

CCM 7

# Competition Commission of Mauritius Guidelines:

## GENERAL PROVISIONS

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## 1. Introduction

1.1 The Competition Commission of Mauritius (CCM) is an independent public body, established to enforce the Competition Act 2007<sup>1</sup>. The Act defines four areas of restrictive practice, which the CCM may investigate and – if it believes that a restrictive practice is occurring – take action to remedy. In cases of collusive agreements, the CCM is also empowered to levy fines on enterprises involved. The Act sets out the CCM's powers of investigation and some key principles of transparency<sup>2</sup>, natural justice and fairness<sup>3</sup> to which it must have regard.

### Guidelines

1.2 Section 38 of the Act requires that the CCM “within a period of 6 months of its establishment, publish –

- (a) guidelines on the economic and legal analysis which shall be used for the determination of cases under this Act;
- (b) guidelines on the principles which shall be used for the determination of penalties or remedies imposed under the Act, and on the manner in which turnover is to be calculated for the purposes of section 59;
- (c) procedural rules specifying the procedures which the CCM shall follow when carrying out its functions under the Act.

1.3 The CCM has published five documents together constituting its guidelines on economic and legal analysis (item (a) in the list above), in addition to one guidelines document on penalties and remedies and one set of procedural rules. The complete list of guidelines and procedural rules is 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

CCM 7 – Guidelines general provisions

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<sup>1</sup> <http://www.gov.mu/portal/goc/commerce/file/Compact.pdf>

<sup>2</sup> In the requirement to published reasoned decisions, Section 18 of the Act.

<sup>3</sup> Section 38.

1.4 All of these documents are available on the CCM web site, at [www.ccm.mu](http://www.ccm.mu).

1.5 Guidelines on economic and legal analysis are intended to provide information on how the CCM will make its assessment of restrictive practices. The purpose is to enable enterprises to assess their practices to ensure compliance with the Act and to assist persons concerned that they might be affected by restrictive practices to decide whether to complain to the CCM. They also provide a framework for parties and the CCM to discuss evidence and other submissions, during the course of a CCM investigation.

1.6 The Guidelines do not constitute fixed rules. The CCM expects to follow the analytical framework they set out. If parties to its investigations believe that the CCM's analysis or provisional conclusions are not consistent with the guidelines, they should make submissions to that effect. On rare occasions, the facts of a specific case might require the CCM to depart from its guidelines, because circumstances arise that were not envisioned when the Guidelines were drafted. In those circumstances, the CCM would expect to explain clearly its reasons for doing so, in its published decision (and perhaps to modify the guidelines, to take account of such situations).

1.7 The guidelines are based on the CCM's own assessment of established principles of competition law and economics, drawn from other jurisdictions, as applicable under the Competition Act 2007<sup>4</sup>. In general, the CCM welcomes submissions to its investigations based upon established principles of competition law and economics. Parties are welcome to refer to guidelines and case law from other authorities when doing so. However, parties should be aware that the CCM will not regard any such evidence as a 'precedent' in a legal sense. Furthermore, parties should take note that Mauritian competition law is unique and, while it conforms to general best practice principles, is in some ways very different from competition laws in force elsewhere<sup>5</sup>.

1.8 Note that CCM 6, the guidelines on Remedies and Penalties required by the Act, contains both analytical and procedural guidance.

1.9 As the Act provides, the CCM may, from time to time, review and publish the revised versions of, its guidelines and procedural rules. The CCM expects to do so infrequently, and to carry out a wide-ranging public review when it does so. It will not modify guidelines piecemeal, or do so without public notification.

1.10 Guidelines and procedural rules only describe the CCM's approach when investigating restrictive practices, as described in Part IV of the Act. The monitoring and research functions of the Executive

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<sup>4</sup> No one set of guidelines or other documents was used in this assessment. The CCM found the guidelines of the UK competition authorities, the Competition Commission of Singapore and the European Commission (including guidance on enforcement criteria) to be particularly useful sources of material.

