



联合国贸易和发展会议

Distr.
GENERAL

TD/B/RBP/94
5 August 1993
CHINESE
Original: ENGLISH/SPANISH

贸易和发展理事会
限制性商业惯例政府间专家组
第十二届会议
1993年10月18日，日内瓦
临时议程项目4(c)

限制性商业惯例法规手册

贸发会议秘书处的说明

目 录

	<u>页 次</u>
导 言	2
手册稿件格式	3
一、意大利政府关于1990年10月10日“竞争和市场 保护规则”的评论	4
二、牙买加政府关于1993年“公平竞争法”的评论	19
三、委内瑞拉政府关于“1991年12月促进和保护自 由竞争法”的评论	20
 <u>附 件</u>	
一、意大利：1990年竞争和市场保护规则	24
二、牙买加：1993年公平竞争法	40
三、委内瑞拉：1991年促进和保护自由竞争法	82

导 言

1. 《一套多边协议的管制限制性商业惯例的公平原则和规则》F.6(c)节规定要汇编一份限制性商业惯例法规手册。

2. 此外，限制性商业惯例政府间专家组第十一届会议请贸发会议秘书处继续汇编和更新限制性商业惯例法规手册(TD/B/39(2)/7-TD/B/RBP/92, 附件一)。

3. 据此，秘书处编写了本说明，内载意大利、牙买加和委内瑞拉对各自限制性商业惯例法规的评论以及这些法规的案文。

4. 至此，贸发会议秘书处已分发了23个国家对各自限制性商业惯例法规的评论以及这些法规的案文，这些国家是：比利时、巴西、加拿大、智利、丹麦、芬兰、法国、德国、意大利、牙买加、肯尼亚、巴基斯坦、波兰、葡萄牙、大韩民国、挪威、西班牙、斯里兰卡、瑞典、大不列颠及北爱尔兰联合王国、美利坚合众国、委内瑞拉。

5. 贸发会议秘书长在1993年5月7日所发照会中请尚未这样做的国家或自上次向贸发会议秘书处递交来文以来颁布新的限制性商业惯例法规或修改了原有法规的国家向贸发会议秘书处提供有关法规、法院裁决以及评论，请它们按提供的格式(见下文)提供这些材料。(然而，意大利和牙买加等国是第一次颁布限制性商业惯例法规，它们的评论可能不一定与格式相符。)为便利以一种以上的联合国正式语文复制法规案文，请各国按政府间专家组的请求尽可能以联合国的一种或多种其他语文提交法规案文。

6. 贸发会议秘书处感谢为手册的汇编提供了材料的国家，并再次请尚未这样做的国家按秘书长的上述请求提供材料。

手册稿件格式

- A. 说明颁布法规的理由。
- B. 说明法规的目标以及最初的法规颁布以来的演变程度。
- C. 说明受管制的惯例、行动或行为，并说明每一项的：
 - (a) 管制类型，例如：明令禁止、原则上禁止、或具体案件具体审查；
 - (b) 此项管制对《原则和规则》D节第3和4段所列惯例、行动或行为的涵盖程度，以及任何可能受管制的其他惯例、行动或行为，包括专门用于保护消费者的管制办法--例如，关于误导型广告的管制办法--涵盖的其他惯例、行动或行为。
- D. 说明法规的适用范围，示明：
 - (a) 是否对所有货物交易和服务交易一律适用，若非如此，则示明哪些交易不适用；
 - (b) 是否适用于无论发生在何处但在该国有影响的所有惯例、行动或行为；
 - (c) 是否取决于存在某项协议或取决于该协议生效。
- E. 说明执法机制（行政和/或司法机制），示明是否订有通知协议和登记协议，以及（各）机构的主要权力。
- F. 说明任何并行的或补充性的法规，包括与其他国家达成的、涉及在限制性商业惯例领域开展合作或解决争端的程序的条约或谅解。
- G. 说明行政和/或司法机构作出的主要决定以及涵盖的具体问题。
- H. 简明文献目录，列出法规和主要决定的出处，以及政府的解释性出版物、或法规，或其中的具体章节。

一、意大利政府关于1990年10月10日 “竞争和市场保护规则”的评论

导 言

1990年10月10日，意大利议会颁布了建立“保障竞争和市场”的权力机构的第287/90号法。美国早在1890年就颁布了《谢尔曼法》，如果美国的经验不考虑在内，则所有其他工业国制订反垄断法规也是远远早于意大利：法国是1945年(第45-1483号法令)，日本是1947年(私营垄断和限制性贸易惯例法)，联合王国是1948年(垄断和限制性惯例法)，德国最初是1923年，后来则是1946-1947年。此外，欧经共同体在1950年代中期颁布了扶持竞争的法规(见：设立欧洲煤钢共同体(ECSC)条约第65-67条和建立欧洲经济共同体条约第85-94条)。

一些情况可说明意大利为何在制订反托拉斯法规方面行动较迟。1950年至1990年之间，意大利议会讨论过许多法案，但无一获得通过。原因之一是，意大利存在一个规模很大的、政府拥有的工业部门，许多人认为这一情况有助于消除潜在的垄断地位。此外，国内政治辩论的意识形态色彩很浓，对反托拉斯法未形成共识。事实上，反托拉斯措施往往被视为直接干预市场的工具而不是保护竞争力量的工具。然而，1980年代在国内和国际上都形成了一种新的气氛。具体而言，欧洲一体化进程的加速促使所有成员国都制订了有利于竞争和市场恰当运作的政策，这与欧共体一级实行的政策是一致的。意大利于1986年设立了一个由政府赞助的委员会，负责研究制订反托拉斯法规的可能性。这个委员会于1988年4月发表了一项最后报告，并于该年夏季向议会提交了两项反托拉斯法案。经过透彻的辩论之后，于1990年10月10日颁布了新的意大利反托拉斯法(第287/90号)。

本报告主要介绍这项法律并讨论这项法律的最重要特点(见报告第1章)。由于委员会是1990年底才设立的，因此本报告所涉的几个月(1990年10月至1991年3月)中提请该委员会审理的案件为数不多，但第2章中仍对之作了解和讨论。

