

Actual dynamics of competition law in mauritus law european essay

Law



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The enforcement process cannot be alienated from the actual dynamics which serve to provide a notion of the main principles underlying the CA 2007. This part of the dissertation will focus on the motivations for enacting the CA 2007, with particular emphasis on the Competition Commission of Mauritius and its main roles. Further reference will be made to the investigation procedures which shape the image of the enforcement process.

2. 1. Rationale behind the establishment of the Competition Act 2007

It is alleged that the CA 2003 failed due to lack of political will to proclaim the law.[BIBLIOGRAPHY I 2057]The new institutions provided for by the CA 2003 had not yet been set up and no regulation was formulated in this regard. Various negative consequences flowed from the absence of a competition regulation. For instance, many businesses took advantage of this situation and exploited consumers. The case of Desbro International can be cited as an example, where the firm which had a dominant position in the construction industry resorted to lockouts and thus, urged the government to increase prices. Likewise, consumers continued to suffer in various other sectors. Subsequently, to counter this persistent problem, the government came up with a new Competition Bill in 2006. There was a dire need for proper regulation of competition in order to reap economic efficiency. As such, the CA 2003 was repealed and the CA 2007 was enacted and fully proclaimed on 25th November 2009.[BIBLIOGRAPHY I 2057]It is remarkable that the CA 2007 corrects some of the deficiencies of the CA 2003, notably, by clear provisions of the meaning and categories of restrictive business practices and an independent enforcement agency endowed with extensive

powers to control anticompetitive behaviours. Only by the passing of the CA 2007, did Mauritius obtain a proper regulatory competition regime, which exclusively addresses competition issues. In this field of law, direct "law shopping"[BIBLIOGRAPHY I 2057] was not possible since the economy of Mauritius, characterised by small markets, differs substantially from the highly industrialised countries. As such, it can be deduced that the actual competition legislation has been modelled carefully and minutely, paying attention to the economic structure and conditions prevailing in Mauritius. The drafting of the new Competition Bill had been done with the assistance of international organisations like the CUTS International's Centre for Competition.[BIBLIOGRAPHY I 2057] This evidently demonstrates the concern and degree of professionalism employed while drafting the new law for competition regulation.

2. 2. Competition Commission of Mauritius[BIBLIOGRAPHY I 2057]

In some jurisdictions, competition law tends to be ineffective, that is, the written law has inadequate influence on behaviour because the law is not properly enforced, (Gerber, 2002). It is crucial to have an effective machinery of enforcement. Undoubtedly, Mauritius adheres to the doctrine of separation of powers. The Parliament enacts laws, the executive enforces the law and the judiciary is responsible for the interpretation and application of the legislative provisions. Consequently, it is essential to have an institution responsible for the enforcement process and mainly acting as a watchdog, ensuring that there is compliance with the law which is indeed a challenging task. The main institutional framework for competition law is the

Commission which was established by virtue of section 4 of the CA 2007.

[BIBLIOGRAPHY I 2057]It is the body responsible for the application and enforcement of competition law and is regarded as a milestone agency in this area. Unlike the case in the U. S.,[BIBLIOGRAPHY I 2057]the competition law system in Mauritius lies under the control of a single enforcement agency.

2. 2. 1. Institutional Framework

The Commission is headed by an Executive Director (ED) who holds the post of chief executive officer. Furthermore, as per Section 7 of the CA 2007, the Commission comprises of "... a Chairperson, a Vice Chairperson and 3 other Commissioners who shall be appointed by the President on advice by the Prime Minister given after consultation with the Leader of Opposition." The following organisational chart gives an indication of the hierarchical structure of the Commission. Source: Website of Competition Commission of

MauritiusCompetition law is an area which requires notion of both economic and legal aspects. The above chart clearly depicts that the Commission is well equipped with the relevant human resources to work towards attainment of its objective, albeit at a certain point in time, when the Commission was newly set up, various questions were raised pertaining to the relevance and adequacy of its human resources.[BIBLIOGRAPHY I 2057]The qualification requirements for the post of Commissioners are broadly provided at Section 7(2) of the CA 2007. This exhibits the degree of importance attributed to these posts. In other words, the recruitment of high calibre Commissioners and staff[BIBLIOGRAPHY I 2057]ascertains that there is proper enforcement of the competition legislation. For instance, before

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initiating an investigation, the Chief Economist will have to conduct market surveys and analysis to authenticate the scope of intervention, as delineated in the CA 2007.

