

CONSOLIDATED TO 30 JUNE 2014

LAWS OF SEYCHELLES

FAIR COMPETITION ACT

[3rd November, 2009]

Act 18 of 2009
SI 64 of 2013

ARRANGEMENT OF SECTIONS

FAIR COMPETITION ACT

PART I – PRELIMINARY

Short title
Interpretation
Application of Act

PART II – FAIR TRADING COMMISSION

Administration of Act
Functions
Powers

PART III – RESTRICTIVE BUSINESS PRACTICE

Sub-Part I - Abuse of Dominant Position

Abuse of dominant position
Request for Commission to consider conduct
Notification for guidance
Effect of guidance

**Sub-Part II - Agreements etc Preventing, Restricting or Distorting
Competition**

Provisions restricting, preventing or distorting competition
Agreements containing exclusionary provision
Request for Commission to examine agreement
Notification for guidance
Effect of guidance

Sub-Part III - Resale Price Maintenance

Collective agreements by dealers or suppliers
Agreement re minimum resale price void
Patented goods
Maintenance of minimum resale prices

Withholding supplies

Sub-Part IV - Control of Merger Situation by Commission

Merger

Application to Commission for merger

Permitted merger

Factors to be considered before grant of permission

Sub-Part V - Anti-Competitive Business Conduct

Price fixing

Action to restrain competition

Bid-rigging

Sub-Part VI - Authorisation

Grant of authorisation

Effect of authorisation

Revocation or amendment of authorisation

Register of Authorisation

PART IV – INVESTIGATION BY AND HEARING BEFORE
COMMISSION

Initiation of complaint by Commission

Initiation of complaint by any person

Investigation by Commission

Discontinuation of investigation

Report

Convening of hearings

PART V – ASSESSMENT OF RESTRICTIVE BUSINESS
PRACTICE

Assessment under Sub-Parts I, II and IV of Part III

Assessment under Sub-Parts III and V of Part III

Consideration upon finding of adverse effects on competition

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

Directions in relation to conduct falling within scope of Sub-Part I of Part III

Directions in relation to agreement falling within scope of Sub-Part II of Part III

Consideration of offsetting benefits in determination of remedial measures

Directions under Sub-Part IV of Part III

Directions in relation to agreement or practice falling within scope of Sub-Parts III and V of Part III

Financial penalty

Interim measures

Undertakings

Keeping directions and undertakings under review

PART VII – APPEAL

Appeal to Tribunal
Prosecution of appeal
Appeal to Supreme Court

PART VIII – MISCELLANEOUS

Enforcement of directions, undertakings or order
Regulations
Transitional period

SCHEDULE 1 ((Section 3(3)) – AGREEMENTS OR PRACTICES
EXCLUDED FROM THE ACT

SCHEDULE 2 ((Section 8(2)) – NOTIFICATION FOR GUIDANCE:
PROCEDURE

SCHEDULE 3 ((Section 13(2)) – NOTIFICATION FOR
GUIDANCE: PROCEDURE

SUBSIDIARY LEGISLATION: Sections 54 and 22(2): Fair
Competition (Application for Merger) Regulations, 2013

Citation
Application for merger

PART I – PRELIMINARY

Short title

1. (1) This Act may be cited as the Fair Competition Act.

Interpretation

2. In this Act —

“acquire”, in relation to —

(a) goods, includes to obtain by way of gift, purchase or exchange, lease, hire or hire purchase; and

(b) services, includes to accept the rendering or performance of services;

“advertisement” means any form of communication made to the public or a section of the public for the purpose of promoting the supply of goods or services;

“agreement” includes any agreement, arrangement or understanding, whether oral or in writing or whether or not it is or is intended to be legally enforceable;

“Board” has the meaning given to it under section 2 of the Fair Trading Commission Act, 2009;

“business” —

(a) means the carrying on of any commercial activity for gain or reward; and

(b) includes —

(i) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in goods for gain or reward; or

(ii) acquiring, supplying and otherwise dealing in services for gain or reward;

“Commission” means the Fair Trading Commission established under section 3(1) of the Fair Trading Commission Act, 2009;

“concerted practice” means co-operative or coordinated conduct between enterprises achieved through direct or indirect contact, that replaces their

independent action, but which does not amount to an agreement;

“consumer” means any direct or indirect user of a product or service supplied by an enterprise in the course of business, and includes —

(a) another enterprise that uses the product or service thus supplied as an input to its own business;

(b) a wholesaler, a retailer and a final consumer;

“document” includes —

(a) anything on which there is writing;

(b) a map, plan, drawing or photograph;

(c) anything from which sounds or visual images are capable of being reproduced;

(d) any record created, stored, generated, received or communicated by electronic or electromagnetic means;

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

“exclusive dealing” means any practice whereby a supplier of goods —

(a) as a condition of supplying the goods to a consumer, requires that consumer to —

(i) deal only or primarily in goods supplied by or designated by the supplier or the supplier’s nominee; or

(ii) refrain from dealing in a specified class or kind of goods except as supplied by the supplier or the supplier’s nominee; or

(b) induces a consumer to meet a condition referred to in paragraph (a) by offering to supply the goods to the consumer on more favourable terms or conditions if the consumer agrees to meet that condition;

“goods” includes all chattels other than money, securities or choses in action;

“market restriction” means any practice whereby a supplier of goods, as a condition of supplying the goods to a consumer, requires that consumer to supply any goods only in a defined market, or exacts a penalty of any kind from the consumer if the consumer supplies any goods outside a defined market;

