

COMPETITION ACT

Acts 7/1996, 22/2001¹, 29/2001², S.I's. 207/1996, 323/2001.

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AN ACT to promote and maintain competition in the economy of Zimbabwe; to establish a Competition and Tariff Commission and to provide for its functions; to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices; and to provide for matters connected with or incidental to the foregoing.

[Date of commencement: 9th February, 1998.]

PART I

PRELIMINARY

1 Short title and date of commencement

- (1) This Act may be cited as the Competition Act, 1996.
- (2) This Act shall come into operation on a date to be fixed by the President by statutory instrument (9th February, 1998 - Statutory Instrument 21A/1998).

2 Interpretation

- (1) In this Act—
 - “assistance or protection” bears the meaning assigned to it by section *thirty four B* ;
 - “authorized”, in relation to any agreement, arrangement, practice or conduct, means authorized by the Commission under Part V;
 - “Commission” means the Competition and Tariff Commission established by section *four*;
 - “commodity” means anything, whether movable or immovable, corporeal or incorporeal, which is capable of being acquired or disposed of for value;

“controlling interest”, in relation to—

- (a) any undertaking, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking;
- (b) any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset;

“Director” means the Director of the Commission appointed in terms of subsection (1) of section *seventeen*;

“distribute”, in relation to—

- (a) any commodity, includes to supply, sell, let for hire, store or transport the commodity;
- (b) any service, means to supply or provide the service, whether or not it is attended by the supply of a commodity;

“investigating officer” means a person appointed as an investigating officer in terms of section *forty-six*;

“local industry” bears the meaning assigned to it by section *thirty-four B*;

“member” means a member of the Commission, including the chairman and deputy chairman;

“merger” means the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of—

- (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
- (b) the amalgamation or combination with a competitor, supplier, customer or other person; or
- (c) any means other than as specified in paragraph (a) or (b);

“Minister” means the Minister of Industry and Commerce or any other Minister to whom the President may, from time to time, assign the administration of this Act³;

“monopoly situation” means a situation in which a single person exercises, or two or more persons with a substantial economic connection exercise, substantial market control over any commodity or service;

“order” means an order made by the Commission in terms of section *thirty-one*;

“prescribe” means prescribe by regulations made in terms of section *fifty*;

“price” includes any consideration whatsoever in respect of the distribution of a commodity or service;

“restrictive practice” means—

- (a) any agreement, arrangement or understanding, whether enforceable or not, between two or more persons; or

³ Minister of Industry and International Trade (Statutory Instrument 58/2003)

- (b) any business practice or method of trading; or
- (c) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or
- (d) any situation arising out of the activities of any person or class of persons;

which restricts competition directly or indirectly to a material degree, in that it has or is likely to have any one or more of the following effects—

- (i) restricting the production or distribution of any commodity or service;
- (ii) limiting the facilities available for the production or distribution of any commodity or service;
- (iii) enhancing or maintaining the price of any commodity or service;
- (iv) preventing the production or distribution of any commodity or service by the most efficient or economical means;
- (v) preventing or retarding the development or introduction of technical improvements in regard to any commodity or service;
- (vi) preventing or restricting the entry into any market of persons producing or distributing any commodity or service;
- (vii) preventing or retarding the expansion of the existing market for any commodity or service or the development of new markets therefor;
- (viii) limiting the commodity or service available due to tied or conditional selling;

“service” includes any service, whether personal, professional or otherwise, including any storage, transportation, insurance or banking service and any service provided in conjunction with the distribution of any commodity;

“substantial market control” has the meaning assigned to it in subsection (2);

“tariff charge” bears the meaning assigned to it by section *thirty-four B*;

“tied or conditional selling” means any situation where the sale of one commodity or service is conditional on the purchase of another commodity or service;

“undertaking” means any person engaged for gain in the production or distribution of a commodity or service;

“unfair business practice” means a restrictive practice or conduct specified in the First Schedule;

“unfair trade practice” bears the meaning assigned to it by section *thirty-four B*;

(2) A person has substantial market control over a commodity or service if—

- (a) being a producer or distributor of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to raise or maintain the price of the commodity or service above competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe;
- (b) being a purchaser or user of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to lower or maintain the price of the commodity or service

below competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe.

(3) An agreement, arrangement or understanding to engage in a restrictive practice is presumed to exist between two or more persons if—

- (a) any one of them owns a substantial shareholding, interest or similar right in the other or they have at least one director in common; and
- (b) any combination of them is involved in such restrictive practice;

unless the person concerned or the directors, as the case may be, can establish the absence of an agreement.

3 Application of Act

(1) This Act applies to all economic activities within or having an effect within the Republic of Zimbabwe but shall not be construed so as to-

- (a) limit any right acquired under—
 - (i) the Plant Breeders Rights Act [*Chapter 18:16*]; or
 - (ii) the Copyright Act [*Chapter 26:01*]⁴; or
 - (iii) the Industrial Designs Act [*Chapter 26:02*]; or
 - (iv) the Patents Act [*Chapter 26:03*]; or
 - (v) the Trade Marks Act [*Chapter 26:04*];

except to the extent that such a right is used for the purpose of enhancing or maintaining prices or any other consideration in a manner contemplated in the definition of “restrictive practice” in section *two*; or

- (b) preventing trade unions or other representatives of employees from protecting their members’ interests by negotiating and concluding agreements and other arrangements with employers or representatives of employers in terms of the Labour Act [*Chapter 28:01*]⁵.

(2) Except in so far as criminal liability is concerned, this Act shall bind the State to the extent that the State is concerned in the manufacture and distribution of commodities.

(3) Where a statutory body established to regulate the activities of any person or class of persons authorises a merger between two or more such persons, such body shall, unless the enactment establishing it expressly provides otherwise, apply to the Commission in terms of this Act for the final authorisation of the merger.

PART II

COMPETITION AND TARIFF COMMISSION

4 Establishment of Commission

There is hereby established a commission, to be known as the Competition and Tariff Commission, which shall be a body corporate capable of suing and being sued in its corporate name and, subject to this Act, of performing all acts that a body corporate may by law perform.

⁴ Replaced by the Copyright and Neighbouring Rights Act [*Chapter 26:05*] (Act No. 11 of 2000)

⁵ Formerly called the Labour Relations Act.

5 Functions of Commission

- (1) Subject to this Act, the functions of the Commission shall be—
- (a) to encourage and promote competition in all sectors of the economy; and
 - (b) to reduce barriers to entry into any sector of the economy or to any form of economic activity; and
 - (c) to investigate, discourage and prevent restrictive practices; and
 - (d) to study trends towards increased economic concentration, with a view to the investigation of monopoly situations and the prevention of such situations, where they are contrary to the public interest; and
 - (e) to advise the Minister in regard to—
 - (i) all aspects of economic competition, including entrepreneurial activities carried on by institutions direct or indirectly controlled by the State; and
 - (ii) the formulation, co-ordination, implementation and administration of Government policy in regard to economic competition;
- and
- (f) to provide information to interested persons on current policy with regard to restrictive practices, acquisitions and monopoly situations, to serve as guidelines for the benefit of those persons; and
 - (g) subject to Part IVB, to undertake investigations and make reports to the Minister relating to tariff charges, unfair trade practices and the provision of assistance or protection to local industry; and
 - (h) to monitor prices, costs, and profits in any industry or business that the Minister directs the Commission to monitor, and to report its findings to the Minister; and
 - (i) to perform any other functions that may be conferred or imposed on it by this Act or any other enactment.

(2) For the better exercise of its functions, the Commission shall have power to do or cause to be done, either by itself or through its agents, all or any of the things set out in the Second Schedule, either absolutely or conditionally and either solely or jointly with others.

(3) Subject to this Act, in the lawful exercise of its functions under this Act the Commission shall not be subject to the direction or control of any other person or authority.

6 Membership of Commission

(1) Subject to subsection (2), the Commission shall consist of not fewer than five and not more than ten members appointed by the President.

