

Competition Commission of Mauritius

PRIORITISATION PRINCIPLES

June 2010

DRAFT

For consultation



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I. Introduction

1.1 The CCM was established by the Competition Act 2007 and its powers and duties are set out in that Act. The Executive Director of the CCM has the power to conduct formal investigations of certain restrictive practices, namely:

- (a) Collusive agreements;
- (b) Abuse of monopoly position and non collusive agreements; and
- (c) Mergers that substantially lessen competition

1.2 The Commission has remedial powers to remove restrictive practices, or to mitigate their effects. In the case of collusive agreements, the Commission has the power to penalize deliberate or negligent breaches through fines.

1.3 The Executive Director is also empowered to conduct studies outside the framework of formal investigations of restrictive practices, under Section 30 of the Act. These are termed ‘enquiries’ to distinguish them from formal investigations of restrictive practices. There are no powers to compel co-operation with such enquiries and they can only result in recommendations.

1.4 This document sets out how the Executive Director expects to allocate resources across this wide range of potential activity, and particularly how he will decide into which matters to launch investigations and enquiries. The CCM cannot investigate every matter brought to its attention. To attempt to do so would waste its resources and result in ineffective enforcement, because it would not be able to progress its investigations if too many were active at one time. It is in the interests of consumers and all participants in the Mauritian economy, including businesses under investigation, that the CCM should focus its resources to allow it to progress cases.

1.5 Instead of attempting to catch all forms of anti-competitive activities, the CCM’s will principally focus its resources on those that have an appreciable adverse effect on competition in Mauritius.

1.6 In seeking to target both our resources and enforcement strategy, the CCM needs to consider a range of factors including impact on consumer, strategic significance and cost.

1.7 In this document we set out the principles that will guide the Executive Director in allocating CCM resources, and particularly in deciding to launch enquiries and investigations.

1.8 Following a public consultation, the CCM published a set of Guidelines documents¹. Within those documents, the following are particularly relevant to these prioritization principles:

- (a) CCM 1 – Rules of Procedure

¹ Available at http://www.ccm.mu/Guidelines_and_procedures.html

(b) CCM 7 – General Provisions, Particularly Chapter 2: “The CCM’s objectives under the Competition Act”

1.9 The factors listed in the principles below are for illustrative purposes only and in no way shall be construed as exhaustive. The Executive Director may have to consider at any given point of time appropriate factors other than those enumerated in these principles. We will continue to keep these principles under review.

2. Prioritisation principles

2.1 The Act requires that the Executive Director have ‘reasonable grounds’ for concern about a breach of the Act before launching an investigation. This legal test is the first condition for any investigation to take place. However, the CCM has limited resources, so the Executive Director will generally have to prioritise the CCM’s work over possible cases for which he may have reasonable grounds. This chapter sets out the main principles.

2.2 When deciding on launching a new investigation under the Act, the Executive Director will consider the timing and resource requirements of those investigations and other work going on across the CCM. As part of this we will assess the resources required going forward to complete the investigation, the cost of intervention, and the potential impact in terms of the benefits on the economy and consumers. The Executive Director may also at a particular point in time in an investigation process, consider whether it warrants the continued commitment of resources and decide on the way forward accordingly.

2.3 Where appropriate, he or she may also take into account other relevant factors. Account will also be taken of whether we have a duty to act under any Memorandum of Understanding that the CCM may have signed with any sector regulator in Mauritius.

2.4 In considering the priority to give to different areas of CCM activity, we consider three broad classes of criteria:

- (a) Impact
- (b) Strategic importance; and
- (c) Resources

2.5 In considering these criteria, the Executive Director is not considering whether investigation is justified, but rather the priority to accord to one possible investigation over another. None of these criteria will, or can, influence the initial assessment of ‘reasonable grounds’. Without reasonable grounds, as laid out in the Act, the Executive Director has no power to launch an investigation. No matter how strong the case for action under these criteria, the reasonable grounds test comes first and is unaffected.

Impact

2.6 The CCM is mindful that it is funded from public sources and that its activities also impose costs upon businesses and others. Consequently it will only act when the broad economic impact of intervention justifies its actions.