“merger” means the acquisition or establishment, direct or indirect, by one or more enterprises, whether by purchase of shares or assets, lease of assets, amalgamation or combination or otherwise, of control over the whole or a part of the business of an immediate competitor, supplier, consumer or other enterprise;

“Minister” means the Minister responsible for Trade;

“prescribed” means prescribed by regulations;

“price” includes any charge or fee, by whatever name called, payable in connection with the provision of a good or service;

“restrictive business practice” means any situation falling within Part III;

“service” means a service of any description, whether industrial, trade, professional or otherwise;

“share” —

(a) means a share in the share capital of a company or other body corporate, whether or not it carries the right to vote at general meetings; and

(b) includes —

(i) a beneficial interest in any such share;

(ii) a power to exercise, or control the exercise of, a right to vote attaching to any such share that carries the right to vote at meetings of the company;

(iii) a power to acquire or dispose of, or control the acquisition or disposition of, any such share; or

(iv) a perpetual debenture and perpetual debenture stock;

“supply” includes —

(a) in relation to goods —

(i) to sell, rent, exchange, hire or otherwise dispose of goods or an interest therein or a right thereto; or

(ii) to offer to sell, rent, exchange, hire or otherwise dispose of such goods,

right or interest; or

(b) in relation to services, to provide services or offer to provide such services otherwise than under a contract of employment, and

“supplier” shall be construed accordingly;

“tied selling” means any practice whereby a supplier of goods or services —

(a) as a condition of supplying the goods or services referred to in this definition as the “tied goods” or “tied services” respectively, to a consumer, requires the consumer to —

(i) acquire any other goods or services from the supplier or the supplier’s nominee; or

(ii) refrain from using or distributing, in conjunction with the tied goods, any other goods that are not of a brand or manufacture designated by the supplier or the supplier’s nominee; or

(b) induces a consumer to meet a condition set out in a provision of paragraph (a) by offering to supply the tied goods or tied services to the consumer on more favourable terms or conditions if the consumer agrees to meet that condition;

“trade” means any trade, business, industry,

profession or occupation relating to the supply or acquisition of goods or services;

“Tribunal” means the Tribunal established under section 44(1) of the Fair Trading Commission Act, 2009.

(2) Every reference in this Act to —

(a) “anti-competitive practice” or “anticompetitive business conduct” is a reference to a practice or conduct amounting to or resulting in a non minor restraint of trade or any act of competition in industrial or commercial matters, including the conclusion of an agreement or the establishment of an arrangement that

(i) restricts trade;

(ii) maintains or is likely to result in the maintenance of a dominant position; or

(iii) constitutes a pricing regime respecting a particular product or trade that is controlled by a supplier or purchaser;

(b) “market” is a reference to a market for goods or services supplied in Seychelles;

(c) “lessening of competition” shall, unless the context otherwise requires, include references to hindering or preventing competition.

(3) For the purposes of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market, including competition from goods or

services supplied or likely to be supplied by persons not resident or carrying on business in Seychelles.

Application of Act

3. (1) Save as otherwise provided for in this section or elsewhere in this Act, this Act shall apply to every economic activity within, or having an effect within, Seychelles.

(2) This Act shall bind the State to the extent that the State engages in trade or business for the production or supply of goods or services within a market in Seychelles which is open to participation by other enterprises.

(3) This Act does not apply to matters listed in Schedule 1.

PART II – FAIR TRADING COMMISSION

Administration of Act

4. The Commission shall be responsible for the administration of this Act.

Functions

5. (1) The Commission shall —

(a) be responsible for the promotion and maintenance of fair competition;

(b) carry out on its own initiative or at the request of any person or enterprise that has an interest in a matter, such investigations in relation to the conduct of trade —

(i) as will enable it to prevent the use of business practices in contravention of this Act; or

(ii) as it may consider necessary or desirable in connection with any matters falling within the provisions of this Act;

(c) keep under review commercial activities to ensure that practices that may adversely or unfairly affect the interests of consumers and businesses are prevented or terminated;

(d) take such action as it considers necessary —

(i) to prevent the abuse of a dominant position by an enterprise;

(ii) to eliminate anti-competitive practices; and

(iii) to prevent or control anti-competitive mergers;

(e) make available to consumers general information with respect to their rights and obligations under this Act; and

(f) perform such other functions to give effect to this Act.

Powers

6. (1) The Commission shall have such powers as are necessary to enable it to effectively perform its functions and may, in particular —
- (a) enter into such contracts as may be necessary or expedient for the purpose of performing its functions under this Act;
 - (b) conduct as required, any hearings with interested persons or parties;
 - (c) issue orders and directions in accordance with this Act;
 - (d) impose remedies or financial penalties on an enterprise which conducts its business in breach of this Act;
 - (e) impose such fees as may be required under this Act or regulations made under it;
 - (f) co-operate with authorities in other countries entrusted with functions similar to those of the Commission.

PART III – RESTRICTIVE BUSINESS PRACTICE

Sub-Part I - Abuse of Dominant Position

Abuse of dominant position

7. (1) Subject to subsection (4), any conduct on the part of one or more enterprise or enterprises which amounts to an abuse of a dominant position in a market is prohibited, if it may adversely or unfairly affect trade within Seychelles.

(2) For the purposes of this Act, an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors.

(3) Conduct may, in particular, constitute such an abuse if it consists in —

- (a) restricting the entry of any enterprise into that or any other market that supplies or is likely to supply a substitute for the goods or services supplied in that market;
- (b) preventing or deterring any enterprise from engaging in competitive conduct in that or any other market;
- (c) eliminating or removing any enterprise from that or any other market;
- (d) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory;
- (e) limiting production, markets or technical development to the prejudice of consumers;
- (f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(g) making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements;

(h) exclusive dealing, market restriction or tied selling.