第 1 章

第287/90号法律的特点

1.1 导言

如第1节所示，颁布这项法律是为了执行意大利宪法第41条，保护和保障经济活动和企业的权利，明确提及欧洲共同体有关竞争的法规原则。

提及意大利宪法第41条，这表明立法者的目标是保护和保障私营企业，明确规定“其颁布不得违背公众利益或损害安全、自由和人格尊严”（宪法第41(2)条）。

新法规的另一项主要特点是它与共同体法律的关系。首先，意大利的法律在适用范围方面补充共同体法律。第1节界定了这一范围，其中规定，本法律涉及不直接接受共同体法律（煤钢共同体条约第65/66条、欧共体条约第85/86条、第4064/89号条例、欧共体其他条例以及具有法律地位的共同体文件）管辖的协议、滥用支配地位和合并。换言之，意大利的法规只涉及共同体法律未涉及而影响到意大利领土的惯例。

本国竞争法规和共同体竞争法规涵盖相同的案件：协议、合并以及滥用支配地位。

此外，这项法律的第1(4)节极为重要，其中规定（关于反竞争惯例的）标题一中的条款必须根据共同体法律原则加以理解，这些原则不仅见于共同体法规，而且也体现在欧洲法院的裁决和欧共体委员会的决定之中。

在意大利法律中纳入共同体内已形成的解释原则有许多好处。举例而言，只要联系协议、支配地位和滥用支配地位等概念想一想这样做的助益就可以看出这些好处。

共同体的另一项基本概念是理性规则，根据此项规则，对具体案件的分析、某项变化之前和之后的实际结构的审查以及各种可用办法的分析极为重要。

最后，共同体的制度提及企业的经济概念，以求克服任何可能存在的法律上的模糊之处。根据欧共体的概念，不具备财政和决策自主权的一些法律实体可被视为一个企业。因此，根据共同体法律，一些组合在一起的公司可视为一个企业。

然而，应当考虑到，意大利制度吸收共同体法律的解释原则，但这些原则涉及两种不同的环境，要实现的目标也不同。例如，罗马条约中关于竞争的规定是着眼

于消除可能干扰成员国之间贸易的情况，最终目的是实现经济一体化。国内的法规则适用于已实现一体化的国内市场。

对于这项法律的第1(4)节就应如此理解，不是仅把共同体法规全盘搬入意大利法律，而是表明需把共同体制度和意大利制度结合起来解释这项法律，二者要相互协调和结合。

关于意大利法律中提出的公司集团概念，最高上诉法院1990年2月26日第1429号判决作了重要的贡献。根据这项判决，把集团基本上视为单一企业的经济概念在法律上等同于把集团视为单一综合企业的概念，这种企业由属于集团的每一公司的一些企业家组成。然而，这项判决尚未成为意大利司法制度的组成部分，权力机构也是由于(第1.3节中讨论的)管制概念尚不完全明确而仍要求一切交易均需通报。

1.2 关于协议、滥用支配地位和合并的规定

标题一提及共同体法律的原则，把有关的反竞争惯例界定为：协议、滥用支配地位以及合并。

(a) 协议

第2节沿用了罗马条约第85条的措词，界定了企业间的协议和/或协调惯例，以及企业联合会和类似组织的决定。凡是在较大程度上意图或实际阻止、限制或扭曲国内市场或其相当部分竞争的协议一律在禁止之列。

第2节在总的定义之后列出了违禁协议可能引起的行动：

- 直接或间接固定购买价格或销售价格，或任何其他契约条件；
- 限制或控制生产、市场销路或准入、投资、技术开发或技术进步；
- 分划市场或供应来源；
- 在与合同的其他当事方的商务关系中就同样的服务对相同的交易适用不同的条件，从而使它们在竞争上处于不合理的不利地位；
- 在订合同时要求其他当事方接受附加义务，这种义务根据其性质或商业用途判断与合同主题事项无关。

不过，以上列出的各项只是举例，不是全部。

就协议而言，没有通报义务或要求，法律禁止的协议一律无效。

第4节中规定了限制竞争协议禁例的一个例外，该节允许权力机构批准由于阻

碍竞争自由按第2条原属禁止的协议或协议类别。这一节规定可批准例外，但有时间限制，此处是指能改善市场供应条件(指增进生产、提高生产或销售质量、或工艺或技术进步)从而给消费者带来很大好处的协议。

此种批准要先由有关当事方向权力机构提交申请，批准要在申请提交之日起120天内宣布，期间要按法律规定调查和审查申请。

豁免有时间限制，并且不得在市场的较大部分造成竞争消失。

批准或豁免的有效期不仅受限制，而且第4(2)节还规定，批准的条件之一如不复存在，或有关公司滥用了授权，在权力机构发出警告之后，可撤销这种批准。如是对一整类作出的批准，撤销批准一般限于排除确实发生滥用情形或总体批准中规定的条件确实不复存在的特定协议。

以欧共体和主要工业国的经验来看，负责监督竞争的主要部门采取行动最多的是协议，就此而言，评估限制竞争的经济影响的工作完全由权力机构负责。换句话说，这项法律未授权政府对限制竞争的协议事先订立总体政策，这与有关合并的情况不同。

(b) 滥用支配地位

第3节禁止在全国境内或其较大部分滥用支配地位。具体禁止下列各项：直接或间接固定购买价格或销售价格，或任何其他不合理和过分的合同条件；对消费者不利的限制或控制生产、市场销路或准入、投资、技术开发或技术进步；

- 在与合同的其他当事方的商务关系中就同样的服务对相同的交易适用客观上不同的条件，从而使它们在竞争上处于不合理的不利地位；
- 在订合同时要求其他当事方接受附加义务，这种义务根据其性质或商业用途判断与合同主题事项无关。

同关于协议的清单一样，此处的清单也仅是举例。它们与第2节中列出的相似，但不包括分划市场和供应来源，后者仅适用于协议。

与欧共体条约第86条一样，这项法律并未实际界定支配地位或“滥用支配地位”概念。在这方面，由于缺乏足够明确和客观的参比标准，在本国一级和共同体一级的解释上存在很大的不确定性。

不过，应当指出，要防止的不是支配地位，而是滥用支配地位。

(c) 盘购和合并

第5-7节涉及合并。首先，第5节界定了合并交易，吸收了欧共体第4064/89号条例第3条的主要特点。合并有三种情况：两个或两个以上公司合并、在至少一个公司或多个公司内持有控制地位的一个或多个主体直接或间接获取对一个或多个公司的全部或部分控制、以及两个或多个公司以建立新公司的方式建立一个共同的公司。

