FAIR TRADING COMMISSION OF SEYCHELLES GUIDELINES ON HORIZONTAL AND VERTICAL RESTRICTIVE BUSINESS PRACTICES

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1. INTRODUCTION:

Section 126 and 127 of the Fair Trading Act 2022, prohibits agreements, decisions or concerted practices between enterprises, which are considered restrictive within the definition of these sections, unless they are excluded as per the Act.

Various forms of agreements, decisions or concerted practices are covered in the two sections, but all essentially amount to business practices that directly prevent competition, thus eliminating the benefits that free competition provides to consumers and the economy more generally. In common with competition agencies worldwide, therefore, the Fair Trading Commission (hereinafter referred to as "the Commission") sets a very high priority on enforcement of the prohibition on restrictive business practices.

Enterprises in Seychelles are therefore strongly advised to avoid intentional breaches of these sections of the Act, and to seek legal or other expert guidance on any aspects of their business that might inadvertently breach the provisions. The Commission will expect businesses to have reviewed their practices to ensure compliance with the law in this regard.

Enterprises engaged in restrictive business practices are encouraged to come forward as any enterprise found to be engaged in the aforementioned practices may be fined with a penalty by the Tribunal.

The guidelines also set out some of the factors and circumstances which the Commission may consider in determining whether agreements significantly restrict competition. They indicate the manner in which the Commission will interpret and give effect to the provisions of the Act when assessing agreements between enterprises. An enterprise may also seek guidance if the elements in the guidelines are not well understood.

2. GENERAL APPROACH TO RESTRICTIVE HORIZONTAL AND VERTICAL BUSINESS PRACTICES

The Act defines agreement very broadly to include "*any arrangement or understanding, whether oral or in writing, or whether or not, it is or is intended to be legally enforceable*"

Agreements under the Act have a wide meaning or interpretation. All that is required is that the parties arrived at a consensus, an understanding, on the actions each party will, or will not take. The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation does not mean that it is not a party to the agreement.

The prohibition of restrictive business practices applies equally to agreements between sellers to fix prices to customers, and agreements between buyers to fix prices at which they purchase from suppliers. These agreements are prohibited in the law and the Tribunal may impose a financial penalty.

Enterprises may be in breach of the Fair Trading Act 2022, if it is shown through their concerted practices they have engaged in the prohibited conduct as set out in the Act. The term concerted practice refers to "*co-operative or coordinated conduct between enterprises, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement*."

3. HORIZONTAL RESTRICTIVE BUSINESS PRACTICES UNDER SECTION 126 OF THE FAIR TRADING ACT 2022

The above section of the Act provides an illustrative list of such agreements, decisions or concerted practices between competitors which include;

a) directly or indirectly fixing a purchase or selling price or any other trading condition
b) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services
c) limiting or controlling production, market outlets or access, technical development or investment
d) collusive tendering or bid rigging

Directly or indirectly fixing the selling ('Price fixing') or purchase prices or any other trading condition:

Price Fixing

Price fixing is an agreement between enterprises at the same level in the market to buy or sell a product/service only at a fixed price or to maintain market conditions such that the price is maintained at a given level by controlling supply and demand. There are many ways in which prices can be fixed. For example, the agreement may involve either the price itself or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.

Price-fixing might also take the form of an agreement to restrict price competition. This may include, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors, or not to charge less than any other price in the market. An agreement might restrict price competition even if it does not entirely eliminate it. Competition might, for example, be restricted despite the ability to grant discounts or special deals on a published list price or ruling price.

An agreement might also constitute price fixing by indirectly affecting the prices to be charged. It may cover the discounts or allowances to be granted, transport charges, payment for additional services, credit terms or the terms of guarantees, for example. The agreement might relate to specific charges or allowances or to the ranges within which they fall or to the formulae by which prices or ancillary terms are to be calculated.

Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services:

Enterprises might agree to divide markets for goods or services, whether by territory, type or size of customer or in some other ways. Such agreements are also prohibited under the Act. This prohibition applies equally to agreements between sellers to share markets and agreements between buyers to share sources.