<sup>5</sup> In particular, the Mauritian Competition Act is relatively unusual in the way it treats abuse of monopoly power, treating it as a problem to be remedied rather than an offence to be punished. Much of the specific discussion as to whether certain sorts of behaviour constitute an offence, under Article 82 of the European treaty, or the monopoly provisions of US antitrust law, is therefore not particularly relevant. *CCM 4: Monopoly Situations and Non-Collusive Agreements*, discusses this issue in more detail.

Director, described in Section 30 of the Act, are not necessarily covered by these documents. However, economic analysis carried out under that Section can normally be expected to be consistent with the principles in these guidelines.

### ***Guidelines in this document***

1.11 The General Provisions guidelines contain material applicable to all of the CCM's investigations of restrictive practices. Section 2 sets out the CCM's objectives under the Act – broadly speaking, how the CCM expects to assess the effects of the behaviour it is investigating. Section 3 describes the CCM's approach to exemptions from the Act as provided in schedules to the Act. Section 4 provides more detail on the CCM's approach to one of those exemptions: for agreements relating to Intellectual Property Rights.

1.12 These guidelines are not a substitute for the Act, the regulations or rules. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCM. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

## 2. The CCM's objectives under the Competition Act

2.1 The CCM aims to protect and enhance competition in Mauritius by applying the Competition Act 2007. In doing so, it will frequently have to assess conduct against criteria set by the Act. In this section, the CCM therefore sets out its approach to such matters, under the provisions of the Act.

### **Background**

2.2 The Competition Act 2007 does not provide a single over-arching objective for the CCM, but provides for slightly different matters to be taken into consideration in different circumstances. There are three broad areas of the Act that deal with this topic<sup>6</sup>:

(a) In general, collusive agreements under Sub-part I of Part III of the Act are simply prohibited without any reference to adverse effects, although for a horizontal agreement to be considered collusive under Section 41, it must 'significantly restrict, prevent or distort competition.'

(b) Restrictive practices under sub-parts II and III of Part III of the Act refer to 'competition' being prevented, restricted or distorted, while under mergers the CCM is required to assess whether the merger is likely to result in a 'significant lessening of competition.'

(c) Section 46, on monopoly situations, refers several times to 'consumers' and (in subsection (3) (d) requires the CCM to take into account "where such actions or behaviour that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers."

(d) When considering remedies under Sections 60 and 61, the CCM is empowered to remedy adverse effects on competition and also remedy, mitigate or prevent any resulting detrimental effects on users and consumers,

2.3 This chapter sets out how the CCM will make decisions taking account of these differing objectives.

### **Prohibition of collusive agreements**

2.4 The simplest decision-making rule is provided for collusive agreements under Sub Part I of Part III of the Act. All of the restrictive practices defined under Sections 41, 42 and 43 (including agreements to fix prices, share markets, limit output, rig bids or for resale price maintenance) are prohibited and

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<sup>6</sup> In addition, when considering remedies under Section 50, the CCM can take into account whether off-setting benefits of the restrictive practice exist, 'and the benefits have been or are likely to be shared by consumers and business in general.'. The CCM's approach to considering these benefits is set out in detail in CCM 6: *Penalties and Remedies*.

void. It is not open to enterprises engaged in these practices to argue that they have no adverse effects, nor do the 'off-setting benefits' provisions of the Act apply to such agreements to allow any argument that they have beneficial effects.

2.5 To find a horizontal agreement to be collusive under Section 41, the CCM must believe that its object or effect is to 'significantly prevent, restrict or distort competition'. As noted in *CCM 3: Guidelines on Collusive Agreements*, the CCM would normally regard clear price-fixing, market-sharing or agreements<sup>7</sup> to restrict supply as inherently likely to have such effects. Sections 42 and 43 contain no such provisions: bid-rigging and minimum price resale price maintenance are simply prohibited under the Act.