如有关各公司的合计国内营业额超过5,000亿里拉，或待购公司的国内总营业额超过500亿里拉，此种盘购和合并就须预先通知权力机构(第16节)。

银行和金融机构及保险公司在计算合并和盘购必须通知权力机构的起限方面都有具体的标准。

银行或金融机构盘购一家公司的股权在下列情况下不属于获得对该公司的控制：公司是股份有限公司，或公司正在筹集股本，但以准备在市场上出售股权为前提，条件是在拥有股权的时期内(无论如何不得超过24个月)不行使这些股份所涉的表决权。

在对须预先通知的合并行使预先管制权时，权力机构必须确证这些交易是否造成或加强在国内市场上的支配地位从而在很大程度上或永久性地消除或减少竞争。在评估情况时，权力机构必须考虑法律中例举的一些要点：选择供应和客户的可能性、有关公司的市场地位、得到供应和利用市场销路的程度、市场结构、本国工业的竞争状况、竞争对手面临的市场壁垒、以及有关产品或服务的供需趋向。

如果权力机构在调查之后确信交易会限制竞争，可禁止合并或以采取具体措施防止造成后果为条件批准合并。

法律允许权力机构在特定情况下批准本属禁止的盘购和合并。不过，与针对协议的权力相比，这方面的权力要有限得多。法律第25节规定，意大利部长理事会(内阁)应根据工业部长的提议订立一般标准，由权力机构据以在欧洲一体化进程中涉及国民经济总体利益时暂停此法律第6节中的禁例而作出批准，条件是不致于造成消除市场上的竞争或限制按前述总体经济利益判断并非绝对合理的竞争。

因此，权力机构除根据最高政治层确立的准则外不得批准根据第6节禁止的合并的例外。权力机构有责任评估合并对市场作业的影响，尽管在一切情况下竞争可能绝非受到不合理的排除或限制。权力机构还须订立必要措施，规定在具体时限内恢复充分竞争。意大利政府尚未拟出这些须预先在总体上订立的标准。

1.3 控制概念

第7节中提到的对一公司的控制这一概念大于意大利民法典第2359条中的概念,提及事实上或依法律情由可能产生的主体之间(不仅仅是公司之间)的影响关系。最重要的是,第7节规定控制的形成不仅仅在于第2359条(1991年4月9日第127号法律中提及)所指的情况中,而且还存在于以下情况:“联合或分别形成对一公司产生决定性影响的权益、合同或其他法律关系,同时顾及一切事实上的和依法律的情由”。

1.4 公营和私营公司:垄断企业

关于协议、滥用支配地位以及盘购和合并的规定既适用于私营公司,也适用于公营公司,而且还适用于国家持有控制股权的所有公司(第8节)。不过,这些规定不适用于另一些公司,这类公司具有管理一般经济利益的服务的法定责任。在垄断之下(按国家的规定)在市场上运作,但仅限于实现其具体目标之必需。

另一项重要规定见于第9节,该规定允许生产依法给予体制垄断权的货物和服务,前提是这些货物和服务是公司自用的,或是提供给母公司或附属公司使用的。但是,如果垄断的唯一理由是公共政策、警方政策、国防和电信部门,受1990年8月6日第223号法律制约,则不允许内部用途的生产。

1.5 保障竞争和市场的权力机构

为防止标题一所指的反竞争活动或防止此类活动的影响,这项法律规定新设第10节中提及的权力机构,即“保障竞争和市场权力机构”。这个权力机构的主要特点是具有独立地位,因为在第19(2)条中明确规定“权力机构在判断和评估方面的运作应充分自主和独立”。

权力机构是一个联合机构,有主席1人,成员4人,由参议院议长和众议院议长任命。这五名成员任期7年,不得连任,担任成员的主要条件是个人独立,此外还辅以关于容许与职务不相称的严格规定以及具体的专业资格要求。

权力机构的独立性还体现于要求该机构的一切措施均须在专门的公报中公布(第26节),按规定编写的报告须每年提交总理,由总理将报告转交议会(第23节)。这两项要求的目的在于确保权力机构的工作受到政府、议会和公众舆论的监督。

权力机构各部门各单位的业务由工业部长根据该机构主席提议任命的秘书长加以监督。权力机构有自己的工作人员，人数不得超过法律规定的150人。

权力机构是一个行政机构，没有司法权。它具有最近意大利法律系统中出现的“独立行政部门”的一切特征，与法国和北美传统中的独立机构相一致。

按意大利宪法第24条和第113条的规定，权力机构的决定要受法院控制。法律第33节规定，须由拉丁姆区域行政法庭就针对权力机构的任何行政措施提起的上诉作出裁决。私人提出的要求取消某项决定和赔偿的案件以及任何要求实施紧急程序上的申请均属主管上诉法院管辖。

1.6 权力机构在协议、滥用支配地位和合并等方面的权力

权力机构在协议方面和在滥用支配地位方面的权力是不同的，而法律对此规定的程序则是相同的(第12-15节)，关于合并的规定在第16-19节。

关于它的调查权力，有必要作一初步的大致说明：不应以总括和无区别的形式进行审查，只应在有证据表明可能违犯法律的案件中进行调查。第14节和第16节对此分别作了规定，其中提到“第2和第3节所指的违法嫌疑案件”和“根据第6节有可能被禁止的”合并。这符合欧共体第4064/89号条例第6条，其中规定只有在对合并与共同市场的一致性有严重疑问时才进行调查。

此项法律规定的行政程序也限定了确立行政程序一般规定的第241/1990号法律。因此，后一项法律适用于第287号法律未涵盖的所有事项。

根据将由总统令颁布的条例第10(5)节订立了权力机构在行使权力时必须遵守的调查程序，目的是确保公布决定和推论，并让当事方有机会进行讨论，讨论需作记录。由于这些条例尚未颁布，权力机构目前暂时按1990年第241和287号法律的规定行事。

1.7 权力机构的权力限度

就金融机构和银行以及广播和出版公司而言，实施有关协议、滥用支配地位以及盘购和合并的条款的权力分属这些单位的监督机构：意大利银行，以及出版和广播业的保证方。不过，它们在采取任何有关竞争的措施之前，必须先征求权力机构的意见。在此情况下，规则是“沉默即同意”：如果在请求提出后30天内权力机构不作答复，前述监督机构就可进而实施其措施。

第20(5)节为权力机构与意大利银行之间的关系规定了一项不同的程序，即，可以允许为货币制度稳定而对第2节所指的禁例给予有限的豁免，同时要顾及第4(1)节确定的标准。在此情况下，意大利银行可与权力机构联合商定给予授权，而权力机构须判定有关事项是否损害竞争。