Limiting or controlling the supply of goods or services to, or the acquisition of them from, any person:

An agreement which restricts the supply or acquisition of goods or services in the form of fixing production levels or quotas or dealing with structural overcapacity will be regarded as collusive if it restricts, prevents or distorts competition significantly. If two enterprises were, for example, to agree to restrict their production capacities, refrain from producing as much as they would independently, or divert production into other markets (for example, overseas), such an agreement might be considered collusive, creating an artificial scarcity of the goods and driving up the price.

The Commission does not need to observe price effects to form a view that such a restriction of supply constitutes a prohibited collusive agreement. Such a restriction of supply might emerge only over the long term, and still be regarded as a prohibited collusive agreement. For example, agreements to limit technical development would normally be considered collusive, as would agreements to limit capacity or otherwise restrict investment.

Similarly, agreements between buyers to keep prices down by restricting purchases can also be regarded as collusive if they restrict, prevent or distort competition significantly.' For example, agreements between retailers to restrict opening hours would be prohibited.

Collusive tendering or Bid Rigging:

Bid rigging is a collusive agreement that occurs when bidders agree among themselves to eliminate competition in the procurement process. Bid rigging is the way that conspiring competitors effectively raise prices where purchasers – often but not necessarily government – acquire goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bid process. It is not necessary for all bidders to participate in the conspiracy.

Types of Bid Rigging

Bidders can eliminate competition in public procurement in many ways. For example:

- Bid Suppression occurs when some of the conspirators agree not to submit a bid so that another conspirator can successfully win the contract.

- Complementary Bidding (also known as cover or courtesy bidding) occurs when one of the conspirators agrees to submit a bid that either is too high to be accepted or contains conditions that they know to be unacceptable to the agency calling for the bids. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

- Bid Rotation occurs when the bidders take turns being the designated successful bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator company. A strict bid rotation pattern suggests collusion is taking place.

Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder.

The Commission will not necessarily always classify any bid-rigging scheme it finds into these forms but has described them briefly to explain what form of evidence it might seek when investigating bid-rigging.

Note that agreements between bidders and employees of the purchasing body are unlikely to be regarded as breaches of the Fair Trading Act 2022, although they may well be offences under other statutes (especially those dealing with ethics). For example, it would not normally be a matter for the Commission if a more expensive bid was selected in a tendering process over a more attractive lower bid, or if some bidders have more information from the buyer than others.

It is presumed that an agreement or a concerted practice outlined in section 126(1) of the Fair Trading Act 2022 exists between two or more enterprises, if;

(a) any one of those enterprises owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and
(b) any combination of those enterprises engages in that restrictive horizontal practice.

However, the presumption created may be rebutted, if an enterprise or a director or shareholder concerned establishes that a reasonable basis exists to conclude that any practice in which any of the enterprises engaged in was a normal commercial response to conditions prevailing in the market.

4. AGREEMENTS, DECISIONS OR CONCERTED PRACTICES THAT HAVE THE OBJECT OR EFFECT OF PREVENTING, RESTRICTING OR DISTORTING COMPETITION

Notwithstanding the above-mentioned, the Act also prohibits any agreement between, or decision or concerted practice by, enterprises in a horizontal relationship, or an association of enterprises, in the same market that has the object or effect of preventing, restricting or distorting competition in a market, unless a party to the agreement, decision or concerted practice can prove that any technological, efficiency, or other pro-competitive or public interest gain resulting from it outweighs that effect.

Where it is shown that the object of the agreement is to restrict competition, the onus will be on the parties to the agreement, decision or concerted practices to defend it and to establish that it meets the criteria for exemption in Section 126 (1) (b) of the Fair Trading Act 2022.For example, an enterprise may be exempted from prohibition if the agreement contributes to improving the supply or production of goods or services while allowing consumers to also benefit from this agreement.

Section 126 (1) of the Fair Trading Act 2022, does not apply in respect of an agreement or a concerted practice engaged in by

(i) an enterprise and its wholly owned subsidiary or a wholly owned subsidiary of that subsidiary enterprise or

(ii) other enterprises within a single economic entity similar in structure to those in (i).

The various legal entities belonging to the same single economic unit are not considered as independent enterprises. In assessing whether a subsidiary is independent of, or forms part of the same economic unit with its parent, the Commission will assess whether the parent can, and does in fact, exercise decisive influence over the subsidiary with the result that the latter does not enjoy 'real autonomy' in determining its commercial position on the market.

