PROHIBITED ANTI-COMPETITIVE AGREEMENTS

ENSURING THE BENEFITS OF FAIR COMPETITION
ENSURING THE BENEFITS OF FAIR COMPETITION (Brochure No.4)

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“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.” (Adam Smith, “An Inquiry into the Nature and Causes of the Wealth of Nations”, 1776)

Under the Law on the Protection of Competition (as amended), agreements between two or more independent enterprises are prohibited. Also prohibited are decisions made by business associations and any concerted practices, the purpose or effect of which is to significantly disturb or limit market competition on a particular market. This does not go as far as presuming (as per Adam Smith above) that all contact between competing enterprises amounts to a conspiracy against consumer welfare. However, if independent enterprises or business associations do act to disturb competition or try to do so, those actions are illegal and may expose the firms or associations concerned to significant administrative penalties and civil damages claims by those directly affected.

In basic terms, enterprises may sometimes act to distort competition by cooperating with their competitors, by fixing prices or dividing the market up so that each enterprise has a monopoly or near-monopoly in part of the market. In addition, anti-competitive agreements can be open or secret (e.g. cartels). They may be written down (either as an “agreement between companies” or in the decisions or rules of professional associations) or take the form of less formal arrangements.

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1 Law on the Protection of Competition (No.03/L-220) of 2010 as amended by the Law amending and supplementing the Law on the Protection of Competition (No.04/L-226) of 2014.
Prohibited agreements

The Law provides that the specific types of agreements between enterprises or decisions by business associations are prohibited (unless exempted by law or a decision of the Authority). Accordingly, agreements or decisions are generally anti-competitive if they:

- directly or indirectly impose purchase or sale price or any other conditions on trade;
- limit or control production, the market, technological development and investments;
- share markets or supply sources;
- implement unequal conditions for similar transactions with other enterprises (consequently placing them in an unfavourable competitive position);
- apply conditions for contracts to rely on other contracting subjects, through supplementary conditions that do not have any natural or common trade practice connection to the purpose of such contract.

This list is not exhaustive. On the other hand, some agreements may be exempt from prohibition if they have a positive effect on consumer welfare and on the market for other reasons (see below).

Agreements to fix prices are particularly damaging to competition and the interests of consumers. Price fixing can take the form of an agreement (written, verbal, or inferred from conduct) between competitors that raises, lowers, or stabilises prices or competitive terms. Generally, the Law requires that each enterprise establishes prices and other business terms on its own, without agreeing with these with competitors. The prohibition not only covers direct price cooperation, but also agreements that indirectly fix prices. It is irrelevant whether undertakings cooperate directly with each other or indirectly through, for example, a buying organisation or a professional association.

Some further examples include the following:
- **Pay-for-Delay** – an agreement between a brand drug manufacturer and a would-be generic competitor to delay the release of a generic version of the branded drug, depriving consumers of lower-priced generics.

- **Bid-Rigging** – competitors agree in advance who will submit the winning bid during a competitive bidding process.

- **Limiting output.** This may be the effect of firms concluding e.g. specialisation agreements, joint production agreements, exclusive agreements or patent licensing agreements.

- **Market Division** – an agreement between competitors not to compete within each other’s geographic territories.

- **Group Boycotts** – two or more competitors agree not to do business with a specific person or company.

- **Exclusive Dealing Arrangements** – an agreement that a buyer will only buy exclusively from a particular supplier.

- **Price Discrimination** – charging different prices to similarly situated buyers.

- **Tying** – when a company makes the purchase of an item conditioned on buying a second item.

A decision by a business association may be prohibited also e.g. where the regulations of a trade association give associations the power to determine how enterprises should conduct themselves on the market or where the association facilitates the sharing of information about the behaviour of competitors.
**Exempted agreements**

The fact that an agreement is actually or potentially restrictive of competition does not mean that it is automatically prohibited (unless it is a hard-core cartel, see below). It may be that an agreement which appears to fall within the prohibition of Article 4 of the Law is excluded or exempted from the competition rules. For example, agreements may be allowed if they:

- have more positive than negative effects;
- are not concluded between competitors
- involve enterprises with only a small combined share of the market;
- are necessary to improve products or services, develop new products or find new and better ways of making products available to consumers.

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**Some Examples**

- **Research and development agreements** and **technology transfer** agreements are often acceptable under the Law, because some new products require expensive research that would be too costly for one enterprise working alone. Agreements on joint production, purchasing or sales, or on standardisation, may also benefit from exemption from prohibition under the Law.

- **Distribution agreements** may be illegal, for example, if producers force retailers to decorate the shop or train staff in a particular way. But they may be allowed if the aim is to provide a suitable environment for storing or selling the product, to provide customers with personalised advice, or to prevent one distributor from unduly benefiting from a competitor's promotional efforts. Each case must be assessed individually – taking account of the market position of the companies involved and the amounts involved.
Accordingly, prohibited agreements under Article 4 the Law may be exempted under Articles 5 to 8 of the Law.

Article 5 concerns “horizontal agreements”\(^2\) or firms competing at the same level on the market (e.g. two manufacturers). It provides that these may be exempted from prohibition (especially where their purposes concern the rationalisation or specialisation of economic activity leading to greater economic efficiency in the market e.g. via research and development of products or processes, the joint purchase or sale of products from one single source). However, this exemption will only apply where it is properly justified, the market benefits (especially for consumers) are real and the impact on competition is relatively minor.