(2) The persons to be appointed under subsection (1) shall be chosen for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment and, in selecting such persons, the Minister in consultation with the President shall ensure that so far as possible all interested groups and classes of persons, including consumers, are represented on the Commission.

7 Disqualifications for appointment as member

(1) A person shall not be appointed as a member, and no person shall be qualified to hold office as a member, if—

- (a) he is not a citizen of or ordinarily resident in Zimbabwe; or
- (b) in terms of a law in force in any country—
 - (i) he has been adjudged or otherwise declared insolvent or bankrupt and has not been rehabilitated or discharged; or
 - (ii) he has made an assignment to, or arrangement or composition with, his creditors which has not been rescinded or set aside;

or

- (c) he has been convicted in Zimbabwe or in any other country of an offence involving fraud or dishonesty and sentenced to a term of imprisonment imposed without the option of a fine, whether or not any portion of the sentence has been suspended, and he has not received a free pardon.

(2) A member of Parliament shall not be qualified for appointment as a member, nor shall he hold office as a member.

(3) A person shall not be qualified for appointment as a member, nor shall he hold office as a member, if he is a member of four or more other statutory bodies.

(4) For the purposes of subsection (3)—

- (a) a person who is appointed to a council, board or other authority which is a statutory body or which is responsible for the administration of the affairs of a statutory body shall be regarded as a member of that statutory body;
- (b) “statutory body means—
 - (i) any commission established by the Constitution; or
 - (ii) any body corporate established directly by or under an Act for special purposes specified in that Act, the membership of which consists wholly or mainly of persons appointed by the President, a Vice-President, a Minister or any other statutory body or by a Commission established by the Constitution.

8 Terms and conditions of office of members

(1) Subject to this Part, a member shall hold office for such period, not exceeding three years, as the Minister may fix on his appointment, and upon the expiry of his term of office he shall be eligible for re-appointment as a member.

(2) On the expiry of the period for which a member has been appointed, he shall continue to hold office until he has been re-appointed or his successor has been appointed:

Provided that a member shall not continue to hold office under this subsection for a period exceeding six months.

(3) Subject to this Part, a member shall hold office on such terms and conditions as the Minister may fix for members generally.

9 Vacation of office by members

A member shall vacate his office and his office shall become vacant—

- (a) one month after the date on which he gives notice to the Minister, of his intention to resign, or after the expiry of such other period of notice as he and the Minister may agree; or
- (b) if he becomes a member of Parliament; or

- (c) if he becomes disqualified in terms of paragraph (a) or (b) of subsection (1) of section *seven* or in terms of subsection (3) of that section to hold office as a member; or
- (d) on the date he begins to serve a sentence of imprisonment, whether or not any portion has been suspended, imposed without the option of a fine in any country; or
- (e) if he is required in terms of section *ten* to vacate his office.

10 Minister may require member to vacate his office or may suspend him

- (1) The Minister may require a member to vacate his office if the member—
 - (a) has been guilty of improper conduct as a member or guilty of conduct that is prejudicial to the interests or reputation of the Commission; or
 - (b) has failed to comply with any condition of his office fixed by the Minister in terms of subsection (3) of section *eight*; or
 - (c) is mentally or physically incapable of efficiently performing his functions as a member.
- (2) The Minister, on the recommendation of the Commission, may require a member to vacate his office if the Minister is satisfied that the member has been absent without the permission of the Commission from three consecutive meetings of the Commission, of which the member was given not less than seven days' notice, and that there was no just cause in the member's absence.
- (3) The Minister—
 - (a) may suspend from office a member against whom criminal proceedings have been instituted in respect of an offence for which a sentence of imprisonment without the option of a fine may be imposed; and
 - (b) shall suspend from office a member who has been sentenced by a court to imprisonment without the option of a fine, whether or not any portion has been suspended, pending determination of the question whether the member is to vacate his office;

and while the member is so suspended he shall not exercise any functions or be entitled to any remuneration as a member.

11 Filling of vacancies on Commission

On the death of, or the vacation of office by, a member, the Minister may, subject to this Part, appoint a person to fill the vacancy:

Provided that, if as a result of the vacancy the number of members is fewer than the minimum specified in section *six*, the Minister shall appoint a person to fill the vacancy.

12 Chairman and vice-chairman of Commission

(1) The Minister shall designate one of the members to be the chairman of the Commission and another member to be the vice-chairman.

(2) The chairman and vice-chairman of the Commission shall hold office as such for such period as the Minister may fix:

Provided that the Minister may at any time for good cause terminate the appointment of the chairman or the vice-chairman as such and designate another member as chairman or vice-chairman, as the case may be.

(3) The vice-chairman shall perform the chairman's functions during any period that the chairman is for any reason unable to perform them.

13 Meetings and procedure of Commission

(1) The Commission shall hold its first meeting on a date and place fixed by the Minister, and thereafter shall meet for the dispatch of business and adjourn, close and otherwise regulate its meetings and procedure as it thinks fit:

Provided that the Commission shall meet at least six times in each financial year.

(2) The chairman of the Commission—

(a) may convene a special meeting of the Commission at any time; and

(b) shall convene a special meeting of the Commission on the written request of the Minister or not fewer than two members, which meeting shall be convened for a date not sooner than seven days and not later than thirty days after the chairman's receipt of the request.

(3) Written notice of a special meeting convened in terms of subsection (2) shall be sent to each member not later than forty-eight hours before the meeting and shall specify the business for which the meeting has been convened.

(4) No business shall be discussed at a special meeting convened in terms of subsection (2) other than—

(a) such business as may be determined by the chairman of the Commission, where he convened the meeting in terms of paragraph (a) of subsection (2); or

(b) the business specified in the request for the meeting, where the chairman of the Commission convened the meeting in terms of paragraph (a) of subsection (2).

(5) The chairman or, in his absence, the vice-chairman of the Commission shall preside at all meetings of the Commission:

Provided that, if the chairman and the deputy chairman of the Commission are both absent from any meeting of the Commission, the members present may elect one of their number to preside at that meeting as chairman.

(6) Half of the members shall form a quorum at any meeting of the Commission.

(7) Subject to subsection (11), all acts matters or things authorized or required to be done by the Commission may be decided by a majority vote at any meeting of the Commission at which a quorum is present.

(8) With the Commission's approval, the chairman of the Commission may invite any person to attend a meeting of the Commission or a committee, where the chairman considers that the person has special knowledge or experience in any matter to be considered by the Commission or the committee, as the case may be, at that meeting.

(9) A person invited to attend a meeting of the Commission or of a committee in terms of subsection (8) may take part in the proceedings of the Commission or the committee as if he were a member thereof, but shall not have a vote on any question before the Commission or committee, as the case may be.

(10) Subject to section *sixteen*, at all meetings of the Commission each member present shall have one vote on any question before the Commission and, in the event of an equality of

votes, the person presiding at the meeting shall have a casting vote in addition to a deliberative vote.

(11) Any proposal circulated among all members and agreed to in writing by a majority of them shall have the same effect as a resolution passed by a duly constituted meeting of the Commission and shall be incorporated into the minutes of the next succeeding meeting of the Commission:

Provided that, if a member requires that such a proposal be placed before a meeting of the Commission, this subsection shall not apply to the proposal.

14 Committees of Commission

(1) For the better exercise of its functions, the Commission may establish one or more committees in which it may vest such of its functions as it considers appropriate:

Provided that the vesting of any function in a committee shall not divest the Commission of that function, and the Commission may mend or rescind any decision of the committee in the exercise of that function.

(2) On the establishment of a committee in terms of subsection (1), the Commission—

- (a) shall appoint at least one member to be a member of the committee and shall designate that member or one of those members, as the case may be, to be chairman of the committee; and
- (b) may appoint as members of the committee, on such terms and conditions as the Commission may fix, persons who are not members.

(3) Meetings of a committee may be convened at any time and at any place by the chairman of the Commission or the chairman of the committee.

(4) Subject to subsection (3) and to sections sixteen and twenty-one, the procedure to be followed at any meeting of a committee and the quorum at any such meeting shall be as fixed by the Commission.