Some of the factors that the Commission may consider in its assessment include:

a) the parent's shareholding in the subsidiary;
b) whether or not the parent has control of the board of directors of the subsidiary; and
c) whether the subsidiary complies with the directions of the parent on sales and marketing activities and investment matters.

Corporate Immunity Policy

Price-fixing, market-sharing and output-restricting agreements, also called cartels, are the most harmful anticompetitive practices and difficult to detect because they are kept

hidden most of the time. Due to the secret nature of these practices, enterprises participating or which have participated in them should be given an incentive to come forward and inform the Commission of the cartel's activities. The benefits of granting corporate immunity to enterprises which cooperate with the Commission outweigh the benefits arising from fully enforcing financial penalties on those enterprises.

As Corporate Immunity initiatives have been found to be effective in other competition regimes, a similar initiative has been adopted for the Commission's enforcement strategy. Enterprises which come forward with information that enables or assists the Commission to determine that a breach has taken place under section 126 (1) (a) of the Fair Trading Act 2022, may receive substantial reductions in, or complete immunity from, financial penalties levied by the Tribunal for that cartel activity.

Quality of information provided by an enterprise

As a minimum to meet the conditions for corporate immunity treatment by the Commission, the information provided must be such as to provide the Commission with sufficient basis for taking forward a credible investigation or to add significant value to the Commission's investigation. In practice this means that the information is sufficient to allow the Commission to exercise its formal powers of investigation or genuinely advance the investigation.

Confidentiality

An enterprise coming forward with evidence of cartel activity may be concerned about the disclosure of its identity as an enterprise that has volunteered information. The Commission will therefore endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of such enterprise confidential throughout its investigation.

In accordance with Section 29 of the Fair Trading Act 2022, disclosure of information will only be possible if consent is received in writing by the either the Chairperson of the Tribunal or the Chief Executive Officer as the case may be.

Procedure for Corporate Immunity

An enterprise that wishes to take advantage of the immunity highlighted in these guidelines must contact the Commission. Anyone contacting the Commission on the enterprise's behalf must have the power to represent the enterprise.

Initial contact can be made by telephone or email. Upon such application, the Commission shall, within 7 days of the application having been made, respond in writing and acknowledge the receipt of the application for Corporate Immunity and specify the way the application has been received by the Commission.

In the event of a dispute as to whether an application for Corporate Immunity was made, the acknowledgment letter of the Commission shall be conclusive evidence of such application.

The enterprise making a Corporate Immunity application should immediately provide the Commission with all the evidence relating to the suspected breach available to it at the time of the application for leniency.

Effects of Corporate Immunity

Corporate Immunity does not protect the enterprise from the other consequences of breaching the Fair Trading Act 2022.

Note that further information is provided in the Fair Trading (Corporate Immunity) Policy 2022

5. VERTICAL RESTRICTIVE BUSINESS PRACTICES

Vertical business practices are business practices entered into between two or more enterprises operating at different levels of the production or distribution chain. Vertical business practices may lead to significant efficiencies, especially when the supplier does not have significant market power. However, when these vertical business practices reduce the level of inter-brand (competition between different brands) or intra-brand (competition between the same brand sold in different outlets) competition significantly, they may be anti-competitive and ultimately prohibited under the Fair Trading Act 2022. As per Section 127 (1) of the Fair Trading Act 2022, "*an agreement, decision or concerted practice, by enterprises in a vertical relationship, is prohibited, if it has the object or effect of preventing, restricting or distorting competition in a market*".

Similar to Section 126 (1)(b) of the Fair Trading Act 2022, the Commission will assess the business practices on its objective meaning and aims of the aforementioned. The notion of "restriction of competition by object" refers to certain forms of coordination between enterprises that can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. Although it is not necessary to prove the parties' subjective intent to prevent, restrict or distort competition, evidence of the existence of such intent is a relevant factor to take into consideration.

Further to the above, Section 127(1) of the Fair Trading Act 2022, will not apply if a party to the agreement can prove any technological, efficiency or other pro-competitive gain resulting from the agreement that outweighs that effect.