2.7 In considering impact we will assess qualitatively the likely harm that the CCM could address through action. Thus, impact includes the likelihood that a problem exists, the likelihood that the CCM will be able effectively to take action against it as well as its scale and the nature of its economic effects.

2.8 What would be the expected economic impact on innovation, efficiency, adaptability and competitiveness of the Mauritian economy?

2.9 What would be the likely direct effect on consumer welfare in the market or sector where the intervention takes place? Consumer welfare includes better value for consumers in terms of price, quality and range of service, immediately and over time.

2.10 What would be the likely indirect effect on consumer welfare? This principle captures further improvement to consumer welfare and consumer confidence that results from changes in consumer, business or government policy which is prompted by CCM's intervention/action. It thus captures deterrence, improved awareness for consumers, business and government.

Strategic importance

2.11 Prioritising only those cases with the highest impact might not achieve the CCM's broader purpose of promoting competition and compliance with competition law across the economy. For example, even if there were one sector in which problems were believed to be so large that all of the CCM's resources could be devoted to tackling them, that would not be a sensible use of those resources, as abuses could continue unchecked across the economy².

2.12 The CCM will therefore consider the strategic fit of each of its cases, both with its other cases and with its objectives more broadly. This assessment will include factors like:

- (a) Innovation: establishing or testing new legal and economic approaches;
- (b) Capacity building that enhances the capability of the CCM and the competition policy system as a whole; and
- (c) Building the credibility of our competition regime³.

2.13 Is the CCM best placed to act? Alternatives to CCM action could include

- (a) Action by other bodies, such as sector regulators, consumer protection units of the relevant Ministries, consumer protection organisations;

² It should therefore not be assumed that there is any sector so small that it is excluded from scrutiny by the CCM.

³ This could apply to ensuring that the CCM's cases cover a reasonable spread of the sectors, or forms of activity, in which competition problems may be occurring, to ensure that no sector thinks itself immune. It could also apply when the CCM has not been able to obtain evidence at the enquiry stage, and needs to launch an investigation to allow information-gathering powers to be brought into play, as envisaged in Section 5(2)(4) of the Rules of Procedure.

- (b) Private enforcement; or
- (c) Market developments, self-regulation or legislative developments.

Costs

2.14 What are the resource implications to the CCM of doing the work? This includes:

- (a) Whether the resource requirements of the work are proportionate to the benefits from doing the work; and
- (b) the period over which the resources will be needed.

2.15 Would the costs imposed on other organizations be disproportionate to the likely benefits as assessed above? This includes possible demands on other public bodies, the businesses under investigation and other parties involved in the CCM's work.

3. Intentional or negligent breach of the prohibition on collusive agreements

3.1 The Act treats collusive agreements, described at Sections 41 to 43, somewhat differently from all of the other restrictive practices it defines. There is no scope for arguing that there are ‘off-setting benefits’ from these agreements between competitors to fix prices or other conditions. They are simply prohibited, and if found are null and void. Uniquely, in the Competition Act, intentional or negligent breaches of these sections of the Act can be penalized, with a fine of up to 10% of turnover.

3.2 This difference of approach reflects the uniquely damaging effects of price-fixing for competition. In common with other competition authorities, the CCM regards deliberate price-fixing as the most serious offence under competition law.

3.3 Accordingly, the CCM believes it should not exercise discretion over whether to investigate, when there are reasonable grounds to suspect that a collusive agreement has been deliberately or negligently entered into (for example, when it receives credible evidence⁴ of communication between competitors with a clear intent to collude). It will always investigate any such concerns that meet the reasonable grounds test, if it believes that there is a reasonable prospect of obtaining sufficient evidence.

3.4 Thus, most of the criteria set out in this document – such as the size of the overall detriment and the cost of investigation will not be accorded any weight when deciding whether to pursue such hard-core cartels.

⁴ For example, from a whistleblowing ‘insider’ or an applicant for corporate leniency.

4. Comments and notes on the principles

4.1 It should not be assumed that any of the criteria to which the Executive Director has regard when assigning priority will be quantified. In particular, there is no suggestion that a cost-benefit analysis will be carried out before beginning an investigation.

