UNITED
NATIONS

TD

United Nations Conference
on Trade and Development

Distr.
GENERAL

TD/B/RBP/94
5 August 1993

ENGLISH
Original: ENGLISH/SPANISH

TRADE AND DEVELOPMENT BOARD
Intergovernmental Group of Experts on
Restrictive Business Practices
Twelfth Session
Geneva, 18 October 1993
Item 4 (c) of the provisional agenda

Handbook on Restrictive Business Practices Legislation

Note by the UNCTAD secretariat

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GE.93-52900 (E)

INTRODUCTION

1. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in Section F.6 (c), provides for the compilation of a Handbook on Restrictive Business Practices Legislation.

2. Further, the Intergovernmental Group of Experts on Restrictive Business Practices, at its eleventh session, requested the UNCTAD secretariat to continue the compilation and updating of the Handbook on Restrictive Business Practices Legislation. (TD/B/39(2)/7 - TD/B/RBP/92, annex I).

3. Accordingly, the secretariat prepared this note which contains commentaries on and texts of restrictive business practices legislation of Italy, Jamaica and Venezuela.

4. Thus, to date the UNCTAD secretariat has issued notes containing commentaries and texts of restrictive business practices legislation of 23 countries: Belgium, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, Jamaica, Kenya, Pakistan, Poland, Portugal, the Republic of Korea, Norway, Spain, Sri Lanka, Sweden, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Venezuela.

5. The Secretary-General of UNCTAD, in his note of 7 May 1993, requested States which so far had not done so, or which had introduced new or amending RBP legislation since their last communication to the UNCTAD secretariat, to provide the UNCTAD secretariat with their relevant legislation, court decisions and comments, on the basis of the format supplied (see below). (However, in the case of States adopting RBP Legislation for the first time like Italy and Jamaica, the commentary may not necessarily conform to the format.) In order to facilitate the reproduction of texts of legislation in more than one official language of the United Nations, States were invited, as called for by the Intergovernmental Group, to submit, if possible, the text of their legislation in one or more other languages of the United Nations.

6. The UNCTAD secretariat is grateful to States which have contributed the material requested for the compilation of the Handbook, and once again requests States which have not yet done so to meet the request of the Secretary-General mentioned above.

Format for contributions to the Handbook

A. Description of the reasons for the introduction of the legislation.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation.

C. Description of the practices, acts or behaviour subject to control, indicating for each:

(a) The type of control, for example: outright prohibition, prohibition in principle, or examination on a case-by-case basis;

(b) The extent to which the practices, acts or behaviour in Section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example, controls concerning misleading advertising.

D. Description of the scope of application of the legislation, indicating:

(a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;

(b) Whether it applies to all practices, acts or behaviour having effects on that country, irrespective of where they are committed;

(c) Whether it is dependent upon the existence of an agreement, or of that agreement being put into effect.

E. Description of the enforcement machinery (administrative and/or judicial), indicating any notification and registration agreements, and principal powers of body(ies).

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices.

G. Description of the major decisions taken by administrative and/or judicial bodies, and the specific issues covered.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof.

I. COMMENTARY BY THE GOVERNMENT OF ITALY ON ITS "RULES FOR THE PROTECTION OF COMPETITION AND THE MARKET", 10 OCTOBER 1990

Introduction

On 10 October 1990 the Italian Parliament enacted Law No. 287/90 establishing the Authority to "guarantee competition and the market". Quite apart from considering the United States experience, where the Sherman Act was enacted in 1890, all the other industrial countries adopted anti-monopoly legislation much earlier than Italy: France in 1945 (Ordonnance No. 45-1483), Japan in 1947 (Law on Private Monopolies and on Restrictive Trade Practices), the United Kingdom in 1948 (Monopolies and Restrictive Practices Act) and Germany first in 1923 and then in 1946-1947. Furthermore in the mid-fifties the EEC enacted legislation favouring competition (see arts. 65-67 of the Treaty establishing the European Coal and Steel Community (ECSC) and arts. 85-94 of the Treaty establishing the European Economic Community).

The delay in adopting antitrust legislation in Italy can be explained by a number of circumstances. Between 1950 and 1990 many bills were debated by the Italian Parliament, but none was adopted. One of the reasons is the existence in Italy of a quite large Government-owned industrial sector, believed by many people to contribute to the elimination of potential monopolistic positions. Furthermore the political debate in the country was quite ideological and no common view for an antitrust law emerged. In fact antitrust measures were often viewed as a tool for directly intervening in the market, not for protecting competitive forces. However in the 1980s a new climate developed, both domestically and internationally. In particular, the acceleration of the European integration process led all the member States to enact policies, favouring competition and the orderly functioning of the markets, which were consistent with those prevailing at the EEC level. In Italy a Government-sponsored Commission was set up in 1986 in order to study the possibility of adopting antitrust legislation. The Commission published a final report in April 1988 and in the summer of that year two antitrust bills were brought before Parliament. After a very thorough debate, the new Italian antitrust law (No. 287/90) was enacted on 10 October 1990.

This Report mainly contains a description of the law and a discussion of its most important features (see Chap. 1 of the Report). Because the Commission was only established at the end of 1990, the cases brought to its attention in the few months (October 1990 - March 1991) covered by this Report are quite small in number, but are none the less presented and discussed in Chapter 2.

Chapter 1

THE FEATURES OF LAW NO. 287/90

1.1 Introduction

As section 1 indicates, this law was enacted to implement Article 41 of the Italian Constitution to protect and guarantee the right of economic initiative and enterprise and refers expressly to the principles of the legislation of the European Community governing competition.

The reference to Article 41 of the Italian Constitution indicates that the aim of the legislator is to protect and guarantee private enterprise, with the clarification that "it cannot be enacted in conflict with the public good or in such a manner as to jeopardize security, freedom and human dignity" (Art. 41 (2) of the Constitution).

The other major feature of the new legislation is its relationship to Community law. First of all, the Italian law complements Community law with regard to the scope of application. This scope is defined in section 1, which states that the law relates to agreements, abuse of a dominant position and mergers which are not directly governed by Community law (Arts. 65/66 of the ECSC treaty, Arts. 85/86 of the EEC Treaty, Regulation No. 4064/89, other EEC regulations and Community documents having the force of law). In other words, Italian legislation merely governs practices which are not otherwise covered by Community law, whose effects relate to the Italian territory.

Both national and Community competition legislation cover the same cases: agreements, mergers, and abuse of a dominant position.

Moreover, section 1 (4) of the law is extremely important, where it states that the provisions of Title I (dealing with anti-competitive practices) must be construed according to the principles of Community law which are to be found not only in Community legislation but also in the judgements of the Court of Justice and the decisions of the EEC Commission.

There are many advantages of receiving into Italian law the principles of interpretation which have been developed within the Community. One only needs to think, for example, of how helpful this is in relation to the very notions of agreement, dominant position and the abuse of that position.

Another fundamental Community concept is the rule of reason, according to which the analysis of the specific case, the examination of the actual structure before and after a given change occurs and the examination of the available alternatives is of fundamental relevance.

Lastly, the Community system refers to the economic notion of enterprise, trying to overcome any possible legal veil. According to the EEC concept, several legal entities without financial and decision-making autonomy can be deemed as a single enterprise. Under Community law an integrated group of companies can therefore be considered as a single enterprise.

However, it should be borne in mind that when the Italian system receives the principles for interpretation from Community law these same principles relate to two different environments, with different purposes to attain. For instance the provisions of the Treaty of Rome relating to competition are designed to eliminate situations which might interfere with trade between member States, with the ultimate aim of achieving economic integration. Domestic legislation applies to an already integrated national market.

It is in this way that section 1 (4) of the Law has to be construed, and not merely as a wholesale transposition of Community legislation into Italian law, but rather as a reminder of the need to interpret the law on the basis of the European system jointly with that of the Italian system, coordinating and mutually integrating them.

With reference to the notion of Groups of companies as provided by Italian law, the judgement of the Supreme Court of Cassation No. 1429 of 26 February 1990 makes an important contribution. According to this judgement the economic notion which identifies the Group as being essentially a single enterprise has a legal equivalent in the notion of the Group as a single complex enterprise, made up of a number of entrepreneurs one for each company belonging to the Group. This judgement, however, is not yet an integral part of the Italian judiciary system and the Authority, also because the notion of control (discussed in section 1.3) was not yet made completely clear, requires all operations to be communicated.

1.2 Provisions governing agreements, the abuse of a dominant position and mergers

Title I, referring to the principles of Community Law, defines the relevant anti-competitive practices as: agreements, abuse of a dominant position and mergers.

(a) Agreements

Section 2, taking up the wording of Article 85 of the Treaty of Rome, defines agreements and/or concerted practices between undertakings, as well as the decisions by associations of undertakings and similar organizations. All agreements which have as their object or effect the prevention, restriction or distortion of competition within the national market, or a substantial part of it, to an appreciable extent, are prohibited.

After the general definition, section 2 lists the acts which may be the result of prohibited agreements:

- directly or indirectly fixing purchase or selling prices, or any other contractual conditions;

- limiting or controlling production, market outlets or access, investment, technical development or technological progress;

- sharing markets or sources of supply;

- applying dissimilar conditions to equivalent transactions in commercial relations with other contracting parties for the same services, thereby placing them at an unjustified competitive disadvantage;

- making the conclusion of contracts subject to acceptance by the other contracting parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.

However, this list is purely given by way of example and is not exhaustive.

In the case of agreements, there is no obligation or requirement to communicate them, and any agreements which are prohibited by law are automatically null and void.

One exception to the prohibition on agreements restricting competition is given in section 4 which permits the Authority to give its permission for agreements or categories of agreements which, pursuant to Article 2 should be forbidden because they prevent freedom of competition. This section provides for the possibility of authorizing exceptions, but only for a limited period, in the case of agreements which improve the conditions of market supply (in terms of increasing production, enhancing the quality of production or distribution, or technical or technological progress) which lead to substantial benefits to consumers.

This authorization is granted upon request submitted by the interested parties to the Authorities, which is required to pronounce within 120 days from the date the application is filed, using the powers to investigate and examine the application provided by the law.

Exemptions should be limited in time and should not go as far as removing competition from an appreciable part of the market.

Quite apart from the time limits on the validity of authorization or exemption, section 4 (2) provides that the authorization can always be withdrawn, after the Authority has given advance warning to this effect, whenever any one of the conditions justifying it no longer obtain, or whenever the authorization is abused by the company concerned. In the case of authorization given for a whole category, the effects of withdrawal will presumably be limited to excluding those particular agreements for which the abuse or the non-existence of the conditions laid down in the general authorization have specifically occurred.

As far as agreements are concerned, which in the experience of the EEC and the main industrial countries have caused the largest number of actions on the part of the authorities responsible for monitoring competition, the process of assessing the economic effects of limiting competition is entrusted wholly to the Authority. In other words, the law gives no role to the government to lay down general prior policy over agreements restricting competition, unlike the situation that exists with regard to mergers.

(b) Abuse of a dominant position

Section 3 forbids the abuse of a dominant position within the national territory or an appreciable part of it. In particular the following is forbidden: directly or indirectly fixing purchase or selling prices, or any other unjustifiable onerous contractual conditions; limiting or controlling production, market outlets or access, investment, technical development or technological progress to the detriment of consumers;

- applying objectively dissimilar conditions to equivalent transactions in commercial relations with other contracting parties for the same services, thereby placing them at an unjustified competitive disadvantage;

- making the conclusion of contracts subject to acceptance by the other contracting parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject-matter of such contracts.

This list, like the one relating to agreements, is provided purely by way of example. They are similar cases to those listed in section 2 except with regard to sharing the market and supply sources which only apply in the case of agreements.

Like Article 86 of the EEC Treaty, the law does not actually define the concepts of dominant position or "abuse of a dominant position". In this connection, both at national and Community level, there is a considerable degree of uncertainty of interpretation because of a lack of sufficiently clear and objective reference criteria.

However, it must be noted that it is not the occurrence of a dominant position which has to be prevented, but the abuse of it.

(c) Acquisitions and Mergers

Sections 5-7 govern mergers. First of all, section 5 defines merger operations, taking up the essential features of Article 3 of EEC Regulation 4064/89. It occurs in three cases: when two or more companies merge, when one or more subjects holding a controlling position in at least one or more companies directly or indirectly acquire control of all or part of one or more companies, and lastly when two or more companies create a common company through the constitution of a new company.

Advance notice of acquisitions and mergers must be given to the Authority whenever the combined domestic turnover of all the companies involved exceeds 500 billion lire, or when the total domestic turnover of the company to be acquired exceeds 50 billion lire (section 16).

Banks and financial institutions and insurance companies have specific criteria for calculating the thresholds beyond which the Authority must be notified of mergers and acquisitions.

Control is not acquired over a company when a bank or financial institution acquires equity interest in that company when it is incorporated, or when the share capital is being raised, provided that it does so in order to sell the equity interest on the market, on condition that during the period it is in possession of the equity interests, which may not exceed 24 months under any circumstances, it does not exercise any voting rights accruing to those shares.

In exercising prior control over mergers subject to prior notification, the Authority must ascertain whether these operations involve creating or strengthening a dominant position on the national market to such an extent that it appreciably or permanently eliminates or reduces competition. In order to apprise the situation the Authority must take account of a number of elements which are set out in the law by way of example: the possibility of choosing supplies and customers, the market position of the companies concerned, their access to sources of supply and market outlets, the structure of the markets, the competitive situation of the national industry, market barriers to competing companies, and the trend of supply and demand of the products or services in question.

After carrying out its investigation, if the Authority is certain that the operation does, in fact, restrict competition, it may ban the merger or authorize it on condition that specific measures are taken to prevent the consequences from arising.

The law permits the Authority in particular cases to authorize forbidden acquisitions and mergers. However, this power is far more restricted in the case of mergers than in the case of agreements. Section 25 of the law provides that the Italian Council of Ministers (the Cabinet) shall, at the proposal of the Minister for Industry, lay down the general criteria to be used by the Authority when issuing authorization as a waiver to the prohibitions provided by section 6 of the law, when major general interests of the domestic economy are involved in the process of European integration, on condition that these do not eliminate competition from the market or restrict competition which is not strictly justified by the aforementioned general economic interests.

The authority may not therefore grant exceptions to the prohibition on forbidden mergers pursuant to section 6 except in accordance with the general guidelines laid down at the highest political level. The Authority is duty-bound to appraise the effects of mergers on the operations of the market notwithstanding that, at all events, competition may never be unjustifiably eliminated or restricted. The Authority must also prescribe the measures required to be taken in order to restore full competition by a specific deadline. These criteria, which have to be laid down in general terms in advance, have not yet been drawn up by the Italian Government.

1.3 The notion of control

The definition of control of a company, indicated in section 7 is broader than the one given in Article 2359 of the Italian Civil Code, referring to relations of influence between subjects (and not only between companies) which may arise as a result of particular de facto or de jure circumstances. Most

specifically, section 7 provides that control is established not only in the cases provided by Article 2359 (referred to in Law No. 127 of 9 April 1991), but also when there are "rights, contracts or other legal relations which jointly or severally create the possibility of exercising a decisive influence on the activities of a company, taking account of all the de facto and de jure circumstances".

1.4 Public and private companies: monopolies

All the provisions governing agreements, abuse of a dominant position, and acquisitions and mergers apply both to private and public companies, and to all those in which the State holds a controlling interest (section 8). However they do not apply to those companies which have the statutory duty of managing services of general economic interest and are operated on the market under a monopoly (regulated by the State), albeit only within the limits strictly necessary for the attainment of their specific objects.

Another important provision is given in section 9 which permits the production of goods and services for which the law provides an institutional monopoly, provided that these are for the company's own use, or for the use of its parent or subsidiary companies. Production for internal use is not admitted, however, when the monopoly is only justified for reasons of public policy, police policy, national defence and in the telecommunications sector, and is governed by Law No. 223 of 6 August 1990.

1.5 The Authority as the guarantor of competition and the market

In order to prevent the anti-competitive activities referred to in Title I or to prevent their effects, the law has instituted a new Authority named in section 10 "Authority to guarantee competition and the market". The essential feature of this Authority is its independence, as clearly stated in Article 19 (2) which provides that "the Authority shall operate with full autonomy and independence in relation to its judgements and assessments".

The Authority is a collegial body composed of a Chairman, and four members appointed by the speakers of the Senate and of the Chamber of Deputies. The five members remain in office for seven years and may not be reappointed, and the fundamental condition for membership is their personal independence, which is strengthened by stringent provisions governing incompatibility with their post, and specific professional qualifications.

The independence of the Authority is also manifested by the requirement that all its measures are required to be published in a special bulletin (section 26) and a statutory Report must be submitted each year to the Prime Minister, who refers it to Parliament (section 23). Both these requirements are designed to ensure that the work of the Authority is subject to the judgement of the Government, Parliament and public opinion.

The operation of the services and offices of the Authority are overseen by a General Secretary, appointed by the Minister of Industry at the proposal of the Chairman of the Authority. The Authority also has its own staff, which may not exceed the statutory limits of 150 persons.

The Authority is an administrative body without jurisdictional power. It has all the features of what has been recently introduced into the Italian legal system as "an independent administrative Authority", along the lines of the independent agencies in the French and North American tradition.

Decisions by the Authority are subject to the control of the Courts, as prescribed by Articles 24 and 113 of the Italian Constitution. Section 33 of the law provides that the decision to appeal against any of the administrative measures of the Authority must be taken by the Latium Regional Administrative Tribunal. Cases brought by private individuals for annulments and damages, and any petitions to obtain emergency procedures fall within the jurisdiction of the competent Appeal Court.

1.6 The powers of the Authority in relation to agreements, abuse of a dominant position, and mergers

The Authority's powers differ as between agreements and abuses of a dominant position, for which the law provides the same procedures (sections 12-15), and mergers which are governed by sections 16-19.

With regard to its investigative powers, a preliminary general remark is necessary: the examination should not be initiated in a general and indiscriminate manner, but only in cases in which there is evidence to suggest that the law has been violated. This is provided by sections 14 and 16 which refer, respectively, to "cases of presumed violations of sections 2 and 3" and mergers which are "likely to be prohibited pursuant to section 6". This is consistent with Article 6 of EEC Regulation 4064/89 which lays down that investigation is only to take place when there are serious doubts as to the compatibility of the merger and the Common Market.

The administrative procedure governed by this law also qualifies Law No. 241/1990 establishing general provisions for the administrative procedure. The latter law therefore applies in all matters not otherwise covered by Law No. 287.

The investigative procedures with which the Authority must comply in exercising its powers are laid down, pursuant to section 10 (5) in regulations to be issued by Presidential Decree, in order to ensure that the decisions and reasoning is publicly known, and to give an opportunity for a discussion between the parties, of which a record is required to be kept. Since these regulations have not yet been issued, the Authority is provisionally following the provisions of Laws Nos. 241 and 287 of 1990.

1.7 Limits on the powers of the Authority

In the case of financial institutions and banks, as well as broadcasting and publishing companies, the powers to enforce the Articles relating to agreements, abuse of a dominant position and acquisitions and mergers relate to their respective supervisory bodies: the Bank of Italy, and the guarantor for the publishing and broadcasting industries. However, before these are able to adopt any measures relating to competition, they must consult the

Authority. In this case the rule is "silence equals assent": if the Authority does not reply within 30 days of the date the request is made, the supervisory body may proceed with its own measures.

Section 20 (5) provides for a different procedure in the case of relations between the Authority and the Bank of Italy, by introducing the possibility of allowing a limited exemption to the prohibition referred to in section 2 in the interests of the stability of the monetary system, taking account of the criteria set forth in section 4 (1). In this case, the Bank of Italy may issue authorization by joint agreement with the Authority, which must judge whether the conduct is detrimental to competition or not.

In the case of operations involving insurance companies, the Authority is responsible for applying the law after hearing the opinion of the comptroller of private insurance companies (ISVAP)

The Authority may, at all events, notify the Bank of Italy and the guarantor of any instances in which sections 2 and 3 (agreements and abuse of a dominant position) have been violated.

It should also be noted that the control over publishing and broadcasting lies on a special plane, mainly in connection with Article 21 of the Italian Constitution which sanctions freedom of information. In this case, the economic aspect of the protection of competition, even though it may be present, takes on a different relevance.

1.8 Consulting and fact-finding powers of the Authority

In addition to its decision-making powers, which involve a fact-finding phase and the possibility of imposing sanctions, the Authority also exercises two other important powers: notification and making proposals, and consultation. Both these powers acquire considerable importance in the broader view of the protection of competition, which not only involves regulating anti-competitive conduct on the part of companies but also restricting distortions stemming from administrative and statutory constraints, and identifying all the actions that need to be taken in order to enable the market to function properly. For this purpose, the law wisely provides that the Authority shall not only exercise its consulting and fact-finding powers in order to pronounce on individual and specific cases but also on problems of a general nature, based upon its knowledge and experience.

The power to notify and propose is provided by section 21 which provides as follows: "the Authority shall identify cases of particular relevance in which the provisions of law or regulations or general administrative provisions are creating distortions to competition or to the sound operation of the market which is not justified by the requirements of general interest".