(4) An enterprise is not to be treated as abusing a dominant position —

(a) if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit;

(b) if the effect or likely effect of its behaviour in a market is the result of its superior competitive performance; or

(c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights —

(i) has the effect of lessening competition substantially in a market; and

(ii) impedes the transfer and dissemination of technology.

Request for Commission to consider conduct

8. (1) Sections 9 and 10 provide for conduct of an enterprise which the Commission considers may infringe the prohibition in section 7(1), to be considered by it on the application of that enterprise.

(2) Schedule 2 provides for the procedure to be followed —

(a) by an enterprise making an application; and

(b) by the Commission, in considering an application.

Notification for guidance

9. (1) An enterprise which applies for conduct to be considered under this section shall —

(a) notify the Commission of it; and

(b) apply to it for guidance.

(2) On an application under this section, the Commission may give the applicant guidance as to whether or not, in its view, the conduct is likely to infringe the prohibition in section 7(1).

Effect of guidance

10. (1) This section applies to conduct, if the Commission has determined an application under section 9(2) by giving guidance that the conduct is unlikely to infringe the prohibition in section 7(1).

(2) The Commission shall take no further action under this Sub-Part with respect to the conduct to which this section applies, unless—

(a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its guidance;

(b) it has a reasonable suspicion that the information on which it based its guidance was incomplete, false or misleading in a material particular; or

(c) a complaint about the conduct has been made to it.

(3) A penalty may not be imposed under this Sub-Part in respect of any infringement of the prohibition by conduct to which this section applies.

(4) The Commission may, however, remove the immunity given by subsection (3) if —

(a) it takes action under this Sub-Part with respect to the conduct in one of the circumstances mentioned in subsection (2);

(b) it considers that it is likely that the conduct will infringe the prohibition; and

(c) it gives notice in writing to the enterprise on the application of which the guidance was given that it is removing the immunity as from the date specified in the notice.

(5) Where the Commission has a reasonable suspicion that information —

(a) on which it based its guidance; and

(b) which was provided to it by an enterprise engaging in the conduct,

was incomplete, false or misleading in a material particular, the date specified in the notice under subsection (4)(c) may be earlier than the date on which the notice is given.

Sub-Part II - Agreements etc Preventing, Restricting or Distorting Competition

Provisions restricting, preventing or distorting competition

11. (1) Subject to this section, agreements between enterprises, trade practices or decisions of enterprises, or undertakings or concerted practices of enterprises that have or are likely to have as their object or effect the prevention, restriction or distortion of competition within Seychelles, are prohibited unless they are excluded in accordance with the provisions of this Sub-Part.

(2) Subsection (1) applies to agreements, practices, undertakings or decisions that —

(a) directly or indirectly fix purchase or selling prices, or determine any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) provide for the artificial dividing up of markets or sources of supply;

(d) affect tenders to be submitted in response to a request for bids; including —

(i) not to submit a bid in response to a call or request for bids or tenders; or

(ii) as bidders they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves, unless enterprises are not able to submit their bids individually;

(e) apply dissimilar conditions to equivalent transactions with other parties engaged in the same trade, thereby placing those other parties at a competitive disadvantage; or

(f) make the conclusion of agreements subject to acceptance by parties other than the offer or of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.

(3) Subsection (1) applies only if the agreement, practice, undertaking or decision is, or is intended to be, implemented in Seychelles.

(4) Subsection (1) does not apply to —

(a) an agreement or a category of agreements the conclusion of which has been authorized under section 28(2); or

(b) an agreement, a practice, an undertaking or a decision that in the opinion of the Commission —

(i) contributes to the improvement of production of goods, supply of goods and services, or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits;

(ii) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in subparagraph (i); or

(iii) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

(5) An agreement or decision which is prohibited by subsection (1) is void.

Agreements containing exclusionary provision

12. (1) An enterprise shall not give effect to an exclusionary provision in an agreement where the agreement is entered into or arrived at between enterprises any two or more of which are in competition with each other, if the effect of the provision is to prevent, restrict or limit —

(a) the supply of goods or services to; or

(b) the acquisition of goods or services from,

any particular enterprise or class of enterprise either generally or in particular circumstances or conditions, by all or any of the parties to the agreement.

(2) For the purposes of subsection (1), an enterprise is in competition with another enterprise if the first mentioned enterprise is, or is likely to be or in the absence of the provision referred to in subsection (1), would be or would be likely to be, in competition with the other enterprise, in relation

to the supply or acquisition of all or any of the goods or services to which that provision relates.

Request for Commission to examine agreement

13. (1) Section 14 provides for an agreement to be examined by the Commission on the application of a party to it, if the party considers that it may infringe the prohibition in section 11(1) or 12 (1).

(2) Schedule 3 provides for the procedure to be followed —

- (a) by a party making such an application; and
- (b) by the Commission, in considering such an application.

Notification for guidance

14. (1) A party to an agreement which applies for the agreement to be examined under this section shall —

- (a) notify the Commission of it; and
- (b) apply to it for guidance.

(2) On an application under this section, the Commission may give the applicant guidance as to whether or not, in its view, the agreement is likely to infringe the prohibition in section 11(1) if it is not excluded, or 12(1).

(3) Where an agreement to which a prohibition applies has been notified to the Commission under this section, no penalty is to be imposed under this Sub-Part in respect of any infringement of the prohibition by the agreement which occurs during the period —

- (a) beginning with the date on which notification was given; and
- (b) ending with such date as may be specified in a notice in writing given to the applicant by the Commission when the application has been determined.