Impact

4.2 When considering 'impact', the Executive Director will have regard to the criteria set out in Chapter 2 of *CCM 7 – General Provisions*⁵. This chapter sets out the CCM's interpretation of its objectives as set out in the Act.

4.3 As that Chapter notes, the CCM's primary concern is not with the outcome of any restrictive practice, in terms of prices or other variables, but rather with the process of competition, also termed *rivalry*. As CCM 7 notes:

"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."

"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."

4.4 When it does consider outcomes, the CCM will have regard to the criteria set out in Section 46 of the Act (on monopoly). These require the CCM to have regard to whether the 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."

4.5 Although this clause occurs only under the monopoly provisions of the Act, its concerns seem relevant to the CCM's objectives more generally. When considering 'impact', these criteria will be taken into account.

4.6 CCM 7 further notes that:

"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

⁵ http://www.ccm.mu/CCM7%20-%20Guidelines%20-%20General%20provisions_Nov09.pdf

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.”

“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.”

Likelihood of success

4.7 A small likelihood of success may be a good reason for the CCM not to proceed with a complaint. However, should even a small likelihood of success have another important impact, the CCM may still consider initiating such an investigation. For example if an investigation has only a low chance of success, but would nevertheless provide clarity on a law or policy, the Executive Director might investigate.

Effective remedies

4.8 Under ‘Impact’ we noted that the Executive Director would take account of “the likelihood that the CCM will be able effectively to take action against” the restrictive practice. Not all competition problems can be easily or effectively remedied. As noted in CCM 6 – Remedies and Penalties, the CCM regards remedies which act to promote competition itself as likely to be more effective than those that merely suppress the effects of a failure of competition (such as price controls). In prioritizing the use of CCM resources, therefore, the Executive Director will consider whether there is a conceivable remedy that promotes or restores competition, in the event that the Commission were to identify a restrictive practice.

No consideration of ‘impact for deliberate or negligent collusive agreements

4.9 Again, we note that none of the criteria described under ‘Impact’ would stop the investigation of a suspected deliberate or negligent breach of the prohibition on collusive agreements (a ‘hard core cartel’) if the Executive Director has credible evidence of such a breach.

Strategic importance

4.10 The CCM will consider whether an investigation may result in enhancing our capacity, in terms of skills and competencies of our staff, our leadership ability and excellence on competition issues. Furthermore, the CCM will consider any similar effects on other public bodies, such as the sector regulators with whom we have signed MOUs. The CCM will consider the following as enhancing our capacity:

- (a) Innovation, in terms of establishing and testing new legal and economic approaches

(b) Cases which will clarify areas of law which have practical commercial or competition importance, which will result in facilitating compliance and potentially promoting productivity, efficiency and competitiveness; and

(c) Cases that enhance our ability to deal with complex cases where deterrence considerations play a determining role in our decision to initiate or pursue an investigation.

Costs

4.11 Again, we note that this statement of prioritization principles in no way commits the Executive Director to a quantitative assessment of the costs and benefits of launching an investigation, or any other decision that he is empowered to take under the Act. However, as part of the prioritization exercise, the Executive Director will consider in broad terms how the benefits (defined as the impact plus any strategic considerations) compare with the likely scale of the costs of the investigation, to the CCM, to the public sector more widely and to the private sector and other stakeholders.

4.12 In making this assessment, the Executive Director will not take account of any reputational damage the parties under investigation may suffer. It is the intention of the CCM to establish the principle that it will investigate in a wide variety of cases, and that the fact of investigation itself should not be perceived as damaging. No breach of the Act can be said to have occurred until the Commission formally decides that, following an investigation as laid down in the Act. The CCM will work with parties under investigation to ensure that this message is understood, by the media and if necessary by other companies doing business with parties under investigation.

4.13 Naturally, any costs to parties later found to be in breach of the Act, arising from a loss of monopoly power, or the removal of restrictive practices, or any penalties imposed by the Commission, will not be considered 'costs' of the investigation at this stage.

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