

# GUIDE TO THE MAURITIUS COMPETITION ACT 2007

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## PREFACE

This Guide provides general information to parties wishing to understand the basic tenets of Mauritian competition law, taking into account the implementation of a competition policy brought about by the coming into force of the Competition Act 2007 on 24 October 2008.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have. It is intended to provide a brief outline of Mauritius' legal and regulatory environment in relation to competition law. If any questions arise in relation to the contents, they may be addressed to any member of the team, using the [contact information](#) provided at the end of this Guide.

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## 1. INTRODUCTION

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

Parts I and II of the Act were proclaimed and came into force on 24 October 2008 to allow the establishment of the Competition Commission (**Commission**) while the remainder of the Act was proclaimed and came into force on 25 November 2009.

This Guide covers all aspects of the Act, including the powers and functions of the Commission; details of the different restrictive business practices set out in the Act; the investigation and hearing process; the possible penalties imposed; and the ways of appeal.

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

## 2. THE COMPETITION COMMISSION

The Commission is set up as a body corporate (§4) under the Act, consisting of a chairperson, a vice-chairperson and three other commissioners, being persons from the public sector, private sector and academia, appointed by virtue of their qualifications and experience in law, economics, accountancy, or commerce, appointed by the President of Mauritius, on the advice of the Prime Minister of Mauritius (§7).

The Commission, as an independent public body, shall be impartial (§4) and any decisions made by it shall be independent of the Government or any other local authority.

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

In carrying out this role, the Commission is required to:

- conduct hearings and investigate enterprises if the need arises;
- determine whether or not any enterprise has engaged / is engaging in restrictive business practices; and
- should the Commission determine that there has been any anti-competitive behavior or practice on the part of any enterprise, it may impose such penalties or remedial steps it deems fit on such enterprises to ensure compliance with the Act (§5).

For the purposes of the Act, an “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.

The powers of the Commission include (§6):

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

To facilitate its disciplinary role, the Commission has published detailed guidelines for for business and consumers as well as formal guidance notes on the economic and legal analysis which shall be used for the determination of cases, the principles which shall be used for the determination of penalties or

remedies imposed under the Act; and the procedural rules specifying the procedures which the Commission shall follow when carrying out its functions under the Act (§38).

The list of guidelines and procedural rules issued by the Commission to date are as follows:

- CCM 1 – procedural rules;
- CCM 2 – market definition and the calculation of market shares;
- CCM 3 – collusive agreements;
- CCM 4 – monopoly situations and non-collusive agreements;
- CCM 5 – mergers;
- CCM 6 – remedies and penalties; and
- CCM 7 – guidelines general provisions.

While the Commission will generally follow the analytical framework set out in the above guidelines, the guidelines, however, do not constitute fixed rules. They are based on the Commission's own assessment of established principles of competition law and economics, as applicable under the Act and, the Commission has in its guidelines, issued the following cautionary statement, namely that "Mauritian law is unique and, while it conforms to best practice principles, it is in some ways very different from competition laws in force elsewhere."

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

### 3. **RESTRICTIVE BUSINESS PRACTICES**

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

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

#### 3.1 **Collusive agreements**

##### (a) **Horizontal agreements**

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

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

**(b) Bid rigging**

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

**(c) Vertical agreements involving resale price maintenance**

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

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

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

**3.2 Other restrictive agreements****(a) Non-collusive horizontal agreements**

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

**(b) Other vertical agreements**

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

**3.3 Monopoly situations**

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

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

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

- the extent to which the enterprise(s) enjoys such a position of dominance in the market as to make it possible for it to operate in the market, and to adjust prices or output, without effective constraint from competitors or potential competitors;

- the availability or non-availability of substitutable goods or services;
- the availability or non-availability of nearby competitors; and
- whether the actions or behaviour of an enterprise in a monopoly situation have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers.

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

#### 3.4 **Merger situations**

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

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

### 4. **INVESTIGATIONS AND HEARINGS BEFORE THE COMMISSION**

#### 4.1 **Investigations by the Executive Director**

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

The enterprise under investigation may be ordered to attend a hearing or may be requested to provide any book, document, record, article or to provide a statement made under oath to the Executive Director (§52). Failure to abide by the request or notice given by the Executive Director without lawful or reasonable excuse will result in an individual being liable to a fine not exceeding MUR50,000 and to imprisonment for a term not exceeding two years, or a body corporate in being liable to a fine not exceeding MUR200,000 (§52).

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

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

#### 4.2 **Hearings**

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

## 5. PENALTIES AND REMEDIES

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

### 5.1 Directions relating to collusive agreements

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

### 5.2 Financial penalty

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

The financial penalty must not exceed 10% of the turnover of the enterprise in Mauritius during the period of the breach up to a maximum period of five years (§59).

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

### 5.3 Directions relating to monopoly situations

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

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

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

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

### 5.4 Remedies in merger control

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

### 5.5 Interim measures

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

### 5.6 Undertakings

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

## 6. RIGHT TO APPEAL

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

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

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).