(4) The date specified in the notice under subsection (3)(b) may not be earlier than the date on which the notice is given.

Effect of guidance

15. (1) This section applies to an agreement if the Commission has determined an application under section 14(2) by giving guidance that the agreement is unlikely to infringe the prohibition in section 11(1) regardless of whether or not it is excluded, or 12(1).

(2) The Commission shall take no further action under this Sub-Part with respect to an agreement to which this section applies, unless—

- (a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its guidance;
- (b) it has a reasonable suspicion that the information on which it based its guidance was incomplete, false or misleading in a material particular; or

(c) a complaint about the agreement has been made to it by a person which is not a party to it.

(3) A penalty may not be imposed under this Sub-Part in respect of any infringement of a prohibition by an agreement to which this Sub-Part applies.

(4) The Commission, however, may remove the immunity given by subsection (3) if —

(a) it takes action under this Sub-Part with respect to the agreement in one of the circumstances mentioned in subsection (2);

(b) it considers it likely that the agreement will infringe the prohibition; and

(c) it gives notice in writing to the party on the application of which the guidance was given that it is removing the immunity as from the date specified in the notice.

(5) If the Commission has a reasonable suspicion that information —

(a) on which it based its guidance; and

(b) which was provided to it by a party to the agreement,

was incomplete, false or misleading in a material particular, the date specified in the notice under subsection (4)(c) may be earlier than the date on which the notice is given.

Sub-Part III - Resale Price Maintenance

Collective agreements by dealers or suppliers

16. (1) It is unlawful for any two or more enterprises that are suppliers of goods, or their agents, to enter into or carry out any agreement whereby the enterprises or their agents, as the case may be, undertake to—

(a) supply goods only to dealers, whether those dealers are parties to the agreement or not, which undertake to resell or have resold goods in accordance with agreed conditions as to the price at which those goods may be resold; or

(b) supply goods to dealers that resell or have resold goods in breach of any conditions as to the price at which those goods may be resold on terms less favourable than those applicable in the case of other dealers carrying on business in similar circumstances, or withhold supplies of goods from such dealers.

(2) It is unlawful for an enterprise that is a supplier of goods or its agent to enter into or carry out any agreement—

(a) whereby it undertakes to withhold orders for supplies of goods from suppliers, whether parties to the agreement or not, which —

(i) supply or have supplied goods without imposing a condition respecting the minimum price at which goods may be resold; or

(ii) refrain from taking steps to ensure compliance with the condition referred to under subparagraph (i) in respect of goods supplied by them; or

(b) that permits discrimination in its handling of goods supplied under subsection (1).

(3) It is unlawful for those enterprises or their agents referred to in subsection (1) or the enterprise or its agent referred to in subsection (2) to enter into or carry out any agreement authorising —

(a) the recovery of penalties, however described, by or on behalf of the parties to the agreement from dealers who re-sell or have resold goods in breach of any condition described in subsection (1) or (2); or

(b) the conduct of any proceedings in connection with the recovery of penalties as described in paragraph (a).

(4) An agreement that contravenes any of the provisions of this section is void.

Agreement re minimum resale price void

17. (1) A term or condition of an agreement for the sale of any goods by a supplier to a dealer is void to the extent that it purports to establish or provide for the establishment of minimum prices to be charged on the resale of those goods.

(2) Subject to subsections (3) and (4), it is unlawful for a supplier of goods or its agent to —

(a) include in an agreement for the sale of goods a term or condition which is void by virtue of this section;

(b) require, as a condition of supplying goods to a dealer, the inclusion in the agreement of any term or condition or the giving of any undertaking that is void in accordance with subsection (1);

(c) notify to dealers, or otherwise publish in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of those goods.

(3) Subsection (2)(a) does not affect the enforceability of an agreement except in respect of the term or condition which is void by virtue of this section.

(4) Nothing in subsection (2)(c) shall be construed as precluding a supplier or an agent acting on a supplier's behalf, from notifying to dealers or otherwise publishing prices recommended as appropriate for the resale of goods supplied or to be supplied by the supplier.

Patented goods

18. (1) Section 17 applies to patented goods and goods made by a patented process as it applies to other goods.

(2) Notice of any term or condition which is void by virtue of section 17, or which would be so void if included in an agreement relating to the sale of any such goods, is of no effect for the purpose of limiting the right of a dealer to dispose of those goods without infringement of the patent.

(3) Nothing in section 17 and this section affects the validity, as between the parties to an agreement and their successors, of any term or condition of —

(a) a licence granted by the proprietor of a patent or a licensee under any such licence; or

(b) any assignment of a patent,

insofar as it regulates the price at which goods produced or processed by the licensee or assignee may be sold by the dealer.

Maintenance of minimum resale prices

19. (1) It is unlawful for a supplier to withhold supplies of any goods from a dealer seeking to obtain them for resale on the ground that the dealer —

(a) has sold goods obtained either directly or indirectly from that supplier at a price below the resale price or has by other means supplied such goods either directly or indirectly to a third party which had done so; or

(b) is likely, if the goods are supplied to it, to sell them at a price below that price, or supply them either directly or indirectly to a third party who would be likely to supply the goods at a price below that paid for those goods.

(2) Where under this section it would be unlawful for a supplier to withhold supplies of goods, it is also unlawful for that supplier to cause or procure any other supplier to do so.