Having identified these cases, the Authority notifies Parliament, the Prime Minister, the competent Ministers, any of the local authorities concerned, as relevant. Moreover, the Authority may indicate any measures that need to be taken in order to eliminate or to prevent such distortions, and is given the important power of publishing its remarks and its proposals.

It should also be noted that although the law speaks of "an opinion regarding the necessary steps to be taken" this is only a power to make a proposal, because it is the Authority which takes the initiative and draws the attention of the agency in question to the advisability of acting in one way or another.

The opinion, on the other hand, forms part of a different stage in the procedure. In this case, it is the competent agency which takes the initiative by requesting another agency to express its opinion.

The same applies to section 24 which provides that within 18 months of its constitution, the Authority is required to submit a report to the Prime Minister on the steps that must be taken in order to adapt all the legislation relating to public tenders, franchise holders and the commercial distribution companies to the principles of competition. In other words, the Authority must make direct proposals for the sound management of these sectors once it has identified the causes of distortions to competition.

Public tenders, commercial distribution and the operations of franchise holders account for a very large share of national production in Italy. There are also sectors in which important initiatives have already been taken by the Community in order to broaden competition within the Common Market. It is obvious that the function which section 24 vests in the Authority is particularly delicate and important.

The consulting power is provided by section 22, which permits the Authority to express its view on legislation or regulations, and on problems relating to competition and the market whenever it deems this appropriate or whenever requested to do so by the public agencies or government departments concerned. The Prime Minister may also request the opinion of the Authority in relation to legislation or regulation whose direct effect is:

- to place quantitative restrictions on the exercise of an activity or access to a market;

- to lay down exclusive rights in certain spheres;

- to impose general pricing practices or conditions of sale.

These opinions are optional and not binding. However, the Authority may intervene whenever it deems appropriate. But here again, the Authority is required to play a very important role in protecting competition.

1.9 A number of interpretative problems relating to the implementation of this law

The most sensitive and complex issues relating to the application of Law 287/90, concern the interpretation of the provisions governing the abuse of a dominant position, mergers and agreements.

Reference in the law to very general and abstract categories of cases is probably designed to avoid the risk of excessively rigid or detailed provisions governing competition from becoming rapidly out of date, in a

sphere which is extremely fluid and changeable. However it is necessary to define with sufficient clarity and coherence a set of criteria for identifying and appraising situations which might lead to the distortion of competition. This is the reasoning behind the reference made to the principles of the similar Community system (and implicitly to the case-law relating thereto) in the last subsection of section 1, relating to the interpretation of the provisions of Title I of the law.

1.10 Market power and abuse of a dominant position

The concept of market power is relevant for the purposes of applying the provisions governing abuse of a dominant position and the control of mergers. In its most general sense, market power relates to the possibility on the part of a company to operate independently of other companies for a sufficiently long period of time, for example, by fixing higher prices than the competitors without risking a rapid and substantial decline in its market share.

Such a position, unlike the case of monopoly or quasi-monopoly does not exclude the existence of some competition, but it places the company which is in the position of maintaining the monopoly, if not to decide at least to substantially influence the way in which the competition is practised, and at all events to behave in many cases without being accountable (Hoffmann La Roche, case 39).

These definitions leave many issues open relating to ascertaining the actual existence of a dominant position on the market. Since it is impossible to hold up such positions with some theoretical state of perfect competition, the assessment can only be carried out indirectly, by analysing data, facts and circumstances which, on a case-by-case basis, provide sufficient clues to be able to establish a reasonable and non-arbitrary presumption of overall "immunity" on the part of the company from the constraints and conditioning factors which typically stem from effective, appreciable, competition.

This is the approach taken by the EEC Commission and the Court of Justice in applying Community Law. The evidence which is taken into consideration includes, first and foremost, the market share. However, as is well known, the simple reference to market shares is a necessary criterion for defining a dominant position, but it does not always provide a clear cut answer. The relevant market should in fact be defined in terms of all the goods and services, varying widely in quality and type, for which one might reasonably presume effective, mutual competition, defined in terms of their price cross-elasticities, and also taking account of any specific territorial features.

In addition to the size of the market share, other elements are also important for ascertaining the existence of a dominant position, section 6 (1), where it forbids mergers that lead to the constitution or strengthening of a dominant position on the national market, requires the Authority to take account of the possibility of choosing suppliers and customers (evidently considering both national and foreign products), the raising of strategic barriers to entry. According to all these criteria, pursuant to section 3, a dominant position may also be identified in relation to smaller areas within the national territory, which are nevertheless

important in terms of the dimension (whether absolute or relative) of the local market for the products considered, as well as the presence of particular competitive conditions suggesting that the local market is distinct from the markets in adjacent areas of the territory. However, even these elements provided by the law are not adequate to objectively identify cases of abuse of a dominant position. From this point of view it should be borne in mind that the prohibition provided by section 3 does not refer to a dominant position per se, but to the abuse of the market power by a dominant company.

This abuse basically consists in conduct designed to exploit the market power of the company in order to obtain economic benefits which would otherwise not be possible. From this point of view it is not only unlawful to act by abusing a position of strength but also by performing actions which, while lawful in themselves, nevertheless produce restrictive effects on competition precisely because of the limitations already imposed by the fact that a company holds a dominant market position. This is the case of a company which refuses to sell its products, otherwise acceptable under normal conditions, when the dominant position of the company which refuses to sell is such that the potential customer is thereby excluded from the market, or finds the market outlets or access to the market restricted thereby, to the detriment of consumers (cf. Zoja, judgement of 6 March 1974, and United Brands, judgement of 14 February 1978).

1.11 Agreements restricting freedom of competition

Law 287/90 adopts a very broad notion of agreement. Section 2 (1) defines as agreements every attempt by individual companies - either directly or through associations or consortia set up between themselves - to regulate their behaviour by voluntarily restricting their own freedom of action on the market, irrespective of the formal features and the legal character of the commitments entered into.

Generally speaking the law would seem to exclude cases of agreements between companies belonging to the same Group, because of the notion of enterprise repeatedly upheld by the EEC Court of Justice. According to this notion the Group is viewed as a single economic unit, within which the affiliated companies, while having separate legal personalities, do not have real autonomy to decide on their market behaviour, but basically only apply the instructions laid down by the parent company (see Beguelin, judgement of 25 November 1971, Continental Can and Centrofarm, judgement 31 October 1974). According to section 2 (2) agreements are forbidden "which have the object or effect of preventing, limiting or substantially distorting competition on the domestic market or a substantial part of it". The alternative reference to the object or effect of the agreement suggests that the ban may apply to any agreement or a clause in any agreement, which restricts competition regardless of whether the restrictions or the impediments constitute the object or the effect of that agreement. Indeed, the prohibition may be based upon one or other of these elements, jointly or singly.

The need for substantial interference with the competition, however, places a limit on the scope of the ban, namely, the requirement that the distortions must be substantial in relation to the market taken as a whole, in other words, sufficient to substantially influence the operation of the market.

Moreover, in its Decision dated 12 September 1986 the EEC Commission pointed out that the provisions of Article 85 of the Treaty of Rome only relate to "agreements which have an appreciable effect on market conditions", and therefore excluded from the prohibition - assuming them to be barely relevant - a whole series of agreements identified on the basis of certain minimal parameters, relating to the market share of the products forming the subject-matter of the agreement (not more than 5 per cent of the market) and the dimension of the companies involved (a turnover of not more than 200 million ECU).

This does not, however, mean that agreements which exceed these limits are necessarily of relevance. As the Commission expressly pointed out, under certain circumstances agreements concluded between companies exceeding the limits may also affect trade between member States or competition only to an insignificant degree, and are therefore not included within the scope of Article 85 (1).

One may reasonably assume that it is mainly in terms of qualitative parameters that the ban provided by section 2 is not applicable to cases in which cooperation between companies designed to improve the efficiency and rational organization of their activities is the sole object of the agreement, leaving the companies concerned completely free to act and compete on the market.

The exceptions to the prohibition referred to in Article 2 are those which relate to agreements or categories of agreements which, unlike the "irrelevant" agreements, or exclusive cooperation agreements, should be considered as prohibited because they restrict freedom of competition. These cases may in fact require the specific clearance from the Authority in the cases provided for and governed by section 4 of the law.

Chapter 2

ACTIVITIES DURING THE FIRST FEW MONTHS OF THE ENTRY INTO FORCE OF THE LAW

2.1 Introduction

The account of the powers exercised by the Authority during the first few months of implementation of the law can be divided in terms of the cases indicated by the law. A distinction may be drawn between overseeing mergers (sections 5 and 6), overseeing agreements (section 2), drafting and requesting opinions (section 20), reporting (section 21), and providing consultancy (section 22).

During the first few months the Authority was engaged on major organizational duties regarding, inter alia, finding and furnishing appropriate headquarters to accommodate the present staff. The Authority began operations on 21 November 1990 on premises provided by the Ministry of Industry, and then took out the lease for the present premises in Via Calabria 48 in Rome, where the Authority moved in February 1991.

2.2 Acquisitions and mergers

As soon as it had been instituted, the Authority set about examining the communications it had been receiving as prescribed by law. By 31 March 1991, 74 communications had been submitted relating to mergers. Some communications referred to more than one operation.

Documentation on mergers was examined in order to ascertain the relevance of such operations, if any, in respect to Community law so that the information could be forwarded to the EEC Commission (cf. section 1 (2)). However, none of the mergers showed a Community relevance. Section 16 communications were analysed in order to ascertain whether the merger operations described in them restricted freedom of competition, contravening the prohibition provided by section 6 of the law. Since no effects distorting competition have come to light in relation to any of the mergers communicated to it, the Authority has not yet deemed it necessary to undertake any investigations, and has therefore issued all the communications provided by section 16 (4), within the statutory period.

2.3 Features of the mergers examined

The communications examined comprise a total of 83 mergers, of which 47 were between companies belonging to the same Group. By far the largest number of operations are intrasectoral: 67 out of 83. This is all the more evident in the case of intra-group mergers. Only 8 of 47 mergers within the same group related to companies belonging to different sectors.

The largest number of mergers involved companies in the following sectors: banks and financial intermediaries, electrical and electronic equipment industry and the chemical industry.

One of the first points that can be made regarding the results is the wide variation in connection with the sectoral distribution of the operations.

On the one hand, the three sectors mentioned above account for about 50 per cent of all the mergers, while in 14 of the remaining 26 sectors, no mergers occurred.

Eleven of the 83 mergers examined, of which 9 were extra-group operations, referred to mergers involving companies with a total national turnover of less than L. 500 billion and in which the national turnover of the prospective merged company does not exceed 50 billion.

In this connection there are a number of comments that one can make regarding the analysis of the individual cases notified. First of all, even though the dimensions of the individual companies involved in the operation do not exceed the statutory threshold, the aggregate turnover in Italy of the group to which the parent company belongs may exceed those thresholds. Moreover, new companies are very often incorporated with the specific aim of purchasing divisions of companies or equity interests, and it is not therefore possible to know their turnover.

2.4 Design of the form for communicating mergers

Law 287/90 laid down the obligation to give the Authority advance notice of mergers, but says nothing about the formalities. Several times the law clearly provides that the communication should be made in a specific manner, meeting specific requirements. Section 16 (4), for example, refers to a merger "notified according to the specified procedure". Moreover, arguing conversely from the provisions of section 16 (7), the communications which are sent to the Authority must be complete, correct and truthful.

The Authority has therefore agreed that all the information which is essential for the preliminary examination to be conducted must be systematically submitted and has decided to design a special form for general use to be recommended to the companies wishing to notify mergers.

It is in the interest of the companies themselves to ensure that the information is correct and exact, both to avoid delays and to remove uncertainties as soon as possible, and also to avoid the penalties which they will incur in the event of failure to comply with the obligations to submit prior communication (section 19 (2)). Moreover, by making the communications more uniform, more efficient methods for checking them can be adopted and operations made more transparent.

When drafting the form for communications, the Authority drew on the experience of the Community, using as its model the form annexed to RRC Regulation 4064/89. With regard to the purely domestic scope of application of Law 287, the Community form was amended and considerably simplified, even though all the necessary adjustments can be made as experience with it develops.

2.5 Agreements

By 31 March 1991, only two cases of agreements had been brought to the attention of the Authority by parties not directly involved. In one of them the Latium Association of Petroleum Products Traders had urged its members to charge a specific price (according to a special price list) even for petroleum products supplied in quantities of less than 2,000 litres.

The Authority, deeming that the Latium Union might be in breach of section 2 of the law, decided to investigate the matter. To acquire further information, it convened the parties concerned, together with other associations belonging to the same category and operators in the sector in order to appraise the reference market.

The Latium Union of Petroleum Product Traders acknowledged that it was anti-competitive conduct to circulate the price-list, and accordingly notified its members that the price-list was cancelled and null and void, even as a guideline.

2.6 Opinions pursuant to section 20 and relations with other institutions

As far as relations with other government departments are concerned, frequent contacts have been maintained between the Authority and ISVAP and the Bank of Italy, pursuant to section 20 of the law, in relation to mergers involving banks and insurance companies.

During the first few months of activity, the Authority has requested six opinions from ISVAP, as prescribed by section 20 (4), relating to mergers involving insurance companies. No particular problems have arisen in connection with these mergers, and neither has ISVAP indicated any distortion of competition.

Relations with the Bank of Italy relate to the complex and delicate provisions of section 20. During this period the Authority has issued four opinions relating to mergers between banks. In all four cases the Authority found no evidence of distorted competition, and submitted its opinion to the Bank of Italy which did not consider it necessary to dissent from the Authority's favourable opinion.

The Authority has also been in contact with other institutions, including the Ministry for the Merchant Marine, in relation to the problem of port regulations, and the CIP in relation to the case of the Latium Union of Petroleum Product Traders.

In its relations with the Community, the Authority has appointed its representatives to the ECC Commission. Representatives have also been appointed to attend meetings of the Committee on the Agreements Committees and the Mergers Committee.

2.7 Notification and consulting activities

Sections 21 and 22 of the law empower the Authority to notify Parliament and the Government of situations distorting competition, and to issue opinions on legislation or regulations, and on problems relating to competition and the market.

The Authority has used these powers in relation to the application of section 9 of the law which grants the right to produce any goods or services which are the object of a monopoly or public franchise provided they are for its own use, or the use of its parent company and subsidiaries.

More specifically, three applications have been submitted to the Authority to acknowledge the right to produce for own use in relation to the port regulations, which typically create a legal monopoly. The cases in question related to the loading and unloading of ships, tug services, and processing and conserving frozen fish which is a monopoly of the local port companies.

In all these cases, the Authority was requested to guarantee the right to self-production and to take action in relation to the prices charged by the port companies for these operations.

The Authority pointed out that section 9 allows any company which intends to produce for its own use a perfect subjective right, namely a legal position in which the holder of the right may make use of it without requiring any further intervention on the part of the State. Consequently, the right to self-production is total and is immediately protected by the law, and guaranteed by the Courts in the event of any attempt to interfere with the exercise of that right.

In this connection, the Authority, which is an administrative body, is obviously not required to act as a Court. More specifically, the Authority pointed out that its specific intervention in any individual instance can only take place in the case of an activity being performed by a monopoly when a dominant position is being abused, in breach of Law 287/90.

But as far as the complaints relating to the charges levied by companies enjoying a monopoly situation are concerned, the Authority has no powers to intervene directly and immediately. This has been formalized by the Authority in three measures, reiterating that in the individual cases examined it was unable to take the requested action and that it was not possible to say whether or not the circumstances of self-production existed, or to take any action over the prices charged by the monopoly company.

In view of this, the Authority decided to avail itself of the general powers vested in it by sections 21 and 22 of the law, consisting in the right to report any instances of distorted competition, and to issue an opinion on legislation or regulations and problems relating to competition and the market.

It therefore notified Parliament of the need to promptly enact legislation regarding the ports which would enshrine both the spirit and the

scope of Law 287/90, guaranteeing freedom of competition and the correct functioning of the market in the ports, and amending any regulations that were no longer cogent with Italian and Community legislation in general.

A Government Bill has already been laid before Parliament (No. 3313 ter, Chamber of Deputies) to remove the monopoly in the ports by repealing Article 110 of the Maritime Code as from 1 January 1993. In relation to this Bill, the Authority has pointed out the need to ensure that this monopoly should be removed as soon as possible, even before the indicated date.

On the subject of the need to reform the laws governing ports, the Authority has emphasized the need to review the price-fixing criteria, in order to rapidly liberalize the monopoly. Nevertheless, this has to be done bearing in mind such fundamental elements as the dignity of the workers, the quality and quantity of the work performed, and also appraising the need to incentivate employment, and increase the competitiveness of the national port services.

II. COMMENTARY BY THE GOVERNMENT OF JAMAICA ON ITS "FAIR COMPETITION ACT", 1993

A. The Act is designed to be a companion piece of legislation to the Government's policy of economic reform and modernization. Its speedy evolution can be traced to the rapid pace of the programmes of liberalization, deregulation and privatization.

The Act became law on 9 March 1993 but it does not take effect until 9 September 1993. This is to allow for the continuation of the public education programme and for businesses to get their houses in order.

B. The intent of the Fair Competition Act is to ensure that all legitimate enterprises have an opportunity to participate in what is perceived as a growing Jamaican economy. It also provides for specific consumer protection over a range of unfair practices.

While the Government has greatly relaxed its hold on the economy to allow competitive forces free play, it must now act as a reference to make sure that everyone plays by the same rules. Businesses and consumers alike have demanded a market place in which business can operate fairly and equitably, and where everyone is allowed to participate according to prescribed and transparent regulations.

C. The Act focuses on behavioural rather than structural problems of the free market system. It will prohibit strictly, all forms of price fixing and resale price maintenance. It will make void all provisions in agreements that have the effect of lessening competition. It will prevent the abuse of a dominant market position and market restriction. It will restrict exclusive dealing and bid-rigging or collusive tendering.

On the consumer side, the Fair Competition Act will control misleading advertising, tied selling, sale at bargain price, sale above advertised price and double ticketing.

D. The law will not only apply to those involved in the production of goods but equally to those involved with the delivery of services. It will also apply equally to the government as it will to the private sector. It applies to transactions affecting the Jamaican market.

There are certain exceptions to the law. For example, section 3 exempts trade unions in their arrangements for collective bargaining, persons or businesses with rights under or existing by virtue of any copyright, patent or trademark and any arrangements that the Fair Trading Commission has authorized.

E. The Act will be administered by a Fair Trading Commission that will have very wide powers of investigation. It will be able to enter any business place and recover relevant documents, it will be able to summon persons

before it and administer the oath. It will also be able to prescribe any remedy it deems fit for any abuse of a dominant market position and for any other breaches of the law. Its positions are enforceable by the Supreme Court by way of pecuniary sanctions, etc. The law provides a maximum pecuniary sanction of 5 million Jamaican Dollars (J$5m) on a business for each breach and of one million Jamaican Dollars (J$1m) on an individual for each breach. The law also allows an individual a private right of action to pursue breaches of the Act directly with the Supreme Court.

III. COMMENTARY BY THE GOVERNMENT OF VENEZUELA ON ITS "LAW TO PROMOTE AND PROTECT THE EXERCISE OF FREE COMPETITION", DECEMBER 1991

A. Description of the reasons for the introduction of the legislation

The Law to Promote and Protect the Exercise of Free Competition of 30 December 1991 was enacted on the occasion of the restoration of the economic guarantee established in article 96 of the Constitution. The guarantee of economic freedom had been restricted at least since 1961 and its restoration made it necessary to bring into force a series of laws, including the aforementioned Law. Moreover, the elimination of a range of controls and restrictions on economic activity, including most price controls, made it desirable to put into effect an instrument to punish improper manoeuvres aimed at obstructing or restricting economic freedom.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation.

The fundamental objective of the Law is the regulation of the exercise of economic freedom by means of the protection of free competition. The Act seeks "to promote and protect the exercise of free competition and the efficiency that benefits the producers and consumers; and to prohibit monopolistic and oligopolistic practices and other means that could impede, restrict, falsify or limit the enjoyment of economic freedom."

C. Description of the practices, acts or behaviour subject to control, indicating for each:

(a) The type of control, for example: outright prohibition, prohibition in principle, or examination on a case-by-case basis;

(b) The extent to which the practices, acts or behaviour specified in paragraphs 3 and 4 of the Set of Principles and Rules are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those relating specifically to consumer protection, for example, misleading advertising.

In conformity with article 7 of Regulation No. 1 of the Law to Promote and Protect the Exercise of Free Competition, the following practices, acts or behaviour are subject to outright prohibition:

(a) agreements, decisions, collective recommendations or concerted activities among competitors to:

(i) fix prices or marketing conditions;

(ii) limit production by fixing levels or quotas;

(iii) boycott or impede access to the market, by inducing third parties to refuse to supply goods or services, obstruct access to goods or services, or refuse to sell raw materials or factor inputs or offer services to others;

(iv) take part in bidding;

(v) divide markets, geographical areas, supply sectors or supply sources.

(b) Unilateral behaviour or practices that constitute an abuse of market power.