### **Assessing effects on competition**

2.6 Restrictive practices other than collusive agreements are assessed for their effects on competition<sup>8</sup>. The CCM regards 'competition' in this sense as describing very broadly the process of rivalry between enterprises, so that those enterprises which best meet their customers' requirements prosper, while those which do not lose sales and may even fail. Vigorous competition can be expected to result in lower prices and greater choice than would be expected when competition is weak. It can also result in better quality products and services, or a wider variety of products and services better suited to the differing requirements of different customers.

2.7 By providing rewards for efficient enterprises and penalizing the least efficient, rivalry between enterprises is also likely to enhance the efficiency of production and productivity over time. Such rivalry also promotes longer term productivity growth and economic development.

2.8 It is this process of rivalry that the CCM is empowered to protect under the Act. It may take account of other matters as possible *indicators* of a failure of competition, but only as possible indicators. For example, high prices, or increased prices, might indicate a competition problem, but they might be driven by a range of other causes. Similarly, behaviour such as aggressive price-cutting that damages rival businesses is normally the result of vigorous competition, rather than evidence of anti-competitive behaviour.

### **Adverse and detrimental effects of failures of competition**

2.9 Section 46, relating to monopoly situations states that the CCM will have regard to whether a monopolist's actions:

*"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. "*

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<sup>7</sup> Where 'agreement' has a broader interpretation than an explicit or written agreement – see CCM 3 for details.

<sup>8</sup> Under Section 50 of the Act.

2.10 This clause relates only to adverse effects arising from the monopolist's actions. It does not imply that the CCM should consider arguments that the monopolist's behaviour *benefits*, for example, the competitiveness of the economy of Mauritius. This issue is addressed when considering 'off-setting benefits', when determining remedies.

2.11 Under sections 60 and 61, the CCM may also take action to remedy, prevent or mitigate detrimental effects on consumers and users.

2.12 Where it is necessary to consider such adverse and detrimental effects, the CCM will generally seek to protect and promote the consumer interest by fostering greater competition. The economy of Mauritius is also likely to function better to the extent that it meets the needs of its consumers. The CCM will not in general intervene to provide consumers with a better product offering or price than might reasonably be expected to arise in a competitive market.

2.13 The CCM can intervene only when there is a competition problem, and only to promote the interests of affected consumers and users. The CCM does not have the power to intervene solely on grounds of 'fairness' between different consumers, or between consumers and suppliers. There is no provision in the Act for the CCM to favour some groups of consumers or some sections of society over others.

### ***International aspects***

2.14 The CCM is concerned with competition in markets in Mauritius, and competition to supply those markets. Restrictive practices relating to exports will not in general be regarded as a concern<sup>9</sup>.

2.15 The Act draws no distinction between Mauritian-owned and foreign-owned enterprises, and the CCM too will make no such distinction. A restrictive practice that prevents foreign entry into an industry will be regarded no differently from one which prevents entry by a Mauritian competitor. A merger between a foreign enterprise and a Mauritian enterprise will be assessed no differently from a merger between two Mauritian enterprises.

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<sup>9</sup> However, sales to foreign tourists, although they could be regarded as 'invisible exports' will be considered as markets for goods and services in Mauritius.

### 3. Applying the Competition Act in regulated sectors

3.1 All sectors of the economy are subject to legal constraints, to regulation or otherwise affected by Government policy to some extent. However, some sectors, such as utilities or financial products, are subject to sector-specific regulation, normally with a dedicated regulatory body to enforce that regulation. Moreover, in Mauritius there are several State-owned bodies, notably the State Trading Corporation, that operate as businesses but act in pursuit of Government policy objectives rather than private profit.

3.2 Different countries have adopted different solutions to the difficulties raised by extending competition law to regulated sectors. In Mauritius, as in many other countries, the Competition Act fully applies to those sectors and the Competition Commission has the duty and power to enforce it in those sectors<sup>10</sup>.