6. EXAMPLE OF RESTRICTIVE VERTICAL BUSINESS PRACTICES

Resale Price Maintenance

Resale price maintenance is a restriction of the retailer's ability to determine its resale price. Most suppliers sell their products to the final consumer indirectly through a network of retailers. Resale Price Maintenance is a practice whereby the retailer is required to sell the supplier's product at certain prices, at or above a price floor (Minimum resale price maintenance) or at or below a price ceiling (maximum resale price maintenance). Resale price maintenance increases price transparency on the market, which may facilitate collusion, and eliminate intra-brand price competition. Both Minimum resale price maintenance and minimum resale price maintenance are prohibited under the Fair Trading Act 2022.

A supplier can however recommend a minimum resale price to a reseller, provided that the recommendation is not binding. Where a resale price appears on a good whereby the supplier has recommended a minimum/maximum resale price, the reseller needs to ensure that the words "recommended price" appear next to the resale price.

Single Branding

Single branding refers to vertical agreements whereby the buyer is obliged to procure all or most of its requirements for a particular product from a single supplier. Single branding agreements may have restrictive effects on competition. The possible competition risks of single branding are foreclosure of the market to competing suppliers/potential suppliers and softening of competition. Single branding may also facilitate collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition. All these restrictive effects have a direct impact on inter-brand competition.

When assessing the effects of single branding on competition, the Commission will look at the market position of the parties vis-à-vis their competitors to ascertain anticompetitive foreclosure and other effects. Anti-competitive foreclosure is less likely in the market for intermediate products as buyers of inputs are less reliant on brands.

Exclusive Distribution

Exclusive distribution means vertical agreements whereby the supplier agrees to sell a particular product to only one distributor in a particular area/ district or to a particular group of customers. Exclusive distribution may result in an anti-competitive effect if the supplier has a significant market power which may reduce or eliminate intra-brand

competition, lead to market partitioning, facilitate price discrimination, soften competition and facilitate collusion in a scenario where there are many suppliers involved in exclusive distribution of substitutable products.

Selective Distribution

Selective distribution means vertical agreements whereby the supplier appoints authorized distributors based on predefined selection criteria. The restriction imposed by selective distribution is two-fold: restrictions on the number of authorized distributors and a restriction on the possibility of resale to non-authorized distributors. Selective distribution may stifle intra- brand competition, soften competition, facilitate collusion between suppliers and buyers and precipitate market foreclosure. The risk of anticompetitive effects is greater where the supplier has significant market power so that inter-brand competition is weakened as well.

Exclusive Supply

In these vertical agreements, the supplier is obliged or induced to sell the contract products only to one buyer in general or for a particular use. Exclusive supply may lead to the foreclosure of competing buyers. The duration and the portion of the affected market are therefore important factors to consider, as well as entry barriers and suppliers' countervailing power. The assessment of anti-competitive foreclosure on exclusive supply will consider the market power of the buyer on the upstream purchase market, and the duration and extent of the application of the obligation. The market position of competing buyers on the upstream market is also important to the determination of the possibility of foreclosure. Entry barriers at the supplier level are important to establish the extent to which alternative suppliers can enter the market.

Further, it is vital to assess the countervailing power of the supplier as important suppliers may not succumb to the scenario of being cut off from alternative buyers. Foreclosure, in this arrangement, becomes a problem where there are weak suppliers and strong buyers. Additional factors such as the level of trade and nature of the product also need to be taken into account as foreclosure is less likely in the market for intermediate products and homogeneous products.

7. AUTHORISATION FOR RESTRICTIVE BUSINESS PRACTICES

An enterprise that proposes to enter into or carry out an agreement or to engage in a business practice which, in its opinion, is an agreement, or practice affected or prohibited by Section 126-127 of the Fair Trading Act 2022, may apply to the

Commission for an authorisation to do so according to Section 128 of the Fair Trading Act 2022.

The application needs to be made in the prescribed form[1] and accompanied with such information as may be prescribed or as the Commission may reasonably require. Where it is satisfied that the agreement or practice is likely to promote public benefit and is reasonable in the circumstances, the Commission will recommend to the Tribunal to grant an authorisation. The Tribunal may grant an authorisation, subject to such terms and conditions as the Tribunal considers fit and for such time as it may specify.

Before granting or refusing an authorisation, the Tribunal will give notice to the interested persons to submit any written representations on the application for authorisation within 30 days of the notice,

[1] Annex: Form for Authorisation