就涉及保险公司的交易而言，权力机构要负责在听取私营保险公司(ISVAP)会计主任的意见之后执行法律。

权力机构在任何情况下均可向意大利银行和保证方通报违反第2和第3节(协议和滥用支配地位)的任何情事。

还应指出，对出版和广播的控制属特殊情况，主要与意大利宪法第21条有关，该条规定了新闻自由。在此情况下，保护竞争即便有其经济层面也有不同的意义。

1.8 权力机构的咨询和实况调查权力

决策权涉及实况调查阶段和实行制裁的可能性，除此之外，权力机构还行使另外两项重要权力：发出通知和提出建议，以及咨询。从保护竞争的大角度来看，这两项权力都很重要，不仅涉及规约各公司的反竞争行为，而且限制行政和法律制约引起的扭曲，并且提出为使市场正常运作而需采取的一切行动。为此，这项法律明智地规定不仅应行使咨询和实况调查权以便就个别和具体的案件作出表态，而且还要根据自己的知识和经验就一般性质的问题作出表态。

第21节规定了通知和提议权力，该节规定如下：“权力机构应查明特别相关的案件，在此类案件中，法律规定或条例或一般行政规定对竞争或市场的恰当运作造成以普遍利益要求判断属于不合理的扭曲。”

权力机构查明此类案件后视情况分别通知议会、总理、主管部长和任何有关地方当局。此外，权力机构也可提出需采取哪些措施消除或防止此类扭曲，并且具有发表其意见和建议的重要权力。

还应指出，虽然此项法律提及“关于需采取的步骤的意见”，但这只是提出建议的权力，因为要由权力机构采取主动行动并提请有关机构注意是否宜以某种方式采取行动。

另一方面，此处所指的意见构成程序中另一不同阶段的一部分。在此情况下，要由主管机构采取主动行动，请另一个机构发表意见。

第24节也是如此，其中规定，权力机构在组建后18月之内需向总理提交一份报

告，说明须采取哪些步骤使有关公开招标、特许权持有人以及商业经销公司的法规适应竞争原则。换句话说，权力机构在查明扭曲竞争的原因后必须就如何妥善管理这些部门提出直接的建议。

在意大利全国的生产中，公开招标、商业经销和特许权持有人的业务占很大比例。另外还有一些部门，共同体为扩大共同市场内的竞争已在这些部门采取了重要的主动行动。显然，第24节为权力机构规定的职能特别敏感和重要。

第22节规定了咨询权，其中允许权力机构在认为适当时或在有关公共机构或政府部门要求时就法规或条例以及有关竞争和市场的问题发表意见。总理也可请权力机构就某些法规或条例发表意见，这些法规或条例的直接作用是：

- 对活动或市场准入施加数量限制；
- 确立某些领域的专有权；
- 确定一般的定价惯例或销售条件。

这些意见仅供参考，没有约束力。不过，权力机构在认为适当时可出面干预。但在这种情况下按要求权力机构也应在保护竞争方面发挥十分重要的作用。

1.9 与执行此项法律有关的一些解释问题

与适用第287/90号法律有关的最敏感和复杂的问题在于如何解释关于滥用支配地位、合并和协议的规定。

此项法律中所提案件类别十分粗放和抽象，原因可能是要避免过于僵化或详细的竞争规定，因为这样的规定会迅速过时，而竞争这个领域又是极其易变的。但是，有必要十分明确和连贯地确定一套标准，据以查明和评估可扭曲竞争的情况。关于此法律标题一中规定之解释的第1节最后一部分之所以提及共同体模拟制度的原则(并且未言明地提及与之有关的判例法)，其原因就在于此。

1.10 市场力量和滥用支配地位

适用关于滥用支配地位的规定和管制合并需引入市场力量这一概念。最广义而言，市场力量是指一公司在足够长的时期内独立于其他公司而运作的可能性，例如，定价高于竞争对手，而其市场份额又无迅速大量减退的风险。

这种地位不同于垄断或半垄断的情况，它并不排除一定的竞争，但使保持垄断地位的公司即便不能决定也至少能在很大程度上影响竞争的操作方式，而且无论如

何都能在许多情况下不承担责任(Hoffmann La Roche, case 39)。

这些定义使得在确证是否存在市场支配地位方面留下了许多未决的问题。由于在理论上竞争状况完善的情况下无法保持这种地位，因此只能间接进行评估，即，分析数据、事实和情况，据以在具体案件具体处理的基础上取得充分的线索，从而合理地、非武断地推论公司在总体上不受制于有效切实的竞争一般都会带来的限制和节制因素。

欧共体委员会和欧洲法院在适用共同体法律时采取的就是这种办法。考虑的证据中最重要的是市场份额。然而，众所周知，市场份额这一简单的参比因素是确定支配地位的必要标准之一，但并非一律都能提供明确的答案。事实上，有关市场的界定应考虑到所有货物和服务，其质量和类型千差万别，对之可合理地推定存在有效的相互竞争，还要考虑到价格的交叉弹性，并且要顾及任何特定的地域特点。

除了市场份额的大小之外，另一些因素对于确证是否存在支配地位也很重要，第6(1)节规定禁止会导致形成或加强国家市场支配地位的合并，其中要求权力机构考虑是否有选择供应商和客户的可能性(显然要考虑本国和外国产品)，以及对进入市场设置战略壁垒的情况。参照所有这些标准，根据第3节，支配地位也可按全国领土内的较小区域加以判定，这些区域虽然较小，但对于有关产品在当地市场上的(绝对或相对)支配地位也很重要，此外还要看是否有特定的竞争条件表明当地市场不同于国内邻近地区的市场。不过，法律中提及的这些要点仍不足以客观地判断滥用支配地位的情况。从这个角度来看，应考虑到第3节中的禁例不是指支配地位本身，而是指一个具有支配地位的公司滥用市场力量。

这种滥用主要是指利用公司的市场力量企图获取以其他方式无法获得的经济好处的行为。从这个角度来看，属于非法的不仅仅是滥用实力地位的行为，还有某些本身合法但恰恰因为公司拥有市场支配地位而已构成限制的、产生限制作用的行动。以下情况就是如此：一公司拒绝出售正常条件下可接受的产品，而该公司的支配地位很强，从而使潜在的客户被排除在市场之外，或对市场销路或市场准入造成限制，损及消费者(参看Zoja, 1974年3月6日判决。以及 United Brands, 1978年2月14日判决)。

