

GUIDANCE ON NON-COMPETE RESTRICTIONS

A. INTRODUCTION

1. It is recognized that non-compete restrictions may arise in various types of combinations, including the acquisition of a business or an enterprise, formation of a joint venture or acquisition of controlling/ non-controlling interest in an enterprise. Where a non-compete restriction is found to follow the principles set out in the Commission's Guidance, the Commission's order approving the combination under Section 31 of the Competition Act, 2002 ('Act') will be deemed to cover the non-compete restriction. Thus, in such cases, the non-compete restriction will be deemed to be *directly related and necessary to the implementation of the combination*.
2. In contrast, non-compete restrictions that do not comply with the principles set out in the Commission's Guidance, will not be regarded as directly related and necessary to the implementation of the combination and the Commission's approval of the combination will not therefore include the non-compete restriction.
3. In such cases, the Commission's order would state that the non-compete restriction is not "ancillary" to the combination. However, the finding that a non-compete restriction is deemed to be *not ancillary* to a combination, as such, will not be prejudicial to the legal status thereof, i.e., there is no presumption that those non-compete restriction that do not comply with the Guidance would automatically infringe the provisions of the Act.
4. Importantly, the standards set forth in this Guidance would not be applied mechanically, but would take into consideration the specific circumstances of each case. Each case would be evaluated in the light of its own facts.

B. GENERAL PRINCIPLES

5. The non-compete restriction should be directly related and necessary to the implementation of the combination.
 - 5.1. In order to be directly related, the non-compete restriction must be connected and closely linked to the combination, but ancillary or subordinate to its main object. It is not sufficient if the restriction has been entered into at the same time or in the same context as the combination or because it merely expressed to be so related. A non-compete restrictions is considered directly related where it is economically related to the main combination and it is intended to allow a smooth transition to the post-combination scenario.
 - 5.2. The necessity of a non-compete restraint means that in the absence of such restrictions, the combination could not be implemented or could only be implemented under more

uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably higher difficulty.

- 5.3. The non-compete restriction should not exceed what is reasonably required. If equally effective alternatives are available for attaining the same objective, parties to a combination must have chosen one which is the least restrictive of competition.
6. In determining the necessity and proportionality of the non-compete restriction, it is appropriate to take account of its duration, subject matter and geographic field of application, scope of application, having due regard to the nature of the business concerned:
 - 6.1. Where the transfer includes both goodwill and know-how, the non-compete clause is justified only for a period of up to 3 years and up to 2 years if the transfer of goodwill only is involved. Longer durations may still be justified in a limited range of circumstances where, for example, in certain industries and sectors, customer loyalty to a seller will persist longer durations or the nature of the know-how transferred justifies an additional period of protection. In the case of a joint venture, the duration of the restriction can normally be the standing period of the joint venture. In certain circumstances, a period longer than the standing period of the joint venture may be justified.
 - 6.2. In the case of an acquisition, the geographical scope of a non-compete clause must be limited to an area in which the seller has offered the products or services before the transfer. This protection from competition may also extend to those territories that the seller was planning to enter at the time of the transaction, provided that the seller has already invested in such a move. The acquirer does not need to be protected against competition from the seller in other territories where the latter had not previously operated.
 - 6.3. In the case of a joint venture, the geographic scope of a non-compete should be limited to the area in which the parent enterprise(s) of the joint venture offered the relevant products or services before establishing the joint venture (this may extend to territories which the parents were planning to enter at the time of the transaction, provided necessary investments evidencing this intention have been made). Any extension of the non-compete covenant imposed on parents to areas in which the joint venture may in the future decide to become active, is not ancillary. Where a joint venture has been set up to enter a new market, the scope of non-competition clauses can be extended to the products, services and territories in which the joint venture is supposed to operate pursuant to the joint venture agreement. However, one parent need not be protected against competition from the other parent(s) of the joint venture in markets in which the joint venture does not operate or does not propose to operate from the outset, i.e., a non-compete should not be used for the purposes of protecting one parent's interest against competition from the other parent(s) in markets other than those in which the joint venture will be active from the outset).

- 6.4. A non-compete obligation must be restricted to the products and services which comprise the main activity of the transferred business/enterprise or the joint venture, as the case may be. This may include improved versions or updates of products as well as successor models. It can also include products and services at an advanced stage of development at the time of the combination, or products which are fully developed but not yet marketed. Protection against competition from the seller in product or service markets in which the transferred enterprise / joint venture, as the case may, was not active before the transfer, will not be considered necessary;
- 6.5. A non-compete obligation may bind only the seller, its subsidiaries and agents. Non-compete obligations imposed on others, such as resellers, will not be considered as ancillary to the combination. Non-competition obligation may be imposed only on controlling shareholders of an enterprise. A non-compete obligation on non-controlling shareholders will not be considered directly related and necessary to the implementation of the combination.
- 6.6. Clauses which limit a seller's right to purchase or hold shares in an enterprise competing with the business transferred shall be considered directly related and necessary to the implementation of the combination under the same conditions as outlined above, provided it does not prevent the vendor from purchasing or holding shares solely for investment purposes, without granting him/her, directly or indirectly, management functions or any material influence in the competing company. The same principle applies to parents of a joint venture.