15 Remuneration and allowances of members of Commission and committees

Every member of the Commission or of a committee shall be paid from moneys appropriated for the purpose by Act of Parliament—

- (a) such remuneration, if any, as the Minister, with the approval of the Minister responsible for finance, may fix for members of the Commission or of committees, as the case may be, generally; and
- (b) such allowances as the Minister may fix to meet any reasonable expenses incurred by the member in connection with the business of the Commission or the committee, as the case may be.

16 Members of Commission and committees to disclose certain connections and interests

(1) If a member of the Commission or of a committee, or a spouse of such a member—

- (a) knowingly acquires or holds a direct or indirect pecuniary interest in a company or association of persons—
 - (i) whose conduct is the subject of an investigation or order under this Act; or
 - (ii) which is applying or negotiating for a contract with the Commission;

or

- (b) tenders for or acquires or holds a direct or indirect pecuniary interest in a contract with the Commission; or
- (c) owns immovable property or a right in immovable property or a direct or indirect pecuniary interest in a company or association of persons which results in his private interests coming or appearing to come into conflict with his functions as a member of the Commission or of the committee, as the case may be;

the member shall forthwith disclose the fact to the Commission or the committee, as the case may be.

(2) A member referred to in subsection (1) shall take no part in the consideration or discussion of, or vote on, any question before the Commission or the committee, as the case may be, which relates to any investigation, order, contract, right, immovable property or interest referred to in that subsection.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

17 Appointment and functions of Director of Commission

(1) The Commission shall appoint a Director, who shall be responsible for administering the Commission's affairs, funds and property and for performing any other functions that may be conferred or imposed upon him by or under this Act or that the Commission may delegate or assign to him.

(2) The terms and conditions of the Director's appointment shall be as fixed by the Commission with the approval of the Minister.

(3) Members shall not be eligible for appointment as the Director.

(4) The Director's appointment shall be terminated if he would be required in terms of paragraph (b), (c) or (d) of section *nine* to vacate his office had that section and paragraphs (a) and (b) of subsection (1) of section *seven* applied to him.

(5) An assignment of functions under subsection (1)—

- (a) may be made either generally or specially and subject to such restrictions, reservations and exceptions as the Commission may determine; and
- (b) may be revoked by the Commission at any time; and
- (c) shall not preclude the exercise of the functions by the Commission itself.

(3) The Commission shall appoint at least two Assistant Directors of the Commission to assist the Director in the performance of his functions, one of whom shall be responsible for tariffs and the other for competition, and subsections (2), (3), (4) and (5) shall apply to the Assistant Directors as they apply to the Director.

18 Policy directions to Commission

(1) Subject to subsection (2), the Minister may give the Commission such general directions relating to the policy the Commission is to observe in the exercise of its functions as the Minister considers to be necessary in the national interest.

(2) Before giving the Commission a direction in terms of subsection (1), the Minister shall inform the Commission, in writing, of the proposed direction and the Commission shall, within

thirty days of such further period as the Minister may allow, submit to the Minister, in writing, its views on the proposal.

(3) The Commission shall take all necessary steps to comply with any direction given to it in terms of subsection (1).

(4) When any direction has been given to the Commission in terms of subsection (1), the Commission shall ensure that the direction and any views the Commission has expressed on it in terms of subsection (2) are set out in the Commission's annual report.

19 Validity of decisions and acts of Commission and committees

No decision or act of the Commission or a committee and no act that is authorized by the Commission or a committee shall be invalid solely because there was a vacancy in the membership of the Commission or the committee or because a disqualified person purported to act as a member of the Commission or the committee, as the case may be, at the time the decision was taken or the act was done or authorized.

20 Execution of contracts and instruments by Commission

An agreement, contract or instrument approved by the Commission may be entered into or executed on the Commission's behalf by any person generally or specially authorized by the Commission for that purpose.

21 Minutes of proceedings of Commission and committees

(1) The Commission shall cause minutes of all proceedings of and decisions taken at every meeting of the Commission and of every committee to be entered in books kept for the purpose.

(2) Any minutes referred to in subsection (1) which purport to be signed by the person presiding at the meeting to which the minutes relate or by the person presiding at the next following meeting of the Commission or the committee concerned, as the case may be, shall be accepted for all purposes as prima facie evidence of the proceedings and decisions taken at the meeting concerned.

22 Reports of Commission and supply of information to Minister

(1) As soon as is practicable after the end of each financial year, the Commission shall prepare and submit to the Minister a report on all its activities during the year ended on that date, and the Minister shall lay the report before Parliament, together with any comments thereon that he wishes to make, during the next sitting of Parliament.

(2) In addition to the report referred to in subsection (1), the Commission—

- (a) shall submit to the Minister such other reports as the Minister may require; and
- (b) may submit to the Minister such other reports as the Commission considers desirable;

in regard to the operations and activities of the Commission.

(3) The Commission shall give the Minister all information relating to its operations and activities that the Minister may at any time require.

PART III

FINANCIAL PROVISIONS RELATING TO COMMISSION

23 Funds of Commission

The funds of the Commission shall consist of—

- (a) moneys payable to the Commission from moneys appropriated for the purpose by Act of Parliament; and
- (a1) fees payable to the Commission in terms of the Act;
- (b) any other moneys that may vest in or accrue to the Commission, whether in terms of this Act or otherwise.

24 Investment of moneys not immediately required by Commission

Moneys not immediately required by the Commission may be vested in such manner as the Minister, acting on the advice of the Minister responsible for finance, may approve.

25 Accounts of Commission

(1) The Commission shall ensure that proper accounts and other records relating to such accounts are kept in respect of all the Commission's activities, funds and property, including such particular accounts and records as the Minister may direct.

(2) As soon as possible after the end of each financial year, the Commission shall prepare and submit to the Minister a statement of accounts in respect of that financial year or in respect of such other period as the Minister may direct.

26 Audit of Commission's accounts

(1) Subject to the Audit and Exchequer Act [*Chapter 22:03*], the Commission shall appoint as auditors one or more persons approved by the Minister who are registered as public auditors in terms of the Public Accountants and Auditors Act [*Chapter 27:12*].

(2) The accounts kept by the Commission in terms of subsection (1) of section *twenty-five* shall be examined by the auditors appointed in terms of subsection (1).

(3) The auditors appointed in terms of subsection (1) shall make a report to the Commission and to the Minister on the statement of accounts prepared in terms of subsection (2) of section *twenty-five*, and in their report shall state whether or not in their opinion the statement of accounts gives a true and fair view of the Commission's financial affairs.

(4) In addition to the report referred to in subsection (3), the Minister may require the Commission to obtain from the auditors appointed in terms of subsection (1) such other reports, statements or explanations in connection with the Commission's activities, funds and property as the Minister may consider expedient, and the Commission shall forthwith comply with any such requirement.

(5) If, in the opinion of the auditors appointed in terms of subsection(1)—

- (a) they have not obtained any information or explanation they require; or
- (b) any accounts or records relating to any accounts have not been properly kept by the Authority; or
- (c) the Commission has not complied with any provision of this Part;

the auditors shall include in their report made in terms of subsection (3) or (4), as the case may be, a statement to that effect.

(6) If in terms of the Audit and Exchequer Act [*Chapter 22:03*] the Commission's accounts are required to be audited by the Comptroller and Auditor-General, any reference in this section

to auditors appointed in terms of subsection (1) shall be construed as a reference to the Comptroller and Auditor-General.

27 Powers of auditors

(1) An auditor referred to in section *twenty-six* shall be entitled to all reasonable times to require to be produced to him all accounts and other records relating to such accounts which are kept by the Commission or its agents and to require from any member of the Commission or employee or agent of the Commission such information and explanation as in the auditor's opinion are necessary for the purpose of his audit.