3.3 However, regulation can in some ways affect the way the Competition Commission will go about enforcing the law. The CCM has the power to carry out investigations only with regard to the restrictive practices defined in the Act, as carried out by 'enterprises'. This includes State-owned enterprises, or the State itself when the State is engaged in business activity. However, the CCM has no powers over *policy* which might restrict, prevent or distort competition. 'Policy' here should be taken to include the use of regulatory powers by regulatory bodies, as well as Government policy itself. The Competition Act does not in any sense over-ride other legislation or policy decisions and the CCM has no powers to strike down or over-rule policy or regulatory decisions. A regulator's decisions cannot be in breach of the Competition Act in the way that the behaviour of an enterprise might be<sup>11</sup>.

3.4 The CCM can conduct inquiries into policy matters, and can make recommendations to Government or other State bodies about the effects of policy on competition. It would make such findings public with its reasons, in a similar format to its decisions on restrictive practices. But it has only an advisory role. This is quite appropriate. As an expert body on competition matters, the CCM is well-placed to identify policies that restrict, prevent or distort competition, and the costs of such restrictions. However, it is not competent to decide how to weigh these competition considerations against other effects of the policy – such as social or environmental objectives.

3.5 When an enterprise under investigation is taking actions that distort competition to comply with Government (or a regulator's) policy requirements, the CCM will consider whether it is the policy itself

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<sup>10</sup> The Minister has the power to exempt sectors from the provisions of the Competition Act, an issue discussed in the next chapter. At the time of publication of these Guidelines, only petroleum and LPG were exempted.

<sup>11</sup> Except, obviously, when the regulator is buying and selling. For example, its practices in procurement could be covered by the restrictive practices provisions of the Act.

that is causing any distortions to competition. If so, it might make recommendations but would not normally take action against the enterprise itself<sup>12</sup>.

3.6 This should not be taken to imply that all actions taken by regulated enterprises that are consistent with regulators' directions or other policy decisions are exempt. The CCM will normally want to consider whether the enterprise could have complied with those decisions in a manner that does not distort competition, or that results in less distortion. If there were more competitive alternatives, the CCM could find the behaviour to constitute a restrictive practice and could impose remedies or (for intentional or negligent breaches of the collusive agreements provisions) fines. Enterprises should therefore seek to comply with price controls or other mandatory policies in a manner which minimizes distortions to competition. Similarly, enterprises merging to meet regulatory objectives should consider whether there are any alternatives which meet the same objectives without harming competition.

3.7 Enterprises should ensure that any regulatory directions are made explicit, rather than seeking to carry out what they believe to be a regulator's wishes without specific direction to do so.

3.8 The CCM would be particularly concerned about collusive agreements concluded supposedly on the basis of compliance with regulatory policy. These are the most serious breaches of the Competition Act and it is not obvious why regulated enterprises should ever need to breach them. Enterprises subject to price controls from regulators should of course comply with that requirement, but they should not make agreements about prices with potential competitors or require retailers to sell only above a minimum price floor<sup>13</sup>. Enterprises should each individually comply with price controls.

3.9 The role of sector regulators also has implications for *how* the CCM will carry out competition investigations in regulated sectors. A sector regulator is an unbiased source of expertise on what are usually complex technical and economic issues at stake in regulated sectors. Regulators also have a legitimate interest in being well-informed about the CCM's activities in the sectors they regulate. In the interests of efficiency, both the CCM and sector regulators should try to avoid duplicating one another's work or acting at cross-purposes. For all these reasons, the CCM will wish to work closely with sector regulators. As required by the Competition Act, it therefore agrees Memoranda of Understanding (MOUs) with sector regulators and publishes them on its web site. These MOUs differ slightly in each sector, but all have the core objective on ensuring good communication between the CCM and sector regulators, and defining procedures for the exchange of views. MOUs cannot over-ride legislation, so each Party to the MOU reserves its rights to act as prescribed by its enabling legislation, but commits to discussions with the other party when planning to take action that affects the other.