In conformity with article 8 of the aforementioned Regulation, prohibited practices subject to authorization are those that offer advantages to consumers or users of the goods and services in question, that contribute to increase the economic efficiency of the persons participating in them and comply with the following conditions:

(1) They contribute to production improvements, commercialization and distribution of goods and services or promoting technical or economic progress;

(2) They entail advantages for consumers or users.

Such practices or activities are subject to prior authorization by the Office of the Superintendent for the Promotion and Protection of Free Competition, as well as to control over their implementation. The authorization will contain the minimum required to achieve the intended goal. Examples of such practices, in conformity with article 16 of Regulation No. 1, are as follows:

(a) Uniform application of rules and standards relating to general trading conditions, as well as conditions of supply and payment;

(b) Research into and joint development of technical or technological improvements;

(c) Specialization with a view to rationalizing, planning and encouraging production and the agreements necessary for its implementation or execution;

(d) The export of goods or services;

(e) The undertaking to supply or purchase exclusively specific products;

(f) The imposition or establishment of limitations on the acquisition or utilization of industrial or intellectual property rights, including technical expertise;

(g) The granting of franchises.

Misleading advertising and other acts of unfair competition are prohibited by the Law.

D. Description of the scope of application of the legislation, indicating:

(a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;

The law is applicable to all transactions in goods and services. There are no exceptions based on specific sectors of the economy, but Resolution No. 0005/93 of 18 June 1993 issued by the Office of the Superintendent states that concerted practices between competitors do not affect the behaviour of the relevant market in the following cases:

(a) When not more than 15 per cent (15%) of the total volume of trade carried out with products that are identical or considered similar by the user are involved, on the basis of their properties, price and use; and

(b) The participating enterprises have a volume of annual operations not exceeding 30 million Bolivars a year.

(b) Whether it applies to all practices, acts or behaviour having effects on that country, irrespective of where they are committed;

The Law is applicable to all practices, acts or behaviour having effects on the country, irrespective of where they are committed.

(c) Whether it is dependent upon the existence of an agreement, or of that agreement being put into effect.

The mere existence of an agreement that restricts competition makes the competition legislation applicable, irrespective of its implementation.

E. Description of the enforcement machinery (administrative and/or judicial), indicating any notification and registration agreements, and principal powers of body/bodies.

The administrative machinery responsible for enforcing the legislation is the Office of the Superintendent for the Defence of Free Competition. In conformity with article 29 of the Law it has the following functions:

(a) To resolve matters assigned to it by the Law;

(b) To conduct the investigations necessary to verify the existence of anti-competitive practices, and prepare case files concerning such practices;

(c) To determine the existence or non-existence of prohibited practices or conduct, act to proscribe them, and impose the penalties provided in the Law;

(d) To adopt the necessary preventive measures to avoid the detrimental effects of the prohibited practices;

(e) To authorize those practices in exceptional cases;

(f) To propose to the Executive Branch the regulations necessary for the application of the Law;

(g) To issue an opinion on matters within its competence when so requested by the judicial or administrative authorities.

The competent judicial authority is the First Administrative Court.

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices.

The basic legislation regulating this matter is the Law to Promote and Protect the Exercise of Free Competition and its Regulation No. 1. Decision 285 of the Cartagena Agreement, whose sphere of application is defined in article 2, also applies in Venezuela.

G. Description of the major decisions taken by administrative and/or judicial bodies, and the specific issues covered.

On 2 December 1992 the Office of the Superintendent took a decision in the case of the Federacion Farmaceutica de Venezuela. This decision refers to a case of "boycott".

On 17 May 1993 the Office of the Superintendent took the decision to impose a fine in the case of Premezclado y Prefabricados de Concreto S.A. (Pre-Mex), Premezclados Tucon, C.A., Mezcladora Mixto-Listo Consolidada, C.A., Venmar, C.A. (Venmarca) and Premezclados Avila, C.A. This decision refers basically to the existence of a price agreement among the aforementioned businesses.

The First Administrative Court has not handed down any judicial decision.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Government, or legislation, or particular parts thereof.

None.

ANNEXES

Annex 1

ITALY

(Original: ENGLISH and FRENCH)

Rules for the Protection of Competition and the Market (*)

TITLE I

REGULATIONS ON CARTELS, ABUSE OF DOMINANT POSITION AND CONCENTRATIONS

ARTICLE 1

Scope and relationship to Community rules

1. The provisions of the present Law implementing Article 41 of the Constitution protecting and guaranteeing the right of economic initiative shall apply to cartels, to abuses of a dominant position and to concentrations which do not fall within the scope of Articles 65 and/or 66 of the Treaty establishing the European Coal and Steel Community, Articles 85 and/or 86 of the Treaty establishing the European Economic Community (EEC), EEC Regulations or Community acts having an equivalent regulatory effect.

2. Where the Authority safeguarding competition and the market as referred to in Article 10, hereinafter referred to as the Authority, considers that a case submitted for examination by it does not fall within the scope of the present Law pursuant to paragraph 1 [it] shall inform the Commission of the European Communities of this and forward to it any information at its disposal.

3. Where cases are already the subject of proceedings by the Commission of the European Communities in pursuance of the standards referred to in paragraph 1, the Authority shall suspend its examination with the exception of any aspects which fall exclusively within national competence.

4. The rules contained in the present Title shall be interpreted on the basis of the principles of the European Communities' rules concerning the regulation of competition.

ARTICLE 2

Cartels restricting freedom of competition

1. The following shall be regarded as cartels: agreements and/or practices negotiated between undertakings and resolutions, even if adopted pursuant to statutory or regula-

* Law of 10 October 1990 n. 287 (*Gazzetta Ufficiale n. 240, 13 Ottobre 1990*). Translation by the Department of Trade and Industry Translation Service, United Kingdom.

tory provisions, by consortiums, associations of undertakings and other similar bodies.

2. The following shall be prohibited: cartels between undertakings which have the aim or effect of preventing, restricting or appreciably distorting the play of competition within the national market or within a large part of it and, in particular, those which involve:

a) Directly or indirectly fixing purchase or selling prices or other contractual conditions;

b) Preventing or restricting production, outlets, access to the market, investment, technical development or technological progress;

c) Dividing up markets or sources of supply;

d) Applying objectively unequal conditions to other contractors in commercial relationships providing equivalent services, thereby possibly subjecting them to unjustifiable competitive disadvantages;

e) Making the conclusion of contracts subject to the acceptance by the parties of additional services which by their nature or according to commercial practice are not related to the object of such contracts.

3. Prohibited cartels shall be null and void.

ARTICLE 3
Abuse of dominant position

1. The abuse of a dominant position within the national market or within a large part of it by one or more than one undertaking shall be prohibited and it shall also be prohibited to:

a) Directly or indirectly impose purchase or selling prices or other unfair contractual conditions;

b) Prevent or restrict production, outlets or access to the market, technical development or technological progress, to the detriment of consumers;

c) Apply to commercial partners objectively different conditions for equivalent services, thereby subjecting them to an unjustifiable competitive disadvantage;

d) Make the conclusion of contracts subject to the acceptance by the parties of additional conditions which by their nature or according to commercial practice are not related to the object of such contracts.

ARTICLE 4
Derogation from ban on cartels restricting freedom of competition

1. The Authority may, by means of a provision which it may make, authorize, even for a limited period, cartels or categories of cartels prohibited under the terms of Article 2 which may result in improvements in the supply conditions on the market, the effects of which are such that they entail a sizeable advantage for consumers and which are defined taking account also of the need to guarantee undertakings the necessary competitiveness at international level and which are linked in particular to an increase in production or to a qualitative improvement in production itself or in distribution or, further, to technical and technological progress. The authorization cannot anyhow permit restrictions not strictly necessary to the achievement of the aims referred to and cannot permit suppression of competition in a substantial part of the market.

2. The Authority may, after giving notice, revoke the measure authorizing derogation as referred to in paragraph 1 in cases where the person concerned abuses the

authorization or where certain conditions on which the authorization was based no longer obtain.

3. Applications for authorization shall be submitted to the Authority, which shall avail itself of the powers of examination referred to in Article 14 and shall act within a period of 120 days from submission of such application.

ARTICLE 5
Concentrations

1. A concentration shall occur where:

a) Two or more undertakings merge;

b) One or more persons controlling at least one undertaking, or one or more undertakings, directly or indirectly, acquire, either by purchasing shares or by the purchase of part of the assets or by contract or by any other means, control of all or part of one or more undertakings;

c) Two or more undertakings, by setting up a new company, create a joint venture.

2. Control of an undertaking shall not be transferred where, on the creation of an undertaking or on an increase of its capital, a bank or a financial institution purchases holdings in that undertaking in order to resell them on the market, provided it does not exercise the voting rights conferred by the holdings during the period when it owns such holdings which in any case shall not exceed 24 months.

3. Operations which have as their main object or effect the coordination of the actions of independent undertakings shall not be regarded as concentrations.

ARTICLE 6
Ban on concentrations restricting freedom of competition

1. In the case of concentrations subject to notification pursuant to Article 16, the Authority shall assess whether they involve the establishment or reinforcement of a dominant position on the national market which could eliminate competition or result in an appreciable and lasting reduction in competition. This situation must be assessed bearing in mind the alternatives available to suppliers and users, the position of the undertakings concerned on the market, their access to supplies or markets, the market structures, the competitive position of the national industry, barriers to the entry of competing undertakings and the trends of demand and supply for the products or services in question.

2. Where, in the context of the examination referred to in Article 16 paragraph 4, the Authority has ascertained that the operation entails the consequences referred to in paragraph 1, it shall ban the concentration or it shall authorize it and lay down the necessary measures to prevent such consequences.

ARTICLE 7
Control

1. Under the terms of the present Article, control shall be gained in cases as laid down in Article 2359 of the Civil Code and furthermore where there are rights, contracts or other legal relationships which, individually or jointly, and taking account of the circumstances *de facto* and *de jure*, confer the possibility of exercising a decisive influence over the activities of an undertaking, including:

a) Rights of property or of tenure over all or part of an undertaking's assets;
b) Rights, contracts or other legal relationships which confer a decisive influence over the composition, resolutions or decisions of the organs of an undertaking.

2. Control shall be acquired by the person or by the undertaking or by the group of persons or undertakings:
a) Who own the above-mentioned rights or benefit from the above-mentioned contracts or are the subjects of the other above-mentioned legal relationships;
b) Who, without holding such rights or benefits and not being subject of such legal relationship, are empowered to exercise the ensuing rights.

ARTICLE 8
Public undertakings in legal monopoly situations

1. The provisions referred to in the preceding Articles shall apply to both private and public undertakings and to those in which the state is the majority shareholder.

2. The provisions referred to in the preceding Articles shall not apply to undertakings which, in accordance with legislative provisions, provide services of general economic interest or which operate on the market on a monopoly basis, on matters which relate strictly to the performance of the specific tasks with which they have been charged.

ARTICLE 9
Own-production

1. The legal reservation in favour of the state or of a public body holding a monopoly position on a market and the legal reservation for an undertaking charged with the provision of goods and services to the public against remuneration shall not imply a ban on third parties producing such goods or services for their own use and for use by the controlling company and the controlled company.

2. Own-production shall not be authorized in cases where, on the basis of the provisions containing the reservation, it is established that the latter has been made for reasons of public order, public security and national defence and, subject to a concession, for the telecommunications sector.

TITLE II

ESTABLISHMENT AND FUNCTIONS OF THE AUTHORITY SAFEGUARDING COMPETITION AND THE MARKET

CHAPTER I

ESTABLISHMENT OF THE AUTORITY

ARTICLE 10
Autority safeguarding competition and the market

1. The Authority safeguarding competition and the market shall be established, and named the Authority, for the purposes of the present Law. The Authority's head office shall be in Rome.

2. The Authority shall act with full autonomy and independence of judgment and assessment; it shall be a collegial body consisting of the Chairman and four members proposed and appointed jointly by the Presidents of the Chamber of Deputies and the Senate of the Republic. The Chairman shall be chosen from among persons known for their independence, who have held high institutional offices with wide-ranging responsibilities. The four members shall be chosen from among persons known for their independence, who will be selected from among judges from the Council of State, the State Audit Court and the Court of Cassation, ordinary university professors of economic or legal disciplines and persons with an economic background exhibiting a high level of professional experience.

3. Members of the Authority shall be appointed for a non-renewable period of seven years. They may not, under pain of losing their position, exercise any professional or consultancy activities. Nor may they be directors or employees of public or private bodies or perform other public duties of whatever. Civil servants shall be made available for the full period of the mandate.

4. The Authority shall be entitled to correspond with all public authorities and with other bodies under public law and to ask them both for data and information and for co-operation in the performance of its duties. In its role as the competent national authority safeguarding competition and the market, the Authority shall maintain the relationships laid down by Community rules on this subject with the institutions of the European Communities.

5. Within a period of ninety days from the entry into force of the present Law, examination procedures shall be set up by decree of the President of the Republic, on a proposal from the Minister of Industry, Commerce and Crafts, after consultation with the Treasury Minister, following a decision of the Council of Ministers, guaranteeing the persons concerned full knowledge of the documents relating the adversarial procedure and the proceedings.

6. The Authority shall lay down the rules concerning its organization and its operation, rules on the legal and economic position of the staff and their career path and rules intended to govern the control of expenditure within the limits laid down in the present Law, including those derogating from the provisions on the general national accounting system.

7. The Authority shall undertake the autonomous management of expenditure to cover its operations within the limit of the credits allocated for this purpose in the national budget and entered in a single chapter of the provisional statement of expenditure of the Ministry of Industry, Commerce and Crafts. Financial management shall be based on the provisional budget approved by the Authority before 31 December of the year preceding that to which the budget refers. The content and structure of the provisional budget, which must in any case contain the expenditure which is possible within the limits of the forecast revenue, shall be drawn up on the basis of the rules referred to in paragraph 6, which shall also govern the detailed rules of procedure for any amendments. The financial management report approved before 30 April of the following year shall be submitted for auditing by the Court of Auditors. The provisional budget and the financial management report shall be published in the *Gazzetta Ufficiale* of the Italian Republic.

8. The payments made to the President and Members of the Authority shall be determined by decree of the President of the Council of Ministers, on a proposal

from the Minister of Industry, Commerce and Crafts, in co-operation with the Treasury Minister.

ARTICLE 11
Staff of the Authority

1. By decree of the President of the Council of Ministers, a specific role shall be created for the paid staff of the Authority. The number of posts in the organizational structure may not exceed 150. Staff recruitment shall be carried out by public competition, with the exception of those categories for which recruitment provisions are laid down under Article 16 of Law No. 56 of 28 February 1987.

2. The legal and economic position of staff and their career path shall be established according to the criteria laid down in the collective employment contract in force for the Bank of Italy, taking account of the specific functional and organizational requirements of the Authority.

3. Staff employed by the Authority shall be prohibited from exercising any other employment or other duties and from exercising professional, commercial or industrial activities.

4. The Authority may recruit up to 50 officials on fixed-term contracts subject to a legal regime under private law. Furhermore, the Authority may, if appropriate, call in expert consultants on specific subjects and problems.

5. The Secretary General shall be responsible to the Chairman for the functioning of the Authority's services and offices. He shall be appointed by the Minister of Industry, Commerce and Crafts, on a proposal from the Chairman of the Authority.

CHAPTER II

THE AUTHORITY'S POWERS CONCERNING CARTELS RESTRICTING FREEDOM OF COMPETITION AND ABUSE OF DOMINANT POSITION

ARTICLE 12
Powers of examination

1. After assessing the documents in its possession and those brought to its notice by the public authorities or by any other interested party, including bodies representing consumers, the Authority shall institute an examination to determine whether the prohibitions laid down in Articles 2 and 3 are being infringed.

2. The Authority may moreover, *ex officio* or at the request of the Minister of Industry, Commerce and Crafts or the Minister of State Participations, institute investigatory proceedings of a general nature in the economic sectors in which the development of trade, price movements or other circumstances indicate that the play of competition may be impeded, restricted or distorted.

ARTICLE 13
Notification of cartels

1. Undertakings may notify the Authority of cartels which have been set up. If within a period of 120 days from notification the Authority does not initiate the examination referred to in Article 14, it may no longer initiate such an examination, except in cases where the information notified is incomplete or untrue.

ARTICLE 14
Examination

1. In the case of an alleged infringement of Articles 2 or 3, the Authority shall notify the undertakings and bodies concerned that an examination is being initiated. The owners or legal representatives of such undertakings or bodies shall be entitled to a hearing in person or through a special attorney within a period fixed at the time of notification and they shall be permitted to submit conclusions and opinions at any stage in the examination and be entitled to a further hearing before the closure of the examination.

2. The Authority may, at any stage of the examination, ask undertakings, bodies and persons in possession of information to supply it and to submit documents which may be of use for the purposes of the examination; it may decide to undertake inspections in order to examine the undertaking's documents and to produce copies of such documents and additionally avail itself of the cooperation of other government bodies. It may decide to have expert reports and economic and statistical analyses produced and to consult experts about any factor which is relevant to the purposes of the examination.

3. Any information, news or data relating to the undertakings which are subject to examination by the Authority shall be subject to official secrecy, even in respect of public authorities.

4. In exercising their functions, officials of the Authority shall be considered to be public officials. They shall be subject to official secrecy.

5. On a decision by the Authority, the persons who are requested to provide the documents referred to in paragraph 2 shall be liable to an administrative fine of up to ITL 50 million if, without good reason, they refuse or fail to supply the information or to submit the documents, or to an administrative fine of up to ITL 100 million if they submit untruthful information or documents. The penalties provided for by the rules in force shall also apply.

ARTICLE 15
Service of notice and penalties

1. If following the examination referred to in Article 14 the Authority ascertains that there have been infringements of Articles 2 or 3, it shall set a time limit on the undertakings and bodies concerned to eliminate the infringements. In the most serious cases it may decide, taking account of the gravity and the duration of the infringement, to further impose an administrative fine of at least one per cent and not exceeding ten per cent of the turnover of each undertaking or body achieved in the course of the last financial year completed before notice was served and relating to the products which form the object of the cartel or of the abuse of a dominant position; time limits shall be laid down for the undertaking to pay the penalty.

2. In the case of non-compliance with the notice referred to in paragraph 1, the Authority shall impose an administrative fine of up to ten per cent of the turnover or, in cases where the penalty referred to in paragraph 1 has already been imposed, a fine of a minimum sum which is no less than double the penalty already imposed with a ceiling of ten per cent of the turnover as defined in paragraph 1; it shall also set a time limit for the payment of the fine. In cases of repeated non-compliance, the Authority may decide to suspend the activities of the undertaking for up to 30 days.

CHAPTER III
THE AUTHORITY'S POWERS TO BAN CONCENTRATIONS

ARTICLE 16
Notification of concentrations

1. The concentrations referred to in Article 5 must be notified in advance to the Authority if the aggregate turnover achieved nationally by all the undertakings concerned exceeds ITL 500 billion or if the total turnover achieved nationally by the undertaking which is to be acquired is higher than ITL 50 billion. These figures shall be raised each year by a sum equivalent to the rise in the GDP price deflator index.

2. In the case of banks and financial institutions the turnover used shall be equal to the value of one-tenth of the total assets, with the exclusion of suspense accounts and, in the case of insurance companies, to the value of premiums received.

3. Within a period of five days from the notification of a concentration, the Authority must inform the President of the Council of Ministers and the Minister of Industry, Commerce and Crafts.

4. If the Authority considers that a concentration may be subject to prohibition under the terms of Article 6, it shall initiate the examination immediately, within a period not exceeding 30 days from the date of receipt of the notification or from the time at which the concentration was made known to it, in compliance with the rules contained in Article 14. In the case of a concentration which is notified in accordance with the rules, where it considers that an examination ought not to be initiated, the Authority shall immediately inform the undertakings concerned and the Minister of Industry, Commerce and Crafts of its conclusions on this matter, within a period of 30 days from receipt of the notification.

5. Any takeover bid which may result in a concentration subject to notification as laid down in paragraph 1 of the present Article must be notified to the Authority at the same time as it is notified to the Commissione Nazionale per le Società e la Borsa.

6. In the case of a takeover bid notified to the Authority in pursuance of paragraph 5, the latter must notify the initiation of the examination within a period of 15 days from receipt of the notification and immediately inform the Commissione Nazionale per le Società e la Borsa.

7. The Authority may initiate the examination after the time limits provided for in the present Article have passed when the information supplied by the undertakings in the notification appears to be seriously imprecise, incomplete or untrue.

8. The Authority must, within a predetermined period of 45 days from the start of the examination provided for in the present Article, inform the undertakings concerned and the Minister of Industry, Commerce and Crafts of its conclusions on the matter. This period may be extended in the course of the examination for a period not exceeding 30 days if the undertakings do not supply the information and the data available to them which is requested.

ARTICLE 17
Temporary suspension of concentration

1. In carrying out the examination provided for in Article 16, the Authority may order the undertakings concerned to suspend the completion of the concentration until the examination has been concluded.

2. The provision contained in paragraph 1 shall not prevent the completion of a takeover bid which has been notified to the Authority in pursuance of Article 14 paragraph 5 subject to the acquirer not exercising the voting rights conferred by the securities in question.

