the merger situation has resulted in, or is likely to result in, a substantial lessening of competition within any market for goods or services.

Sub-Part V – Share of supply criteria and assessment of restrictive business practices

49. Share of supply criteria

(1) For the purpose of establishing whether the share of supply criteria set out in sections 44, 45, 46 or 48 are satisfied, the share of the group as a whole is to be used where an enterprise -

- (a) is a subsidiary of a group; or
- (b) is otherwise party to agreements by which enterprises are interconnected within a group.

(2) For the purpose of establishing whether the share of supply criteria set out in sections 44, 45, 46 or 48 are satisfied, the Commission may also take into account any cross-shareholding between or amongst groups.

50. Assessment of restrictive business practices

(1) The Commission shall, in relation to every agreement falling under Sub-Part I of this Part, establish whether, on the facts of the case, the parties to the agreement have infringed the prohibition imposed under that Sub-Part.

(2) When reviewing a matter falling within Sub-Parts II, III and IV of this Part, the Commission shall have regard to 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, and shall first determine whether competition in any market is adversely affected in that, in the case of -

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

- (b) a monopoly situation, the conduct of one or more parties -
 - (i) has the object or effect of preventing, restricting or distorting competition; or
 - (ii) in any other way constitutes exploitation of the monopoly situation, having regard to the factors set out in section 46;
- (c) a merger situation, the creation of a merger situation has resulted, or is likely to result, in a substantial lessening of competition within any market or markets for goods and services.

(3) Where the review of the matters described in subsection (2) leads to a finding by the Commission that there are adverse effects for competition in a particular case, it shall, before deciding on any appropriate remedial action to be taken as provided for under Part VI, consider -

- (a) if any of the offsetting public benefits specified in subsection (4) are present; and
- (b) whether and to what extent the benefits, if they are present, should be taken into account in determining the remedial action to be taken.

(4) A benefit shall be considered for the purposes of subsection (3)(a) if it is shown that the effects of any absence, prevention, restriction or distortion of competition are outweighed by specific gains in respect of -

- (a) the safety of goods and services;
- (b) the efficiency with which goods are produced, supplied or distributed or services are supplied or made available;
- (c) the development and use of new and improved goods and services and in the means of production and distribution; or
- (d) the promotion of technological and economic progress,

and the benefits have been or are likely to be shared by consumers and business in general.

PART IV - INVESTIGATIONS

51. Report to Commission

(1) Where the Executive Director has reasonable grounds to believe that a restrictive business practice is occurring or about to occur, he shall investigate, or cause to be investigated, such restrictive business practice.

(2) Upon completion of an investigation, the Executive Director shall submit his report on the investigation to the Commission.

52. Power of Executive Director to investigate restrictive business practices

(1) The Executive Director may, for the purposes of any investigation under this Act –

- (a) order any person to attend, at a specified time and place, for the purpose of being examined orally in relation to any matter;
- (b) order any person to produce before it any book, document, record or article as may be required with respect to any matter relevant to the investigation, which he is not prevented by any other enactment from disclosing;
- (c) order any person to furnish a statement in writing made on oath or affirmation setting out all information which may be required under the notice.

(2) Every order made under this section shall be in writing and signed by the Executive Director or a member of the staff of the Commission duly authorised in writing by the Executive Director.

(3) A person on whom an order under subsection (1) has been served shall –

- (a) comply with the order;
- (b) attend before the Executive Director in accordance with the terms of the order;
- (c) continue to attend on such other days as may be directed until the examination is complete; and
- (d) answer questions and furnish all information, documents, records or statements, including certified copies thereof, as ordered.

(4) The Executive 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.

(5) 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 Executive 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.

(6) Any person who, without lawful or reasonable excuse, fails to attend a hearing or to produce a document or other material when required to do so under subsection (3) shall commit an offence and shall, on conviction, be liable, in the case of -

- (a) an individual, to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 2 years; or
- (b) a body corporate, to a fine not exceeding 200,000 rupees.

(7) The Executive Director may require evidence at a hearing to be given under oath.

53. Entry and search

(1) Subject to subsection (2), the Executive Director may, for the purposes of this Act -

- (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 items which may be required as evidence.