(2) Any member of the Commission or employee or agent of the Commission who fails without just cause to comply with a requirement of an auditor in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

PART IV

INVESTIGATION AND PREVENTION OF RESTRICTIVE PRACTICES, Mergers and Monopoly Situations

28 Power of Commission to investigate restrictive practices, mergers and monopoly situations

(1) Subject to this Act, the Commission may make such investigation as it considers necessary—

- (a) into any restrictive practice which the Commission has reason to believe exists or may come into existence;
- (b) in order to ascertain—
 - (i) whether any merger has been, is being or is proposed to be made;
 - (ii) the nature and extent of any controlling interest that is held or may be acquired in any merger or proposed merger;
- (c) into any type of business agreement, arrangement, understanding or method of trading which, in the opinion of the Commission, is being or may be adopted for the purpose of or in connection with the creation or maintenance of a restrictive practice;
- (d) into any monopoly situation which the Commission has reason to believe exists or may come into existence.

(1A) For the purposes of subsection (1) the Commission may, through its investigation officers, make a preliminary investigation without notice, and section *forty-seven* shall apply to such preliminary investigation.

(2) If the Commission considers an investigation to be necessary, whether or not after a preliminary investigation in terms of subsection (1a), the Commission shall publish a notice in the *Gazette* and in such newspaper circulating in the area covered by the investigation as the Commission thinks appropriate-

- (a) stating the nature of the proposed investigation; and
- (b) calling upon any interested person who wishes to do so to submit written representations to the Commission in regard to the subject-matter of the proposed investigation.

(3) For the purposes of an investigation under this section, the Commission shall have the powers that are conferred upon a commissioner by the Commissions of Inquiry Act [*Chapter 10:07*], other than the power to order a person to be detained in custody, and sections 9 to 13 and 15 to 19 of that Act shall apply, *mutatis mutandis*, in relation to an investigation under this section and to any person summoned to give or giving evidence at that investigation.

(4) In any investigation under this section, the Commission shall ensure that the rules commonly known as the rules of natural justice are duly observed and, in particular, shall take all reasonable steps to ensure that every person whose interests are likely to be affected by the outcome of the investigation is given as adequate opportunity to make representations in the matter.

(5) The prosecution or pending prosecution of a person under section *forty-two* for entering into, engaging in or otherwise giving effect to a restrictive practice which is an unfair business practice shall not be a bar to the Commission's investigating the restrictive practice under this section or making an order in regard to it.

29 Prohibition of certain acts pending investigation

(1) At any time after embarking on an investigation under section *twenty-eight*, the Commission may publish a notice doing either or both the following—

- (a) prohibiting or staying any restrictive practice or merger that is the subject of the investigation;
- (b) directing that any action be taken which, in the Commission's opinion, will prevent or stay any restrictive practice or merger that is the subject of the investigation;

pending the outcome of the investigation.

(2) A notice in terms of subsection (1) shall be published in the *Gazette* and in such newspaper circulating in the area covered by the investigation as the Commission thinks appropriate.

(3) A notice in terms of subsection (1) shall remain in force—

- (a) until the completion of the Commission's investigation into the matter concerned; or
- (b) for a period of six months from the date of its publication in the *Gazette*;

whichever is the shorter period.

(4) The Commission may at any time amend or revoke a notice in terms of subsection (1):

Provided that no such amendment shall have the effect of prolonging the validity of the notice for longer than the period specified in subsection (3).

(5) It shall not be necessary for the Commission to notify or receive representation from any person before publishing a notice in term of subsection (1) or amending or revoking any such notice, if in the Commission's opinion such notification or receiving of representations would unduly delay the publication of the notice or would defeat its purpose.

(6) The Commission shall without delay provide a written statement of its reasons for having published a notice in terms of subsection (1), upon being requested for such a statement by—

- (a) any party to the restrictive practice or merger to which the notice relates; or
- (b) any other person, where the statement is requested for the purpose of any judicial review or other legal proceedings instituted in regard to the notice.

(7) Any person who contravenes or fails to comply with any provision of a notice in terms of subsection (1) with which it is his duty to comply shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(8) Section *thirty-three* shall apply, *mutatis mutandis*, to the civil enforcement of a notice published in terms of this section as if the notice were an order.

30 Negotiations by Commission

(1) The Commission may at any time negotiate with any person with a view to making an arrangement which, in the Commission's opinion, will—

- (a) ensure the discontinuance of any restrictive practice which exists or may come into existence; or
- (b) terminate, prevent or alter any merger or monopoly situation which exists or may come into existence;

whether or not the Commission has embarked on an investigation into the restrictive practice, merger or monopoly situation concerned.

(2) Where the Commission has made an arrangement after negotiations under subsection (1), it may embody the arrangement in an order.

31 Orders by Commission

(1) If the Commission is satisfied, having regard to the matters referred to in section *thirty-two*, that any restrictive practice which exists or may come into existence is or will be contrary to the public interest, the Commission may make any one or more of the following orders in respect of that restrictive practice—

- (a) prohibiting any person named in the order, or any class of persons, from engaging in the restrictive practice or from pursuing any other course of conduct which is specified in the order and which, in the Commission's opinion, is similar in form and effect to the restrictive practice;
- (b) requiring any party to the restrictive practice to terminate the restrictive practice, either wholly or to such extent as may be specified in the order, within such time as is specified therein;
- (c) requiring any person named in the order, or any class of persons, to notify prices to the Commission, with or without such further information as may be specified in the order;
- (d) regulating the price which any person named in the order may charge for any commodity or service:

Provided that the Commission shall not make any such order unless it is satisfied that the price being charged by the person concerned is essential to the maintenance of the restrictive practice to which the order relates;

- (e) prohibiting any person named in the order, or any class of persons, from notifying persons supplying any commodity or service of a price recommended or suggested as appropriate to be charged by those persons;
- (f) generally, making such provision as, in the opinion of the Commission, is reasonably necessary to terminate the restrictive practices or alleviate its effects.

(2) If the Commission is satisfied, having regard to the matters referred to in *section thirty-two*, that any actual or proposed merger or monopoly situation is or will be contrary to the public interest, the Commission may make any one or more of the following orders in respect of that merger or monopoly situation-

- (a) declaring it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to make or to carry out any agreement or arrangement which is specified in the order and which, in the Commission's opinion, will lead to or maintain the merger or monopoly situation;
- (b) in the case of a monopoly situation, requiring any person who exercises control over the business or economic activity concerned to take such steps as are specified in the order to terminate the monopoly situation within such time as is specified in the order;
- (c) prohibiting or restricting the acquisition by any person named in the order of the whole or part of any undertaking or assets, or the doing by that person of anything which will or may result in such an acquisition, if the acquisition is likely, in the Commission's opinion, to lead to a merger or monopoly situation;
- (d) requiring any person to take steps to secure the dissolution of any organization, whether corporate or unincorporated, or the termination of any association, where the Commission is satisfied that the person is concerned in or a party to the merger or monopoly situation;
- (e) requiring that, if any merger takes place or any monopoly situation exists, any party thereto who is named in the order shall observe such prohibitions or restrictions in regard to the manner in which he carries on business as are specified in the order;
- (f) generally, making such provision as, in the opinion of the Commission, is reasonably necessary to terminate or prevent the merger or monopoly situation, as the case may be, or alleviate its effects.

(3) Notwithstanding any other law and without derogation from the generality of subsection (2), an order made in respect of a merger or monopoly situation may provide for any of the following matters—

- (a) the transfer or vesting of property, rights, liabilities or obligations;
- (b) the adjustment of contracts, whether by their discharge or the reduction of any liability or obligation or otherwise;
- (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (d) the formation or winding up of any undertaking or the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.

(4) An order shall be in writing and served on every person named therein:

Provided that, if the order applies to persons generally or if, in the Commission's opinion, it is impractical to serve it individually on all the persons to whom it applies, the Commission shall cause the order to be published in the *Gazette* and in such other manner as the Commission considers will bring it to the attention of the persons to whom it applies.

(5) Before making an order under this section, the Commission shall ensure that every person affected thereby is informed of the broad terms of the order it proposes to make and is given an adequate opportunity to make representations in the matter:

Provided that, if the proposed order will apply to persons generally or if, in the Commission's opinion, it is impractical to notify its terms to all the persons to whom it will apply, the Commission shall cause the broad terms of the proposed order to be published in the *Gazette* and in such other manner as the Commission considers will bring it to the attention of the persons to whom it will apply.