ARTICLE 18
Conclusion of examination of concentrations

1. If, after the examination provided for in Article 16, the Authority ascertains that a concentration falls within the framework of those referred to in Article 6, it shall prohibit its enforcement.

2. In cases where, in the course of the examination, insufficient evidence comes to light to justify intervention against a concentration, the Authority shall close the examination and immediately inform the undertakings concerned and the Minister of Industry, Commerce and Crafts of its conclusions on the matter. This measure may be adopted at the request of the undertakings concerned as a means of proving that they have eliminated from the original concentration plan factors which might possibly involve distortions of competition.

3. If the concentration operation has already been completed, the Authority may lay down the necessary measures to re-establish conditions of effective competition, eliminating the distorting effects.

ARTICLE 19
Administrative fines for failure to comply with the ban on concentrations or with the notification requirement

1. In cases where the undertakings complete a concentration in contravention of the ban referred to in Article 18 paragraph 1 or where they fail to comply with the provisions referred to in paragraph 3 of the same Article, the Authority shall impose administrative fines ranging from a minimum of one per cent to a maximum of ten per cent of the turnover of the undertakings which are the subjects of the concentration.

2. In the case of undertakings which have failed to comply with the prior notification requirements laid down in Article 16 paragraph 1, the Authority may impose administrative fines on the same undertakings at a rate of one per cent of the turnover for the year preceding that in which the notice was made, to be added to any penalties applying in pursuance of paragraph 1 as a result of the conclusions of the examination provided for by the present Title III, the start of which shall be fixed at the date of notification of the penalty referred to in the present paragraph.

CHAPTER IV
SPECIAL PROVISIONS

ARTICLE 20
Credit companies, insurance companies and the broadcasting and publishing sectors

1. The application of Articles 2, 3, 4 and 6 to undertakings operating in the broadcasting and publishing sectors shall fall within the competence of the authority provided for by the legislation in force for the broadcasting and publishing sectors.

2. The application of Articles 2, 3, 4 and 6 to credit companies shall fall within the competence of the relevant supervisory authority.

3. The measures of the supervisory authorities referred to in paragraphs 1 and 2 in pursuance of Articles 2, 3, 4 and 6 shall be adopted following consultation of the Authority safeguarding competition and the market as referred to in Article 10, which shall issue an opinion within a period of 30 days from receipt of the documentation on which the measure is based. After this time limit has passed the supervisory authority may adopt the measure on its own competence.

4. In the case of operations involving insurance companies, the measures of the Authority provided for in Article 10 shall be adopted after consultation of the Institute for the Supervision of Private and Collective Insurance (ISVAP), which shall issue an opinion within a period of 30 days from receipt of the documentation on which the measure is based. After this time limit has passed the Authority referred to in Article 10 may adopt the measure on its own competence.

5. The supervisory authority for credit companies may also authorize, for a limited period, cartels derogating from the ban in Article 2 on grounds of the stability requirements of the monetary system, bearing in mind the criteria referred to in Article 4 paragraph 1. Such authorization shall be adopted by agreement with the Authority referred to in Article 10, which shall assess whether or not the cartel involves the elimination of competition.

6. The Authority referred to in Article 10 may notify the supervisory authorities referred to in paragraphs 1 and 2 of a possible continuing infringement of Articles 2 and 3.

7. By way of derogation from the provisions of the preceding paragraphs, where the cartel, abuse of a dominant position or concentration relate to undertakings operating in sectors subjects to the supervision of more than one authority, each of those authorities may adopt measures falling within its competence.

8. The supervisory authorities referred to in the present Article shall operate according to the procedure laid down for the Authority referred to in Article 10.

9. The provisions of the present Law on concentrations shall not constitute a derogation from the standards in force in the banking, insurance, broadcasting and publishing sectors.

TITLE III

THE AUTHORITY'S POWERS OF INFORMATION AND CONSULTATION

ARTICLE 21

Power of communication to Parliament and the Government

1. In order to contribute to the more effective protection of competition and the market, the Authority shall identify particularly important cases in which legislative or regulatory standards or general administrative provisions produce distorsions of competition or of the correct functioning of the market which are not justified by general interest requirements.

2. The Authority shall notify situations in which distortions arise from legislative provisions to Parliament and to the President of the Council of Ministers and, in

other cases, to the President of the Council of Ministers, to the competent Ministers and to the local and regional authorities concerned.

3. The Authority shall, if it is advisable, issue an opinion on the measures necessary to eliminate or prevent distortions and may publish the cases notified and the opinions in the appropriate way even based on the nature and the importance of the distortions concerned.

ARTICLE 22
Consultation activities

1. The Authority may express opinions on legislative or regulatory initiatives and on problems relating to competition and the market if it considers this appropriate or at the request of the authorities and public bodies concerned. The President of the Council of Ministers may request an opinion from the Authority on legislative or regulatory initiatives which have the direct effect of:

a) Subjecting the exercise of an activity or access to a market to quantitative restrictions;

b) Establishing exclusive rights in certain areas;

c) Imposing generalized practices relating to prices and conditions of sale.

ARTICLE 23
Annual report

1. Before 30 April of each year the Authority shall submit to the President of the Council of Ministers a report on its activities throughout the preceding year. The President of the Council of Ministers shall, within a period of 30 days, convey the report to Parliament.

ARTICLE 24
Report to the Government on certain sectors

1. After consulting the authorities concerned, the Authority shall within 18 months of its appointment, submit to the President of the Council of Ministers a report on the actions to be taken to adapt to the principles of competition the regulations on the award of public contracts, public utilities and commercial distribution.

TITLE IV

RULES CONCERNING GOVERNMENT POWERS ON CONCENTRATIONS

ARTICLE 25
Government powers on concentrations

1. The Council of Ministers shall, on a proposal from the Minister of Industry, Commerce and Crafts, lay down generally and in advance criteria on the basis of which the Authority may exceptionally, for reasons of the general interest of the national economy within the framework of European integration, authorize concentrations which are prohibited in pursuance of Article 6, provided they do not involve the elimination of competition from the market or restrictions on competition which are not strictly justified by the above-mentioned general interest. In such cases, and

whatever the circumstances, the Authority shall lay down the necessary measures to re-establish conditions of full competition within a predetermined period.

2. In the case of concentrations as referred to in Article 16 involving bodies or undertakings from countries which do not protect the independence of bodies or undertakings by means of standards producing effects similar to those of the preceding Titles or which apply discriminatory provisions or which impose clauses having similar effects in relation to acquisitions by Italian undertakings or bodies, the President of the Council of Ministers, following discussion with the Council of Ministers, may, on a proposal from the Minister of Industry, Commerce and Crafts, within a period of 30 days from the notification referred to in Article 16 paragraph 3, prohibit the concentration on essential grounds relating to the national economy.

Article 26
Publishing of decisions

1. The decisions referred to in Articles 15, 16, 18, 19 and 25 shall be published within a period of 20 days by the Presidency of the Council of Ministers in a bulletin produced for this purpose. The conclusions of the examinations referred to in Article 12 paragraph 2 shall also, if the Authority considers it appropriate, be published in this bulletin.

Title V

RULES ON SHAREHOLDINGS IN CREDIT INSTITUTIONS

Article 27
Shareholdings in credit institutions

1. The purchase or subscription of shares or of holdings in credit institutions by any person, directly or through controlled companies, trust companies or intermediaries, must be authorized by the Bank of Italy where, taking account also of shares or holdings already owned, it involves a shareholding exceeding five per cent of the capital of the credit institution and, whatever this threshold, where it involves control of the credit institution. Authorization shall also be required to take control of a company which holds shares in a credit institution exceeding the above-mentioned limit.

2. For the purposes of the present Title, control shall be deemed to exist, in pursuance of Article 2359 of the Civil Code, even where a single member or more than one member belonging to a voting syndicate — in which case each of them is considered to exercise control — owns more than one-quarter of the total number of ordinary shares or holdings or more than one-tenth in the case of a company whose shares are quoted on the Stock Exchange and provided no member or other voting syndicate composed of other members has a greater total number of ordinary shares or holdings or otherwise controls the company. By voting syndicate shall be understood any agreement between members governing the casting of votes. Any agreement governing the casting of votes must be notified to the Bank of Italy within a period of 48 hours from the date on which it is signed.

3. Operations referred to in paragrah 1 which, taking account also of shares and holdings already owned, involve a shareholding not exceeding five per cent but exceeding one per cent of the capital and transfer operations relating to shares or hold-

ings already owned involving a reduction in the shareholding exceeding one per cent must be notified to the Bank of Italy within a period of 48 hours from the date on which they are signed.

4. Where he shareholding exceeds five per cent of the capital of the credit institution renewed authorization shall be required for subsequent variations which, on their own or jointly with preceding variations, involve an increase or reduction in the shareholding exceeding two per cent of the capital of the credit institution.

5. If a person authorized in pursuance of the preceding paragraphs no longer fulfils a number of the conditions which made the authorization necessary, he must notify the Bank of Italy of this within a period of 15 days. In cases where a person no longer fills such conditions as a consequence of an operation involving control of a credit establishment being transferred to another person, the operation must receive the prior authorization of the Bank of Italy.

6. Persons other than credit institutions and financial bodies or companies and companies or financial bodies which control such persons or are controlled by them shall not be authorized to purchase or subscribe, directly or through controlled companies, trust companies or intermediaries, shares or holdings in a credit institution which, with those already held, involve a shareholding exceeding 15 per cent of the capital of the institution in order to take control of it. However, if control is taken through membership of voting syndicates as referred to in paragraph 2, authorization may be granted if the applicant's membership of the syndicate, taking account also of shares and holdings already owned and controlled, is not a decisive factor in forming the majority required by the resolutions of the syndicate itself.

7. Holdings exceeding one per cent of the capital of credit institutions which are in existence on the date of entry into force of the present Law must be notified to the Bank of Italy by registered letter within a period of 60 days, specifying any situations which do not conform to those which may be authorized pursuant to the present Article and the number of shares or holdings bought after 25 January 1989. Shareholdings exceeding five per cent and those involving control of the credit institution may be deemed to be authorized if the Bank of Italy does not decide otherwise whithin a period of 180 days from the date of despatch of the notification. This time limit shall be suspended in cases where additional information or data is requested from the interested party and it shall restart from the date of despatch of such information. Such a request may be repeated only once. The powers of revocation referred to in Article 28 paragraph 2 shall be an exception. Within a period of one year from the date of entry into force of the present Law, the Treasury Minister shall inform Parliament of the list of shareholdings exceeding the limit laid down in paragraph 6 which have been authorized in pursuance of the present paragraph. Shareholdings in existence on the date of entry into force of the present Law which are owned by public bodies, including economic bodies, shall be deemed to be authorized independently of notification.

8. If bodies or undertakings from countries which do not protect the independence of credit institutions by means or rules having an effect equivalent to that of the present Title or which apply discriminatory provisions or which impose clauses having similar effects in respect of purchases by Italian undertakings or bodies are found to be involved in operations as referred to in paragraph 1, the Bank of Italy shall notify the application for authorization to the Treasury Minister, on a proposal from whom the President of the Council of Ministers may, even on essential grounds relat-

ing to the national economy, prohibit authorization within a period of one month from the notification.

ARTICLE 28
Authorization and notification

1. Persons who wish to be granted authorization as referred to in Article 27 must apply to the Bank of Italy by registered letter. Authorization shall be deemed to be granted if the Bank of Italy fails to react within a period of 90 days from the date of despatch of the registered letter. The time limit shall be suspended if additional information or data is requested from the interested party and shall restart from the date of despatch of the registered letter sent in reply; the request for information and data may be repeated only once.

2. Even if authorization is granted tacitly it may at any time be suspended or revoked by the Bank of Italy, taking account of positions acquired or reinforced as a result of agreements as referred to in Article 27 paragraph 2 or of other events subsequent to authorization.

3. Measures taken by the Bank of Italy shall be notified to the applicant and to the credit institution concerned. Reasons must be given for measures which refuse, revoke or suspend authorization.

4. The Interministerial Committee on Credit and Savings shall lay down the criteria for the granting, suspension and revocation of authorization with a view to safeguarding the independence of the credit institution and protecting the interests of depositors, taking account also of the position of the directors, trustees, general directors and liquidators of companies which have applied for and obtained authorization and those of the companies or bodies to which the credit institution's shareholdings relate, and of connections of a technical, financial, organizational or contractual nature which exist between the applicant and other persons, with regard to the prevention of any dominant influence. The Interministerial Committee on Credit and Savings shall furthermore, on a proposal from the Bank of Italy, issue appropriate provisions under the terms of which shareholders having holdings involving a requirement to apply for authorization must sign a declaration of responsibility (known as the autonomy protocol) at any time for the Bank of Italy and, whatever the circumstance, for every application for authorization to take or increase shareholdings. The Interministerial Committee on Credit and Savings shall, on a proposal from the Bank of Italy, generally establish maximum amounts, criteria, rules of procedure and requirements in respect of the case in question referred to in Article 27 paragraph 6. The Interministerial Committee on Credit and Savings may, in the same resolution, on a proposal from the Bank of Italy, issue provisions in pursuance of the present Law for credit institutions in respect of the definition of a dominant influence and the configuration of the major associate. The Bank of Italy may also give instructions for the safeguarding of the attributive neutrality of credit institutions. The resolutions of the Interministerial Committee on Credit and Saving shall be published in the *Gazzetta Ufficiale* of the Italian Republic.

5. Specimens for applications for authorization and the documentation to be supplied and specimens of the notifications referred to in Article 27 paragraphs 3, 5 and 7 shall be drawn up by the Bank of Italy and published in the *Gazzetta Ufficiale* of the Italian Republic.

Rules for the Protection of Competition and the Market

ARTICLE 29
Suspension of voting rights, compulsory transfer, penal sanctions

1. The voting rights conferred by the shares or holdings acquired or subscribed referred to in Article 27 may not be exercised before notification of the authorization measure, nor before application has been made for the latter, nor before notification or refusal, suspension or revocation of authorization, nor before the end of the time limit laid down in Article 28 paragraph 1. In the case of non-compliance, appeal may be made against the resolution under the terms of Article 2377 of the Civil Code if the required majority could not be achieved without the votes conferred by these actions or holdings. Distraint may also be proposed by the Bank of Italy. The actions or holdings in respect of which voting rights may not be exercised shall be accounted for with a view to the regular constitution of the meeting.

2. Shares or holdings owned by a person as referred to in Article 27 paragraph 6 which exceed 15 per cent of the capital of the credit institution or confer control of it must be transferred within six months following the approval of the budget in which they appear; in the case of those which are in existence on the date of entry into force of the present Law and which have been notified to the Bank of Italy in pursuance of Article 27 paragraph 7, the time limit shall run from the date of notification of the provision which provides for it. In the case of non-completion, the courts shall, at the request of the Bank of Italy, order the sale of the shares or holdings through a broker or a credit company or institution.

3. In the case of failure to apply for authorization, failure to notify or incomplete or false notification as provided in Article 27 and of infringement of the provisions of paragraphs 1 and 2, the directors and general directors of the companies or of the body and the associates who fail to make notification as provided in Article 27 paragraph 2 shall, except where the facts constitute a more serious misdemeanour, be liable to imprisonment of between one and five years and to a fine of ITL 4 to 20 million.

4. The provisions of the present Article shall also apply to shares and holdings not exceeding five per cent of the capital of the credit institution which confer control of that institution by means of agreements as referred to in Article 27 paragraph 2 or of other events subsequent to their purchase or subscription.

Positions as referred to in Article 27 shall be excluded subject to an application for authorization to purchase or subscribe the shares or holdings on which they are based, with retroactive effects, within a period of 48 hours from the decision by the voting syndicate or from the participation of the latter, and to the granting of such authorization by the Bank of Italy in accordance with the provisions of Article 28.

ARTICLE 30
Conflicts of interest

1. Credit institutions must, in granting loans to persons who have links with them or who hold a large portion of their capital or funds, comply with the limits set by the Bank of Italy in pursuance of the directives of the Interministerial Committee on Credit and Savings.

2. Such limits shall be determined by exclusive reference to the credit institution's assets and to the shareholding owned by the borrower himself.

3. The Interministerial Committee on Credit and Savings shall draw up directives

on the subjects of conflicts of interest between credit institutions and their major shareholders relating to other banking activities.

TITLE VI

FINAL PROVISIONS

ARTICLE 31
Penalties

1. In setting the administrative fines resulting from the infringement of the present Law, it shall be appropriate to observe, insofar as they apply, the provisions contained in Chapter I, Sections I and II of Law No. 689 of 24 November 1981.

ARTICLE 32
Financial cover

1. The costs arising from the application of the present Law, which are assessed at ITL 20 billion for 1990, ITL 32 billion for 1991 and ITL 35 billion for 1992, shall be covered by a corresponding reduction in the allocations entered in the three-year budget 1990-1992 under chapter 6856 of the Treasury Ministry's provisional statement for the year 1990, making use for this purpose of the special reserve «Action to safeguard competition and the market».

ARTICLE 33
Jurisdiction

1. Appeals against the administrative provisions adopted on the basis of the provisions contained in Titles I to IV of the present Law shall come under the exclusive jurisdiction of the administrative judiciary. They must be submitted to the Regional Administrative Court of Latium.

2. Actions for avoidance and indemnification of damages and appeals for the purpose of obtaining emergency measures relating to the infringement to the provisions contained in Titles I to IV shall be submitted to the competent Court of Appeal.

ARTICLE 34
Entry into force

1. The present Law shall enter into force on the day following that of its publication in the *Gazzetta Ufficiale* of the Italian Republic.

Annex II

JAMAICA
(Original: English)

THE FAIR COMPETITION ACT, 1993
(Act 9 of 1993)

ARRANGEMENT OF SECTIONS

JAMAICA

No. 9—1993

I assent,

[L.S.]

HOWARD COOKE,
Governor-General,

9th day of March, 1993.

AN ACT to Provide for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices.

[*9th March, 1993*]

BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:—

1. This Act may be cited as the Fair Competition Act, 1993. Short title.

PART I. *Preliminary*

Interpretation.

2.—(1) In this Act, unless the context otherwise requires—

"acquire"—

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

(b) in relation to services, includes accept.

"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;

"authorized officer" means any officer of the Commission authorized by the Commission to assist it in the performance of its functions under this Act;

"business" means any activity that is carried on for gain or reward or in the course of which goods or services are manufactured, produced or supplied, including the export of goods from Jamaica;

"Commission" means the Fair Trading Commission established under section 4;

"consumer" means any person who is either—

(a) a person to whom goods are or are intended to be supplied in the course of a business carried on by the supplier or potential supplier;

(b) a person for whom services are supplied in the course of a business carried on by the supplier or potential supplier,

and who does not seek to receive the goods or services in the course of a business carried on by him;

"Court" means the Supreme Court;

"dealer" means a person carrying on a business of supplying goods, whether by wholesale or retail;

"employee" means a person who works under a contract of employment;

"enterprise" means any person who carries on business in Jamaica but does not include a person who—

(a) works under a contract of employment; or

(b) holds office as director or secretary of a company and in either case is acting in that capacity;

"functions" includes powers and duties;

"goods" means all kinds of property other than real property, money, securities or choses in action;

"group", where the reference is to a group of persons fulfilling specified conditions (other than the condition of being interconnected companies), means any two or more persons fulfilling those conditions, whether or not, apart from fulfilling them they would be regarded as constituting a group;

"group of interconnected companies" means a group consisting of two or more companies all of which are interconnected with each other;

"interconnected company" shall be construed in accordance with subsection (2) (a);

"price" includes any charge or fee, by whatever name called;

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

"supply"—

(a) in relation to goods, includes supply or re-supply by way of gift, sale, exchange, lease, hire or hire purchase;

(b) in relation to services, does not include the rendering of any services, under a contract of employment but includes—

(i) the performance of engagements, for gain or reward (including professional engagements) for any matter; and

(ii) the rendering of services to order, and the provision of services by making them available to potential users,

and "supplier" shall be construed accordingly;

"trade" means any trade, business, industry, profession or occupation, relating to the supply or acquistion of goods or services.

(2) For the purposes of this Act—

(a) any two companies are to be treated as interconnected companies if one of them is a company of which the other is a subsidiary or if both of them are subsidiaries of the same company;

(b) a group of interconnected companies shall be treated as a single enterprise.

(3) Every reference in this Act to the term "market" is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial commonsence, are substitutable for them.

(4) References in this Act to the lessening of competition shall, unless the context otherwise requires, include references to hindering or preventing competition.

(5) 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 Jamaica.

Application of Act.

3. Nothing in this Act shall apply to—

(a) combinations or activities of employees for their own reasonable protection as employees;

(b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;

(c) the entering into of an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trade mark;

(d) the entering into or carrying out of such an agreement or the engagement in such business practice, as is authorized by the Commissioner under Part V;

(e) any act done to give effect to a provision of an arrangement referred to in paragraph (c);

(f) activities expressly approved or required under any treaty or agreement to which Jamaica is a party;

(g) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public;

(h) such other business or activity declared by the Minister by order subject to affirmative resolution.

PART II.—*The Fair Trading Commission*

Establishment of Commission.