(3) In this section “the resale price”, in relation to a sale of goods of any description, means any price —

(a) notified to the dealer or otherwise issued by or on behalf of a supplier of the goods in question, whether lawfully or not, as the price or minimum price which is to be charged or is recommended as appropriate, for a sale of goods of that description; or

(b) agreed to be charged for goods, by an agreement between the dealer and any supplier of the goods.

Withholding supplies

20. (1) For the purposes of this Sub-Part, a supplier of goods shall be treated as withholding supplies from a dealer, where —

(a) the supplier refuses or fails to supply those goods to the order of the dealer;

(b) the supplier refuses to supply those goods to the dealer except at prices, or on terms or conditions as to credit, discount or other matters, which are significantly less favourable than those at or on which that supplier normally supplies those goods to other dealers carrying on business in similar circumstances; or

(c) the supplier enters into an agreement to supply goods to the dealer and treats it in a manner significantly less favourable than that in which the supplier normally treats other dealers in the goods supplied in respect of times or methods of delivery, or other matters arising in the execution of the agreement.

(2) A supplier shall not be treated as withholding supplies of goods on any ground mentioned in section 19(1) if, in addition to that ground, the supplier has other grounds which, standing alone,

would justify the withholding of those supplies.

(3) Subject to subsection (5), where in proceedings brought against a supplier of goods in respect of a contravention of section 19, the matters specified in subsection (4) are proved, it shall be presumed, unless the contrary is proved, that the supplies were withheld on the ground that the dealer had acted or was likely to act as described in that section.

(4) For the purposes of subsection (3), the following are required to be proved —

- (a) supplies of goods were withheld from a dealer;
- (b) during a period ending immediately before the supplies were so withheld, the supplier was doing business with the dealer or was supplying goods of the same description to other dealers carrying on business in similar circumstances; and
- (c) the dealer, to the knowledge of the supplier, had within the preceding 6 months acted as described in section 19(1)(a) or had indicated its intention to act as described in section 19(1)(b) in relation to the goods in question.

(5) Subsections (3) and (4) do not apply where the proof that supplies were withheld consists only of evidence of requirements imposed by the supplier in respect of the time at which or the form in which payment was to be made for goods supplied or to be supplied.

Sub-Part IV - Control of Merger Situation by Commission

Merger

21. All mergers involving an enterprise that—

- (a) by itself controls; or
- (b) together with any other enterprise with which it intends to effect the merger is likely to control,

40 per cent of a market or such other amounts as the Minister may prescribe are prohibited unless permitted by the Commission in accordance with this Sub-Part.

Application to Commission for merger

22. (1) Where an enterprise referred to in subsection (1) is desirous of effecting a merger, it shall apply to the Commission for permission to effect the merger.

(2) An application under subsection (1) shall be made in the prescribed form and accompanied by the prescribed information.

(3) Subsection (1) shall apply to any public bid for the control of an enterprise.

Permitted merger

23. (1) An enterprise seeking permission to effect a merger under section 22(1) shall —

- (a) demonstrate that if the merger was not completed it is not likely that the relevant efficiency gains would be realised by means that would limit competition to a lesser

degree than the merger; or

(b) demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the assets of the failing business, and describe in detail the results of the search for alternative purchasers.

(2) A merger may be permitted if the parties establish that —

(a) the merger is likely to bring about gains in real as distinct from pecuniary efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the merger; or

(b) one of the parties to the merger is faced with actual or imminent financial failure, and the merger represents the least anti-competitive among the known alternative uses for the assets of the failing business.

Factors to be considered before grant of permission

24. In determining, in any particular case whether to grant permission, the Commission shall take into account the following —

(a) the structure of the market likely to be affected by the proposed merger;

(b) the degree of control exercised by the enterprises concerned in the proposed merger in the market, and particularly the economic and financial power of the enterprises;

(c) the availability of alternatives to the services or goods supplied by the enterprises concerned in the merger;

(d) the likely effect of the proposed merger on consumers and the economy; and

(e) the actual or potential competition from other enterprises and the likelihood of detriment to competition.

Sub-Part V - Anti-Competitive Business Conduct

Price fixing

25. (1) An enterprise engaged in the business of producing or supplying goods or services shall not, directly or indirectly—

(a) by agreement or promise, intimidation or threat or any like means, attempt to influence an increase, the maintenance or a reduction of the price at which any other enterprise supplies or offers to supply, or advertises for goods or services; or

(b) refuse to supply goods or services to, or otherwise discriminate against, any other enterprise engaged in business because of the low pricing policy of that enterprise or for any other reason.

(2) Subsection (1) does not apply where the enterprise attempting to influence the conduct of another enterprise, and the enterprise in respect of which the attempt to influence is made, are affiliated companies or, as the case may be, principal and agent.

(3) For the purposes of this section, the publication by a supplier of goods other than a retailer of an advertisement that mentions a resale price for the goods is an attempt to influence an increase or the maintenance of the selling price of any person in the hands of which the goods come for resale, unless the price is so expressed as to make it clear to any person which becomes aware of the advertisement that the goods may be sold at a lower price.

Action to restrain competition

26. (1) An enterprise shall not conspire, combine, agree or arrange with another person to —
- (a) limit the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;
 - (b) prevent, limit or unduly lessen, the manufacture or production of any goods to enhance unreasonably the price thereof;
 - (c) unduly lessen competition in the production, manufacture, purchase, sale, supply, rental or transportation of any goods;
 - (d) unduly lessen, limit or prevent competition in the provision of insurance on persons concerned in or property related to the production, storage, transportation or dealing in any goods or the provision of services; or
 - (e) otherwise unduly restrain or injure competition.