(6) The Commission may amend or revoke an order at any time, and this section shall apply, *mutatis mutandis*, in regard to any such amendment.

32 Factors to be considered by Commission when making orders

(1) In determining, for the purposes of section *thirty-one*, whether or not any restrictive practice, merger or monopoly situation is or will be contrary to the public interest, the Commission shall take into account everything it considers relevant in the circumstances, and shall have regard to the desirability of—

- (a) maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe; and
- (b) promoting the interests of consumers, purchasers and other users of commodities and services in Zimbabwe, in regard to the prices, quality and variety of such commodities and services; and
- (c) promoting, through competition, the reduction of costs and the development of new techniques and new commodities, and of facilitating the entry of new competitors into existing markets.

(2) For the purposes of section *thirty-one*, the Commission shall regard a restrictive practice as contrary to the public interest if it is engaged in by a person with substantial market control over the commodity or service to which the practice relates, unless the Commission is satisfied as to any one or more of the following—

- (a) that the restrictive practice is reasonably necessary, having regard to the character of the commodity or service to which it applies, to protect consumers or users of the commodity or service, or the general public, against injury or harm;
- (b) that termination of the restrictive practice would deny to consumers or users of a commodity or service to which the restrictive practice applies, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them, whether by virtue of the restrictive practice itself or by virtue of any arrangement or operation resulting therefrom;
- (c) that termination of the restrictive practice would be likely to have a serious and persistently adverse effect on the general level of unemployment in any area in which a substantial proportion of the business, trade or industry to which the restrictive practice relates is situated;
- (d) that termination of the restrictive practice would be likely to cause a substantial reduction in the volume or earnings of any export business or trade of Zimbabwe;
- (e) that the restrictive practice is reasonably required to maintain an authorized practice or any other restrictive practice which, in the Commission's opinion, is not contrary to the public interest;

- (f) that the restrictive practice does not directly or indirectly restrict or discourage competition to a material degree in any business, trade or industry and is not likely to do so.

(3) A restrictive practice that is an unlawful trade practice shall be deemed for the purposes of section *thirty-one* to be absolutely contrary to the public interest.

(4) For the purposes of section *thirty-one*, the Commission shall regard a merger as contrary to the public interest if the Commission is satisfied that the merger—

- (a) has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe; or
- (b) has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest.

(4a) When determining whether or not a merger is likely to substantially prevent or lessen competition the Commission shall consider any of the following factors as may be relevant—

- (a) the actual and potential level of import competition in the market;
- (b) the ease of entry into the market, including tariff and regulatory barriers;
- (c) the level, trends of concentration and history of collusion in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the merged parties having market power.
- (f) the dynamic characteristics of the market including growth, innovation and product differentiation;
- (g) the nature and extent of vertical integration into the market;
- (h) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;
- (i) whether the merger will result in the removal of efficient competition.

(5) For the purposes of section *thirty-one* and subsection (4) of this section, the Commission shall regard a monopoly situation as contrary to the public interest unless the Commission is satisfied as to any one or more of the following—

- (a) that the monopoly situation, through economies of scale or for other reasons, has resulted in or is likely to result in a more efficient use of resources in any business, trade or industry than would be the case if the monopoly situation did not exist;
- (b) that the monopoly situation is or is likely to be necessary for the production, supply or distribution of any commodity or service in Zimbabwe, regard being had on the one hand to the resources necessary to produce, supply or distribute the commodity or service and, on the other hand, to the size of the Zimbabwean market for that commodity or service;
- (c) that termination or prevention of the monopoly situation would deny to consumers or users of any commodity or service, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them, whether by virtue of the monopoly situation itself or by virtue of any arrangement or operation resulting therefrom;

- (d) that the monopoly situation is or is likely to be reasonably necessary to enable the parties to it to negotiate fair terms for the distribution of a commodity or service—
 - (i) from a person who is not a party to the monopoly situation and who exercises complete or, substantial control over the distribution of the commodity or service or
 - (ii) to a person who is not a party to the monopoly situation and who exercises complete or substantial control over the market for the commodity or service;
- (e) that termination or prevention of the monopoly situation would be likely to have a serious and persistently adverse effect on the general level of unemployment in any area in which a substantial proportion of the business, trade or industry to which the monopoly situation relates is situated;
- (f) that termination or prevention of the monopoly situation would be likely to cause a substantial reduction in the volume or earnings of any export business or trade of Zimbabwe.

33 Enforcement of orders

(1) The Commission or any person in whose favour or for whose benefit an order has been made may lodge a copy of the order, certified by the Director or a person authorized by the Director, with—

- (a) the Registrar of the High Court; or
- (b) the clerk of any magistrates court which would have had jurisdiction to make the order had the matter been determined by it;

and the Registrar or clerk shall forthwith record the order as a judgment of the High Court or the magistrates court, as the case may be.

(2) An order that has been recorded under subsection (1) shall, for the purposes of enforcement, have the effect of a civil judgment of the High Court or the magistrates court concerned, as the case may be.

(3) If an order that has been recorded under subsection (1) is—

- (a) varied or set aside by the High Court on review or by the Administrative Court on appeal; or
- (b) amended or revoked by the Commission in terms of subsection (6) of section *thirty-one*;

the Registrar of the High Court or clerk of the magistrates court concerned, as the case may be, shall make the appropriate adjustment in his records.

(4) Where an order contains, amongst other provisions, a provision favouring or benefiting a particular person, that provision of the order may be lodged and recorded under subsection (1) in all respects as if it were the entire order, and may be enforced accordingly.

(5) The Commission may make such investigation as it considers necessary to ascertain the extent to which any order has been or is being complied with, whether or not the order has been recorded under subsection (1), and may make such further order as it considers necessary in respect of the restrictive practice, merger or monopoly situation which was the subject of the original order.

(6) Sections twenty-eight to thirty-two and subsections (1) to (4) of this section shall apply, mutatis mutandis, to any investigation carried out and order made in terms of subsection (5).

(7) Without derogation from subsections (1) to (6), any person who contravenes or fails to comply with any provision of an order with which it is his duty to comply shall be guilty of an offence and liable to a fine not exceeding level nine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

34 [Repealed by Act 29 of 2001 with effect from the 31st May, 2002.]

PART IVA
NOTIFIABLE MERGERS

34 Application of Part IVA

- (1) The Minister shall, in consultation with the Commission, prescribe—
- (a) a threshold of combined annual turnover or assets in Zimbabwe, either in general or in relation to specific industries, at or above which this Part will apply with regard to mergers;
 - (b) a method for the calculation of annual turnover and assets.

(2) For the purposes of this Part—

“notifiable merger” means a merger or proposed merger with a value at or above the threshold prescribed in terms of subsection (1).

“non-notifiable merger” means a merger or proposed merger with a value below the threshold prescribed in terms of subsection (1).

34A Notification of proposed merger

(1) A party to a notifiable merger shall notify the Commission in writing of the proposed merger within thirty days of—

- (a) the conclusion of the merger agreement between the merging parties; or
- (b) the acquisition by any one of the parties to that merger of a controlling interest in another.

(2) Notification in terms of subsection (1) shall be made in such form and manner as may be prescribed and shall be accompanied by the prescribed fee, if any, and such information and particulars as may be prescribed or as the Commission may reasonably require.

(3) The Commission may impose a penalty if the parties to a merger—

- (a) fail to give notice of the merger as required by subsection (1);
- (b) proceed to implement the merger without the approval of the Commission as required by subsection (2).

(4) A penalty imposed in terms of subsection (3) may not exceed ten *per centum* of either or both of the merging parties’ annual turnover in Zimbabwe as reflected in the accounts of any party concerned for the preceding financial year.