4.—(1) There is hereby established for the purposes of this Act, a body to be called the Fair Trading Commission which shall be a body corporate to which section 28 of the Interpretation Act shall apply.

Schedule.

(2) The provisions of the Schedule shall have effect as to the constitution of the Commission and otherwise in relation thereto.

Functions of the Commission.

5.—(1) The functions of the Commission shall be—

(a) to carry out, on its own initiative or at the request of any person such investigations in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices;

(b) to carry out such other investigations as may be requested by the Minister or as it may consider necessary or desirable in connection with matters falling within the provisions of this Act;

(c) to advise the Minister on such matters relating to the operation of this Act, as it thinks fit or as may be requested by the Minister;

(d) to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise; and

(e) to carry out such other duties as may be prescribed by or pursuant to the Act.

(2) It shall be the duty of the Commission—

(a) to make available—

(i) to persons engaged in business, general information with respect to their rights and obligations under this Act;

(ii) for the guidance of consumers, general information with respect to the rights and obligations of persons under this Act affecting the interests of consumers;

(b) to undertake studies and publish reports and information regarding matters affecting the interests of consumers;

(c) to co-operate with and assist any association or body of persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act.

Commission shall seek information.

6. The Commission shall obtain such information as it considers necessary to assist it in its investigation and, where it considers appropriate, shall examine and obtain verification of documents submitted to it.

Power of the Commission.

7.—(1) For the purposes of carrying out its functions under this Act, the Commission is hereby empowered to—

(a) summon and examine witnesses;

(b) call for and examine documents;

(c) administer oaths;

(d) require that any document submitted to the Commission be verified by affidavit;

(e) adjourn any investigation from time to time.

(2) The Commission may hear orally any person who, in its opinion, will be affected by an investigation under this Act, and shall so hear the person if the person has made a written request for a hearing, showing that he is an interested party likely to be affected by the result of the investigation or that there are particular reasons why he should be heard orally.

(3) The Commission may require a person engaged in business or a trade or such other person as the Commission considers appropriate, to state such facts concerning

goods manufactured, produced or supplied by him or services supplied by him as the Commission may think necessary to determine whether the conduct of the business in relation to the goods or services constitutes an uncompetitive practice.

(4) If the information specified in subsection (3) is not furnished to the satisfaction of the Commission, it may make a finding on the basis of the information available before it.

Hearings to be held in public.

8. Hearings of the Commission shall take place in public but the Commission may, whenever the circumstances so warrant, conduct a hearing in private.

Minister may give directions.

9.—(1) The Minister may give to the Commission such directions of a general nature as the Minister considers necessary in the public interest as to the policy to be followed by the Commission.

(2) The Commission shall give effect to any directions given pursuant to subsection (1).

Powers of entry and search, etc.

10.—(1) Subject to this section, the Commission may, for the purpose of ascertaining whether any person has engaged or is engaging in conduct constituting or likely to constitute a contravention of this Act, require an authorized officer to enter and search any premises and inspect and remove for the purpose of making copies, any documents or extracts therefrom in the possession or under the control of any person.

(2) An authorized officer shall not exercise the powers conferred by subsection (1) unless he obtains a warrant authorizing him to exercise those powers in accordance with subsection (4).

(3) Where a Justice of the Peace is satisfied on information on oath that there is reasonable ground for believing that any person has engaged or is engaging in

conduct constituting or likely to constitute a contravention of this Act, the Justice of the Peace may by warrant under his hand, permit an authorised officer to exercise the powers conferred by subsection (1) in relation to any premises specified in the warrant, so, however, that such warrant shall not authorize the detention of a document for a period exceeding seven days.

(4) An authorized officer shall—

(a) on entering any premises pursuant to a warrant issued under subsection (3), produce evidence of his authority to enter the premises and evidence of his identity;

(b) upon completing a search authorized under this section, leave a receipt listing documents or extracts therefrom removed for the purposes of this section.

(5) The occupier or person in charge of any premises entered pursuant to this section shall provide the authorized officer with all reasonable facilities and assistance for the effective exercise of his functions under this section.

Discontinuance of investigation.

11.—(1) At any stage of an investigation under this Act, if the Commission is of the opinion that the matter being investigated does not justify further investigation, the Commission may discontinue the investigation.

(2) The Commission shall, on discontinuing an inquiry, make a report in writing to the Minister stating the information obtained and the reason for discontinuing the investigation.

Financial Provisions, Accounts and Reports

Funds of Commission.

12.—The funds of the Commission shall consist of—

(a) such sums as may be appropriated by Parliament for the purposes of this Act;

(b) any other moneys which may in any manner become payable to or vested in the Commission in respect of any matter incidental to his functions.

Accounts and audit.

13.—(1) The accounts of the Commission shall be audited annually by the Auditor-General or by any auditor or auditors approved by him and a statement of accounts so audited shall form part of the annual report referred to in section 14 (1).

(2) The Commission shall, in each year, before a date specified by the Minister—

(a) submit to the Minister a statement of accounts audited in accordance with subsection (1);

(b) submit to the Minister for approval estimates of revenue and expenditure for the financial year next following.

Reports.

14.—(1) The Commission shall, within three months after the end of each financial year, or within such longer period as the Minister may in special circumstances allow, cause to be made and transmitted to the Minister a report dealing generally with the activities of the Commission during the preceding financial year.

(2) The Commission may from time to time furnish to the Minister a report relating to any particular matter or matters investigated, or being investigated which, in the opinion of the Commission, require the special attention of the Minister.

(3) The Minister shall cause a copy of a report submitted under this section to be laid on the Table of the House of Representatives and of the Senate.

Appointment of Staff

Appointment of Executive Director, Secretary and other employees.

15.—(1) The Commission shall appoint and employ an Executive Director who shall hold office for a period of seven years and may be re-appointed for periods not exceeding five years at a time.

(2) The Executive Director shall be in charge of the day to day management of the Commission.

(3) Subject to subsection (4), the Executive Director shall receive such emoluments and be subject to such terms and conditions of service as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives.

(4) The emoluments and terms and conditions of service of the Executive Director, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during the period of his appointment or reappointment, as the case may be.

(5) The emoluments for the time being payable to the Executive Director by virtue of this Act shall be charged on and paid out of the Consolidated Fund.

(6) The Commission may appoint and employ at such remuneration and on such terms and conditions as it thinks fit, such other officers and employees as it thinks necessary for the proper carrying out of the provisions of this Act:

Provided that—

(a) no salary in excess of the prescribed rate shall be assigned to any post without the prior approval of the Minister; and

(b) no appointment shall be made without the prior approval of the Minister to any post to which a salary in excess of the prescribed rate is assigned.

(7) In subsection (3) "the prescribed rate" means a rate of $100,000 per annum or such higher rate as the Minister may, by order, prescribe.

(8) The Governor-General may, subject to such conditions as he may impose, approve of the appointment of any officer in the service of the Government to any office with the Commission, and any officer so appointed shall, during such appointment, in relation to pension, gratuity or other allowance, and to other rights as a public officer, be treated as continuing in the service of the Government.

Pensions, gratuities and other retiring benefits.

16. The Commission may enter into arrangements respecting schemes, whether by way of insurance policies or not for medical benefits, pensions, gratuities and other retiring or disability or death benefits relating to employees of the Commission and such arrangements may include provisions for the grant of benefits to the dependants and the legal personal representatives of such employees.

PART III. *Control of Uncompetitive Practice*

Provisions of agreement having effect of lessening competition.

17.—(1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.

(2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that—

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

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

(c) share markets or sources of supply;

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

(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(f) make the conclusion of contracts 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 contracts,

being provisions which have or are likely to have the effect referred to in subsection (1).

(3) Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.

(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorized under Part V or which the Commission is satisfied—

(a) contributes to—

(i) the improvement of production or distribution of goods and services; or

(ii) the promotion of technical or economic progress,

while allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensible to the attainment of the objectives mentioned in paragraph (a); or

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

Agreements containing exclusionary provisions void.

18.—(1) For the purposes of this Act, a provision of an agreement is an exclusionary provision if—

(a) the agreement is entered into or arrived at between persons of whom any two or more are in competition with each other; and

(b) the effect of the provision is to prevent, restrict or limit the supply of goods or services to, or the acquisition of goods or services from, any particular person or class of persons either generally or in particular circumstances or in particular conditions, by all or any of the parties to the agreement or, if a party is a company, by an interconnected company.

(2) For the purposes of subsection (1), a person is in competition with another person if that person or any interconnected company is, or is likely to be or, but for the relevant provision, would be or would be likely to be, in competition with the other person or with an interconnected company, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.

(3) No person shall give effect to an exclusionary provision of an agreement.

Existence of dominant position.

19. For the purposes of this Act an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.

Abuse of dominant position.

20.—(1) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, if it—

(a) restricts the entry of any person into that or any other market;

(b) prevents or deters any person from engaging in competitive conduct in that or any other market;

(c) eliminates or removes any person from that or any other market;

(d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;

(e) limits production of goods or services to the prejudice of consumers;

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

(2) An enterprise shall not be treated as abusing a dominant position—

(a) if it is shown that—

(i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and

(ii) consumers were allowed a fair share of the resulting benefit;

(b) 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 trade mark.

Action in relation to abuse of dominant position.

21.—(1) Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse has had or is having the effect of lessening competition substantially in a market, the Commission shall—

(a) notify the enterprise of its finding; and

(b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned.

(2) In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a

market, the Commission shall consider whether the practice is a result of superior competitive performance.

(3) For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property.

PART IV. *Resale Price Maintenance*

Collective Resale Price Maintenance

Collective agreements by suppliers prohibited.

22.—(1) It is unlawful for any two or more enterprises, being suppliers of goods, to enter into or carry out any agreement by virtue of which they undertake—

(a) to withhold supplies of goods from dealers (whether parties to the agreement or not) who resell or have resold goods in breach of any condition as to the price at which those goods may be resold;

(b) to refuse to supply goods to such dealers except on terms and conditions which are less favourable than those applicable in the case of other dealers carrying on business in similar circumstances;

(c) to supply goods only to persons who undertake or have undertaken to do any of the acts described in paragraph (a) or (b).

(2) It is unlawful for any two or more enterprises referred to in subsection (1) to enter into or carry out any agreement authorizing—

(a) the recovery of penalties (however described) by or on behalf of the parties to the agreement from dealers who resell or have resold goods in breach of any such condition as described in subsection (1) (a); or

(b) the conduct of any proceedings in connection therewith.

Collective agreement by dealers.

23.—(1) It it unlawful for any two or more enterprises, being dealers in any goods, to enter into or carry out any agreement by which they undertake—

(a) to withhold orders for supplies of goods from suppliers (whether parties to the agreement or not)—

(i) who supply or have supplied goods without imposing such a condition as is described in section 22 (1) (a); or

(ii) who refrain or have refrained from taking steps to ensure compliance with such conditions in respect of goods supplied by them; or

(b) to discriminate in their handling of goods against goods supplied by those suppliers.

(2) It is unlawful for any two or more enterprises referred to in subsection (1) to enter into or carry out an agreement authorizing—

(a) the recovery of penalties (however described) by or on behalf of the parties to the agreement from the suppliers referred to in subsection (1); or

(b) the conduct of any proceedings in connection therewith.

Application of sections 22 and 23 to associations.

24. Sections 22 and 23 apply in relation to an association whose members consist of or include—

(a) enterprises which are suppliers or dealers in any goods; or

(b) representatives of such enterprises,

as they apply to an enterprise.

Individual Minimum Resale Price Maintenance

Minimum resale price maintained by contract or agreement.

25.—(1) Any term or condition of an agreement for the sale of 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 the goods in Jamaica.

(2) Subject to subsections (3) and (4), it is unlawful for a supplier of goods (including an association or person acting on behalf of such supplier) 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 to the like effect;

(c) notify to dealers, or otherwise publish on or 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 the goods in Jamaica.

(3) Paragraph (a) of subsection (2) 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 paragraph (c) of subsection (2) shall be construed as precluding a supplier (or an association or person acting on behalf of a supplier) 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 under section 25.

26.—(1) Section 25 applies to patented goods (including 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 25, 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 25 and in this section affects the validity, as between the parties and their successors, of any term or condition—

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

(b) of any assignment of a patent,

so far as it regulates the price at which goods produced or processed by the licensee or assignee may be sold by him.

Maintenance of minimum resale prices by other means.

27.—(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 supplied such goods either directly or indirectly to a third party who had done so; or

(b) is likely, if the goods are supplied by him, 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 do so.

(2) In this section "the resale price", in relation to a sale of any description, means—

(a) any price notified to the dealer or otherwise published 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 on or is recommended as appropriate for a sale of that description; or

(b) any price prescribed or purporting to be prescribed for that purpose by an agreement between the dealer and any such supplier.

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

Interpretation.

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

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

(b) if he refuses to supply those goods to that 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 he normally supplies those goods to other dealers carrying on business in similar circumstances; or

(c) if, although he enters into an agreement to supply goods to the dealer, he treats him in a manner significantly less favourable than that in which he normally treats other such dealers 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 27 (1) if, in addition to that ground, he has other grounds which, standing alone, would have led him to withhold those supplies.

(3) Subject to subsection (4), if, in proceedings brought against a supplier of goods in respect of a contravention of section 27 (1), it is proved that supplies of goods were withheld by the supplier from a dealer, and it is further proved that—

(a) 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

(b) the dealer, to the knowledge of the supplier, had within the preceding six months acted as described in section 27 (1) (a) or had indicated his intention to act as described in section 27 (1) (b) in relation to the goods in question,

it shall be presumed, unless the contrary is proved, that the supplies were withheld on the ground that the dealer had so acted or was likely so to act.

(4) Subsection (3) does 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.

PART V. *Authorizations.*

Grant of authorization.

29.—(1) Subject to subsection (2), any person who proposes to enter into or carry out an agreement or to engage in a business practice which in the opinion of that person, is an agreement or practice affected or prohibited by this Act, may apply to the Commission for an authorization to do so.

(2) In respect of an application under subsection (1), the Commission—

(a) may notwithstanding any other provision of this Act, if it is satisfied that the agreement or practice, as the case may be, is likely to promote the public benefit grant an authorization subject to such terms and conditions as it thinks fit; or

(b) may refuse to grant an authorization and if it does so, the Commission shall inform the applicant in writing of its reasons for refusal.

Effect of authorization.

30. While an authorization granted under section 29 remains in force, nothing in this Act shall prevent the person to whom it is granted from giving effect to any agreement or any provision of an agreement or from engaging in any practice to which the authorization relates.

Revocation of authorization.

31.—(1) Subject to subsection (2), the Commission may revoke or amend an authorization if it is satisfied that—

(a) the authorization was granted on information that was false or misleading;

(b) there has been a breach of any terms or condition subject to which the authorization was granted.

(2) The Commission shall, before revoking or amending an authorization, serve on the relevant applicant a notice in writing specifying the default and inform him of his right to apply to the Commission to be heard on the matter within such time as may be specified in the notice.

Register of authorizations.

32.—(1) The Commission shall keep a register, in such form as it may determine, of authorizations granted under this Part.

(2) The register shall be kept at the office of the Commission and shall be available for inspection by members of the public at all reasonable times.

PART VI. *Exclusive Dealing, Tied Selling and Market Restriction*

Exclusive dealing.

33.—(1) For the purposes of this section—

"exclusive dealing" means—

(a) any practice whereby a supplier of goods, as a condition of supplying the goods to a customer requires that customer to—

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

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

(b) any practice whereby a supplier of goods induces a customer to meet a condition referred to in sub-paragraph (a) by offering to supply the goods to the customer on more favourable terms or conditions if the customer agrees to meet that condition;

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

"tied selling" means—

(a) any practice whereby a supplier of an article, as a condition of supplying the article (in this section referred to as the "tied article") to a customer, requires the customer to—

(i) acquire any other article from the supplier or his nominee;

(ii) refrain from using or distributing, in conjunction with the tied article, another article that is not of a brand or manufacture designated by the supplier or the nominee; and

(b) any practice whereby a supplier of an article induces a customer to meet a condition set out in paragraph (a) by offering to supply the tied article to the customer on more favourable terms or conditions if the customer agrees to meet that condition.

(2) Where on investigation the Commission finds that an enterprise is engaging in tied selling, the Commission shall prohibit that enterprise from so doing.

(3) Where on investigation the Commission finds that exclusive dealing or market restriction, because it is engaged in by a major supplier of goods in a market or because it is widespread in a market, is likely to—

(a) impede entry into or expansion of an enterprise in the market;

(b) impede introduction of goods into or expansion of sales of goods in the market; or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Commission may prohibit that supplier from continuing to engage in market restriction or exclusive dealing and to take such other action as, in the Commission's opinion, is necessary to restore or stimulate competition in relation to the goods.

(4) The Commission shall not take action under this section where, in its opinion exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of goods into a market or of new goods into a market and this section shall not apply in respect of exclusive dealing or market restriction between or among interconnected companies.

PART VII. *Offences against Competition*

Price fixing.

34.—(1) A person who is engaged in the business of producing or supplying goods shall not, directly or indirectly—

(a) by agreement, threat, promise or any like means, attempt to influence upward or discourage the reduction of, the price at which any other person supplies or offers to supply or advertises goods;

(b) refuse to supply goods to or otherwise discriminates against any other person engaged in business;

(c) refuse to supply goods to or otherwise discriminates against any other person engaged in business because of the low pricing policy of that other person.

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person—

(a) are interconnected companies; or

(b) principal and agent.

(3) For the purposes of this section, a suggestion by a producer or supplier of goods of a resale price or minimum resale price in respect thereof, however arrived at, is proof of an attempt to influence the person to whom the suggestion is made, unless it is proved that the person making the suggestion, in so doing, also made it clear to the person to whom it was made that he was under no obligation to accept it and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion.

(4) 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 upward the selling price of any person into whose hands the goods come for resale unless the price is so expressed as to make it clear to any person who becomes aware of the advertisement that the goods may be sold at a lower price.

35.—(1) No person shall conspire, combine, agree or arrange with another person to— Conspiracy.

(a) limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;

(b) prevent, limit or lessen unduly, the manufacture or production of any goods or to enhance unreasonably the price thereof;

(c) lessen unduly, competition in the production, manufacture, purchase, barter, sale, supply, rental or transportation of any goods or in the price of insurance on persons or property;

(d) otherwise restrain or injure competition unduly.

(2) Nothing in subsection (1) applies to a conspiracy, combination, agreement or arrangement which relates only

to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public—

(a) in the practice of a trade or profession relating to the service; or

(b) in the collection and dissemination of information relating to the service.

Bid-rigging.

36.—(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 or 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 shall not apply in respect of an agreement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate.

Misleading advertising.

37.—(1) A person shall not, in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest, by any means—

(a) make a representation to the public that is false or misleading in a material respect;

(b) make a representation to the public in the form of a statement, warranty or guarantee of performance, efficacy or length of life of goods that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

(c) make a representation to the public in the form of a statement, warranty or guarantee that services

are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification or skill;

(d) make a representation to the public in a form that purports to be—

(i) a warranty or guarantee of any goods; or

(ii) a promise to replace, maintain or repeat an article or any part thereof or to repeat or continue service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out;

(e) make a materially misleading representation to the public concerning the price at which any goods or services or like goods or services have been, are or will be ordinarily supplied.

(2) For the purposes of paragraph (e) of subsection (i), a representation as to price is to be construed as referring to the price at which the goods or services have been supplied generally in the relevant market unless it is clearly specified to be the price at which the goods or services have been supplied by the person by whom or on whose behalf the representation is made.

(3) For the purposes of this section and section 38, the following types of representation shall be deemed to be made to the public by and only by the person who caused it to be expressed, made or contained, that is to say, a representation that is—

(a) expressed on an article offered or displayed for sale;

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale;

(c) expressed on a display in the place where the article is sold;

(d) made in the course of selling the article to the ultimate consumer;

(e) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner made available to a member of the public.

(4) Where the person referred to in subsection (3) is outside of Jamaica, the representation shall be deemed to be made—

(a) in the case described in paragraph (a), (b) or (e) of that subsection, by the person who imported the article; and

(b) in a case described in paragraph (c) of that subsection, by the person who imported the display into Jamaica.

(5) Subject to subsections (3) and (4), every person who, for the purpose of promoting, directly or indirectly, the supply or use of any goods or any business interest, supplies to a wholesaler, retailer or other distributor of goods any material or thing that contains a representation of a kind referred to in subsection (1) shall be deemed to have made that representation to the public.

Representation as to reasonable test and publication of testimonials.

38. A person shall not, for the purpose of promoting, directly or indirectly, the supply or use of any goods, or for the purpose of promoting, directly or indirectly any business interest—

(a) make a representation to the public that a test as to the performance, efficacy or length of life of the goods has been made by any person; or

(b) publish a testimonial with respect to the goods, unless he can establish that—

(i) the representation or testimonial was previously made or published by the person by

whom the test was made or the testimonial was given, as the case may be; or

(ii) before the representation or testimonial was made or published, it was approved and permission to make or publish it was given in writing by the person who made the test or gave the testimonial, as the case may be,

and it accords with the representation or testimonial previously made, published or approved.