1.11 限制竞争自由的协议

第287/90号法律采用了广义的协议概念。第2(1)节把协议界定为个别公司--直接或通过相互之间的协会或财团--通过自愿限制各自在市场上的行动自由而调节其

作为的每一种企图，不论达成的承诺的形式特征和法律特点如何。

一般而言，法律似乎排除了属同一集团的各公司之间的协议，这是因为欧共体法院一再坚持的企业概念。据这种概念判断，集团被视为单一的经济单位，其中的成员公司虽各具独立的法人地位，但在决定市场行为方面没有真正的自主权，而是基本上仅遵从母公司的指示（参看Beguelin，1971年11月25日判决、Continental Can and Centrofarm，1974年10月31日判决）。根据第2(2)节，属禁止之列的是“意图或实际阻止、限制或在很大程度上扭曲国内市场或其相当部分竞争”的协议。对协议的意图或实际作用的两种提法表明禁令可适用于任何协议或任何协议中的一个条款，无论限制或阻碍是该协议的意图还是实际作用，只要是限制竞争就在禁止之列。事实上，既可根据这些要点的某一项决定禁止，也可根据这些要点的几项决定禁止。

不过，关于需以对竞争造成重大干扰才予禁止的规定限制了禁止的范围，即，规定扭曲必须是从整个市场来看程度很大的，换句话说，必须是足以影响市场运作的。

此外，欧共体委员会在1986年9月12日的决定中指出，罗马条约第85条的规定仅涉及“对市场条件具有明显影响的协议”，因此，禁例中不包括一系列按某些最低限度参数评判的协议，这些参数涉及构成协议主体事项的产品的市场份额（市场份额不高于5%）及有关公司的规模（营业额不超过2亿欧洲货币单位）。

不过，这并不意味着凡是超过这些限度的协议必定在禁止之列。正如委员会明确指出的那样，在某些情况下，公司之间达成的、超出限度的协议虽然也会影响成员国之间的贸易或竞争，但程度甚小，因此不在第85(1)条范围之内。

可以合理地设想，主要是在质量参数方面第2节的禁例不适用于公司之间旨在提高效率的合作和协议的唯一目的在于合理组织其活动的情况，因而有关公司完全可以自由地在市场上采取行动和开展竞争。

第2条所指禁例的例外是指某些协议或协议类别，它们不同于“无关的”协议或排他型合作协议，由于会限制竞争自由，因此应视为受到禁止。这些案件可能事实上需要由权力机构在此项法律第4节规定和涵盖的情况下作出特别批准。

第 2 章

该法律生效后头几个月里的活动

2.1 引言

在开始执行该项法律的头几个月里，该权力机构运用权力的情况可用该项法律所指的案件来表示。可以分为以下几种情况：监督合并(第5和第6节)，监督协议(第2节)，起草和要求提供意见(第20节)，报告(第21节)，提供咨询(第22节)。

在头几个月里，该权力机构主要做了组织方面的工作，其中包括为现有的工作人员寻找适当的办公用地和提供相应的设施条件。权力机构于1990年11月21日在工业部提供的地方开始工作，后来于1991年2月租下并搬到了罗马的Via Calabria 48号即现在的办公地址。

2.2 盘购与合并

该权力机构从建立时起就着手审查按该法律规定收到的来文。到1991年3月31日为止，共收到了与合并有关的74项来文。一些来文提到不止一项合并行动。

对来文进行审查是为了查明这些合并行动是否与共同体法律有关，如果有关，则提交欧共体委员会(参见第1(2)节)。然而，经审查之后，发现没有任何一项合并与共同体有关。对第16节所指的来文进行了分析，以便查明所述的合并行动是否限制了竞争，违反了该法律第6节规定的禁止。由于没有发现所述的任何合并行动具有扭曲竞争的作用，所以权力机构尚不认为有必要进行任何调查，并在法定时限内公布了所有的来文。

2.3 所审查的合并具有的特点

所审查的来文共涉及83起合并，其中47起是属于同一集团的公司之间的合并。到目前为止数量最多的合并是同一部门内的合并：83起中有63起。这一点在集团内合并中尤为明显。47起同一集团内的合并中只有8起是不同部门的公司的合并。

数量最多的合并涉及下列部门的公司：银行和金融中介机构，电动和电子设备工业以及化学工业。

就审查结果能说的第一点意见是，合并行动在各部门的分布很不平衡。一方面，上边所提到的三个部门占了所有合并的约50%，而在剩下的26个部门中，有14个部门根本没有出现任何合并。

在所审查的83起合并中有11起(其中9起是集团外的合并)合并涉及的公司在全国总生产或营业额不超过5,000亿里拉，而合并后产生的新公司的生产或营业额不超过500亿里拉。

就个别案件的分析结果而言，可以得出如下几点意见。首先，即使参加合并的具体公司没有超出法定的限额，但母公司所属的集团在意大利的总生产或营业额可能超出那些限额。另外，新公司的成立往往是专门为了购买其他公司的子公司或其股权，因此要知道它们的生产或营业额是不可能的。

2.4 通报合并所用格式的设计

第287/90号法律规定了向该权力机构提前通报合并的义务，但对如何通报，未置一词。该法律有好几处明确规定，通报的来文应按特定格式书写，应符合具体的要求。例如第16(4)节提到合并应“按特定程序通报”。此外，从第16(7)节规定的相反角度说，向权力机构提交的来文必须完整，准确和真实。

权力机构因此商定，必须系统性地提交对初步审查来说必不可少的所有资料，并决定设计一种普遍适用的专门格式，供拟通报合并的公司使用。

对于公司自己而言，确保资料准确无误也符合它们自己的利益，既可避免拖延，尽可能消除不确定性，又可避免受罚，因为一旦没有履行提前通报的义务就要受罚(第19(2)节)。此外，使来文一致，便可能采用检查来文的更高效的方法，工作可以更加透明。

权力机构在拟定来文的格式时，参照了共同体的经验，仿照了第4064/89号RRC条例所附载的格式。在第287号法律的纯粹国内适用范围方面，对共同体的格式进行了修订，并在很大程度上进行了简化，尽管随着经验的发展可以做一切必要的调整。

2.5 协议

到1991年3月31日为止，仅有两个协议案件由非直接当事者提请权力机构注意。其中一项协议是，拉丁姆石油制品商人协会敦促其会员(根据一个专门的价目表)按特定价格收费，对数量低于2,000升的石油制品也如此。

