

## CHAPTER 21

### COMPETITION POLICY

#### Article 21.1: Competition Law and Authorities

1. Each Party shall maintain national competition laws that proscribe anticompetitive business conduct to promote competition in order to increase economic efficiency and consumer welfare, and shall take appropriate action with respect to that conduct.
2. Each Party shall endeavor to apply its national competition laws to all commercial activities in its territory. This does not prevent a Party from applying its national competition laws to commercial activities outside its borders that have an appropriate nexus to its jurisdiction.
3. Each Party may provide for certain exemptions from the application of its national competition laws provided that those exemptions are transparent, established in its law, and based on public interest or public policy grounds.
4. Each Party shall maintain a national competition authority or authorities (national competition authorities) responsible for the enforcement of its national competition laws.
5. Each Party shall ensure that the enforcement policies of its national competition authorities include:
  - (a) treating persons of another Party no less favorably than persons of the Party in like circumstances;
  - (b) considering, if applicable, the effect of enforcement activities on related enforcement activities by a national competition authority of another Party; and
  - (c) limiting remedies relating to conduct or assets outside the Party's territory to situations in which there is an appropriate nexus to harm or threatened harm affecting the Party's territory or commerce.

#### Article 21.2: Procedural Fairness in Competition Law Enforcement

1. For the purposes of this Article, "enforcement proceeding" means a judicial or administrative proceeding following an investigation into the alleged violation of the national competition laws and does not include matters occurring before a grand jury.

2. Each Party shall ensure that its national competition authorities:
  - (a) provide transparency, including in writing, regarding the applicable competition laws, regulations, and procedural rules pursuant to which national competition law investigations and enforcement proceedings are conducted;
  - (b) conduct their investigations subject to definitive deadlines or within a reasonable time frame, if the investigations are not subject to definitive deadlines;
  - (c) afford to a person a reasonable opportunity to be represented by legal counsel, including by:
    - (i) allowing, at the person's request, counsel's participation in all meetings or proceedings between the national competition authority and the person. This sub-subparagraph does not apply to matters occurring before a grand jury, ex parte proceedings, or to searches conducted pursuant to judicial warrants, and
    - (ii) recognizing a privilege, as acknowledged by its law, if not waived, for lawful confidential communications between the counsel and the person if the communications concern the soliciting or rendering of legal advice; and
  - (d) with respect to reviews of merger transactions, permit early consultations between the national competition authority and the merging persons to provide their views concerning the transaction, including on potentially dispositive issues.
3. Each Party shall ensure that all information that its national competition authorities obtain during investigations and reviews, and that its law protects as confidential or privileged is not disclosed, subject to applicable legal exceptions.
4. Each Party shall ensure that its national competition authorities do not state or imply in any public notice confirming or revealing the existence of a pending or ongoing investigation against a particular person that that person has in fact violated the Party's national competition laws.
5. Each Party shall ensure that its national competition authorities<sup>1</sup> have the ultimate burden of establishing the legal and factual basis for an alleged violation in an enforcement proceeding; however, a Party may require that a person against whom that allegation is made be responsible for establishing certain defenses to the allegation.
6. Each Party shall ensure that all final decisions in contested civil or administrative matters finding a violation of its national competition laws are in writing and set out the findings of fact

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<sup>1</sup> For Canada, this includes the public prosecutor for criminal prosecutions.

and conclusions of law on which they are based. Each Party shall make public those final decisions, with the exception of any confidential material contained therein.

7. Each Party shall ensure that before it imposes a sanction or remedy against a person for a violation of its national competition laws, it affords the person a reasonable opportunity to:

- (a) obtain information regarding the national competition authority's concerns, including identification of the specific competition laws alleged to have been violated;
- (b) engage with the relevant national competition authority at key points on significant legal, factual, and procedural issues;
- (c) have access to information that is necessary to prepare an adequate defense if the person contests the allegations in an enforcement proceeding; however, a national competition authority is not obliged to produce information that is not already in its possession. If a Party's national competition authority<sup>2</sup> introduces or will introduce confidential information in an enforcement proceeding, the Party shall, as permissible under its law, allow the person under investigation or its legal counsel timely access to that information;
- (d) be heard and present evidence in its defense, including rebuttal evidence, and, whenever relevant, the analysis of a properly qualified expert;
- (e) cross-examine any witness testifying in an enforcement proceeding; and
- (f) contest an allegation that the person has violated national competition laws before an impartial judicial or administrative authority, provided that in the case of an administrative authority, the decision-making body must be independent of the unit offering evidence in support of the allegation;

except that a Party may provide for these opportunities within a reasonable time after it imposes an interim measure.