(5) When determining an appropriate penalty, the Commission shall consider the following factors—

- (a) the nature, duration, gravity and extent of the contravention; and

- (b) any loss or damage suffered as a result of the contravention; and
 - (c) the behaviour of the parties concerned; and
 - (d) the market circumstances in which the contravention took place; and
 - (e) the level of profit derived from the contravention; and
 - (f) the degree to which the parties have co-operated with the Commission ; and
 - (g) whether the parties have previously been found in contravention of this Act.
- (6) Civil proceedings for the recovery of any penalty imposed in terms of subsection (3) may be brought against the party or parties concerned by the Commission.

PART IVB

INVESTIGATION OF TARIFF CHARGES AND RELATED UNFAIR TRADE PRACTICES

34B Interpretation in Part IVB

In this Part—

“assistance or protection”, in relation to local industry, includes—

- (a) the raising of tariff charges on imported commodities or services that compete with commodities or services provided by local industry;
- (b) the lowering of tariff charges on imported commodities or services that are used by local industry;
- (c) the implementation by the Government of legislative or administrative measures for the purpose of countering unfair trade practices;
- (d) the conclusion of arrangements with any other country for the benefit of local industry;
- (e) the implementation by the Government of other legislative and administrative measures that may, directly or indirectly, assist any person to undertake any gainful activity for the benefit of local industry.

“local industry” means the persons who in Zimbabwe are engaged in the business of producing or providing, otherwise than by importation, commodities or services for consumption in or export from Zimbabwe, and includes any class of such persons;

“tariff charge” means any duty, tax or charge levied by the State in connection with commodities or services imported into or exported from Zimbabwe;

“unfair trade practice” means—

- (a) the dumping of imported commodities as described in subsection (1) of section 90 of the Customs and Excise Act [*Chapter 23:02*];
- (b) the granting of a bounty or subsidy with respect to imported commodities within the meaning of section 92 of the Customs and Excise Act [*Chapter 23:02*];
- (c) any other practice in relation to the importation of commodities or services of the sale of imported commodities or the provision of an imported service where such practice is declared to be unfair in terms of paragraph (b) of subsection (3) of section *thirty-four C*.

34C Investigations by Commission

(1) Subject to this Act, the Commission may make such investigations as it considers necessary—

- (a) into any tariff charge or any matter related thereto, which the Commission has reason to believe is causing or threatens to cause detriment to local industry;
- (b) in order to ascertain whether any tariff charge needs to be revised and the extent of any such revision, for the purpose of providing assistance or protection to local industry and additionally, or alternatively, redressing any imbalance in trade between Zimbabwe and any other country;
- (c) into any application for assistance or protection to local industry;
- (d) into any complaint that, as a result of the importation, actual or prospective, of any goods—
 - (i) detriment has been, or will be, caused or threatened to an established local industry; or
 - (ii) the establishment or expansion of local industry has been, or will be, detrimentally affected;

where the commodities concerned—

- A. are or may be found to have been dumped as described in subsection (1) of section 90 of the Customs and Excise Act [*Chapter 23:02*]; or
 - B. are goods in respect of which a bounty or subsidy has been or will be granted within the meaning of subsection (1) of section 92 of the Customs and Excise Act [*Chapter 23:02*];
- (e) into any complaint of an unfair trade practice;
 - (f) into any practice in connection with the importation of commodities or services or the sale of imported commodities or services for the purpose of determining whether it should be declared an unfair trade practice in terms of paragraph (b) of subsection (3).

(2) Subsections (3) and (4) of section *twenty-eight* shall apply with necessary modifications to an investigation in terms of subsection (1).

(3) Upon completion of an investigation in terms of this section, the Commission shall make a report of its findings and recommendations thereon to the Minister, who may, as the case requires, do any one of the following—

- (a) refer the matter to the Minister responsible for finance in terms of subsection (4) of section 90, section 91 or subsection (2) of section 92 of the Customs and Excise Act [*Chapter 23:02*]; or
- (b) by notice in the *Gazette*, declare any practice in relation to the importation of commodities and services or the sale of imported commodities and services to be an unfair trade practice; or
- (c) recommend that the Minister responsible for finance impose, abolish or amend any tariff charge to the extent that he is empowered by law to do so; or
- (d) take such other action in connection with the report as he thinks fit.

PART V

AUTHORIZATION OF RESTRICTIVE PRACTICES, MERGERS AND OTHER CONDUCT

35 Application to Commission for authorization

- (1) Any person who proposes to—
 - (a) enter into, carry out or otherwise give effect to any agreement or arrangement; or
 - (b) engage in any practice or conduct;

which he considers may be prohibited, restricted or otherwise affected by this Act shall apply to the Commission for its authorization of such agreement, arrangement, practice or conduct.

(2) An application under subsection (1) shall be made in such form and manner as may be prescribed and shall be accompanied by the prescribed fee, if any, and such information and particulars as may be prescribed or as the Commission may reasonably require.

(3) Any person who, in or for the purposes of an application under subsection (1), makes a statement which he knows to be false or misleading or does not believe on reasonable grounds to be true, shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

36 Grant or refusal of authorization

(1) On receipt of an application under section *thirty-five*, the Commission shall publish a notice in the *Gazette* and in such newspaper as the Commission considers appropriate—

- (a) stating the nature of the authorization sought by the applicant; and
- (b) calling upon any interested person who wishes to do so to submit written representations to the Commission in regard to the authorization sought by the applicant:

Provided that, where the applicant has sought the Commission's authorization of a proposed merger, the Commission need not publish such a notice if the Commission considers that publication of the notice may prejudice the parties to the merger and is not likely to produce representations or information that will materially assist the Commission in its determination of the application.

(2) After conducting such investigation as it considers necessary into any application under section *thirty-five*, and taking into account any representations received in response to the relevant notice published under subsection (1), the Commission shall either—

- (a) grant the authorization sought by the applicant, subject to such terms and conditions as the Commission thinks appropriate, if the Commission is satisfied that the agreement, arrangement, practice or conduct concerned is not contrary to the public interest; or
- (b) refuse to grant the authorization sought by the applicant, if the Commission is not satisfied as provided in paragraph (a).

(3) The Commission shall observe the requirements of section *thirty-two* in determining whether or not any agreement, arrangement, practice or conduct is contrary to the public interest.

(4) For the purposes of any investigation under subsection (2), the Commission may exercise any of the powers conferred on it by section *twenty-eight* and shall observe the rules referred to in subsection (4) of that section.

(5) Any investigation under subsection (2) shall be conducted, and any decision under that subsection shall be reached, as expeditiously as possible.

37 Effect of authorization

While an authorization under section *thirty-six* is in force, nothing in this Act shall prevent the person to whom it was granted from—

- (a) entering into, carrying out or otherwise giving effect to the agreement or arrangement to which the authorization relates; or
- (b) engaging in the practice or conduct to which the authorization relates;

as the case may be.

38 Amendment or revocation of authorization

(1) Subject to this section, the Commission may amend or revoke any authorization granted under section *thirty-six*, if the Commission is satisfied that—

- (a) the authorization was granted in error or on the basis of information that was false or misleading; or
- (b) that there has been a breach of any term or condition subject to which the authorization was granted; or
- (c) that there has been a material change of circumstances since the authorization was granted and, as a result, the agreement, arrangement, practice or conduct that was authorized is contrary to the public interest.

(2) Before amending or revoking an authorization under subsection (1), the Commission—

- (a) shall cause the person to whom the authorization was granted to be informed, in writing, of the proposal to amend or revoke his authorization and shall afford him a reasonable opportunity to make representations in regard to the proposal; and
- (b) may conduct an inquiry into the proposed amendment or revocation, in which event the Commission may exercise any of the powers conferred on it by sections twenty-eight and twenty-nine and shall observe the rules referred to in subsection (4) of section *twenty-eight*.

(3) The Commission shall observe the requirements of section *thirty-two* in determining whether or not any agreement, arrangement, practice or conduct is contrary to the public interest for the purposes of paragraph (c) of subsection (1).