(2) The Executive Director or any person delegated by him shall not enter and search any premises without a warrant signed by a Magistrate.

- (3) A Magistrate may issue a warrant where he is satisfied –
- (a) that the Executive Director has reasonable grounds for suspecting that there are on any premises documents which it has power to require to be produced and that those documents have not been produced following a request; or
 - (b) that the Executive Director has reasonable grounds for suspecting that the documents required to be produced, would be altered, suppressed or disposed of.

(4) Where a Magistrate is satisfied that the Executive 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 in respect of which an authorised officer enters pursuant to a warrant issued under this section shall provide the officer with all reasonable facilities and assistance in the exercise of his powers.

54. Legal professional privilege

(1) Nothing in this Part shall require a person to disclose or produce information or a document that the person would in an action in a court be entitled to refuse to disclose or produce on the grounds of legal professional privilege.

(2) Notwithstanding subsection (1), a law practitioner shall disclose the name and address of a client to the Executive Director when required to do so by the Executive Director in the exercise of his powers under this Act.

PART V – HEARINGS BEFORE THE COMMISSION

55. Convening of hearings

(1) Upon receipt of a report under section 51, the Commission may, if the party under investigation so requests, convene a hearing at which the Commissioners can hear the views of any person they consider to have a relevant interest in the case.

(2) A minimum of 3 Commissioners shall attend the hearing.

(3) A hearing shall be governed by and be conducted in accordance with rules published by the Commission under section 38.

56. Penalties and directions

(1) The Commission shall not impose a penalty on, or give a direction to, an enterprise, under Part VI, unless it has held a hearing in relation to that enterprise.

(2) Notwithstanding subsection (1), the Commission may impose a penalty or make a direction if the enterprise concerned has elected not to attend a hearing requested by the Commission or has failed to attend a hearing when required to do so by the Commission.

57. Conflict of interests

A Commissioner shall not attend a hearing if the Commissioner has a direct or indirect interest in the outcome of the investigation to which the hearing relates.

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

58. Directions by Commission

(1) Where a restrictive agreement falls within the scope of sections 41, 42 and 43, the Commission may give the enterprise such directions as the Commission considers appropriate to ensure that the enterprise ceases to be a party to the restrictive agreement.

(2) A direction under subsection (1) may, in particular, require the enterprise to terminate or modify the agreement within such period as may be specified by the Commission.

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

59. Financial penalty

(1) The Commission may, in relation to a restrictive agreement falling within the scope of sections 41, 42 and 43, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on the enterprise.

(2) The Commission shall not impose a financial penalty unless it is satisfied that the breach of the prohibition was committed intentionally or negligently.

(3) 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 Mauritius during the period of the breach of the prohibition up to a maximum period of 5 years.

(4) 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.

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

(6) Where a penalty has not been paid within the specified date and -

(a) no appeal against the order was brought under Part VIII; or

(b) an appeal was made but dismissed or withdrawn,

the Commission may apply to the Judge in Chambers for a mandatory order to enforce the payment of the penalty against the enterprise concerned.

60. Directions relating to distortion, prevention or restriction of competition

(1) Where the Commission determines, after review, that an enterprise is a party to a restrictive agreement falling within the terms of section 44 or 45 or that it is a party to a monopoly situation falling within the terms of section 46, and that -

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

(b) in relation to the monopoly situation, any conduct of the enterprise -

(i) has the object or effect of preventing, restricting or distorting competition, or

(ii) in any other way, constitutes exploitation of the monopoly situation,

the Commission may give the enterprise such directions as it considers necessary, reasonable and practicable to –

(A) remedy, mitigate or prevent the adverse effects on competition that the Commission has identified; or

(B) 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 effects on, or the absence of, competition.

(2) In determining, in any particular case, the remedial measures required to be taken, the Commission shall have regard to the extent to which any of the offsetting benefits specified in section 50(4) are present in that case.

(3) Subject to subsections (1) and (2), a direction under this section may include, but is not limited to, a requirement that the enterprise to which it is given shall -

- (a) terminate or amend an agreement;
- (b) cease or amend a practice or course of conduct, including 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;
- (e) provide the Commission with specified information on a continuing basis.