Double ticketing.

39. A person shall not supply any article at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the article in the quantity in which it is so supplied at the time at which it is so supplied—

(a) on the article, its wrapper or container;

(b) on anything attached to, inserted in or accompanying the article, its wrapper or container or anything on which the article is mounted for display or sale; or

(c) on a display or advertisement at the place at which the article is purchased.

Sale at bargain price.

40.—(1) For the purposes of this section, "bargain price" means—

(a) a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or

(b) a price so represented in an advertisement, that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the goods advertised or like articles are ordinarily sold.

(2) A person shall not advertise at a bargain price goods which he—

(a) does not intend to supply; or

(b) does not have reasonable grounds for believing he can supply,

at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which he carries on business, the nature and size of his enterprise and the nature of the advertisement.

(3) Subsection (2) does not apply where the person who is advertising proves that—

(a) he took reasonable steps to obtain in adequate time a quantity of the article that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond his control that he could not reasonably have anticipated;

(b) he obtained a quantity of the article that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed his reasonable expectations; or

(c) after he became unable to supply the article in accordance with the advertisement, he undertook to supply the same article or equivalent article of equal or better quality at the bargain price and within a reasonable time to all persons who requested the article and who were not supplied therewith during the time when the bargain price applied and that he fulfilled the undertaking.

Sale above advertised price.

41.—(1) A person who advertises goods for sale or rent in a market shall not, during the period and in the market to which the advertisement relates, supply goods at a price that is higher than that advertised.

(2) This section shall not apply in respect of—

(a) an advertisement that appears in a catalogue or other publication in which it is prominently stated

that the prices contained therein are subject to error of the person establishes that the price advertised is in error;

(b) an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement.

(3) For the purposes of this section, the market to which an advertisement relates shall be deemed to be the market to which it could reasonably be expected to reach, unless the advertisement defines market specifically by reference to a geographical area, store, sale by catalogue or otherwise.

Obstruction of investigation.

42. Any person who, in any manner, impedes, prevents or obstructs any investigation by the Commission under this Act or any authorized officer in the execution of his duties under this Act is guilty of an offence and liable on conviction in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

Destruction of records, etc.

43. Every person who—

(a) refuses to produce any document, record or thing, or to supply any information, when required to do so by the Commission under this Act; or

(b) destroys or alters or causes to be destroyed or altered, any document, record or thing required to be so produced or in respect of which a warrant is issued under this Act,

is guilty of an offence and liable on conviction in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

Giving false or misleading information to Commission.

44. Any person who gives to the Commission or an authorized officer any information which he knows to be false or misleading is guilty of an offence and liable on conviction in a Circuit Court to a fine or to imprisonment for

a term not exceeding five years or to both such fine and imprisonment.

Failure to attend and give evidence.

45. Any person who—

(a) refuses or fails to comply with a requirement of the Commission under this Act;

(b) having been required to appear before the Commission—

(i) without reasonable excuse refuses or fails so to appear and give evidence;

(ii) refuses to take an oath or make an affirmation as a witness;

(iii) refuses to answer any question put to him,

is guilty of an offence and liable on conviction before a Resident Magistrate to a fine not exceeding twenty thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

PART VIII. *Enforcement, Remedies and Appeals*

Application for enforcement.

46. If the Court is satisfied on an application by the Commission that any person—

(a) has contravened any of the obligations or prohibitions imposed in Part III, IV, VI or VII; or

(b) has failed to comply with any direction of the Commission,

the Court may exercise any of the powers referred to in section 47.

Powers of Court.

47.—(1) Pursuant to section 45 the Court may—

(a) order the offending person to pay to the Crown such pecuniary penalty not exceeding 1 million dollars in the case of an individual and not exceeding 5 million dollars in the case of a person other than an individual;

(b) grant an injunction restraining the offending person from engaging in conduct described in paragraph (a) or (b) of section 45,

in respect of each contravention or failure referred to in section 45.

(2) In exercising its powers under this section the Court shall have regard to—

(a) the nature and extent of the default;

(b) the nature and extent of any loss suffered by any person as a result of the default;

(c) the circumstances of the default;

(d) any previous determination against the offending person.

(3) The standard of proof in proceedings under this section and section 47 shall be the standard of proof applicable in civil proceedings.

Civil liability.

48.—(1) Every person who engages in conduct which constitutes—

(a) a contravention of any of the obligations or prohibitions imposed in Parts III, IV, VI or VII;

(b) aiding, abetting, counselling or procuring the contravention of any such provision;

(c) inducing by threats, promises, or otherwise the contravention of any such provision;

(d) being knowingly conceived in or party to any such contravention; or

(e) conspiring with any other person to contravene any such provision,

is liable in damages for any loss caused to any other person by such conduct.

(2) An action under subsection (1) may be commenced at any time within three years from the time when the cause of action arose.

Appeals against finding of Commission.

49.—(1) Any person who is aggrieved by a finding of the Commission may within fifteen days after the date of that finding, appeal to a Judge in Chambers.

(2) The Judge in Chambers may—

(a) confirm, modify or reserve the findings of the Commission or any part thereof; or

(b) direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.

(3) In giving any direction under this section, the Judge shall—

(a) advise the Commission of his reasons for doing so; and

(b) give to the Commission such directions as he thinks just concerning the reconsideration or otherwise the whole or any part of the matter that is referred back for reconsideration.

(4) In reconsideration of the matter, the Commission shall have regard to the Judge's reasons for giving a direction under subsection (1) and the Judge's directions under subsection (3).

Operation of order pending determination of appeal.

50. Where an appeal is brought against any findings of the Commission any directions or order of the Commission based on such findings shall remain in force pending the determination of the appeal, unless the Judge otherwise orders.

PART IX.—*General*

Exemption from income tax, stamp duties, transfer tax and customs duty.

51.—(1) The income of the Commission shall be exempt from income tax.

(2) The Commission shall be exempt from stamp duty on all instruments executed by it or on its behalf.

(3) There shall be exempt from taxation under the Transfer Tax Act any transfer by the Commission of property belonging to it or of any right or interest created in, over or otherwise with respect to any such property.

(4) No customs duty or other similar impost shall be payable upon any article imported into Jamaica, or taken out of bond in Jamaica, by the Commission, and shown to the satisfaction of the Commissioner of Customs to be required for the use of the Commission in the performance of its functions under this Act.

Regulations.

52. The Commission may, with the approval of the Minister, make regulations generally for giving effect to the provisions of this Act and, without prejudice to the generality of the foregoing, may make regulations—

(a) prescribing the procedure to be followed in respect of applications and notices to, and proceedings of, the Commission;

(b) prescribing any other matters which are required by this Act to be prescribed.

Powers of Commission to prohibit disclosure of information, documents and evidence

53.—(1) The Commission may prohibit the publication or communication of any information furnished or obtained, documents produced, obtained or tendered, or evidence given to the Commission in connection with the operations of the Commission.

(2) Every person who publishes or communicates any such information, documents or evidence the publication of

which is prohibited by the Commission under subsection (1) is guilty of an offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Application to the Crown.

54. Subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown.

Transitional.

55.—(1) A provision in an agreement in force at the date of commencement of this Act which would, but for the provisions of this section, be unenforceable, shall continue to be enforceable for a period of six months from that date.

(2) For a period of six months from the said date this Act shall not apply in relation to any business practice which, but for the provisions of this section, would be affected or prohibited by this Act.

SCHEDULE (Section 4)

The Fair Trading Commission

Constitution of Commission.

1.—(1) The Commission shall consist of such number of persons not being less than three nor more than five as the Minister may from time to time appoint.

(2) The Executive Director shall be a member *ex officio* of the Commission.

Appointment of directors.

2.—(1) The members referred to in paragraph 1 (1) shall be appointed by the Minister by instrument in writing.

(2) A member other than the Executive Director, shall, subject to the provisions of this Schedule, hold office for such period not exceeding three years, as the Minister may specify in the instrument appointing the member and each member shall be eligible for reappointment.

Chairman.

3. The Minister shall appoint one of the members of the Commission referred to in paragraph 1 (1) to be chairman thereof.

Acting appointments.

4. If the chairman or any other member of the Commission is absent or unable to act, the Minister may appoint any person to act in the place of the chairman or other member.

Resignations.

5.—(1) Any member other than the chairman or the Executive Director may at any time resign his office by instrument in writing addressed to the Minister and transmitted through the chairman, and from the date of the receipt by the Minister of that instrument, that member shall cease to be a member of the Commission.

(2) The chairman may at any time resign his office by instrument in writing addressed to the Minister, and such resignation shall take effect as from the date on which the Minister receives that instrument.

Revocation of appointments.

6. The Minister may terminate the appointment of any member other than Executive Director if such member—

(a) becomes of unsound mind or becomes permanently unable to perform his functions by reason of ill health;

(b) is convicted and sentenced to a term of imprisonment;

(c) fails without reasonable excuse to carry out any of the functions conferred or imposed on him under this Act; or

(d) engages in such activities as are reasonably considered prejudicial to the interest of the Commission.

Gazetting of appointments.

7. The names of all members of the Commission as first constituted and every change of membership shall be published in the *Gazette*.

Leave of absence.

8. The Minister may, on the application of any member other than the Executive Director, grant leave of absence to the member.

Seal and execution of documents.

9.—(1) The seal of the Commission shall be kept in the custody of the Executive Director or the Secretary and shall be affixed to instruments pursuant to a resolution of the Commission, in the presence of the Executive Director or any other member of the Commission, and the secretary thereof.

(2) The seal of the Commission shall be authenticated by the signatures of the Executive Director or any other member authorized to act in that behalf, and the secretary.

(3) All documents other than those required by law to be under seal, made by, and all decisions of, the Commission may be signified under the hand of the Executive Director or any other member of the Commission authorized to act in that behalf and the secretary.

Procedure and meetings.

10.—(1) The Commission shall meet as often as may be necessary or expedient for the transaction of its business and such meetings shall be held at such places and times and on such days as the Commission may determine.

(2) The Chairman may at any time call a special meeting of the Commission, and shall call a special meeting to be held within seven days of receipt of a written request for that purpose addressed to him by any two members of the Commission.

(3) The chairman shall preside at all meetings of the Commission, and if the chairman is absent from a meeting the members present and constituting a quorum shall elect one of their number to preside at the meeting.

(4) The quorum of the Commission shall be three.

(5) The decisions of the Commission shall be by a majority of votes, and, in addition to an original vote the chairman or other person presiding at the meeting shall have a casting vote in any case in which the voting is equal.

(6) Minutes in proper form of each meeting of the Commission shall be kept and shall be confirmed as soon as practicable thereafter at a subsequent meeting.

(7) Subject to the provisions of this Schedule the Commission may regulate its own proceedings.

Disclosure of interest.

11. A member who is directly or indirectly interested in any matter which is being dealt with by the Commission—

(a) shall disclose the nature of his interest at a meeting of the Commission; and

(b) shall not take part in any deliberation or decision of the Commission with respect to that matter.

Protection of Commission.

12. No act done or proceeding taken under this Act shall be questioned on the ground—

(a) of the existence of any vacancy in the membership of, or any defect in the constitution of the Commission; or

(b) of any omission, defect or irregularity not affecting the merits of the case.

Protection of members.

13.—(1) No action, suit or other proceedings shall be brought or instituted personally against any member in respect of any act done *bona fide* in the course of carrying out the provisions of this Act.

(2) Where any member is exempt from liability by reason only of the provisions of this paragraph, the Commission shall be liable to the extent that it would be if that member were a servant or agent of the Commission.

Remuneration of members.

14. There shall be paid from the funds of the Commission to the chairman and other members of the Commission such remuneration whether by way of honorarium, salary or fees, and such allowances as the Minister may determine.

Office of member other than Executive Director, not public office.

15. The office of a member other than the Executive Director shall not be a public office for the purposes of Chapter V of the Constitution of Jamaica.

Annex III

VENEZUELA

(Original: English and Spanish)

GACETA OFICIAL
DE LA REPUBLICA DE VENEZUELA

AÑO CXIX — MES III | Caracas: lunes 30 de diciembre de 1991 | No. 4.353 Extraordinario

SUMARIO

CONGRESO DE LA REPUBLICA

EL CONGRESO DE LA REPUBLICA DE VENEZUELA

DECRETA

la siguiente.

LEY PARA PROMOVER Y PROTEGER EL EJERCICIO DE LA LIBRE COMPETENCIA

TITULO I
DISPOSICIONES GENERALES

ARTICULO 1°.- Esta Ley tiene por objeto promover y proteger el ejercicio de la libre competencia y la eficiencia en beneficio de los productores y consumidores y prohibir las conductas y prácticas monopólicas y oligopólicas y demás medios que puedan impedir, restringir, falsear o limitar el goce de la libertad económica.

ARTICULO 2°.- Se aplicará el ordenamiento jurídico del Acuerdo de Cartagena cuando se produzcan efectos restrictivos sobre la libre competencia en el mercado Subregional Andino.

ARTICULO 3°.- A los efectos de esta Ley se entiende por libertad económica, el derecho que tienen todas las personas a dedicarse a la actividad económica de su preferencia sin más limitaciones que las derivadas de los derechos de los demás y las que establezcan la Constitución y leyes de la República.

Se entiende por actividad económica, toda manifestación de producción o comercialización de bienes y de prestación de servicios dirigida a la obtención de beneficios económicos.

Se entiende por libre competencia, aquella actividad en la cual existan las condiciones para que cualquier sujeto económico, sea oferente o demandante, tenga completa libertad de entrar o salir del mercado, y quienes están dentro de él, no tengan posibilidad, tanto individualmente como en colusión con otros, de imponer alguna condición en las relaciones de intercambio.

TITULO II
AMBITO DE APLICACION DE LA LEY

Capítulo I
Sujetos de aplicación

ARTICULO 4°.- Quedan sometidas a esta Ley todas las personas naturales o jurídicas, públicas o privadas que, con o sin fines de lucro, realicen actividades económicas en el territorio nacional o agrupen a quienes realicen dichas actividades.

Capítulo II
Actividades reguladas

Sección Primera
Prohibición General

ARTICULO 5°.- Se prohíben las conductas, prácticas, acuerdos, convenios, contratos o decisiones que impidan, restrinjan, falseen o limiten la libre competencia.

Sección Segunda
Prohibiciones particulares

ARTICULO 6°.- Se prohiben las actuaciones o conductas de quienes, no siendo titulares de un derecho protegido por la Ley, pretendan impedir u obstaculizar la entrada o la permanencia de empresas, productos o servicios en todo o parte del mercado.

ARTICULO 7°.- Se prohíben las acciones que se realicen con intención de restringir la libre competencia, a incitar a terceros sujetos de esta Ley a no aceptar la entrega de bienes o la prestación de servicios; a impedir su adquisición o prestación; a no vender materias primas o insumos o prestar servicios a otros.

ARTICULO 8°.- Se prohibe toda conducta tendiente a manipular los factores de producción, distribución, desarrollo tecnológico o inversiones, en perjuicio de la libre competencia.

ARTICULO 9°.- Se prohíben los acuerdos o convenios, que se celebren directamente o a través de uniones, asociaciones, federaciones, cooperativas y otras agrupaciones de sujetos de aplicación de esta Ley, que restrinjan o impidan la libre competencia entre sus miembros.

Se prohíben los acuerdos o decisiones tomados en asambleas de sociedades mercantiles y civiles contrarios a los fines anteriormente señalados.

ARTICULO 10.- Se prohiben los acuerdos, decisiones o recomendaciones colectivas o prácticas concertadas para:

1° Fijar, de forma directa o indirecta, precios y otras condiciones de comercialización o de servicio;

2° Limitar la producción, la distribución y el desarrollo técnico o tecnológico de las inversiones;

3° Repartir los mercados, áreas territoriales, sectores de suministro o fuentes de aprovisionamiento entre competidores;

4° Aplicar en las relaciones comerciales o de servicios, condiciones desiguales para prestaciones equivalentes que coloquen a unos competidores en situación de desventaja frente a otros; y

5° Subordinar o condicionar la celebración de contratos a la aceptación de prestaciones suplementarias que, por su naturaleza o con arreglo a los usos del comercio, no guarden relación con el objeto de tales contratos.

ARTICULO 11.- Se prohíben las concentraciones económicas, en especial las que se produzcan en el ejercicio de una misma actividad, cuando a consecuencia de éllas se generen efectos restrictivos sobre la libre competencia o se produzca una situación de dominio en todo o parte del mercado.

ARTICULO 12.- Se prohíben los contratos entre los sujetos de esta Ley, referidos a bienes y servicios, en la medida en que establezcan precios y condiciones de contratación para la venta de bienes o prestación de servicios a terceros, y que tengan la intención o produzcan o puedan producir el efecto de restringir, falsear, limitar o impedir la libre competencia en todo o parte del mercado.

ARTICULO 13.- Se prohíbe el abuso por parte de uno o varios de los sujetos de esta Ley de su posición de dominio, en todo o parte del mercado nacional y, en particular, quedan prohibidas las siguientes conductas:

1° La imposición discriminatoria de precios y otras condiciones de comercialización o de servicios;

2° La limitación injustificada de la producción, de la distribución o del desarrollo técnico o tecnológico en perjuicio de las empresas o de los consumidores;

3° La negativa injustificada a satisfacer las demandas de compra de productos o de prestación de servicios;

4° La aplicación, en las relaciones comerciales o de servicios, de condiciones desiguales para prestaciones equivalentes que coloquen a unos competidores en situación de desventaja frente a otros;

5° La subordinación de la celebración de contratos a la aceptación de prestaciones suplementarias que, por su naturaleza o con arreglo a los usos del comercio, no guarden relación con el objeto de tales contratos; y

6° Otras de efecto equivalente.

ARTICULO 14.- A los efectos de esta Ley, existe posición de dominio:

1° Cuando determinada actividad económica es realizada por una sola persona o grupo de personas vinculadas entre sí, tanto en condición de comprador como de vendedor y tanto en su condición de prestador de servicios como en su calidad de usuario de los mismos; y

2° Cuando existiendo más de una persona para la realización de determinado tipo de actividad, no haya entre éllas competencia efectiva.

ARTICULO 15.- Se tendrá como personas vinculadas entre sí a las siguientes:

1° Personas que tengan una participación del cincuenta por ciento (50%) o más del capital de la otra o ejerzan de cualquier otra forma el control sobre élla;

2° Las personas cuyo capital sea poseído en un cincuenta por ciento (50%) o más por las personas indicadas en el ordinal anterior, o que estén sometidas al control por parte de éllas; y

3° Las personas que, de alguna forma, estén sometidas al control de las personas que se señalan en los ordinales anteriores.

PARAGRAFO UNICO: Se entiende por control a la posibilidad que tiene una persona para ejercer una influencia decisiva sobre las actividades de uno de los sujetos de aplicación de esta Ley, sea mediante el ejercicio de los derechos de propiedad o de uso de la totalidad o parte de los activos de éste, o mediante el ejercicio de derechos o contratos que permitan influir decisivamente sobre la composición, las deliberaciones o las decisiones de los órganos del mismo o sobre sus actividades.

ARTICULO 16.- A los efectos de establecer si existe competencia efectiva en una determinada actividad económica, deberán tomarse en consideración los siguientes aspectos: El número de competidores que participen en la respectiva actividad, la cuota de participación de éllos en el respectivo mercado, la capacidad instalada de los mismos, la demanda del respectivo producto o servicio, la innovación tecnológica que afecte el mercado de la respectiva actividad, la posibilidad legal y fáctica de competencia potencial en el futuro y el acceso de los competidores a fuentes de financiamiento y suministro, así como a las redes de distribución.

PARAGRAFO UNICO: Cuando la posición de dominio se derive de la ley, las personas que se encuentren en esa situación, se ajustarán a las disposiciones de esta Ley, en cuanto no se hayan estipulado condiciones distintas en los cuerpos normativos que la regulen, conforme a lo dispuesto en el Artículo 97 de la Constitución.

Sección Tercera
De la Competencia Desleal

ARTICULO 17.- Se prohíbe el desarrollo de políticas comerciales que tiendan a la eliminación de los competidores a través de la competencia desleal y, en especial, las siguientes:

1° La publicidad engañosa o falsa dirigida a impedir o limitar la libre competencia;

2° La promoción de productos y servicios con base en declaraciones falsas, concernientes a desventajas o riesgos de cualquier otro producto o servicio de los competidores; y

3° El soborno comercial, la violación de secretos industriales y la simulación de productos.

Sección Cuarta
Del Régimen de Excepciones

ARTICULO 18.- El Presidente de la República, en Consejo de Ministros y oída la opinión de la Superintendencia para la Promoción y Protección de la Libre Competencia, fijará las normas dentro de las cuales podrá permitirse la realización de las siguientes actividades:

1° La fijación directa o indirecta, individual o concertada de precios de compra o venta de bienes o servicios ;

2° La aplicación en las relaciones comerciales de condiciones diferentes para prestaciones similares o equivalentes que ocasionen desigualdades en la situación competitiva, especialmente si son distintas de aquellas condiciones que se exigirían si hubiera una competencia efectiva en el mercado, salvo los casos de descuentos por pronto pago, descuentos por volúmenes, menor costo del dinero por ofrecer menor riesgo y otras ventajas usuales en el comercio; y

3° Las representaciones territoriales exclusivas y las franquicias con prohibiciones de comerciar otros productos.