(2) Nothing in subsection (1) applies to a case where the arrangements are related to the introduction or maintenance of —

- (a) standards for products or the quality of service that is reasonably necessary for the protection of the public; and
- (b) standards of competence and integrity that are required —
 - (i) in the practice of a trade or profession relating to the service; or
 - (ii) in the collection and dissemination of information relating to the service.

Bid-rigging

27. (1) Subject to subsection (2), it is unlawful for two or more persons to enter into an agreement whereby—

- (a) one or more of them agree to undertake not to submit a bid in response to a call or request for bids or tenders; or
- (b) as bidders or tenderers they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves.

(2) This section does not apply in respect of an agreement that is entered into or a submission that is arrived at only by enterprises each of which is, in respect of every one of the others, an affiliate.

Sub-Part VI - Authorisation

Grant of authorisation

28. (1) Notwithstanding this Act, an enterprise that proposes to enter into or carry out an agreement or to engage in a business practice which, in its opinion, is an agreement or practice affected or prohibited by this Act, may apply to the Commission in the prescribed form for an authorisation to do so.

(2) The Commission upon receipt of an application under subsection (1) may grant an authorisation, where it is satisfied that the agreement or practice, as the case may be, is likely to promote the public benefit and is reasonable in the circumstances.

(3) An authorisation may be subject to such terms and conditions as the Commission considers fit and for such time as it shall specify.

(4) The Commission shall before granting an authorisation —

(a) publish a notice in the Gazette and in at least one newspaper that is published daily informing the public of the application and advising that any person who has an interest in the matter may submit written objections to the grant of the authorisation, within the time specified in the notice; and

(b) consider all objections received and satisfy itself that it is reasonable in the circumstances to grant the authorisation.

(5) Where the Commission refuses to grant an authorisation, it shall inform the applicant in writing of the refusal and the reasons for such refusal.

Effect of authorisation

29. While an authorisation granted under section 28(2) remains in force, nothing in this Act shall prevent the applicant from giving effect to any provision of an agreement, or from engaging in any practice, to which the authorisation relates.

Revocation or amendment of authorisation

30. (1) Subject to subsection (2), the Commission shall —

(a) revoke an authorisation where it is satisfied that —

(i) the authorisation was granted on information that was false or misleading;

(ii) there has been a breach of any terms or conditions, subject to which the authorisation was granted; or

(iii) the circumstances that justified the grant of the authorisation no longer exist; or

(b) amend the authorisation where it is satisfied that the current conditions in the market necessitate an amendment.

(2) The Commission shall, before revoking or amending an authorisation —

(a) serve on the relevant applicant a notice in writing specifying the reason for the proposed revocation or amendment; and

(b) inform the applicant of its right to apply to it to be heard on the matter within such time as may be specified in the notice.

Register of Authorisation

31. (1) The Commission shall keep or cause to be kept, in such form as it may determine, a Register of Authorisation granted under this Sub-Part.

(2) The Register of Authorisation shall be kept at the office of the Commission and shall be available for inspection by members of the public during the hours of business of the Commission.

PART IV – INVESTIGATION BY AND HEARING BEFORE COMMISSION

Initiation of complaint by Commission

32. The Commission may initiate a complaint against an alleged restrictive business practice.

Initiation of complaint by any person

33. (1) Any person may —

(a) submit information concerning an alleged restrictive business practice, in any manner or form; or

(b) submit a complaint against an alleged restrictive business practice,

to the Commission.

(2) Sections 31 and 32 of the Fair Trading Commission Act apply, with such modifications and adaptations as are necessary, to a complaint submitted under this section.

Investigation by Commission

34. (1) The Commission shall investigate —

(a) a complaint initiated under section 32 or submitted under section 33; or

(b) a proposed merger under section 22(1), in order to satisfy itself that the proposed merger would not adversely affect competition or be detrimental to consumers.

(2) The Commission for the purposes of investigating a complaint, may —

(a) enter and search any premises;

(b) inspect and remove, for the purpose of making copies, any documents or extracts therefrom in the possession or under the control of any person; and

(c) upon completing the search authorised by a warrant, leave a receipt listing documents or extracts therefrom that are removed for the purposes of this section.

(3) Sections 34 and 35 of the Fair Trading Commission Act, 2009, apply, with such modifications and adaptations as are necessary, to a search or seizure executed under this Act.

Discontinuation of investigation

35. (1) Where the Commission at any stage of an investigation under this Act is of opinion that the matter being investigated does not justify further investigation, the Commission may discontinue the investigation, and shall make a report in writing stating the reasons for such discontinuation.

(2) Where the Commission discontinues an investigation under subsection (1), it shall —

(a) within 14 days of the discontinuation notify the parties concerned in the investigation of the discontinuation; and

(b) submit a report of the discontinuation to the Minister within 3 months of such discontinuation.

Report

36. At any time after the conclusion of an investigation, the Chief Executive Officer shall submit his or her report of the investigation to the Board.

Convening of hearings

37. (1) Upon receipt of a report submitted under section 36, the Board shall convene a hearing.

(2) Part VI of the Fair Trading Commission Act, 2009, applies with such modifications and adaptations as are necessary, to a hearing convened under this Act.

PART V – ASSESSMENT OF RESTRICTIVE BUSINESS PRACTICE

Assessment under Sub-Parts I, II and IV of Part III

38. (1) When reviewing a matter falling within Sub-Parts I, II and IV of Part III, the Commission shall have regard to the desirability of maintaining and encouraging competition and the benefits to be gained in respect of price, quantity, variety and quality of goods and services, and shall first determine whether competition in any market is adversely affected in that, in the case of —

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

(b) a monopoly situation, the conduct of one or more parties —

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

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

(c) a merger situation, a proposed merger will result or is likely to result, in a substantial lessening of competition within any market, having regard to the factors set out in section 24.