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

61. Remedies in merger control

(1) Where the Commission determines, after investigation that -

- (a) an enterprise is a party to a merger situation; and
- (b) the creation of the merger situation has resulted, or is likely to result, in a substantial lessening of competition within a market for goods or services,

the Commission may give the enterprise such directions as it considers necessary, reasonable and practicable to -

- (i) remedy, mitigate or prevent the substantial lessening of competition; and
- (ii) remedy, mitigate or prevent any adverse effects that have resulted from, or are likely to result from, the substantial lessening of competition.

(2) In the case of a prospective merger, a direction may require an enterprise to -

- (a) desist from completion or implementation of the merger insofar as it relates to a market in Mauritius;

- (b) divest such assets as are specified in the direction within the period so specified in the direction, before the merger can be completed or implemented;
 - (c) adopt, or desist from, such conduct, including conduct in relation to prices, as is specified in the direction as a condition of proceeding with the merger.
- (3) In the case of a completed merger, a direction may require an enterprise to -
 - (a) divest itself of such assets as are specified in the direction within the period so specified in the direction;
 - (b) adopt, or to desist from, such conduct, including conduct in relation to prices, as is specified in the direction as a condition of maintaining or proceeding with the merger.
- (4) A direction given under this section shall be in writing.

62. Interim measures

- (1) Where –
 - (a) the Commission has reasonable grounds to suspect that an enterprise is a party to a prohibited agreement and has not completed its examination of the matter, but believes that there is the risk of serious or irreparable damage to a particular person as a consequence of the agreement;
 - (b) an enterprise is a party to an agreement which is subject to review, to a monopoly situation or to a merger situation, on which the Commission has opened but not completed an investigation, and where the Commission is satisfied that -
 - (i) there is prima facie evidence that competition is being prevented, restricted, distorted or substantially lessened and that, in consequence, serious or irreparable damage may be caused to a particular person; or
 - (ii) the enterprise is taking steps that would effectively pre-empt remedial action being taken that would restore the conditions of competition existing prior to the investigation,

the Commission may, after having taken cognizance of the report of the Executive Director on the matter, give such directions as it considers

appropriate if, as a matter of urgency, it considers it is necessary to do so to -

- (A) prevent serious or irreparable damage to a particular person or category of persons;
- (B) protect the public interest; or
- (C) prevent pre-emptive action being taken by the enterprise under investigation.

(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.

63. Undertakings

(1) An enterprise may offer a written undertaking to the Commission to address any concern that has arisen, or is likely to arise, during an investigation in respect of a restrictive agreement subject to investigation, a monopoly situation or a merger situation.

(2) The undertaking may be offered before the start of the investigation or at any stage during the investigation.

(3) The Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has about any prevention, restriction distortion or substantial lessening of competition.

(4) An undertaking accepted by the Commission shall be published by the Commission in the form of a decision of the Commission.

(5) An undertaking accepted by the Commission shall have effect as if it were a direction under section 60.

64. Keeping directions and undertakings under review

(1) The Commission shall keep under review the compliance with directions given by it and the performance of undertakings given by an enterprise.

(2) The Commission may, where it is satisfied that there has been a material change of circumstances -

- (a) agree to vary or terminate a direction; or
- (b) accept a variation to an undertaking or release an enterprise from an undertaking.

65. Enforcement of directions and undertakings

(1) Where the Commission determines that an enterprise has failed, without reasonable excuse, to comply with a direction or undertaking, the Commission may, subject to subsection (2), apply to the Judge in Chambers for a mandatory order requiring the enterprise to make good the default within a time specified in the order.

(2) The Commission shall consider any representations the enterprise wishes to make before making an application under subsection (1).

(3) The Judge in Chambers may provide in the order that all the costs of, or incidental to, the application shall be borne by the enterprise in default.

PART VII – RELATIONSHIP BETWEEN COMMISSION AND OTHER REGULATORS

66. Memorandum of Understanding between Commission and regulators

The Commission and regulators shall enter into a memorandum of understanding governing the effective exercise of their respective responsibilities and establishing mechanisms for practical co-operation in the exercise of those responsibilities, including the use of the sector-specific expertise of the regulators in respect of investigations under this Act.

PART VIII – APPEALS

67. Appeal to Supreme Court

(1) (a) Any party who is dissatisfied with an order or direction of the Commission may appeal to the Supreme Court against that order or direction.