PARAGRAFO UNICO: Al fijar las normas dentro de las cuales podrá permitirse la realización de las actividades señaladas en los ordinales anteriores, el Ejecutivo Nacional de manera concurrente, cumplirá con lo siguiente:

1° La autorización de dichas actividades deberá tener por objeto, contribuir a mejorar la producción, la comercialización y la distribución de bienes y la prestación de servicios o a promover el progreso técnico o económico;

2° Las actividades que se autoricen deberán aportar ventajas para los consumidores o usuarios;

3° La autorización previa de las actividades que se permitan, así como el control de su ejecución, por la Superintendencia; y

4° La autorización sólo contendrá lo indispensable para lograr el objeto que se persigue.

TITULO III
DE LA SUPERINTENDENCIA PARA LA PROMOCION Y PROTECCION DE LA LIBRE COMPETENCIA

Capítulo I
De su Régimen Interior

ARTICULO 19.- Se crea la Superintendencia para la Promoción y Protección de la Libre Competencia con autonomía funcional en las materias de su competencia, adscrita administrativamente al Ministerio de Fomento.

ARTICULO 20.- La Superintendencia tendrá su sede en la ciudad de Caracas; pero, podrá establecer dependencias en otras ciudades del país, si así lo considerase necesario.

ARTICULO 21.- La Superintendencia estará a cargo de un Superintendente designado por el Presidente de la República.

ARTICULO 22.- El Superintendente tendrá un Adjunto designado por el Presidente de la República. Ambos durarán cuatro (4) años en el ejercicio de sus cargos y podrán ser designados para ejercer nuevos períodos.

Las faltas temporales del Superintendente serán suplidas por el Adjunto.

Las faltas absolutas del Superintendente y del Adjunto serán suplidas por quienes designe el Presidente de la República para el resto del período.

ARTICULO 23.- El Superintendente y el Adjunto deberán ser mayores de treinta (30) años, de reconocida probidad y experiencia en asuntos financieros, económicos y mercantiles, vinculados a las materias propias de esta Ley.

PARAGRAFO UNICO: No podrán ser designados Superintendente y Superintendente Adjunto:

1° Los declarados en quiebra, culpable o fraudulenta, y los condenados por delitos o faltas contra la propiedad, contra la fe pública o contra el patrimonio público;

2° Quienes tengan con el Presidente de la República, con el Ministro de Fomento, o con algún miembro de la Superintendencia, parentesco hasta el cuarto grado de consanguinidad o segundo de afinidad o sean cónyuges de alguno de ellos;

3° Los deudores de obligaciones morosas, bancarias o fiscales;

4° Los miembros de las direcciones de los partidos políticos, mientras estén en el ejercicio de sus cargos;

5° Los funcionarios, directores o empleados de las personas naturales o jurídicas a que se refiere esta Ley; y

6° Quienes estén desempeñando funciones públicas remuneradas.

ARTICULO 24.- El Superintendente y el Adjunto no podrán ser removidos de sus cargos sino por los siguientes supuestos:

1) En caso de condena penal;

2) Por incompatibilidad sobrevenida; y

3) Por incumplimiento de los deberes del cargo y por ineptitud plenamente comprobada.

ARTICULO 25.- La Superintendencia contará con una Sala de Sustanciación, la cual tendrá las atribuciones que le señalan esta Ley, su Reglamento y el Reglamento Interno de la Superintendencia.

La Sala de Sustanciación estará a cargo del Superintendente Adjunto y contará con funcionarios

instructores en número suficiente que permitan garantizar la celeridad en la decisión de las materias de competencia de la Superintendencia.

ARTICULO 26.- El Superintendente no podrá desempeñar ninguna otra función, pública o privada, salvo las académicas y docentes que no menoscaben el cumplimiento de sus deberes y funciones.

ARTICULO 27.- Los funcionarios de la Superintendencia, serán de libre nombramiento y remoción por el Superintendente.

ARTICULO 28.- Los funcionarios de la Superintendencia que hayan investigado una empresa, no podrán trabajar para ésta ni para ninguna otra que tenga vinculación accionaria directa o indirecta, con dicha empresa, dentro del año siguiente a la investigación. Igual prohibición recaerá sobre su cónyuge y sus parientes hasta el cuarto grado de consanguinidad y segundo de afinidad.

El funcionario se inhibirá ante el Superintendente si se le comisiona para efectuar investigaciones relativas a empresas o personas, si ello compromete en cualquier forma su interés o si en éllas prestan servicios su cónyuge o alguno de sus parientes hasta el cuarto grado de consanguinidad o segundo de afinidad. Igualmente se le aplicará el régimen de incompatibilidades previsto en el Capítulo II de la Ley Orgánica de Procedimientos Administrativos.

Capítulo II
De sus atribuciones

ARTICULO 29.- La Superintendencia tendrá a su cargo la vigilancia y el control de las prácticas que impidan o restrinjan la libre competencia. Entre otras, tendrá las siguientes atribuciones:

1) Resolver las materias que tiene atribuidas por esta Ley;

2) Realizar las investigaciones necesarias para verificar la existencia de prácticas restrictivas de la competencia e instruir los expedientes relativos a dichas prácticas;

3) Determinar la existencia o no de prácticas o conductas prohibidas, tomar las medidas para que cesen e imponer las sanciones previstas en esta Ley;

4) Dictar las medidas preventivas, de oficio o a solicitud de interesados, para evitar los efectos perjudiciales de las prácticas prohibidas;

5) Otorgar las autorizaciones correspondientes en aquellos casos de excepción a que se refiere el Artículo 18 de esta Ley, siempre dentro de los límites de las normas que se dicten al efecto;

6) Proponer al Ejecutivo Nacional las reglamentaciones que sean necesarias para la aplicación de esta Ley;

7) Dictar su reglamento interno y las normas necesarias para su funcionamiento;

8) Emitir dictamen sobre los asuntos de su competencia cuando así lo requieran las autoridades judiciales o administrativas;

9) Crear y mantener el Registro de la Superintendencia; y

10) Cualesquiera otras que le señalen las leyes y reglamentos.

Capítulo III
Del Registro de la Superintendencia para la Promoción y Protección de la Libre Competencia

ARTICULO 30.- La Superintendencia deberá llevar un Registro en el cual se inscribirán los siguientes actos:

1° Las investigaciones que se hubieren iniciado y los resultados obtenidos. En libro aparte, que será de uso reservado de la Superintendencia, se incorporarán los documentos aportados por los particulares que, por su contenido, deban permanecer bajo reserva;

2° Las medidas que se hubieren tomado en cada caso y las disposiciones previstas para asegurar su cumplimiento;

3° Cualquier otra resolución o decisión que afecte a terceros o a funcionarios de la Superintendencia; y

4° Las sanciones impuestas.

Capítulo IV
Del Deber de Informar

ARTICULO 31.- Todas las personas y empresas que realicen actividades económicas en el país, públicas o privadas, nacionales o extranjeras, deberán suministrar la información y documentación que les requiera la Superintendencia.

Los datos e informaciones suministrados, tendrán carácter confidencial, salvo si la Ley establece su registro o publicidad.

TITULO IV
DEL PROCEDIMIENTO

Capítulo I
Del Procedimiento en caso de Prácticas Prohibidas

ARTICULO 32.- El procedimiento se iniciará a solicitud de parte interesada o de oficio.

La iniciación de oficio sólo podrá ser ordenada por el Superintendente.

Cuando se presuma la comisión de hechos violatorios de las normas previstas en esta Ley, el Superintendente ordenará la apertura del correspondiente procedimiento e iniciará, por medio de la Sala de Sustanciación, la investigación o sustanciación del caso si éste fuere procedente.

ARTICULO 33.- Con excepción de las infracciones a las disposiciones de la Sección Tercera del Capítulo II del Título II de esta Ley, las cuales prescriben a los seis (6) meses, las demás infracciones prescriben al término de un (1) año.

La prescripción comenzará a contarse desde la fecha de la infracción; y para las infracciones continuadas o permanentes, desde el día en que haya cesado la continuación o permanencia del hecho.

ARTICULO 34.- La Sala de Sustanciación practicará los actos de sustanciación requeridos para el esclarecimiento de los hechos y la determinación de las responsabilidades.

En ejercicio de sus facultades, la Sala de Sustanciación tendrá los más amplios poderes de investigación y fiscalización y, en especial, los siguientes:

1° Citar a declarar a cualquier persona en relación a la presunta infracción;

2° Requerir de cualquier persona la presentación de documentos o información que puedan tener relación con la presunta infracción;

3° Examinar, en el curso de las averiguaciones, libros y documentos de carácter contable; y

4° Emplazar, por la prensa nacional, a cualquier persona que pueda suministrar información en relación con la presunta infracción.

ARTICULO 35.- Durante la sustanciación del expediente y antes de que se produzca decisión, la Superintendencia podrá dictar las medidas preventivas siguientes:

1° La cesación de la presunta práctica prohibida; y

2° Dictar medidas para evitar los daños que pueda causar la supuesta práctica prohibida.

PARAGRAFO PRIMERO: Si las medidas preventivas han sido solicitadas por parte interesada, el Superintendente podrá exigirle la constitución de una caución para garantizar los eventuales daños y perjuicios que se causaren.

PARAGRAFO SEGUNDO: En caso que las mencionadas medidas preventivas pudieran causar grave perjuicio al presunto infractor, éste podrá solicitar al Superintendente la suspensión de sus efectos. En este caso, el Superintendente deberá exigir la constitución previa de caución suficiente para garantizar la medida.

ARTICULO 36.- Cuando en el curso de las averiguaciones aparezcan hechos que puedan ser constitutivos de infracción de esta Ley, la Sala de Sustanciación notificará a los presuntos infractores de la apertura del respectivo expediente administrativo, con indicación de los hechos que se investigan, concediéndoles un plazo de quince (15) días para que expongan sus pruebas y aleguen sus razones. En aquellos casos en que la Sala de Sustanciación lo estime necesario, podrá conceder una prórroga de quince (15) días. Cuando sean varios los presuntos infractores, el plazo señalado comenzará a contarse desde la fecha en que haya ocurrido la última de las notificaciones a que se refiere este Artículo.

ARTICULO 37.- Una vez transcurrido el plazo o la prórroga establecidos en el Artículo anterior, la Superintendencia deberá resolver dentro de un término de treinta (30) días.

ARTICULO 38.- En la resolución que ponga fin al procedimiento, la Superintendencia deberá decidir sobre la existencia o no de prácticas prohibidas por esta Ley.

PARAGRAFO PRIMERO: En caso de que se determine la existencia de prácticas prohibidas, la Superintendencia podrá:

1° Ordenar la cesación de las prácticas prohibidas en un plazo determinado;

2° Imponer condiciones u obligaciones determinadas al infractor;

3° Ordenar la supresión de los efectos de las prácticas prohibidas; y

4° Imponer las sanciones que prevé esta Ley.

PARAGRAFO SEGUNDO: En la resolución que dicte la Superintendencia, debe determinarse el monto de la caución que deberán prestar los interesados para suspender los efectos del acto si apelasen la decisión, de conformidad con el Artículo 54.

PARAGRAFO TERCERO: La falta de pago de la multa o el pago efectuado después de vencido el plazo establecido para ello, causa la obligación de pagar intereses de mora hasta la extinción de la deuda, calculados éstos a la tasa del seis por ciento (6%) por encima de la tasa promedio de redescuento fijada por el Banco Central de Venezuela durante el lapso de la mora.

ARTICULO 39.- La decisión del Superintendente con respecto al artículo anterior, será notificada a los interesados.

ARTICULO 40.- Durante la sustanciación del procedimiento, los interesados tendrán acceso al expediente hasta dos (2) días antes de que se produzca la decisión definitiva, y podrán exponer sus alegatos, los cuales serán analizados en la decisión.

ARTICULO 41.- En todo lo no previsto en este Capítulo, el procedimiento se regirá conforme a las disposiciones de la Ley Orgánica de Procedimientos Administrativos.

Capítulo II
Procedimiento para las Autorizaciones

ARTICULO 42.- En el otorgamiento de las autorizaciones que se prevén en esta Ley y para la decisión de los demás asuntos que no tengan establecido un procedimiento especial, se seguirá el procedimiento ordinario previsto en la Ley Orgánica de Procedimientos Administrativos.

TITULO V
DE LAS SANCIONES

Capítulo I
Disposiciones Generales

ARTICULO 43.- Las sanciones administrativas a que se refiere este Título, serán impuestas por la Superintendencia en la decisión definitiva que ponga fin al procedimiento.

Cuando se efectúe la notificación de la resolución contentiva de la decisión a los infractores, será entregada la correspondiente planilla de liquidación de la multa impuesta a fin de que cancelen el monto en la oficina recaudadora correspondiente en el plazo de cinco (5) días después de vencido el término previsto en el Artículo 53.

ARTICULO 44.- Las sanciones previstas en este Título se aplicarán sin perjuicio de las establecidas en otras leyes.

ARTICULO 45.- Los autores, coautores, cómplices, encubridores e instigadores de hechos violatorios previstos en esta Ley, responderán solidariamente por las infracciones en que incurrieren.

ARTICULO 46.- Las sanciones que se apliquen, de conformidad con esta Ley, prescriben por el transcurso de cuatro (4) años, contados desde la fecha en que haya quedado definitivamente firme la resolución respectiva.

La acción para reclamar la restitución de lo pagado indebidamente por concepto de sanciones pecuniarias prescribe después de transcurrido el lapso de cuatro (4) años.

ARTICULO 47.- Cuando el sancionado no pague la multa dentro del plazo señalado en el único aparte del Artículo 43, se procederá de conformidad con el procedimiento para la ejecución de créditos fiscales previsto en el Código de Procedimiento Civil.

A tal efecto, constituirán título ejecutivo las planillas de liquidación de multas que se expidan de conformidad con el presente Título.

ARTICULO 48.- A falta de disposiciones especiales, se aplicarán supletoriamente las disposiciones de la legislación penal, compatibles con las materias reguladas por esta Ley.

Capítulo II
De las Sanciones en Particular

ARTICULO 49.- Quienes incurran en las prácticas y conductas prohibidas señaladas en las Secciones Primera, Segunda y Tercera del Capítulo II del Título II de esta Ley, podrán ser sancionados por la Superintendencia con multa del diez por ciento (10%) del valor de las ventas del infractor, cuantía que podrá ser incrementada hasta el veinte por ciento (20%). En caso de reincidencia, la multa se aumentará a cuarenta por ciento (40%). El cálculo del monto de las ventas a las que se refiere este artículo, será el correspondiente al ejercicio económico anterior a la Resolución de la multa.

ARTICULO 50.- La cuantía de la sanción a que se refiere el Artículo anterior, se fijará atendiendo a la gravedad de la infracción, para lo cual se tendrá en cuenta:

1° La modalidad y alcance de la restricción de la libre competencia;

2° La dimensión del mercado afectado;

3° La cuota de mercado del sujeto correspondiente;

4° El efecto de la restricción de la libre competencia, sobre otros competidores efectivos o potenciales, sobre otras partes del proceso económico y sobre los consumidores y usuarios;

5° La duración de la restricción de la libre competencia; y

6° La reincidencia en la realización de las conductas prohibidas.

ARTICULO 51.- La Superintendencia podrá imponer, independientemente de las multas a que se refiere el Artículo 49, multas de hasta un millón de bolívares (Bs. 1.000.000,oo), a aquellas personas que no cumplan las órdenes contenidas en las resoluciones dictadas por élla, todo de conformidad con lo dispuesto en los Artículos 35 y 38. Estas multas podrán ser aumentadas sucesivamente en un cincuenta por ciento (50%) del monto original cada vez si en el lapso previsto no hubieren sido canceladas por el infractor.

ARTICULO 52.- Toda infracción a esta Ley y a sus reglamentos, no castigada expresamente, será sancionada con multa de hasta tres millones de bolívares (Bs. 3.000.000,oo), según la gravedad de la falta, a juicio de la Superintendencia.

TITULO VI
DE LOS RECURSOS

ARTICULO 53.- Las resoluciones de la Superintendencia, agotan la vía administrativa y contra éllas sólo podrá interponerse, dentro del término de cuarenta y cinco (45) días contínuos, el recurso contencioso-administrativo, de conformidad con la Ley de la materia.

ARTICULO 54.- Cuando se intente el recurso contencioso-administrativo contra resoluciones de la Superintendencia, que determinen la existencia de prácticas prohibidas, los efectos de las mismas se suspenderán si el ocurrente presenta caución, cuyo monto se determinará, en cada caso, en la resolución definitiva, de conformidad con el parágrafo segundo del Artículo 38.

TITULO VII
DE LAS ACCIONES DERIVADAS DE ESTA LEY

ARTICULO 55.- Sin perjuicio de lo indicado en el parágrafo único de este Artículo, los afectados por las prácticas prohibidas, podrán acudir a los tribunales competentes para demandar las indemnizaciones por daños y perjuicios a que hubiere lugar, una vez que la resolución de la Superintendencia haya quedado firme.

PARAGRAFO UNICO: En caso de infracción de las disposiciones de la Sección Tercera del Capítulo II del Título II de esta Ley, los afectados podrán acudir directamente ante los tribunales competentes, sin necesidad de agotar la vía administrativa. Sin embargo, si los afectados decidieren iniciar el respectivo procedimiento administrativo, de conformidad con las disposiciones del Capítulo I del Título IV de esta Ley, no podrán demandar el resarcimiento de los daños y perjuicios que hubieren podido sufrir como consecuencia de prácticas prohibidas, sino después que la resolución de la Superintendencia haya quedado firme.

ARTICULO 56.- Las acciones por daños y perjuicios derivados de prácticas prohibidas por esta Ley, prescribirán:

1° A los seis (6) meses contados desde la fecha en que la resolución de la Superintendencia haya quedado firme; o

2° A los seis (6) meses para las infracciones a las disposiciones de la Sección Tercera del Capítulo

GACETA OFICIAL
DE LA REPUBLICA DE VENEZUELA

DEPOSITO LEGAL p p 76-0002

AÑO CXIX — MES III No. 4.353 Extraordinario
Caracas: lunes 30 de diciembre de 1991

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Teléfonos: 572.03.57. – 576.12.72

LEY DEL 22 DE JULIO DE 1941

Art. 11.—LA GACETA OFICIAL, creada por Decreto Ejecutivo del 11 de octubre de 1872, continuará editándose en la Imprenta Nacional con la denominación GACETA OFICIAL DE LOS ESTADOS UNIDOS DE VENEZUELA.

Art. 12.—La GACETA OFICIAL DE LOS ESTADOS UNIDOS DE VENEZUELA, se publicará todos los días hábiles, sin perjuicio de que se editen numeros extraordinarios siempre que fuere necesario; y deberán insertarse en ella sin retardo los actos oficiales que hayan de publicarse.

Parágrafo Unico.—Las ediciones extraordinarias de la GACETA OFICIAL tendrán una numeración especial.

Art. 13.—En la GACETA OFICIAL DE LOS ESTADOS UNIDOS DE VENEZUELA, se publicarán los actos de los Poderes Públicos que deberán insertarse y aquéllos cuya inclusión sea considerada conveniente por el Ejecutivo Nacional.

Art. 14.—Las Leyes, Decretos y demás actos oficiales tendrán carácter de públicos por el hecho de aparecer en la GACETA OFICIAL DE LOS ESTADOS UNIDOS DE VENEZUELA, cuyos ejemplares tendrán fuerza de documentos públicos.

II del Título II de esta Ley, en el caso de que no se iniciare el procedimiento administrativo del Capítulo I del Título IV de esta Ley. La prescripción comenzará a contarse desde la fecha en que se consumó la infracción; y para las infracciones continuadas o permanentes, desde el día en que cesó la continuación o permanencia del hecho.

TITULO VIII
DISPOSICIONES FINALES

ARTICULO 57.- Son nulos de nulidad absoluta, los actos o negocios jurídicos que tengan por causa u objeto las prácticas y conductas prohibidas en las Secciones Primera y Segunda del Capítulo II del Título II de esta Ley, siempre que no estén amparadas por las excepciones previstas en éllas.

...da, firmada y sellada en el Palacio Federal Legislativo, en Caracas, a ...os trece días del mes de diciembre de mil novecientos noventa y uno. Años 181º de la Independencia y 132º de la Federación.

EL PRESIDENTE.

PEDRO PARIS MONTESINOS

EL VICEPRESIDENTE.

LUIS ENRIQUE OBERTO G.

LOS SECRETARIOS.

JOSE RAFAEL QUIROZ SERRANO

JOSE RAFAEL GARCIA-GARCIA

Palacio de Miraflores, en Caracas, a los treinta días del mes de diciembre de mil novecientos noventa y uno. Año 181º de la Independencia y 132º de la Federación.

Cúmplase,
(L.S.)

CARLOS ANDRES PEREZ.

Refrendado.
La Ministra de Fomento,
(L.S.)

