

CHAPTER 14

COMPETITION

Article 14.1: Definitions

For the purposes of this Chapter:

competition authority means:

- (a) for Hong Kong, China, the Competition Commission or the Communications Authority, or their successors; and
- (b) for Peru, the National Institute for the Defense of Competition and Protection of Intellectual Property (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual - INDECOPI) and the Supervisory Body for Private Investment in Telecommunications (Organismo Supervisor de Inversión Privada en Telecomunicaciones - OSIPTEL), or their successors; and

competition law means:

- (a) for Hong Kong, China, the *Competition Ordinance (Cap. 619)* and any subsidiary legislation made under that Ordinance, as well as any amendment thereto, or any successor legislation; and
- (b) for Peru, the *Legislative Decree 1034*, the *Competition Act*; the *Law 31112*, the *Antitrust Merger Review Act*; and their implementing regulations and amendments.

Article 14.2: Competition Laws and Authorities and Anti-competitive Conduct

1. Recognising that anti-competitive conduct has the potential to restrict bilateral trade and investment, each Party shall maintain its competition law to proscribe¹ such conduct, with the objective of promoting economic efficiency, consumer welfare and free trade, 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 on September 13, 1999.

2. Each Party shall endeavour to apply its competition law to all commercial activities

¹ For greater certainty, the competition law that a Party maintains to proscribe anti-competitive conduct can be civil or criminal in nature.

in its Area.² However, each Party may provide for certain exemptions or exclusions from the application of its competition law provided that those exemptions or exclusions are transparent and are based on considerations such as economic efficiency, public policy grounds or public interest grounds.

3. Each Party shall maintain a competition authority responsible for the enforcement of its competition law. Each Party shall provide that it is the policy of that authority to act in accordance with the objectives set out in paragraph 1 and not to discriminate on the basis of nationality.

Article 14.3: 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 competition law, it affords that person:

- (a) information about the competition authority's competition concerns;
- (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 ensure that its competition authority adopts or maintains written procedures in accordance with which its competition law investigations are conducted. If those investigations are not subject to definitive deadlines, the competition authority of each Party shall endeavour to conduct its investigations within a reasonable timeframe.

3. Each Party shall adopt or maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its competition law and the determination of sanctions and remedies thereunder. These rules shall include

² For greater certainty, nothing in this paragraph shall be construed to preclude a Party from applying its competition law to commercial activities outside its Area that have anti-competitive effects within its jurisdiction.

³ For the purposes of this Article, "enforcement" means an application of competition law by way of investigation or proceeding conducted by a Party's competition authority, but shall not include research, studies or surveys with the objective of examining the general economic situation or general conditions in specific industries. Such research, studies or surveys shall not be construed so as to include an investigation with regard to suspected violation of a Party's competition law.

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

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 competition law 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 in accordance with the laws of that Party.

5. The competition authority of each Party shall be able to resolve alleged violations of the competition law of that Party, as appropriate, voluntarily by consent of that authority and the person subject to the enforcement action.

6. If the competition authority of a Party 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 competition law of that Party.

7. If the competition authority of a Party alleges a violation of the competition law of that Party, that authority shall be responsible for establishing the 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 in accordance with its laws, obtained by its competition authority during the investigative process. If the competition authority of a Party uses or intends to use that information in an enforcement proceeding, the Party shall, subject to its laws 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 competition authority's allegations.

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

Article 14.4: Private Right of Action

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 the competition law of a Party, either independently or following a finding of violation by the competition authority of that Party.

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.

2. Recognising that a private right of action is an important supplement to the public enforcement of competition law, 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, that Party shall adopt or maintain laws or other measures that provide a right that allows a person:

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

4. Each Party shall ensure that a right provided in accordance with paragraph 2 or paragraph 3 is available to persons of the other 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 14.5: Cooperation

1. The Parties recognise the importance of cooperation and coordination between their respective competition authorities to foster effective competition law enforcement in the Areas of the Parties. Accordingly, subject to their laws, regulations, policies and available resources, the Parties 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 technical assistance as appropriate, notification, consultation, exchange of information and coordination on cross-border enforcement matters.

2. The competition authority of a Party may consider entering into a cooperation arrangement or agreement with the competition authority of the other Party that sets out agreed terms of cooperation.

Article 14.6: Technical Cooperation

1. The Parties may promote technical cooperation, including exchange of experiences, training programs, workshops and research collaborations for the purpose of enhancing

their competition authorities' capacity related to competition policy and law enforcement.

2. 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 their laws, regulations, policies and available resources, including:

- (a) providing advice or training on relevant issues, including through the exchange of officials; and
- (b) exchanging information and experiences on competition advocacy, including ways to promote a culture of competition.

Article 14.7: 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 their respective Areas.

2. Each Party shall adopt or maintain laws or regulations on consumer protection.

3. The Parties recognise that unfair trade practices increasingly transcend economies and that cooperation and coordination between the Parties is desirable to effectively address such practices.

4. Accordingly, the Parties shall promote, as appropriate, cooperation and coordination on matters of mutual interest related to unfair trade practices.

5. The Parties shall, subject to their laws, regulations, policies and available resources, endeavour to cooperate and coordinate on the matters set out in this Article through the relevant public bodies or officials responsible for consumer protection policy, laws or enforcement, as determined by each Party.

Article 14.8: Transparency

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

2. Each Party shall make public its competition law, and regulations, guidelines and any rules issued in relation to the administration of such law, excluding internal operating procedures.

3. Each Party shall ensure that a final decision finding a violation of its competition

law is in written form and sets out relevant findings of fact and the legal basis on which the decision is based subject to their respective laws and regulations.

4. Each Party shall ensure to make public the final decisions and any orders implementing them subject to its laws and regulations, excluding any business confidential information or other information that is protected by its laws and regulations from public disclosure.

Article 14.9: Consultations

In order to foster understanding between the Parties, or to address specific matters that arise under this Chapter, on request of the other 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 14.10: Non-application of Dispute Settlement

Neither Party shall have recourse to dispute settlement under Chapter 18 (Dispute Settlement) for any matter arising under this Chapter.