Assessment under Sub-Parts III and V of Part III

39. The Commission shall, in relation to every agreement falling under Sub-Parts III and V of Part III establish whether on the facts of the case, the parties to the agreement have infringed the prohibition imposed under those Sub-Parts.

Consideration upon finding of adverse effects on competition

40. (1) Where the review of any matter described in section 38 leads to a finding by the Commission that there are adverse or unfair effects on competition in a particular case, it shall, before deciding on any appropriate remedial action to be taken as provided for under Part VI, consider —

- (a) if any of the offsetting public benefits specified in subsection (2) are present; and
- (b) whether and to what extent the benefits, if they are present, should be taken into account in determining the remedial action to be taken.

(2) A benefit shall be considered for the purposes of subsection (1) if it is shown that the effects of any absence, prevention, restriction or distortion of competition are outweighed by specific gains of —

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

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

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

Directions in relation to conduct falling within scope of Sub-Part I of Part III

41. (1) Where the Commission determines that any conduct falls within the scope of Sub-Part I of Part III, it shall prepare a report indicating the conduct that constituted the abuse and —

- (a) shall notify the enterprise of its finding accompanied by a copy of the report;
- (b) shall direct the enterprise to cease the abusive conduct within a specified period; and
- (c) may require the enterprise to take such further action as in its opinion is necessary.

(2) A direction given under subsection (1) shall be in writing.

Directions in relation to agreement falling within scope of Sub-Part II of Part III

42. (1) Where the Commission determines that an enterprise is a party to a restrictive agreement

falling within the scope of Sub-Part II of Part III, that —

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

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

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

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

the Commission shall give the enterprise such directions as it considers necessary, reasonable and practicable to —

(aa) remedy, mitigate or prevent the unfair or adverse effects on competition that it has identified; or

(bb) remedy, mitigate or prevent any detrimental effects on users and consumers so far as they have resulted from, or are likely to result from, the adverse or unfair effects on, or the absence of, competition.

(2) A direction given under this section may include a requirement that the enterprise to which it is given —

(a) terminate or amend an agreement;

(b) cease or amend a practice or course of conduct in relation to prices;

(c) supply goods or services or grant access to facilities;

(d) separate or divest itself of any enterprise or assets; or

(e) provide the Commission with specified information on a continuing basis,

within such time as may be specified by the Commission.

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

Consideration of offsetting benefits in determination of remedial measures

43. In determining, in any particular case, the remedial measures required to be taken under sections 41 and 42, the Commission shall have regard to the extent to which any of the offsetting benefits specified in section 40(2) are present in that case.

Directions under Sub-Part IV of Part III

44. (1) Where a merger proposed is likely to result in unfair competition, the Commission may —

(a) direct the enterprises within an agreed period to divest interests or part of their combined businesses or operations, if it is satisfied that such divestment would make the merger less likely to lessen competition or to adversely affect the interests of consumers or the economy;

(b) direct the enterprises to desist from completion or implementation of the merger in so far as it relates to the market in Seychelles; or

(c) direct the enterprises to adopt or desist from such conduct, including conduct in relation to prices, as is specified in the direction as a condition of proceeding with the merger.

(2) Where the Commission determines after investigation that enterprises have, without obtaining the permission of the Commission under section 22(1), structured themselves in such a way as to constitute a merger within the meaning of this Act, it may by notice in writing direct the enterprises concerned to determine the merger within such time as is specified in the direction.

(3) The Commission shall notify the applicant in writing of its determination.

Directions in relation to agreement or practice falling within scope of Sub-Parts III and V of Part III

45. (1) Where the Commission determines that an agreement under Sub-Part III or Sub-Part V of Part III is unlawful or anti-competitive respectively, it shall prepare a report of its findings, and —

(a) shall notify the enterprise or enterprises of its finding accompanied by a copy of the report;

(b) shall declare the agreement null and direct the enterprise to rescind it; and

(c) may require the enterprise to take such further action as in its opinion is necessary.

(2) Where the Commission determines that a conduct under Sub-Part V of Part III is anti-competitive, it shall prepare a report of its findings, and —

(a) shall direct the enterprise to cease the anticompetitive business conduct; and

(b) subsection (1)(a) and (c) applies to a determination of the Commission under this subsection.

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

Financial penalty

46. (1) The Commission may, in relation to a determination made under this Part, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on an enterprise.

(2) Where the Commission imposes a financial penalty on an enterprise, the financial penalty shall not exceed 10 per cent of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition up to a maximum period of 5 years.

(3) An order imposing a penalty under subsection (1) shall be in writing and shall specify the date before which the penalty is required to be paid.

(4) The date specified under subsection (3) shall not be earlier than the end of the period within which an appeal against the order may be brought under section 50.

(5) Where a penalty has not been paid within the specified date and —

- (a) no appeal against the order was brought under section 50; or
- (b) an appeal was made but dismissed or withdrawn,

the Commission may apply to the Supreme Court for an order to enforce payment of the penalty against an enterprise.