8. Each Party shall provide a person that is subject to the imposition of a fine, sanction, or remedy for violation of its national competition laws with the opportunity to seek judicial review by a court or independent tribunal, including review of alleged substantive or procedural errors, unless the person voluntarily agreed to the imposition of the fine, sanction, or remedy.

9. Each Party shall ensure that criteria used for calculating a fine for a violation of national competition laws are transparent. If a Party imposes a fine as a penalty for a non-criminal violation

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<sup>2</sup> For Canada, this includes the public prosecutor for criminal prosecutions.

of its national competition laws that is based on the person's revenue or profit, it shall ensure that the calculation considers revenue or profit relating to the Party's territory.

10. Each Party's national competition authority shall maintain measures to preserve all relevant evidence, including exculpatory evidence, that it collected as part of an enforcement proceeding until the review is exhausted.

### **Article 21.3: Cooperation**

1. The Parties recognize the importance of cooperation and coordination between their respective national competition authorities to foster effective competition law enforcement in the free trade area. Accordingly, the Parties' national competition authorities shall endeavor to cooperate in relation to their enforcement laws and policies, including through investigative assistance, notification, consultation, and exchange of information.

2. The Parties shall seek to further strengthen cooperation and coordination between their respective national competition authorities, particularly regarding those commercial practices that hinder market efficiency and reduce consumer welfare within the free trade area.

3. Each Party shall adopt or maintain measures sufficient to permit negotiations of cooperation instruments that may address, among other matters, enhanced information sharing and mutual legal assistance.

4. The Parties' national competition authorities shall seek to cooperate with respect to their competition policies and in the enforcement of their respective national competition laws, which may include coordination of investigations that raise common law enforcement concerns. This cooperation shall be compatible with each Party's law and important interests, in accordance with their law governing legal privilege and disclosure of business secrets and other confidential information, and within reasonably available resources. The Parties' national competition authorities may cooperate on the basis of mechanisms that exist or may be developed.

5. Recognizing that the Parties can benefit by sharing their diverse experience in developing, implementing, and enforcing their national competition laws and policies, the Parties' national competition authorities shall consider undertaking mutually agreed technical cooperation activities, including training programs.

6. The Parties acknowledge the importance of cooperation and coordination internationally and the work of multilateral organizations in this area, including the Competition Committee of the Organisation for Economic Co-operation and Development, and the International Competition Network.

#### **Article 21.4: Consumer Protection**

1. The Parties recognize the importance of consumer protection policy and enforcement to creating efficient and competitive markets, and enhancing consumer welfare in the free trade area.
2. Each Party shall adopt or maintain national consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities, recognizing that the enforcement of those laws and regulations is in the public interest. The laws and regulations a Party adopts or maintains to proscribe these activities may be civil or criminal in nature.
3. The Parties recognize that fraudulent and deceptive commercial activities increasingly transcend national borders and that cooperation and coordination between the Parties to address these activities effectively is important and in the public interest.
4. 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 through activities such as the exchange of consumer complaints and other enforcement information. That cooperation and coordination may be based on cooperation mechanisms in existence. Each Party shall protect confidential information in accordance with its law, including business information.
5. The Parties shall endeavor 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, law, or enforcement, as determined by each Party and compatible with their respective law and important interests, and within their reasonably available resources.

#### **Article 21.5: Transparency**

1. The Parties recognize the value of making competition enforcement and advocacy policies as transparent as possible.
2. On request of another Party, a Party shall make available to the requesting Party public information concerning:
  - (a) its national 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.

### **Article 21.6: Consultations**

1. 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.
2. The Party addressed shall accord full and sympathetic consideration to the concerns of the requesting Party.
3. To facilitate discussion of the matter that is the subject of the consultations, each Party shall endeavor to provide relevant non-confidential, non-privileged information to the other Party.

### **Article 21.7: Non-Application of Dispute Settlement**

No Party shall have recourse to dispute settlement under Chapter 14 (Investment) or Chapter 31 (Dispute Settlement) for a matter arising under this Chapter.