权力机构认为拉丁姆协会可能违犯该法律第2节，于是决定调查此事。为了获取进一步的材料，它召集了各有关方面，包括该部门内的同一类协会和经营者，以便估定市场标准价。

拉丁姆石油制品商人协会承认散发价目表是不利于竞争的行为，于是通知其会员价目表无效并作废，不具有任何参考意义。

2.6 按照第20节提出的意见以及与其他机构的关系

就与政府其他部门的关系而言，权力机构按照法律第20节，在涉及银行和保险公司的合并事情上，与ISVAP和意大利银行保持了密切的联系。

在头几个月活动期间，在涉及保险公司的合并时，权力机构按照第20(4)节规定，曾六次要求ISVAP提供意见。在这些合并上没有出现任何特别的问题，ISVAP也没有指出有任何扭曲竞争的情况。

与意大利银行的关系涉及第20节复杂微妙的规定。在这段时间里，权力机构就银行间的合并发表了四次意见。权力机构四次都没有发现竞争被扭曲的证据，并把意见提交意大利银行，该银行对权力机构的赞同性意见没有异议。

权力机构还与其他机构保持了联系。在涉及港口管理问题时与商航部进行了联系，在涉及拉丁姆石油制品商人协会时与CIP保持了联系。

在与共同体的关系上，权力机构向欧共体委员会派驻了代表。还任命了参加协议委员会和合并委员会会议的代表。

2.7 通报和咨询活动

法律第21和第22节授权权力机构向议会和政府通报竞争的扭曲情况，并就立法或条例以及与竞争和市场有关的问题发表意见。

权力机构在执行法律第9节的规定上使用了这些权力，第9节准许生产属于垄断目标或公共特许目标的任何商品或服务，但条件是须供自己使用，或供其母公司和

子公司使用。

更具体地说，权力机构收到三项申请，要求它承认为自己使用的生产权。申请涉及港口管理；从法律上讲港口管理是典型的垄断情形。三项申请涉及的是船舶的装卸、拖运服务以及鲜鱼的加工贮藏业务，这些属于当地港口公司的垄断业务。

这些申请都要求权力机构给予为己生产权并就港口公司为这些业务规定的收费标准采取行动。

权力机构指出，第9节准许任何打算为己生产的公司享有主观权利，即享有这样的法律地位：权利持有人可使用权利而不需要国家进行任何进一步的干预。因此，为己生产权是完全的，直接受到法律的保护，并在有人试图干扰此种权利的使用时受到法院的保障。

在这里，权力机构只是一个行政机构，显然不要求它象法院那样行动。更具体地说，权力机构指出，只有在下述个别情形下它才会专门干预：垄断者所采取的行动是对支配地位的滥用，违反了第287/90号法律。

但是，在有人就享受垄断地位的公司所收费用提出控告时，权力机构没有权力直接立即干预。这一点由权力机构正式提出来，它重申，在所审查的具体案件上，它无力采取所要求的行动，它不可能指明是否存在着为己生产的情形，或就垄断公司所收的费用采取任何行动。

有鉴于此，权力机构决定利用法律第21和第22节所赋予它的权力，即它有权报告任何竞争扭曲的情况，有权就立法或条例以及与竞争和市场有关的问题提出意见。

它因此通报议会，有必要立即制定有关港口的法律，确保第287/90号法律的精神和范围不受违犯，保障港口的自由竞争和市场的恰当运作，修订任何不再与一般意大利法律和共同体法律一致的条例。

政府已经向议会提交了一项法案(第3313号之三，众议院)，通过自1993年1月1日起废除《海运法》第110条来消除港口的垄断。对于此法案，权力机构指出，有必要确保尽早地消除这种垄断，即使在规定的日期之前。

关于有必要修改港口法律的问题，权力机构强调，需要审查定价标准，以便迅速地解除垄断。但是在这样做时须牢记一些根本的因素，如工人的尊严，工作的质量和数量，并需要考虑如何提高工人的积极性，提高本国港口服务的竞争力。

二、牙买加政府关于1993年“公平竞争法”的评论

- A. 该法律是配合政府经济改革和现代化政策的法律。其迅速演变的情况可归因于迅速的自由化、放开和私有化方案上。
该法案于1993年3月9日变成了法律，但直到1993年9月9日才生效。这是为了使公共教育方案能够继续，使工商企业有时间调整。
- B. 《公平竞争法》的目的是确保所有合法的企业能够参与日益增长的牙买加经济。它还一系列不公平做法上向消费者提供具体的保护。
政府已经在很大程度上放松了对经济的控制，让竞争力量得以发挥，但现在必须提供一个参照标准以便使人们按照竞争规则进行竞争。工商企业和消费者同样都要求有这样一个市场：企业可以公平地经营，人人能够按照制定出的透明的条例参与竞争。
- C. 该法律着重解决自由市场制度的行为性问题，而不是结构性问题。它将严格禁止一切形式的定价和维持再售价的做法。它将使协议中减弱竞争的一切规定都无效。它将防止滥用市场上的支配地位和限制市场的做法。它将限制排他性交易、操纵投标或串通投标。
在消费一方，《公平竞争法》将控制误导性广告、附带条件销售、廉价销售、超出广告声称价格的销售以及标双价做法。
- D. 该法律不仅适用于参与商品的生产者，而且适用于那些提供服务者。它也同样适用于政府部门，象适用于私人部门一样。它适用于影响牙买加市场的一切交易。
该法律有一些例外情形。例如，第3节规定以下组织或人不在规定范围内：工会为集体谈判而确立的安排，享有任何版权、专利权或商标权以及公平贸易委员会批准的任何安排或因之而存在的个人或工商企业。
- E. 该法律将由公平贸易委员会执行，该委员会将拥有广泛的调查权。它能够进入任何工商场所取走任何文件，能够传唤任何个人提供证词。还能够针对任何滥用市场支配地位或任何其他违法行为，裁定任何它认为适当的补救措施。它的立场可由最高法院判定通过罚款形式予以执行。该法律规定对一次违法的工商企业可最多罚款500万牙买加元，对一次违法的个人可罚款100万牙买加元。该法律还容许个人有权直接向最高法院提出对违反该法行为的起诉。

三、委内瑞拉政府关于1991年12月“促进和保护自由竞争法”的评论

A. 说明颁布该项法规的理由

《促进和保护自由竞争法》是1991年12月30日，值恢复《宪法》第96条中的经济保障之际而通过的。至少从1961年以来，对经济自由的保障一直受到限制，随着恢复这项保障，也有必要新制定一系列法律，包括上述法律。此外，在对经济活动的一系列控制和限制--包括大部分价格控制--取消之后，有必要使用一项法律工具惩罚试图妨害或限制经济自由的不正当行为。