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<sup>12</sup> Procedurally, the CCM could either find that no restrictive practice has occurred, or find a restrictive practice but impose no remedy, because the regulatory objectives constitute an offsetting benefit (see *CCM 6: Remedies and Penalties* for discussion of this concept).

<sup>13</sup> See *CCM4, Collusive Agreements*.

## 4. Exemptions under the Schedule to the Act

4.1 A Schedule to the Act lists (A) agreements or practices and (B) products which are excluded from the Act. Section 74 of the Act provides that The Minister may, by regulations, amend the Schedule.

4.2 As of November 2009 three classes of agreement or practice were exempted under Part A, namely:

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

4.3 As of November 2009, two products were exempted under Part B, namely:

1. Petroleum products
2. Liquid petroleum gas

### *Applicability of the exemptions*

4.4 The CCM regards these exclusions as applying to the restrictive practices listed in Part III of the Act. In case of uncertainty about whether an agreement, practice or product falls within the exempted list or not, the CCM may carry out an investigation under Part IV, using the powers specified in the Act, but will set out in its final report why it believes the matter is not excluded, if it takes action.

4.5 The CCM will interpret exclusions as narrowly as possible within the scope of the Act. In particular, it will not regard broad areas of activity that include some of the excluded matters as being outside its scope. For example, some economic activities might involve the incidental sale of petroleum products.

4.6 This may be particularly relevant to agreements that have the object or effect of fixing prices (or in other ways breaching the prohibitions of Sections 41 to 43 of the Act). An agreement between employers which are also competing enterprises, which has the object or effect of fixing prices, would only be regarded by the CCM as exempt insofar as the agreement related to employees' terms and conditions. Aspects of the agreement that breach Sections 41-43 would be null and void and fines may be levied.

4.7 Similarly, provisions of agreements relating to intellectual property are exempt, but this does not imply that any agreement relating in part to intellectual property rights is exempt in its entirety. More generally, the whole spectrum of the CCM's work is likely to be affected by intellectual property rights, and the treatment of this issue is therefore addressed fully in the next chapter.

## 5. Intellectual property rights

5.1 Intellectual property rights (IPRs), like competition law, are an essential element in a successful market economy. The two both involve the interface between law and economics and can be closely inter-related. An intellectual property right is a legal instrument creating ownership for products where ownership rights would otherwise be harder to enforce than for physical products: such as copyright, patents and trademarks/brands. IPRs affect competition and the work of the CCM across the range of its activities, especially in its investigation of monopoly situations.

### *IPRs and the Competition Act*

5.2 For the most part, the CCM will treat these assets no differently from any physical assets that might be involved in cases it is considering. Thus, for example, the purchase by one enterprise of intellectual property rights from another will be treated as a merger. Similarly, when considering remedies involving the divestment of assets, the CCM may require IPRs, or at least access to intellectual property, to be divested as part of the package, for example, to make the divested entity viable. The CCM will respect intellectual property rights as it does property rights more generally. The CCM would not in normal circumstances require the owner of a physical asset to allow his competitors to use that asset; similarly it would not in normal circumstances force an owner of an IPR to give access to rivals.

5.3 An IPR such as a patent, copyright or trademark is essentially a legally-protected monopoly. This may seem to be at odds with competition policy, but it need not be. A legal monopoly provided by IPR on a specific product does imply that the owner has a monopoly position within the meaning of the Competition Act. A monopoly position can be held only in relation to a market. In most cases, multiple brands compete in a wider product market and the legal 'monopoly' over the brand does not imply that the holder is in a monopoly situation in that wider market. Thus, to assess whether the owner of an IPR is in a monopoly situation, the CC would follow the same procedures as it would in an assessment of any other business.