Interim measures

47. (1) Where —

(a) the Commission has reasonable grounds to suspect that an enterprise is a party to a restrictive business practice and has not completed its investigation of the matter, but believes that there is a risk of serious irreparable damage to a particular person as a consequence of the restrictive business practice; or

(b) an enterprise is a party to an agreement which is subject to an investigation, or to a merger situation, on which the Commission has opened but not completed an investigation, and where the Commission is satisfied that—

(i) there is prima facie evidence that competition is being prevented, restricted, distorted or substantially lessened and that, in consequence, serious or irreparable damage may be caused to a particular person; or

(ii) the enterprise is taking steps that would effectively pre-empt remedial action being taken that would restore the conditions of competition existing prior to investigation,

the Board may, after having taken cognizance of the report of the Chief Executive Officer on the matter, give such directions as it considers appropriate if, as a matter of urgency, it considers it is necessary to do so to —

(aa) prevent serious or irreparable damage to a particular person or category of persons;

(bb) protect the public interest; or

(cc) prevent pre-emptive action being taken by the enterprise under investigation.

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

(3) The Commission shall give an enterprise to which it intends to give a direction the opportunity to make representations before the direction is given.

Undertakings

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

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

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

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

(5) An undertaking accepted by the Commission shall have effect as if it were a direction under section 41(1).

Keeping directions and undertakings under review

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

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

(a) agree to vary or terminate a direction; or

(b) accept a variation to an undertaking or release an enterprise from an undertaking.

PART VII – APPEAL

Appeal to Tribunal

50. A party dissatisfied with an order or direction of the Commission may appeal to the Tribunal against, or with respect to, the order or direction.

Prosecution of appeal

51. An appeal shall be prosecuted in the form and manner provided by the Tribunal.

Appeal to Supreme Court

52. (1) A person dissatisfied with an order or direction of the Tribunal may appeal to the Supreme Court against, or with respect to, the order or direction.

(2) Part VIII of the Fair Trading Commission Act, 2009, applies to an appeal to the Supreme Court.

PART VIII – MISCELLANEOUS

Enforcement of directions, undertakings or order

53. A person who fails or refuses to comply with a final direction, order or undertaking of the Commission or order or direction of the Tribunal commits an offence and is liable on conviction —

(a) where the person is an individual, to a fine not exceeding 100,000 rupees or to imprisonment for a term not exceeding 2 years, or to both; or

(b) where the person is a person other than an individual to a fine not exceeding

400,000 rupees.

Regulations

54. (1) The Minister may make regulations for giving effect to the provisions of this Act.

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

(3) Regulations made under subsection (1) may provide that any person who contravenes them commits an offence and is liable on conviction to a fine not exceeding 200,000 rupees or to imprisonment for a term not exceeding 2 years or to both.

Transitional period

55. (1) The Commission shall not take action under this Act if, within 2 months after the commencement of this Act, enterprises notify the Commission of details of any restrictive business practice, and agree with the Commission as to the manner and the period within which that restricted business practice will be amended, terminated or ceased, and have otherwise settled the matter.

(2) Sections 8, 9, 10, 13, 14 and 15 shall apply only to agreements entered into or arrived at by enterprises on or after 7th June 2010.

SCHEDULE 1 ((Section 3(3)) – AGREEMENTS OR PRACTICES EXCLUDED FROM THE ACT

1. Any practice of employers or agreement by which employers are parties insofar as it relates to the remuneration, terms or conditions or employment of employees.

2. Any practice or agreement approved or required under an international agreement to which Seychelles is a party.

SCHEDULE 2 ((Section 8(2)) – NOTIFICATION FOR GUIDANCE: PROCEDURE

1. In this Schedule —

“applicant” means the party making an application to which this Schedule applies;

“application” means an application under section 9;

“other party”, in relation to conduct of two or more persons, means one of those persons other than the applicant;

“rules” means rules made by the Minister under section 54(1); and

“specified” means specified in the rules.

General rules about applications

2. (1) An application shall be made in accordance with rules.

(2) If the conduct to which an application relates is conduct of two or more persons, the applicant shall take all reasonable steps to notify all of the other parties of which the applicant is aware, that the application for guidance has been made.

(3) Notification under sub-paragraph (2) shall be made in the specified manner.

Procedure on application for guidance

3. When determining an application for guidance, the Commission shall follow such procedure as may be specified.

Publication

4. The Commission shall arrange for an application to be published in such a way as it considers most suitable for bringing it to the attention of those likely to be affected by it, unless it is satisfied that it will be sufficient for it to notify one or more particular persons other than the applicant.

SCHEDULE 3 ((Section 13(2)) – NOTIFICATION FOR GUIDANCE: PROCEDURE

1. In this Schedule —

“applicant” means the party making an application to which this Schedule applies;

“application” means an application under section 14;

“rules” means rules made by the Minister under section 54(1); and

“specified” means specified in the rules.

General rules about applications

2. (1) An application shall be made in accordance with rules.

(2) An applicant shall take all reasonable steps to notify all other parties to the agreement of which the applicant is aware, that the application for guidance has been made.

3. Notification under sub-paragraph (2) shall be made in the specified manner.

Procedure on application for guidance

4. When determining an application for guidance, the Commission shall follow such procedure as may be specified.

Publication

5. The Commission shall arrange for an application to be published in such a way as it considers

most suitable for bringing it to the attention of those likely to be affected by it, unless it is satisfied that it will be sufficient for it to notify one or more particular persons other than the applicant.

LAWS OF SEYCHELLES

FAIR COMPETITION ACT

**SUBSIDIARY LEGISLATION: SECTIONS 54 AND 22(2): FAIR COMPETITION
(APPLICATION FOR MERGER) REGULATIONS, 2013**

[9 September 2013]

SI. 64 of 2013

Citation

1. These Regulations may be cited as the Fair Competition (Application for Merger) Regulations, 2013.

Application for merger

2. An application for merger shall be in the form and in the manner set out in the Schedule.

SCHEDULE

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