(b) Any party wishing to appeal to the Supreme Court under paragraph (a) shall, within 21 days of the date of the order or direction of the Commission, lodge with the Registry of the Supreme Court and the Commission a written notice of appeal.

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

68. Powers of Supreme Court on appeal

On appeal, the Supreme Court may -

(a) affirm, reverse, amend or alter an order or direction of the Commission;

- (b) remit the matter to be further determined by the Commission with its opinion on the matter; or
- (c) make such orders as it thinks fit.

69. Decision not suspended on appeal

No appeal under this Part shall operate as a stay of an order or direction given by the Commission, except for an order imposing a financial penalty on an enterprise.

PART IX - MISCELLANEOUS

70. Disclosure of information

(1) No Commissioner, nor the Executive Director or any other staff of the Commission shall -

- (a) disclose any information relating to the affairs of the Commission, any particular business or the affairs of an individual, which he has obtained under or by virtue of any of the provisions of the Act, unless such disclosure is made –
 - (i) with the written authorisation of the person carrying on the business or the individual, from whom the information was obtained;
 - (ii) for the purpose of the administration or enforcement of this Act;
 - (iii) in connection with the investigations of any criminal offence;
 - (iv) for the purpose of responding to a request made by a foreign or multinational competition authority for the production of information in circumstances where Mauritius is a party to an international agreement providing for the production or exchange of such information;
 - (v) in compliance with the requirements of any Court or the provisions of any other enactment;
- (b) use, for his own personal benefit or for the benefit of any other person, make use of any information, whether directly or indirectly, which has been obtained by him under or by virtue of any of the provisions of this Act.

(2) Any person who contravenes subsection (1) shall commit an offence and shall, on conviction, be liable to a fine not exceeding 200,000 rupees and to imprisonment for a term not exceeding 5 years.

71. 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 Commission under this Act, gives to the Commission information which he knows is false or misleading in a material particular, or recklessly gives to the Commission information which is false or misleading in a material particular;
 - (c) gives to the Executive Director information which he knows is false or misleading in a material particular, or recklessly gives to the Executive Director information which is false or misleading in a material particular;
 - (d) 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;
 - (e) obstructs the execution of a warrant issued under section 53;
 - (f) refuses to take an oath at a hearing before the Commission;
 - (g) fails to answer fully and satisfactorily to the best of his knowledge and belief any question put to him by the Commission in the exercise of powers under sections 52 and 53; or
 - (h) insults, interrupts or otherwise commits any contempt of the Commission,

shall commit an offence.

(2) Any person who contravenes subsection (1) shall commit an offence and shall, on conviction, be liable to a fine not exceeding 500,000 rupees and to imprisonment for a term not exceeding 2 years.

- (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.

72. Regulations

(1) The Minister may make such regulations as he thinks fit for the purposes of this Act.

(2) The Minister may, by regulations, amend the Schedule.

(3) Regulations made under subsection (1) may provide that any person who contravenes 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.

73. Repeal

The following enactments are repealed -

- (a) the Competition Act 2003;
- (b) section 6 of the Fair Trading Act.

74. Consequential amendments

(1) The Statutory Bodies (Accounts and Audit) Act is amended in the Schedule, in Part II, by inserting in the appropriate alphabetical order the following statutory body -

Competition Commission

(2) The Statutory Bodies Pension Funds Act is amended in the Schedule, by inserting in the proper alphabetical order, the following new item -

Competition Commission

75. Commencement

(1) This Act shall come into operation on a date to be fixed by Proclamation.

(2) Different dates may be fixed for the coming into operation of different sections of this Act.

SCHEDULE
(*section 3(4)*)

PART A

Agreements or practices excluded from the Act

1. Any practice of employers or any agreement by which employers are parties insofar as it relates to the remuneration, terms or conditions or employment of employees.
2. Any agreement insofar as it contains provisions relating to the use, licence or assignment of rights under or existing by virtue of laws relating to copyright, industrial design, patents, trade marks or service marks.
3. Any practice or agreement approved or required under an international agreement to which Mauritius is a party.

PART B

Products excluded from the Act

1. Petroleum products
2. Liquid petroleum gas