5.4 However, there are occasions when actions that might be considered anticompetitive are specifically exempt from competition law when they concern IPRs. Schedule 2 to the Act specifically excludes from the Act:

*Any agreement insofar as it contains provisions relating to the use, licence or assignment of rights under or existing by virtue of laws relating to copyright, industrial design, patents, trade marks or service marks.*

5.5 In addition, Section 50(4), which defines off-setting benefits that the CCM will consider when deciding on remedies, may well be relevant when considering cases in which IPRs are significant. For example, trademarks may allow investment in product safety or quality that would not occur were products anonymous, and patents and copyright obviously contribute to development of new goods and services, or technological progress. Because this covers a broader range of topics than the specific

exception created under Schedule 2, these Guidelines here set out more generally the CCM's approach to assessing competition in markets involving IPR.

5.6 In line with international best practice, the CCM takes the attitude that exploitation of IPRs by the holder to maximize the value of that intellectual property, will not be regarded as a restrictive practice. Thus, for example, an inventor with a patent is free to price it at whatever level he chooses, to assign exclusive rights, to prevent resale at prices below a specified price and so on.

5.7 However, also in line with international best practice the CCM does not interpret the IPR exemption to imply that any anticompetitive action or agreement is permitted if it involves IPR. In particular, holders of IPR may not be permitted to 'leverage' the legitimate monopoly power they enjoy from their IPR to restrict, distort or prevent competition in other markets. For example, the holder of an IPR for an imported food product will not be prevented from raising the price of that product by the CCM enforcing the Competition Act. However, such an importer might be considered to be abusing a monopoly situation if he threatens not to supply that product to force his customers to take other products from his line, or to agree to exclude the products of his competitors. 'Bundling' of IPR-protected products with other products, whether formally through a restrictive agreement or for example through a retailer exclusively selling some brand and also thereby capturing customers for his non-branded products, could be an abuse of monopoly .

5.8 Horizontal agreements exempted under Schedule 2 might include such matters as sharing of intellectual property, for example to co-operate in the development and marketing of new products. It should not be assumed that any agreement that involves IPRs in some regard is exempt from the Act under Schedule 2. It is only exempt insofar as it relates to IPRs, and other provisions involving restrictive practices may be fully subject to the Act. For example, agreements on sharing IPRs might also create a channel of communication through which prices more generally are fixed, which would be a breach of Section 41 of the Act. Following investigation, the CCM might (in addition to other penalties and remedies) require agreements to be renegotiated in a manner that preserves the IPR-related element of the original agreement, but removes such effects.

### ***Exclusive import arrangements***

5.9 Many goods sold in Mauritius embody IPR held overseas. In some cases, this property right has been assigned to an importer, giving that importer similar rights within Mauritius as the original holder of the IPR would have.

5.10 As a general principle, the CCM will not treat exclusive import rights any differently from the way it will treat 'original' holders of IPR. If it receives a complaint about behaviour by the holder of an exclusive import right, therefore, the CCM will consider whether it would be concerned were the same complaint being made about a product of Mauritian origin. If not, the CCM will not be concerned.

5.11 However, there may be a concern if IPRs held by the same entity extend across several products if those IPRs could reasonably be expected to be held by different enterprises (for example because the

original holders of those rights are separate enterprises). The holder of an exclusive import right for two competing branding products may have *more* market power than the original owners of those brands.

5.12 The CCM would regard the acquisition of exclusive rights to IPRs on products that can be expected to compete against one another as a horizontal merger and would assess whether any such acquisition is likely to result in a substantial lessening of competition. Similarly, the acquisition of rights that could reasonably be expected to be held by different owners to complementary products (such as different stages of production), may create concerns of a vertical nature, investigated as a vertical merger.

5.13 For existing holders of IPRs, the CCM may find that such holdings represent an abusive monopoly if they create a stronger market position than would exist had all of the original owners of the IPRs themselves imported the products into Mauritius, and it may force divestment of IPRs to remedy that situation if it believes that the monopolist is restricting competition or otherwise exploiting that situation.

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