

CHAPTER 16

COMPETITION POLICY

Article 16.1: Competition Law and Authorities and Anticompetitive Business Conduct¹

1. Each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to that conduct. These laws should take into account the *APEC Principles to Enhance Competition and Regulatory Reform*, done at Auckland, September 13, 1999.

2. Each Party shall endeavour to apply its national competition laws to all commercial activities in its territory.² However, each Party may provide for certain exemptions from the application of its national competition laws provided that those exemptions are transparent and are based on public policy grounds or public interest grounds.

3. Each Party shall maintain an authority or authorities responsible for the enforcement of its national competition laws (national competition authorities). Each Party shall provide that it is the enforcement policy of that authority or authorities to act in accordance with the objectives set out in paragraph 1 and not to discriminate on the basis of nationality.

Article 16.2: Procedural Fairness in Competition Law Enforcement³

1. Each Party shall ensure that before it imposes a sanction or remedy against a person for violating its national competition laws, it affords that person:

- (a) information about the national competition authority's competition concerns;

¹ This Article is subject to Annex 16-A (Application of Article 16.2, Article 16.3 and Article 16.4 to Brunei Darussalam).

² For greater certainty, nothing in paragraph 2 shall be construed to preclude a Party from applying its competition laws to commercial activities outside its borders that have anticompetitive effects within its jurisdiction.

³ This Article is subject to Annex 16-A (Application of Article 16.2, Article 16.3 and Article 16.4 to Brunei Darussalam).

- (b) a reasonable opportunity to be represented by counsel; and
- (c) a reasonable opportunity to be heard and present evidence in its defence, except that a Party may provide for the person to be heard and present evidence within a reasonable time after it imposes an interim sanction or remedy.

In particular, each Party shall afford that person a reasonable opportunity to present evidence or testimony in its defence, including: if applicable, to offer the analysis of a properly qualified expert, to cross-examine any testifying witness; and to review and rebut the evidence introduced in the enforcement proceeding⁴.

2. Each Party shall adopt or maintain written procedures pursuant to which its national competition law investigations are conducted. If these investigations are not subject to definitive deadlines, each Party's national competition authorities shall endeavour to conduct their investigations within a reasonable time frame.

3. Each Party shall adopt or maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder. These rules shall include procedures for introducing evidence, including expert evidence if applicable, and shall apply equally to all parties to a proceeding.

4. Each Party shall provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that Party's laws.

5. Each Party shall authorise its national competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action. A Party may provide for such voluntary resolution to be subject to judicial or independent tribunal approval or a public comment period before becoming final.

6. If a Party's national competition authority issues a public notice that reveals the existence of a pending or ongoing investigation, that authority shall avoid implying in that notice that the person referred to in that notice has engaged in the alleged conduct or violated the Party's national competition laws.

7. If a Party's national competition authority alleges a violation of its national competition laws, that authority shall be responsible for establishing the

⁴ For the purposes of this Article, "enforcement proceedings" means judicial or administrative proceedings following an investigation into the alleged violation of the competition laws.

legal and factual basis for the alleged violation in an enforcement proceeding.⁵

8. Each Party shall provide for the protection of business confidential information, and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process. If a Party's national competition authority uses or intends to use that information in an enforcement proceeding, the Party shall, if it is permissible under its law and as appropriate, provide a procedure to allow the person under investigation timely access to information that is necessary to prepare an adequate defence to the national competition authority's allegations.

9. Each Party shall ensure that its national competition authorities afford a person under investigation for possible violation of the national competition laws of that Party reasonable opportunity to consult with those competition authorities with respect to significant legal, factual or procedural issues that arise during the investigation.

Article 16.3: Private Rights of Action⁶

1. For the purposes of this Article, "private right of action" means the right of a person to seek redress, including injunctive, monetary or other remedies, from a court or other independent tribunal for injury to that person's business or property caused by a violation of national competition laws, either independently or following a finding of violation by a national competition authority.

2. Recognising that a private right of action is an important supplement to the public enforcement of national competition laws, each Party should adopt or maintain laws or other measures that provide an independent private right of action.

3. If a Party does not adopt or maintain laws or other measures that provide an independent private right of action, the Party shall adopt or maintain laws or other measures that provide a right that allows a person:

- (a) to request that the national competition authority initiate an investigation into an alleged violation of national competition laws; and
- (b) to seek redress from a court or other independent tribunal following a finding of violation by the national competition authority.

⁵ Nothing in this paragraph shall prevent a Party from requiring that a person against whom such an allegation is made be responsible for establishing certain elements in defence of the allegation.

⁶ This Article is subject to Annex 16-A (Application of Article 16.2, Article 16.3 and Article 16.4 to Brunei Darussalam).

4. Each Party shall ensure that a right provided pursuant to paragraph 2 or 3 is available to persons of another Party on terms that are no less favourable than those available to its own persons.

5. A Party may establish reasonable criteria for the exercise of any rights it creates or maintains in accordance with this Article.

Article 16.4: Cooperation

1. The Parties recognise the importance of cooperation and coordination between their respective national competition authorities to foster effective competition law enforcement in the free trade area. Accordingly, each Party shall:

- (a) cooperate in the area of competition policy by exchanging information on the development of competition policy; and
- (b) cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation and the exchange of information.