2. 3. Main Functions of the Commission

Section 5 of the CA 2007 enunciates the main functions of the Commission. The functions are crucial since they may be used as benchmark in assessing the effectiveness of the enforcement agency. Any infringement of the provisions of the Act calls for the intervention of the Commission. The Commission has the responsibility to carry out a number of strategic manoeuvres for enforcement of competition law. Broadly, they include providing guidelines[BIBLIOGRAPHY I 2057]to facilitate analysis in dubious cases, establishing enforcement priorities, investigating and performing an active quasi-judicial role. The Commission is endowed with investigatory, prosecutorial and adjudicative powers.

2. 3. 1. Conduct of hearings

The Commission has the statutory duty to conduct hearings with any interested persons or parties. Hearings are normally conducted when the interested parties make a formal request.[BIBLIOGRAPHY I 2057]In such cases, the Commission acts as a court and thus, some basic law principles need to be catered for. One prominent example would be that the parties involved in the hearing ought to have a " right to fair trial". This fundamental right is provided at Section 10 of the Constitution of Mauritius. If a party is denied a hearing, that person can apply for a judicial review of the decision of the Commission who, in principle, cannot impose any penalty nor issue

any direction unless a hearing has been held.[BIBLIOGRAPHY I 2057]One vivid issue that was raised on an international forefront concerns Article 6 of the European Convention of Human Rights, pertaining to the basic right to a fair trial.[BIBLIOGRAPHY I 2057]Due to criminalisation of competition proceedings, adherence to the "right to fair trial" is deemed to be primordial.[BIBLIOGRAPHY I 2057]

2. 3. 2. Control of Restrictive Business Practices (RBPs)

One of the functions falling within the substantive scope of the Commission is to determine the existence of a RBP, as provided under section 5(2). As per Section 2 of the CA 2007, any situation falling within the terms of Part III of the Act will categorize as a RBP. Control of RBPs tends to be the focal point of most competition law systems. They act as a guide to the legal analysis of economic effects of the business practices, (Gerber, 2002). Undeniably, the Commission performs a supervisory role in ensuring that there is compliance with the competition legislation. The CA 2007 does not expressly provide for the supervisory function, albeit certain sections[BIBLIOGRAPHY I 2057]imply such a role. It is fundamental to keep constant eye on suspected cases or possible infringements which may emanate. Subsequently, it can be deduced that the Commission has to conduct extensive market studies to be able to guarantee apt attainment of its functions. Investigations are initiated and market studies are conducted, pursuant to Section 30 of the CA 2007.

2. 3. 3. Remedial Actions

The Commission has the duty to determine any penalty or remedy in case of breach of any relevant provisions contained in the CA 2007. Arguably, it can be said that the enforcement agency is in a better position to fashion remedies since it is well conversant with the gravity of the issues. The remedial actions serve the purpose of acting as deterrence to anticompetitive conduct. Although the Commission has the function of determining penalties and remedies, it is not endowed with the power to grant damages to persons who have suffered as a result of a breach of competition law. Any remedy that the Commission can take is simply aimed at protecting the market at large and is more future oriented.

2. 4. Investigation Procedures

Enforcement of competition law is basically procedural and calls for intelligent investigations. As such, effective enforcement is also reliant on the efficiency of the procedural rules. The Commission is authorised to establish its own procedures[BIBLIOGRAPHY I 2057]for the accomplishment of its main objective.

2. 4. 1. Issue of a complaint

Investigation is triggered either by issue of a complaint or by the Commission's own volition. The ED has the obligation to take appropriate actions to initiate the investigation.[BIBLIOGRAPHY I 2057]Generally, when the Commission receives a complaint[BIBLIOGRAPHY I 2057], the complaint is entered in the register of complaint and the Commission then proceeds with scrutinizing the complaints. The object behind this process is to identify

whether there are complaints of similar nature. After properly analyzing the complaint, the ED shall report to the Commission as to whether there is really occurrence of a RBP or not.

2. 4. 2. Identification of an issue

Alternatively, an investigation may be commenced when an issue crops up, that is, where the Commission has sufficient reasonable grounds to believe that the competitive process is being harmed or about to be harmed. Being attributed the discretion of identifying an issue on its own volition accrues the advantage of not having to rely solely on complaints to initiate investigations. It can be that the competitive process is being breached; nonetheless no person comes forth to issue a complaint. In such cases, market studies conducted by the Commission may signal any potential breach of competition rules. Customarily, competition cases' investigations involve profound analysis of factual information, (Terrel, 1940). Owing to the amount of cases involved, the ED has the option of prioritising the investigations.[BIBLIOGRAPHY I 2057]This denotes the ability of the Commission to deal promptly with serious issues.

2. 4. 3. Major procedural stages

The major steps in an investigation include gathering information, examining parties or witnesses, substantiating information, setting out a statement of issues, notifying provisional findings, submission of a report to the Commission,[BIBLIOGRAPHY I 2057]amongst others. The chart below is an attempt to briefly exhibit the main procedural stages.