39 Register of authorizations

(1) The Commission shall keep a register in which it shall cause to be recorded such particulars as may be prescribed or as it may consider appropriate, of—

- (a) every application for an authorization made under section *thirty-five*; and
- (b) every authorization granted under section *thirty-six*, together with any terms and conditions attaching thereto; and
- (c) every refusal to grant an authorization under section *thirty-six*; and
- (d) any amendment or revocation of an authorization under section *thirty-eight*.

(2) The register kept under subsection (1) shall be open to inspection by members of the public, on payment of the prescribed fee, if any, during ordinary business hours at the offices of the Commission.

PART VI APPEALS

40 Right of appeal to Administrative Court

(1) Any person who is aggrieved by a decision of the Commission under Part IV, IVA, IVB or V may appeal against it to the Administrative Court.

(2) An appeal under subsection (1) shall be made within such period and in such form and manner as may be prescribed in rules made under the Administrative Court Act [*Chapter 7:01*].

41 Composition of Administrative Court for purposes of this Act

(1) For the purpose of hearing any appeal under this Act, the Administrative Court shall consist of a President of the Administrative Court and two assessors appointed by the President of the Administrative Court from the list of persons referred to in subsection (2).

(2) The Presidents of the Administrative Court, with the approval of the Chief Justice and the Minister, shall draw up a list of names of not fewer than ten persons who have ability and experience in commerce, industry, agriculture or administration or who have professional qualifications and are otherwise suitable for appointment as assessors, but who are not members of the Public Service.

PART VII GENERAL

42 Unfair trade practices

(1) The acts or omissions specified in the First Schedule shall be unfair business practices for the purposes of this Act.

(2) The Minister, on the recommendation of the Commission, may by statutory instrument amend the First Schedule—

- (a) by adding any restrictive practice thereto, where the Minister is satisfied that the restrictive practice concerned, if engaged in by any undertaking, would be unfair or deceptive and contrary to the public interest;
- (b) by altering any provision therein;
- (c) by deleting any provision therefrom:

Provided that no such amendment shall have the effect of rendering criminal anything done or omitted before the date of commencement of the amendment.

(3) Any person who enters into, engages in or otherwise gives effect to an unfair trade practice shall be guilty of an offence and liable—

- (a) in the case of an individual, to a fine not exceeding level twelve or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
- (b) in any other case, to a fine not exceeding level fourteen.

43 Certain conduct to have no legal effect

Any agreement, arrangement, undertaking, act or omission which—

- (a) constitutes an unfair business practice or which is entered into in furtherance of an unfair business practice; or
- (b) is entered into in contravention of this Act or any order or notice under this Act;

shall be void with effect from the date on which the conduct concerned became an unfair business practice or the order or notice concerned was made or issued, as the case may be.

44 Right of action of injured parties

(1) Any person who suffers injury, loss or harm as a result of any agreement, arrangement, undertaking, act or omission referred to in section *forty-three* may recover damages, by proceedings in a court of competent jurisdiction, from every person responsible for the agreement, arrangement, undertaking, act or omission.

(2) Subsection (1) shall not limit any person's remedy under any other law for injury, loss or harm that has been or may be occasioned to him by any agreement, arrangement, undertaking, act or omission referred to in section *forty-three*.

45 Commission may require returns

(1) Subject to subsection (3), for the purpose of investigating and detecting restrictive practices and monopoly situations, the Commission may serve a written notice on any person engaged in any business or industry requiring him to furnish the Commission, within such reasonable period or at such reasonable intervals as the Commission may specify in the notice, with information regarding his business or operations, including information as to—

- (a) any business agreement which he may at any time have entered into with any other person, or in which he may at any time have been concerned; and
- (b) any arrangement or understanding to which he or his business or industry may at any time have been a party; and
- (c) any interest which he or his or industry may at any time have acquired in any other business, undertaking or asset.

(2) Any person who, when required to furnish the Commission with information under subsection (1)-

- (a) fails or refuses to do so; or
- (b) furnishes the Commission with information which he knows to be false or does not believe on reasonable grounds to be true;

shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding six months or both such fine and such imprisonment.

(3) Nothing in this section shall be construed as requiring any person to disclose information that he could not be required to disclose when giving evidence in a court of law.

46 Investigating officers

(1) The Commission may—

- (a) designate any of its employees; and
- (b) with the approval of the Public Service Commission, designate any member of the Public Service;

to be an investigating officer for the purposes of this Act.

(2) Investigating officers shall carry out their functions under this Act subject to such directions as the Commission or the Director may give them.

(3) The Commission shall cause every investigating officer to be furnished with a certificate of appointment, which the investigating officer shall exhibit on demand by any interested person before carrying out any function under this Act.

47 Powers of entry and inspection

(1) Subject to subsection (2), an investigating officer may at all reasonable times—

- (a) enter any premises in or on which there is reasonably suspected to be any book, record or document relating to any restrictive practice or unfair trade practice or any actual or potential merger monopoly situation; and
- (b) require any person upon the premises—
 - (i) to disclose all information at his disposal; and
 - (ii) to produce any book, record or document or copy thereof or extract therefrom; that may relate in any way to any restrictive practice, unlawful practice, merger or monopoly situation referred to in paragraph (a);
- (c) make copies of or take extracts from any book, record or document referred to in paragraph (b).

(2) The powers of entry and inspection conferred by subsection (1) shall not be exercised except with the consent of the owner or person in charge of the premises concerned, or where there are reasonable grounds for believing that it is necessary to exercise them for the prevention, investigation or detection of an offence, other than an offence in terms of subsection (2) of section *forty-five*, or for the obtaining of evidence relating to such an offence.

(3) Any person who, without lawful excuse—

- (a) hinders or prevents an investigating officer from exercising any power under subsection (1); or
- (b) fails or refuses to comply with any requirement of an investigating officer under subsection (1); or
- (c) upon being required under subsection (1) to disclose any information, fails or refuses to do so or provides information that is false or which he does not believe on reasonable grounds to be true;

shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

48 Secrecy to be observed

(1) The Director and every member of the Commission or of a committee thereof, and every investigating officer and other person appointed or employed under this Act shall not disclose to any person, except in the performance of his functions under this Act or when required to do so by any law, any information which he may have acquired in the course of his duties in relation to financial or business affairs of any person, undertaking or business.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

49 Certificates of Director to be evidence

(1) For the purposes of section *thirty-three*, a document purporting to be a copy of an order and to be certified by the Director shall be presumed, unless the contrary is proved, to set out the terms of the order concerned and to have been duly certified by the Director, and shall be recorded as a judgment accordingly.

(2) In any proceedings before any court, a document purporting—

- (a) to set out the terms of any order, notice, arrangement, authority or decision of the Commission; or
- (b) to state whether or not any authorization has been granted, amended or revoked by the Commission;

shall, if it purports to be signed by the Director, be admissible on its production by any person as prima facie proof of its contents.

49A Exemption of Commission from liability

No liability shall attach to the Commission, employee or agent thereof for any loss or damage sustained by any person as a result of the bona fide exercise or performance by the Commission, employee or agent thereof of any duty conferred or imposed upon the Commission by this Act:

Provided that the provisions of this section shall not be construed so as to prevent any person from recovering compensation for any such loss, injury or damage caused by negligence or breach of contract.

50 Regulations

(1) The Minister, after consultation with the Commission, may by regulation prescribe anything which by this Act is required or permitted to be prescribed or which, in his opinion, is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Regulations made under subsection (1) may provide for—

- (a) the procedure to be followed in investigations carried out by the Commission;
- (b) the form of notices, orders, applications and authorizations made or issued under this Act;
- (c) fees and charges for any information given, authorization granted or any other thing made or done under this Act.

FIRST SCHEDULE (Sections 2 and 42)

UNFAIR BUSINESS PRACTICES

ARRANGEMENT OF PARAGRAPHS

Paragraph

1. Interpretation.
2. Misleading advertising.
3. False bargains.
4. Distribution of commodities or services above advertised price.
5. Undue refusal to distribute commodities or service.

6. Bid-rigging.
7. Collusive arrangements between competitors.
8. Predatory pricing.
9. Resale price maintenance.
10. Exclusive dealing.