2. A Party's national competition authorities may consider entering into a cooperation arrangement or agreement with the competition authorities of another Party that sets out mutually agreed terms of cooperation.

3. The Parties agree to cooperate in a manner compatible with their respective laws, regulations and important interests, and within their reasonably available resources.

Article 16.5: Technical Cooperation

Recognising that the Parties can benefit by sharing their diverse experience in developing, applying and enforcing competition law and in developing and implementing competition policies, the Parties shall consider undertaking mutually agreed technical cooperation activities, subject to available resources, including:

- (a) providing advice or training on relevant issues, including through the exchange of officials;
- (b) exchanging information and experiences on competition advocacy, including ways to promote a culture of competition; and
- (c) assisting a Party as it implements a new national competition law.

Article 16.6: Consumer Protection

1. The Parties recognise the importance of consumer protection policy and enforcement to creating efficient and competitive markets and enhancing consumer welfare in the free trade area.

2. For the purposes of this Article, fraudulent and deceptive commercial activities refers to those fraudulent and deceptive commercial practices that cause actual harm to consumers, or that pose an imminent threat of such harm if not prevented, for example:

- (a) a practice of making misrepresentations of material fact, including implied factual misrepresentations, that cause significant detriment to the economic interests of misled consumers;
- (b) a practice of failing to deliver products or provide services to consumers after the consumers are charged; or
- (c) a practice of charging or debiting consumers' financial, telephone or other accounts without authorisation.

3. Each Party shall adopt or maintain consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities.⁷

4. The Parties recognise that fraudulent and deceptive commercial activities increasingly transcend national borders and that cooperation and coordination between the Parties is desirable to effectively address these activities.

5. Accordingly, the Parties shall promote, as appropriate, cooperation and coordination on matters of mutual interest related to fraudulent and deceptive commercial activities, including in the enforcement of their consumer protection laws.

6. The Parties shall endeavour to cooperate and coordinate on the matters set out in this Article through the relevant national public bodies or officials responsible for consumer protection policy, laws or enforcement, as determined by each Party and compatible with their respective laws, regulations and important interests and within their reasonably available resources.

Article 16.7: Transparency

1. The Parties recognise the value of making their competition enforcement

⁷ For greater certainty, the laws or regulations a Party adopts or maintains to proscribe these activities can be civil or criminal in nature.

policies as transparent as possible.

2. Recognising the value of the *APEC Competition Law and Policy Database* in enhancing the transparency of national competition laws, policies and enforcement activities, each Party shall endeavour to maintain and update its information on that database.

3. On request of another Party, a Party shall make available to the requesting Party public information concerning:

- (a) its competition law enforcement policies and practices; and
- (b) exemptions and immunities to its national competition laws, provided that the request specifies the particular good or service and market of concern and includes information explaining how the exemption or immunity may hinder trade or investment between the Parties.

4. Each Party shall ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based.

5. Each Party shall further ensure that a final decision referred to in paragraph 4 and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public in a manner that enables interested persons and other Parties to become acquainted with them. Each Party shall ensure that the version of the decision or order that is made available to the public does not include confidential information that is protected from public disclosure by its law.

Article 16.8: Consultations

In order to foster understanding between the Parties, or to address specific matters that arise under this Chapter, on request of another Party, a Party shall enter into consultations with the requesting Party. In its request, the requesting Party shall indicate, if relevant, how the matter affects trade or investment between the Parties. The Party addressed shall accord full and sympathetic consideration to the concerns of the requesting Party.

Article 16.9: Non-Application of Dispute Settlement

No Party shall have recourse to dispute settlement under Chapter 28 (Dispute Settlement) for any matter arising under this Chapter.

ANNEX 16-A:

APPLICATION OF ARTICLE 16.2 (PROCEDURAL FAIRNESS IN COMPETITION LAW ENFORCEMENT), ARTICLE 16.3 (PRIVATE RIGHTS OF ACTION) AND ARTICLE 16.4 (COOPERATION) TO BRUNEI DARUSSALAM

1. If as of the date of entry into force of this Agreement, Brunei Darussalam does not have a national competition law which is in force and has not established a national competition authority, Article 16.2 (Procedural Fairness in Competition Law Enforcement), Article 16.3 (Private Rights of Action) and Article 16.4 (Cooperation) shall not apply to Brunei Darussalam for a period of no longer than 10 years after that date.
2. If Brunei Darussalam establishes a national competition authority or authorities before the end of the 10-year period, Article 16.2 (Procedural Fairness in Competition Law Enforcement), Article 16.3 (Private Rights of Action) and Article 16.4 (Cooperation) shall apply to Brunei Darussalam from the date of establishment.
3. During the 10 year period, Brunei Darussalam shall take such steps as may be necessary to ensure that it is in compliance with Article 16.2 (Procedural Fairness in Competition Law Enforcement), Article 16.3 (Private Rights of Action) and Article 16.4 (Cooperation) at the end of the 10-year period and shall endeavour to comply with these obligations before the end of such period. Upon request of a Party, Brunei Darussalam shall inform the Parties of its progress since entry into force of the Agreement in developing and implementing an appropriate national competition law and establishing a national competition authority or authorities.