IMELDA CISNEROS.

LAW TO PROMOTE AND PROTECT THE EXERCISE OF FREE COMPETITION

TITLE I
GENERAL PROVISIONS

ARTICLE 1: The objective of this Law is to promote and protect the exercise of free competition and the efficiency that benefits the producers and consumers; and to prohibit monopolistic and oligopolistic practices and other means that could impede, restrict, falsify, or limit the enjoyment of economic freedom.

ARTICLE 2: The judicial ordinance of the Cartagena Agreement will apply when restrictive forces are imposed on free competition in the Sub-regional Andean market.

ARTICLE 3: For the purposes of this law, economic freedom is understood as the right of all persons to devote themselves to the economic activity of their choice without any limitations but for those derived by the rights of others and those established by the Constitution and the laws of the Republic.

Economic activity is understood to be every instance of production or sales of goods and services directed towards obtaining economic gains.

Free competition is understood to be a situation characterized by exist adequate conditions which allow any economic agent, be it a supplier or buyer, to freely ~~and~~ enter and exit the market, and those that are in the market have the possibility either individually or through concerted action to impose any conditions on the exchange mechanism.

TITLE II
SCOPE OF THE LAW

CHAPTER I
Persons Subject to the Law

ARTICLE 4: Subject to this Law are all natural or juristic persons, public or private, engaged in profitable or non-profitable economic activities within the country, or group of agents engaged in such activities.

CHAPTER II
Regulated Activities

SECTION I
General Prohibition

ARTICLE 5: Conduct, practices, agreements, conventions, contracts, or decisions that impede, restrict, falsify, or limit free competition are prohibited.

SECTION II
Specific Provisions

ARTICLE 6: Acts or conduct of agents not specifically protected by Law, that willfully impede or obstruct the entry or exit of firms, goods or services into any or all areas of the market are prohibited.

ARTICLE 7: Prohibited are all actions designed to restrict free competition, induce third parties to refuse to supply goods or services; obstruct access to goods or services; or refuse to sell raw materials or factor inputs or offer services to others.

ARTICLE 8: All conduct intended to manipulate factors of production, distribution, technological innovation, or investments in such a way as to be detrimental to free competition is prohibited.

ARTICLE 9: Agreements or conventions entered into directly or through unions, associations, federations, cooperatives, and other groups subject to this Law which restrict or impede competition between their members are prohibited.

Agreements or decisions taken in merchant or civil associations which are contrary to the ends previously mentioned are also prohibited.

ARTICLE 10: Agreements, decisions, collective recommendations or concerted activities are prohibited if they:

1° Fix, directly or indirectly, prices or other conditions essential to the sale or provision of goods or services;

2° Limit production, distribution, and the technical or technological development of investments;

3° Divide markets, geographical areas, supply sectors, or supply sources between competitors;

4° Impose unequal conditions, within any commercial or service transaction, for identical supplies provided that disadvantage one customer over others; and

5° Attach, to any contract, ancillary conditions that because of their nature or because of their accepted commercial use, exhibit no relation to the objective of the contract.

ARTICLE 11: Economic concentrations are prohibited, especially if they arise from the exercise of a single activity, when as a consequence of this activity free competition is restricted or a situation of dominance results in the market or in any part of the market.

ARTICLE 12: Contracts between persons subject to this Law, are prohibited insofar as they set prices and contractual terms for the sale of goods or provision of services to third parties, and are intended to have, or have, or may have the effect of restricting, falsifying, limiting, or impeding competition in all or part of the market.

ARTICLE 13: Abuse on the part of one or several persons subject to this law who hold a dominant position in all or part of the national market is prohibited, and in particular the following conduct is prohibited:

1° Price discrimination and other conditions of sales of services;

2° Unjustified limitations of production, distribution, or technical or technological development, harmful to firms or consumers;

3° The unjustified refusal to meet the demand of goods and services;

4° The imposition, in business and service relations, of unequal conditions for equivalent goods and services that disadvantage some competitors over others;

5° Attach, to any contract, ancillary conditions that because of their nature or because of their accepted commercial use, exhibit no relation to the

objective of the contract.

6° Others of equivalent effect.

ARTICLE 14: For the purposes of this law, a dominant position exists when:

1° A specific economic activity is conducted by a single person or a group of persons who are associated as buyers or as sellers or as either providers or purchasers of services; and

2° There exists more than one person conducting a specific type of activity but with no effective competition between them.

ARTICLE 15: Associated persons means the following:

1° Persons who own a share of 50 percent or more of the capital of the other or exercises any other form of control over that person;

2° Persons whose capital is 50 percent or more owned by the persons indicated in the preceding subparagraph, or who are subject to control by them; and

3° Persons who, in some form, are subject to the control of the persons described in the preceding subparagraphs.

SINGLE PARAGRAPH: Control means the possibility that one person has of exercising a decisive influence on the activities of one of the persons subject to this Law, be it either through the exercise of property rights or by the use of all or part of the assets of that person, or through the exercise of rights or contracts that permit a decisive influence on the membership, deliberations, or decisions of the bodies of said person or on their activities.

ARTICLE 16: For purposes of determining whether effective competition exists in a specific economic activity, it will be important to consider the following factors: The number of competitors participating in the respective activity, their share of the respective market, their installed capacity, demand for the respective product or service, technological innovation that affects the market, the actual and legal likelihood of potential competition in the future, and access by competitors to sources of financing and supply, as well as to distribution networks.

SINGLE PARAGRAPH: When the dominant position is derived from the Law, entities in this position shall be subject to the provisions of this Law unless specific conditions stipulated by the appropriate regulatory bodies dictate

otherwise, as in conformity with ARTICLE 97 of the Constitution.

SECTION III
Unfair Competition

ARTICLE 17: The development of commercial policies which tend to eliminate competitors through unfair methods of competition are prohibited; especially in the following cases:

1° Misleading or false advertising directed to impede or limit free competition;

2° The promoting of products and services based on false declarations with regards to the disadvantages or risks of any other competitors' product or service; and

3° Bribery in commerce, the violation of industrial secrets and the pirating of products.

SECTION IV
Exceptional Treatment

ARTICLE 18: The President of the Republic, in Council of Ministers, and having heard the opinion of the Superintendent for the Promotion and Protection of Free Competition shall determine the norms under which the following activities shall be allowed:

1° The fixing directly or indirectly, individually or in concerted action of bid or offer prices of any good or service;

2° The application, in commercial relations, of unequal conditions for equivalent or similar services that fashion inequities into the competitive process, especially if distinct from conditions which would be emerge naturally it there existed effective competition in the market, except in the case of discounts granted for prompt payment, volume discounts, less risk, and other conditions commonly found in commerce; and

3° Exclusive territory arrangements and franchises with exclusive dealership provisions.

SINGLE PARAGRAPH: In establishing the norms under which the activities indicated in the preceding subparagraphs may be conducted, the Executive Branch shall concurrently comply with the following:

1° Authorization of these activities, will have as objectives: contributing to production improvements, commercialization and distribution of goods and services, or promoting technical or economic progress;

2° The authorized activities must entail advantages for consumers or users;

3° Prior authorization of lawful activities, and control over their implementation, by the Office of the Superintendent; and

4° The authorization will contain the minimum required to achieve intended goals.

TITLE III
THE OFFICE OF THE SUPERINTENDENT FOR THE PROMOTION AND PROTECTION OF FREE COMPETITION

CHAPTER I
Its Internal Regulations

ARTICLE 19: The Office of the Superintendent for the Promotion and Protection of Free Competition with operational autonomy to act in matters within its competence, attached administratively to the Ministry of Development, is created.

ARTICLE 20: The Superintendency will be headquartered in the City of Caracas; however, if deemed necessary it will be able to establish offices in other cities.

ARTICLE 21: The Superintendency shall be administered by a Superintendent who shall be appointed by the President of the Republic.

ARTICLE 22: The Superintendent will have an Assistant, appointed by the President of the Republic. Both will exercise their office for (4) years, and they may be appointed to serve in future periods.

The Assistant shall assume Superintendent responsibilities during any absences.

In case of a permanent absence, the responsibilities of the Superintendent for the Defense of Free Competition and the Assistant Superintendent shall be assumed,

for the remainder of the term, by those designated by the President of the Republic.

ARTICLE 23: The Superintendent and the Assistant Superintendent must be over thirty (30) years of age, of recognized integrity and experienced in financial, economic, and commercial affairs related to the matters covered by this law.

SINGLE PARAGRAPH: The following persons may not be appointed to the offices of Superintendent or Assistant Superintendent:

1° Persons who have declared bankruptcy, and persons found guilty of offenses or misdemeanors against property, against the public faith or against public patrimony.

2° Persons related to the President of the Republic, the Minister of Development, or any member of the office of the Superintendent within the fourth degree of consanguinity or second degree of affinity, or who are spouses of any of them;

3° Debtors with delinquent bank or tax liabilities;

4° Members of political party directorates, while exercising their office;

5° Officials, directors, or employees of the natural or juristic persons subject to this law; and

6° Persons holding paid public office.

ARTICLE 24: The Superintendent and the Assistant Superintendent will not be removed from office except in the following instances:

1° In case of criminal conviction;

2° In case of a subsequent conflict of interest; and

3° For not complying with the duties of the office and for fully proven ineptitude.

ARTICLE 25: The Superintendent shall have a Tribunal [Sala de Sustancación] which shall have the powers indicated by this Law, its Regulations, and the Internal Regulations of the Superintendency.

The Tribunal shall be under the Assistant Superintendent and shall have a staff

of professionals in sufficient number to ensure promptness in resolving matters within the competence of the Superintendency.

ARTICLE 26: The Superintendent may not perform any other functions, public or private, except academic and honorary functions which do not interfere with the carrying out his duties and functions.

ARTICLE 27: The appointment and removal of functionaries in the Superintendency shall be carried out by the Superintendent.

ARTICLE 28: Employees of the Superintendency who have investigated a firm, will not be able to work for said firm or any other firm with which that firm has a shareholder relationship, directly or indirectly, for one year following the investigation. The same prohibition shall apply to spouses and relatives to the fourth degree of consanguinity or second degree of affinity.

An official will disqualify himself if commissioned to investigate firms or persons, if that would involve, in any way, a conflict of interest, or if his spouse or any of his relatives to the fourth degree of consanguinity or second degree of affinity are employed by the firms or persons. The framework of incompatibility spelled out in CHAPTER II of the Organic Law of Administrative Procedures will also be applied.

CHAPTER II
Its Powers

ARTICLE 29: The Superintendency shall be responsible for monitoring and controlling the practices that impede or restrict free competition. Among others, it shall have the following powers and duties:

1° To resolve matters assigned to it by this Law;

2° To conduct the investigations necessary to verify the existence of anticompetitive practices, and prepare case files concerning such practices;

3° To determine the existence or nonexistence of prohibited practices or conduct, act to proscribe them, and impose the penalties provided in this Law;

4° To adopt the necessary preventive measures, at its own initiative or at the request of a concerned party, to avoid the detrimental effects of the prohibited practices;

5° To authorize those practices or conduct in those exceptional cases to

which ARTICLE 18 refers to, and always within the limits which are in effect;

6° To propose to the Executive Branch the regulations necessary for the application of the law;

7° To issue its internal regulations and the rules necessary for its operation;

8° To issue an opinion on matters within its competence when so requested by the judicial or administrative authorities;

9° To create and maintain the Register of the Office of the Superintendent; and

10° Any other powers and duties indicated by the laws and regulations.

CHAPTER III
The Register of the Office of the Superintendent for the Defense of Free Competition

ARTICLE 30: The Superintendency will have to keep a Register in which the following actions are to be recorded:

1° The investigations that have been initiated and the results obtained. Documents furnished by individuals which should remain confidential shall be incorporated in a separate volume, which shall be reserved for use by the Superintendency;

2° Any measures that have been taken in each case and the provisions made to ensure compliance;

3° Any other decision affecting third parties or officials of the Superintendency; and

4° The sanctions imposed.

CHAPTER IV
The Duty to Inform

ARTICLE 31: All persons and firms conducting business in the country, public and private, Venezuelan and alien, must furnish the information and documentation required

of them by the office of the Superintendency.

The information and data supplied shall be confidential except when the Law provides for its registration or publication.

TITLE IV
PROCEDURE

CHAPTER I
Procedure in the Case of Prohibited Practices

ARTICLE 32: Proceedings shall be initiated at the request of a concerned party or at the initiative of the Office.

The initiation of proceedings may be ordered only by the Superintendent.

Whenever it appears that the rules provided for in this Law may have been violated, the Superintendent will order the opening of the corresponding proceeding, and shall initiate through the Tribunal the investigation of the case when appropriate.

ARTICLE 33: With the exception of violations of the provisions of Section III of Chapter II of Title II of this Law, which have a statute of limitations of six (6) months, the other violations <have a statute of limitations of one (1) year.

The statute of limitations shall begin to run from the date on which the violation was committed and, for repeated violations, from the day on which the last violation ceased.

ARTICLE 34: The Tribunal shall perform the necessary investigation to clarify the facts and determine responsibility.

In the exercise of its powers, the Tribunal shall have the broadest investigative and supervisory powers, and in particular the following powers:

1° To summon any person to appear to testify on pertinent matters related to the alleged violation;

2° To require any person to present any documents or information that may be related to the alleged violation;

3° During the investigation, to examine ledgers and documents; and

4° To subpoena any person, through the national press, to appear who may

be able to furnish information with respect to the alleged violation.

ARTICLE 35: During the hearing of the case file, and before its decision is handed down, the office Superintendent may adopt the following preventive measures:

1° It may order the alleged prohibited practice to cease;and

2° Dictate measures to avoid damages that may result from the alleged prohibited practice.

FIRST PARAGRAPH: If the preventive measures have not been solicited by the interested parties the Superintendent may demand a bond to guarantee any eventual damages that may result.

SECOND PARAGRAPH: If the measures are severely biased against the alleged violator, he will be able to petition the Superintendent to suspend the measures. In this case the Superintendent will have to demand the creation of a bond large enough to guarantee the measure.

ARTICLE 36: When in the course of investigations actions are uncovered that may constitute violations of this Law, the Tribunal shall notify the alleged violators that the respective administrative enquiry has been opened, indicate the alleged violations being investigated, and grant them a fifteen (15) day period within which to present their evidence and put forward their arguments. In those cases where the Tribunal deems it necessary, it will be able to give an extension of (15) days. In the case of several alleged violators, the aforementioned period shall begin to be counted from the date on which the last of the notifications referred to in this article was given.

ARTICLE 37: Once the period of time established in the preceding article has elapsed, the Superintendent will have a thirty (30) day period in which to issue a decision.

ARTICLE 38: In the decision that terminates the proceeding, the Superintendency will decide upon the existence or nonexistence of practices prohibited by this law.

FIRST PARAGRAPH: In case the existence of prohibited practices is determined, the Superintendent will be able to:

1° Order that the prohibited practices cease within a determined period of time;

2° Impose specific conditions or obligations on the violator;

3° Order the elimination of the effects arising from the prohibited practices; and

4° Impose the penalties provided by this Law.

SECOND PARAGRAPH: In the resolution issued by the Superintendent there shall be a determination of the amount of the bond to be posted by the parties concerned in case of an appeal in conformity with ARTICLE 54.

ARTICLE 39: The decision issued by the Superintendent relating to the preceding article shall be provided to the violators and parties concerned.

ARTICLE 40: During the proceeding, and until the final decision is handed down, the parties concerned shall have up to two (2) days of advance access to the case file, and will be able to advance arguments which shall be taken into account.

ARTICLE 41: In all that is not foreseen by this Chapter, the proceeding shall be governed by the provisions of the Organic Law on Administrative Proceedings.

CHAPTER II
Procedure for Authorizations

ARTICLE 42: In granting the authorizations provided for in this law, and for the resolution of other matters for which a special procedure has not been established, the regular procedure provided for in the Organic Law on Administrative Proceedings shall be followed.

TITLE V
PENALTIES

CHAPTER I
General Provisions

ARTICLE 43: The administrative penalties referred to under this Title shall be imposed by the Superintendency in the final decision that terminates the proceeding.

When notification of the decision is given to the violators, the corresponding payment terms of the fine shall be delivered to them, so that the violators may proceed to pay the fine at the office of the Treasury within five (5) days following the period provided for in ARTICLE 53.

ARTICLE 44: The penalties provided for in this Title shall be applied without prejudice to the penalties established in other laws.

ARTICLE 45: The authors, co-authors, accomplices, and instigators of acts in violation of this Law shall be responsible personally for the infractions they committed.

ARTICLE 46: The penalties imposed in conformity with this law shall become void by a statute of limitations after the elapse of four (4) years counting from the date of the definitive ruling.

Legal action to recover payments improperly made as monetary penalties shall become barred by statute of limitations by an equal period of four (4) years.

ARTICLE 47: When the person penalized does not pay the fine within the period indicated in the only separate paragraph of ARTICLE 43, action shall be taken in conformity with the procedure for the imposition of taxes and charges payable as spelled out in the Code of Civil Procedure.

For this purpose, the terms of payment for the fines issued in conformity with this Title shall become documents proving the plaintiff's right of execution.

ARTICLE 48: Absent special provisions in this Title, the principles and rules of penal law compatible with the nature and purposes of the matter governed by this law shall be substituted.

CHAPTER II
Specific Penalties

ARTICLE 49: Persons involved in the prohibited practices and conduct indicated in Sections I, II, and III of Chapter II of Title II of this Law, may be punished by the Superintendency with a fine of up to ten percent (10%) of the value of the violator's sales, this quantity can be raised up to twenty percent (20%). In case of repeat offenders, the fine will be raised to forty percent (40%). The relevant sales figures to be used in this calculation will be based on data obtained before the resolution of the fine.

ARTICLE 50: The amount of the penalty referred to in the preceding article shall be established in keeping with the seriousness of the violation, for which purpose the following shall be taken account:

1° The form and scope of the restriction on free competition;

2° The size of the market affected;

3° The market share of the corresponding person subject to this Law;

4° The impact of the restriction of competition on other actual or potential competitors, on other parts of the economic process, and on consumers and users;

5° The duration of the restriction on free competition, and

6° The frequency of repeat offenses.

ARTICLE 51: The Superintendency may impose, independently of the penalties referred to in ARTICLE 49, fines up to one million Bolivars (Bs. 1,000,000), on those persons who do not comply with the orders contained in the decisions issued by the Superintendency in conformity with ARTICLES 35 and 38. These fines may be raised by fifty percent (50%) of the original amount for non-payment.

ARTICLE 52: All violations of this Law and its regulations not specifically penalized shall be punished by a fine of up to three million Bolivars (bs. 3,000,000.00) depending on the gravity of the offense, as judged by the Superintendent.

TITLE VI
REMEDIES

ARTICLE 53: Decisions adopted by Superintendency exhaust the administrative route, and the only remedy that may be undertaken has to be finalized within the period of forty-five (45) calendar days. This remedy is the contentious-administrative appeal in conformity with the Law on that matter.

ARTICLE 54: When the administrative law appeal is being undertaken to review Superintendency resolutions that determined the existence of prohibitive practices, the effects of the resolutions shall be suspended if the appellant posts a bond. The amount of the bond shall be determined in each instance in the final decision, in conformity with the second paragraph of ARTICLE 38.

TITLE VII
ACTIONS DERIVED FROM THIS LAW

ARTICLE 55: Without prejudice to what is indicated in the Single Paragraph of this ARTICLE, persons affected by the prohibited practices may turn to the competent courts to seek indemnification for damages that occurred, once the decision of the Superintendency is final.

SINGLE PARAGRAPH: In case provisions of Section III of Chapter II of Title II of this Law are violated, persons affected may turn directly to competent courts without need to exhaust administrative appeals. However, if the persons

affected decide to initiate the respective administrative proceeding in conformity with the provisions of Chapter I of Title IV of this Law, they may not demand redress for any damages they may have suffered as a consequence of the prohibited practices until after the decision of the Superintendency becomes final.

ARTICLE 56: Legal actions for damages derived from practices prohibited by this Law shall become barred by statute of limitations in:

1° Six (6) months counting from the date on which the resolution of the Superintendency became final.

2° Six (6) months for violations of the provisions of Section III of Chapter II of Title II of this Law, in the cases where the administrative proceeding of Chapter I of Title IV of this Law are not to be initiated. The statute of limitations shall begin to run from the date on which the infraction occurred; and, for repeated violations from the date on which the last violation occurred.

TITLE VIII
FINAL DISPOSITIONS

ARTICLE 57: Legal business transactions which cause or result or are designed to foster practices prohibited by Sections I and II of this Chapter are null and void, provided they are not covered by the exceptions spelled out in this Law.

Presented, signed and sealed in the Legislative Federal Palace, in Caracas, on the thirteenth day of December of nineteen hundred and ninety one. 181st year of Independence and 132nd year of the Federation.

THE PRESIDENT,

PEDRO PARIS MONTESINO

THE VICE-PRESIDENT,

LUIS ENRIQUE OBERTO G.

THE SECRETARIES,

JOSE RAFAEL QUIROZ SERRANO

JOSE RAFAEL GARCIA-GARCIA