Interpretation

1. In this Schedule—

“group of companies ” means two or more companies which—

- (a) have the relationship to each other of holding company and subsidiary or wholly owned subsidiary as defined in the Companies Act [Chapter 24:03]; or
- (b) are substantially controlled by the same person or persons, whether as shareholders, directors or otherwise;

“publish”, in relation to an advertisement, means to make the advertisement known in any manner whatsoever to the public or any section of the public;

“publisher”, in relation to an advertisement, means the person who publishes the advertisement or causes it to be published or on whose behalf it is published.

Misleading advertising

2. (1) For the purposes or in the course of any trade or business, publishing an advertisement—

- (a) containing a representation which the publisher knows or ought to know is false or misleading in a material respect; or
- (b) containing a statement, warranty or guarantee as to the performance, efficacy or length of life of any commodity, which statement, warranty or guarantee the publisher knows or ought to know is not based on an adequate or proper test thereof; or
- (c) containing a statement, warranty or guarantee that any service is or will be of a particular kind, standard, quality or quantity, or that it is supplied by any particular person or by a person of a particular trade, qualification or skill, which statement, warranty or guarantee the publisher knows or ought to know is untrue.

(2) For the purposes of subparagraph (1), a representation, statement, warranty or guarantee expressed on or attached to an article offered or displayed for sale, or expressed on the wrapper or container of such an article, shall be deemed to have been made in an advertisement.

False bargains

3. Advertising any commodity or service for distribution at a price—

- (a) which is represented in the advertisement to be a bargain price; or
- (b) which is so represented in the advertisement as to lead a person who reads, hears or sees the advertisement to the reasonable belief that it is a bargain price;

if the distributor of the commodity or service does not intend to distribute it at that price, or has no reasonable grounds for believing that he can do so, for a period that is, and in quantities that are, reasonable in relation to the nature of the commodity or service concerned and the nature and size of the distributor’s undertaking.

Distribution of commodities or services above advertised price

4. (1) Having advertised any commodity or service for distribution at a particular price, distributing it, during the period and in the market to which the advertisement relates, at a higher price than that advertised.

(2) Subparagraph (1) shall not apply in any case where—

- (a) the advertisement prominently stated that the price of the commodity or service concerned was subject to error or alteration without notice; or
- (b) the advertisement was immediately followed by another advertisement correcting the price mentioned in the first advertisement.

(3) For the purposes of subparagraph (1), the market to which an advertisement relates is the market to which it could reasonably be expected to reach, unless the advertisement defines its market specifically by reference to a particular area, store, outlet or otherwise.

Undue refusal to distribute commodities or services

5. (1) Failing or refusing to distribute any commodity to another person unless the other person—

- (a) ceases or refrains from distributing or using a commodity produced by some other person; or
- (b) restricts his distribution of a commodity produced by some other person; or
- (c) distributes the commodity at a specified price or at a price which is not less than a specified minimum price.

(2) Failing or refusing to distribute a commodity or service to any person, under the usual conditions of distribution, on the ground or belief that that person or someone else connected with him—

- (a) has furnished the Commission or a committee or an investigating officer with any information which he is required to furnish in terms of this Act or
- (b) has given evidence before the Commission at any investigation under this Act; or
- (c) has given evidence before a court in regard to any restrictive practice, merger, monopoly situation or unfair trade practice.

Bid-rigging

6. (1) Entering into or giving effect to an agreement, arrangement or understanding, whether enforceable or not, with another person whereby—

- (a) any of the parties to the agreement, arrangement or understanding undertake not to submit a bid or tender in response to a call or request for bids or tenders; or
- (b) in response to a call or request for bids or tenders, some or all the parties to the agreement, arrangement or understanding submit bids or tenders that have been arrived at by agreement between themselves.

(2) Subparagraph (1) shall not apply to an agreement, arrangement or understanding between companies which are all part of a single group of companies.

Collusive arrangements between competitors

7. (1) Being a producer or distributor of any class or type of commodity or service, entering into or giving effect to any agreement, arrangement or understanding, whether enforceable or not, with another person who produces or distributes a commodity or service of the same or a similar class or type—

- (a) to distribute the commodity or service at a particular price or within a particular range of prices; or
- (b) to share the market for the commodity or service, whether the market shares are divided according to geographical area, class of consumer or otherwise; or
- (c) to limit, by number or quantity, the commodities or services produced or distributed.

(2) Subparagraph (1) shall not apply to an agreement, arrangement or understanding—

- (a) between companies which are all part of a single group of companies; or
- (b) bona fide intended solely to improve standards of quality or service in regard to the production or distribution of the commodity or service concerned.

Predatory pricing

8. Selling at very low prices or at below production costs as a deliberate strategy of driving competitors off the market.

Resale price maintenance

9. Specifying the minimum price at which a product must be resold to customers.

Exclusive dealing

10. Engaging in exclusive dealing, that is—

- (a) supplying or offering to supply goods or services at a particular price; or
- (b) giving or allowing, or offering to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the company;

on the condition that the person to whom the supplier offers or proposes to supply the goods—

- (i) shall not acquire goods or services of a particular kind or description, or not acquire them except to a limited extent, directly or indirectly from a competitor of the supplier;
- (ii) shall not re-supply the goods or services, or not re-supply them except to a limited extent—
 - A. to particular persons or classes of persons;
 - B. in particular places or classes of places.

SECOND SCHEDULE (Section 5)

POWERS OF COMMISSION

1. To acquire premises necessary or convenient for the exercise of its functions and for that purpose, to buy, take in exchange, hire or otherwise acquire immovable property and interests in and rights over such property

2. To buy, take in exchange, hire or otherwise acquire movable property.

3. To maintain, alter and improve any of its property.
4. To mortgage or pledge any of its assets and, with the Minister's approval, to sell, exchange, let, dispose of, turn to account or otherwise deal with any assets which are not required for the exercise of its functions, for such consideration as the Commission may determine.
5. To draw, make, accept, indorse, discount, execute and issue promissory notes, bills of exchange, bills of lading, securities and other negotiable or transferable instruments.
6. To insure against losses, damages, risks and liabilities which it may incur.
7. To make contracts and enter into suretyships or give guarantees, and to modify or rescind such contracts or rescind such suretyships or guarantees.
8. With the approval of the Minister and the Minister responsible for finance, to establish and administer funds and reserves.
9. To employ, on such terms and conditions as the Commission thinks fit, such persons as are necessary for carrying out the Commission's functions and conducting the Commission's affairs, and to suspend or discharge any such employees.
10. With the approval of the Minister and the Minister responsible for finance, to pay such remuneration and allowances and grant such leave of absence and to make such gifts and bonuses and the like to its employees as the Commission thinks fit.
11. To provide pecuniary benefits for its employees on their retirement, resignation, discharge or other termination of service or in the event of their sickness or injury and for their dependants, and for that purpose to effect policies of insurance, establish pension or provident funds or make such other provision as may be necessary to secure for its employees and their dependants any or all the pecuniary benefits to which this paragraph relates.
12. With the Minister's approval, to purchase, take in exchange, hire or otherwise acquire land or dwellings for use or occupation by its employees.
13. To construct buildings and other improvements for use or occupation by its employees on land which it has purchased, taken in exchange, hired or otherwise acquired.
14. To sell or let land or dwellings for residential purposes to its employees.
15. With the Minister's approval, to make or guarantee loans to its employees or their spouses for—
 - (a) the purchase of dwellings or land for residential purposes; or
 - (b) the construction or improvement of dwellings on land which is the property of its employees or their spouses.
16. To provide security in respect of loans such as are described in paragraph 15 by the deposit of securities, in which it may invest such moneys as the Commission considers necessary for the purpose.
17. To do anything for the purpose of improving the skill, knowledge or usefulness of its employees, and in that connection to provide or assist other persons in providing facilities for training, education and research.
18. Generally, to do anything that is calculated to facilitate or is incidental or conducive to the performance of its functions under this Act or any other enactment.