B. 说明该法规的目标以及最初的法规颁布以来的演变情况

该法律的基本目标是通过保护自由竞争，对经济自由的行使加以管理。该法律力求“促进和保护自由竞争和有利于生产者 and 消费者的高效率；禁止可能妨碍、约束、歪曲或限制经济自由的享受的垄断或寡头做法以及其他手段。”

C. 说明受管制的惯例、行动或行为，并说明每一项的：

- (a) 管制类型，例如：明令禁止，原则上禁止，或具体案件具体审查；
- (b) 此项管制对《原则和规则》第3和第4段所列惯例、行动或行为的涵盖程度，以及任何可能受管制的其他惯例、行动或行为，包括专门用于保护消费者的管制办法--例如，关于误导型广告的管制办法--涵盖的其他惯例、行动和行为。

根据《促进和保护自由竞争法》第1号条例第7条，下列惯例、行动或行为受到明令禁止：

- (a) 竞争者之间出于以下目的的协议、决定、集体建议或协调一致的行动：
 - (一) 规定价格或销售条件；
 - (二) 规定数量或配额而限制生产；
 - (三) 通过诱使第三者拒绝提供货物或服务而抵制或阻碍别人进入市

场，阻碍使用别人的货物或服务，或拒绝向别人销售原料或其他投入因素；

(四) 参加投标；

(五) 对市场、地理区域、供应部门或供应来源进行分割。

(b) 构成市场力量滥用的单方面行为或做法。

根据上述条例第8条，经过批准可以开禁的做法是指那些有利于消费者或货物和服务的使用者，有利于增加参与者的经济效率的做法，但须符合下列条件：

(1) 有利于生产的改进，货物和服务的商业化和销售或促进技术或经济进步；

(2) 对消费者或使用者有利。

这类做法或活动应经过促进和保护自由竞争总监办公室的批准，并且在实际过程中须受到监督。批准令应含有实现设想目的的最低限度内容。下面按照第1号条例第16条试举一些这种做法的例子：

(a) 统一实施与一般商业条件有关的规则 and 标准，以及供应和支付条件；

(b) 为改进技术而进行的联合研究和联合开发；

(c) 为了合理化、规化和鼓励生产而实行的专业化以及实现此目标而达成的协议；

(d) 货物或服务的出口；

(e) 供应或购买排他性的特定产品的承诺；

(f) 对工业产权或知识产权包括专门技术在内的获得或利用规定或施加限制；

(g) 给予特许权。

误导型广告和其他不公平竞争都受到法律禁止。

D. 说明该法规的适用范围，示明：

(a) 是否对所有货物交易和服务交易一律适用，若非如此，则示明哪些交易不适用；

该法律适用于所有的货物和服务交易。没有基于特定经济因素的例外，但总监办公室1993年6月18日第0005/93号决议指出，竞争者之间协调一致的做法不影响下列情形下的有关市场行为：

(a) 对于用户根据产品的特性、价格和用途认为相同或相似的产品，当其

贸易量占总贸易量不超过15%时；

(b) 参加的企业年营业额不超过3,000万博利瓦时。

(b) 是否适用于无论发生在何处但在该国有影响的所有惯例、行动或行为；

该法适用于对该国产生影响的所有惯例、行动或行为，而不论发生在哪里。

(c) 是否取决于存在某项协议或取决于该协议生效。

只要存在限制竞争的协议，则这一事实便使竞争法适用，而不论其执行情况如何。

E. 说明执法机制(行政和/或司法机制)，示明是否订有通知协议和登记协议，以及(各)机构的主要权力。

负责执行该法律的行政机构是保护自由竞争总监办公室。根据该法第29条，它负有如下职责：

(a) 解决该法所指定的事项；

(b) 进行必要的调查以核实是否存在破坏竞争的做法，并就这种做法整理案卷；

(c) 确定是否存在受禁的做法或行为，公开谴责这种做法或行为，并按照法律施加惩罚；

(d) 采取必要的预防措施，避免受禁的做法产生有害影响；

(e) 在例外情形下准许这种做法；

(f) 向行政部门提出实施该法所必需的条例；

(g) 在司法或行政当局提出要求，就其职责范围内事项发表意见。

主管的司法当局是第一行政法院。

F. 说明任何平行的或补充性的法规，包括与其他国家达成的、涉及在限制性商业惯例领域开展合作式解决争端的程序的条约或谅解。

有关此事的基本法律是《促进和保护自由竞争法》及其第1号条例。《卡塔赫纳承诺》第285号决定也适用于委内瑞拉，该决定的第2条界定了其适用范围。

G. 说明行政和/或司法机构作出的主要决定以及涵盖的具体问题

1993年5月17日总监办公室就委内瑞拉 Federacion Farmaceutica 一案作出决定。该决定涉及一项“抵制”案。

1993年5月17日总监办公室作出决定，对 Premezclado y Prefabricados de Concreto S.A. (Pre-Mex), Premezclados Tucon, C.A., Mezcladora Mixto-Listo Consolidada, C.A., Venmar, C.A. (Venmarca) 以及 Premezclados Avila, C.A. 实行罚款。这项决定主要涉及在上述企业之间存在着价格协议的情况。

第一行政法院尚未作出任何司法裁决。

H. 简明的文献目录，列出法规和主要决定的出处，以及政府的解释性出版物、或法规或其中的具体章节。

无。

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.

Rules for the Protection of Competition and the Market

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

Rules for the Protection of Competition and the Market

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:

Rules for the Protection of Competition and the Market

- 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 AUTHORITY

ARTICLE 10

Authority 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.

Rules for the Protection of Competition and the Market

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

Rules for the Protection of Competition and the Market

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. Furthermore, 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.

Rules for the Protection of Competition and the Market

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.

Rules for the Protection of Competition and the Market

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.

Rules for the Protection of Competition and the Market

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.

Rules for the Protection of Competition and the Market

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 distortions 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

Rules for the Protection of Competition and the Market

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

Rules for the Protection of Competition and the Market

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 paragraph 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-

Rules for the Protection of Competition and the Market

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 the 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 fulfils 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 within 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-

Rules for the Protection of Competition and the Market

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 Savings 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. Distrainment 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

Rules for the Protection of Competition and the Market

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

1. Short title.

PART I. Preliminary

2. Interpretation.
3. Application of Act.

PART II. The Fair Trading Commission

4. Establishment of Commission.
5. Functions of the Commission.
6. Commission shall seek information.
7. Powers of the Commission.
8. Hearings to be held in public.
9. Minister may give directions.
10. Powers of entry and search, etc.
11. Discontinuance of investigation.