Similarly, Article 6 provides that “vertical agreements” (e.g. between a manufacturer and a distributor) may be exempted from prohibition (especially where the purpose of the agreement is ensure the protection of specific technology or the efficiency of distribution). As with horizontal agreements, this exemption will only apply where it is properly justified, the market benefits (especially for consumers) are real and the impact on competition is relatively minor.

Article 7 has similar provisions concerning the licensing of industrial property (e.g. patent licensing agreements).

Article 7A of the Law allows for so-called “block exemptions”. Accordingly, if certain agreements meet pre-set conditions (i.e. \textit{conditions which agreements must contain and restrictions or conditions that such agreements must not contain}), they are automatically exempt from prohibition. This has been further elaborated by a series of sub-legal acts under the Law:

- \textit{Administrative Instruction No. 02/2017 on Block Exemptions of Horizontal Agreements of Entrepreneurs};

\(^2\) Broadly for the purposes of the competition law, agreements between enterprises in the markets may be classified as either horizontal or vertical. 
\textit{Horizontal agreements} are those between competitors, i.e., entities at the same level of distribution. \textit{Vertical agreements} are those between enterprises at different levels of the chain of distribution, such as between a manufacturer and a distributor, or between a wholesaler and a retailer.
- Administrative Instruction No. 03/2017 on Block Exemptions of Vertical Agreements of Entrepreneurs;
- Administrative Instruction No. 04/2017 on Block Exemption of agreements in the transport sector;
- Administrative Instruction No. 05/2017 on Block Exemption of agreements in the insurance sector;
- Administrative Instruction No. 06/2017 on Block Exemption of Motor Vehicle distribution and service agreements;
- Regulation No. 02/2019 on categories of Specialisation Agreements;
- Regulation No. No. 01/2019 on certain categories of Research and Development Agreements;

However, if during an assessment procedure by the Authority of any agreement it is concluded that the agreement has effects which are contrary to the conditions provided in Article 5, 6 and 7 of the Law, the Authority is required to revoke the block exemption in respect of that agreement.

Article 8 deals with agreements which would otherwise be prohibited by Article 4 of the Law but which can be assumed to be harmless because the parties have market shares sufficiently low that there can be no real effect on competition or trade. Normally, cooperation between enterprises must affect competition to an appreciable extent in order for it to be prohibited. The market share and size of the cooperating partners are important when making this assessment. Moreover, cooperation between small or medium-sized undertakings, where the products affected by the agreement comprise a small proportion of the relevant market, normally falls outside the prohibition.

Accordingly, the Law exempts small value agreements which are generally defined as agreements where joint participation in the market is not significant and does not disturb competition. Details of what constitutes a “small value agreement” are set out in Administrative Instruction No. 05/2012 on the criteria and terms for
determining Small Value Agreements. In particular, a small value agreement is defined as an agreement in which the common participation of the participants in the market of the parties to the agreement and enterprises under their control is not sensitive because the market share in the relevant market does not exceed 10% (where the agreement is between competitors) or 15% (where the agreement is between enterprises which are not actual or potential competitors in the relevant market).

Finally, even if an agreement does not fit precisely within the rules of Articles 5 to 8 of the Law, it is still not automatically unlawful or unenforceable. An agreement may be individually exempted on the grounds that the restrictions of competition are outweighed by its beneficial effects. Thus, Article 9 allows the Authority to consider applications to have individual agreements exempted from Article 4 of the Law. In considering these, the Authority takes the conditions relevant to Articles 5 to 8 into account and may approve the exemption (with or without conditions) or refuse it. Normally, an individual exemption will be subject to a time limit of up to 3 years and may be withdrawn if market conditions substantially change or if the exemption is being abused.
**Cartels**

Cartels are the most serious form of anti-competitive behaviour between competitors because they involve a deliberate attempt to destabilise the market and impede competition. The term cartel is generally used to describe any informal association or arrangement involving two or more competing enterprises. In a cartel, the members discuss and exchange information about their businesses or reach agreements about their future conduct, with the intention of limiting competition between them and increasing their own prices or profitability.

Cartels are generally conducted covertly and will inevitably involve one or more of the "hard-core" restrictions of competition law: price-fixing, bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market-sharing. Therefore, they will, almost certainly, be found to have a negative effect on competition and to have no countervailing benefits. Accordingly, the actions of a cartel will always be illegal under the Law and will not meet the criteria for any exemption.

Clearly, enterprises in cartels that control prices or divide up markets are protected from competitive pressure to launch new products, improve quality and keep prices down. Thus, consumers end up paying more for lower quality. Moreover, cartels can make goods and services completely unavailable to some purchasers and unnecessarily expensive for others.
Consequences of infringements

Prohibited agreements or decisions can have serious consequences for an enterprise:

- firms engaged in activities which breach these provisions can face fines of up to 10% of global turnover;
- prohibited agreements are void and legally unenforceable;
- enterprises infringing the rules on prohibited agreements can find themselves exposed to actions for damages from customers and competitors who can show they have been harmed by the anti-competitive agreement.
**Further information**

For further information, see the other brochures in the KCA series “Ensuring the benefits of Fair Competition” and visit our website at: https://ak.rks-gov.net/
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