Financial Provisions, Accounts and Reports

12. Funds of Commission.
13. Accounts and audit.
14. Reports.

Appointment of Staff

15. Appointment of Executive Director, Secretary and other employees.
16. Pensions, gratuities and other retiring benefits.

PART III. *Control of Uncompetitive Practice*

17. Provisions of agreement having effect of lessening competition.
18. Agreements containing exclusionary provisions void.
19. Existence of dominant position.
20. Abuse of dominant position.
21. Action in relation to abuse of dominant position.

PART IV. *Resale Price Maintenance*

Collective Resale Price Maintenance

22. Collective agreement by suppliers prohibited.
23. Collective agreement by dealers.
24. Application of sections 22 and 23 to associations.

Individual Minimum Resale Price Maintenance

25. Minimum resale price maintained by contract or agreement.
26. Patented goods under section 25.
27. Maintenance of minimum resale prices by other means.
28. Interpretation.

PART V. *Authorizations.*

29. Grant of authorizations.
30. Effect of authorization.
31. Revocation of authorization.
32. Register of authorizations.

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

33. Exclusive dealing.

PART VII. *Offences against Competition*

34. Price fixing.
35. Conspiracy.
36. Bid-rigging.
37. Misleading advertising.

38. Representation as to reasonable test and publication of testimonials.
39. Double ticketing.
40. Sale at bargain price.
41. Sale above advertised price.
42. Obstruction of investigation.
43. Destruction of records, etc.
44. Giving false or misleading information to Commission.
45. Failure to attend and give evidence.

PART VIII. Enforcement, remedies and appeals.

46. Application for enforcement.
47. Power of Court.
48. Civil liability.
49. Appeals against finding of Commission.
50. Operation of Order pending determination of appeal.

PART IX. General

51. Exemption from income tax, stamp duties, transfer tax and customs duty.
52. Regulations.
53. Powers of Commission to prohibit disclosure of information, documents and evidence.
54. Application to the Crown.
55. Transitional.

SCHEDULE.

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, short title. 1993.

PART I. Preliminary

Interpreta-
tion.

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,

The Fair Competition Act, 1993

[No. 9]

3

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 acquisition 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 commonsense, 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.

3. Nothing in this Act shall apply to—

Application
of Act.

- (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.

6

[No. 9]

The Fair Competition Act, 1993

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;

The Fair Competition Act, 1993

[No. 9]

7

- (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.

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.

Commission shall seek information.

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

Power of the Commission.

- (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.

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.

Discontinu-
ance of
investiga-
tion.

(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

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

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

Funds of
Commis-
sion.

10 [No. 9] *The Fair Competition Act, 1993*

- (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 agree-
ment
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 indispensable 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.

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

**Agreements
containing
exclusionary
provisions
void.**

- (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.

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—

Action in relation to abuse of dominant position.

(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 sup-
pliers pro-
hibited.

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.

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

Collective
agreement
by dealers.

- (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.

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

Applica-
tion of
sections
22 and 23 to
associations.

- (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

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.

Minimum
resale price
maintained
by contract
or agree-
ment.

(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.

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—

Maintenance of minimum resale prices by other means.

- (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.

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

Interpretation.

- (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.

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. Grant of authorization.

(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.

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. Effect of authorization.

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

- (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
authori-
zations.

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

26. [No. 9]. *The Fair Competition Act, 1993*

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.

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—

Double
ticketing.

- (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.

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

Sale at
bargain
price.

- (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.

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.

Obstruction
of investi-
gation.

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,

Destruction
of records,
etc.

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.

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

Giving false
or mislead-
ing infor-
mation to
Commis-
sion.

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.

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

Civil
liability.

- (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
Commis-
sion.

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
determina-
tion 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

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

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

(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.

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—

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.

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.

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

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

36 [No. 9] *The Fair Competition Act, 1993*

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.

Transi-
tional.

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

- 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. Constitution of Commission.
- (2) The Executive Director shall be a member *ex officio* of the Commission.
- 2.—(1) The members referred to in paragraph 1 (1) shall be appointed by the Minister by instrument in writing. Appointment of directors.
- (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.
3. The Minister shall appoint one of the members of the Commission referred to in paragraph 1 (1) to be chairman thereof. Chairman.
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. Acting appointments.
- 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. Resignations.
- (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.
6. The Minister may terminate the appointment of any member other than Executive Director if such member— Revocation of appointments.
- (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.
7. The names of all members of the Commission as first constituted and every change of membership shall be published in the *Gazette*. Gazetting of appointments.

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—

The Fair Competition Act, 1993

[No. 9]

39

- (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.

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 Commis-
sion.

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.

Protection
of members.

(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.

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.

Remunera-
tion of
members.

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.

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

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 República

Ley para Promover y Proteger el Ejercicio de la Libre Competencia.

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 prohíben 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 prohíbe 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 prohíben 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 ellas 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 ellas 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 ella;
- 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 ellas; 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 ellos 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:

2º 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

3º 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:

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

2º 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

3º 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:

1º 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;

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

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

4º 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 periodos.

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 periodo.

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:

1º 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;

2º 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;

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

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

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

6º 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 ellas 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.

Quando 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. 1.000.000,00), a aquellas personas que no cumplan las órdenes contenidas en las resoluciones dictadas por ella, 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. 3.000.000,00), 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 ellas sólo podrá interponerse, dentro del término de cuarenta y cinco (45) días continuos, 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

Subscripción anual: Bs. 6.000,00 - Valor de cada ejemplar diario: Bs. 40,00

Ejemplares atrasados 30 por ciento de recargo.

Números Extraordinarios: Bs. 80,00 cada ejemplar hasta 32 páginas

Tarifa sujeta a Resolución Nro. 20 de fecha 28 de diciembre de 1990

Publicada en la Gaceta Oficial Nro. 34.624

Esta Gaceta contiene 8 páginas - Precio: Bs. 80,00

IMPRENTA NACIONAL Y GACETA OFICIAL

San Lázaro a Puente Victoria No. 89

Teléfonos: 572.03.57. - 576.12.72

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 ellas.

...da, firmada y sellada en el Palacio Federal Legislativo, en Caracas, a los 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

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 números extraordinarios siempre que fuere necesario; y deberán insertarse en ella sin retardo los actos oficiales que hayan de publicarse.

Parágrafo Único.—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.

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 if 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 Sustanciación] 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

XX XX XX XX XX