

## Competition-Related Matters

- 14.1 The RIS states that the Agreement will reinforce and build upon existing bilateral agreements with the US on cooperation and mutual assistance in competition policy and antitrust law enforcement.<sup>1</sup>
- 14.2 According to the *Guide to the Agreement*, the Competition-Related Matters Chapter commits Parties to take measures to:
- proscribe anticompetitive business conduct
  - cooperate in the area of competition policy and law enforcement
  - ensure that monopolies and government enterprises do not abuse their position in the marketplace
  - enhance cooperation between government agencies in both countries in the area of consumer protection.<sup>2</sup>
- 14.3 Under the Agreement, business and individuals will be treated fairly in enforcing competition law; consumer protection agencies will work together in combating illegal activity; and consumers and investors defrauded or deceived will have greater redress.<sup>3</sup>
- 14.4 The Chapter consists of 12 articles and an associated side letter between the two Governments on strengthening cooperation, competition policy and law enforcement.<sup>4</sup>

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1 RIS, p. 8.

2 DFAT, *Guide to the Agreement*, p. 77.

3 NIA, para. 8 and RIS, p. 4.

4 DFAT, *Guide to the Agreement*, p. 77.

- 14.5 The Agreement provides a vehicle for addressing competition-related issues of particular concern to Australian companies in the US market, and establishes pro-competitive disciplines on monopolies and state enterprises in both countries.<sup>5</sup>
- 14.6 The Committee received little specific evidence addressing the purpose or operation of this Chapter. Unless otherwise stated, information contained in this chapter of the report is taken from the *Guide to the Agreement*.

## Competition law and anticompetitive business conduct

- 14.7 The Committee understands that obligations under Article 14.2 are framed in general terms, reflecting the fact that, while both Parties have highly developed and extensive competition and antitrust legislation, there are differences in the legal and institutional frameworks in which they operate. Each Party is obliged to
- maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto
  - maintain an authority or authorities responsible for the enforcement of its natural competition laws
  - ensure that a company or individual subject to the imposition of a sanction or remedy for anticompetitive business conduct is afforded due process in terms of having an opportunity to be heard, and to present evidence, and to seek review in a court or independent tribunal.<sup>6</sup>
- 14.8 The article also addresses the treatment of companies or individuals of either country in relation to the enforcement of each other's competition laws. Namely, the enforcement policy of each Party's national competition authorities includes treating non-nationals no less favourably than nationals in like circumstances, and that both Parties intend to maintain their policy in that regard.<sup>7</sup>
- 14.9 This article is not subject to dispute settlement and does not require legislative or regulatory change.<sup>8</sup>

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5 RIS, p. 8.

6 DFAT, *Guide to the Agreement*, pp. 77-78.

7 DFAT, *Guide to the Agreement*, p. 77.

8 DFAT, *Guide to the Agreement*, p. 77.

## Cooperation on competition/antitrust

- 14.10 The Committee understands that competition matters often have a cross-border dimension, when companies subject to investigation for anticompetitive conduct may have engaged in business activity in another country's jurisdiction. The *Guide to the Agreement* states that there are well established channels of practical cooperation between Australia and the US, between the Australian Competition and Consumer Commission (ACCC) and its US counterparts, the Department of Justice Antitrust Division and the Federal Trade Commission.
- 14.11 The Committee understands that Article 14.2 of the Agreement commits the Parties to strengthening their existing cooperation on competition law enforcement and policy.<sup>9</sup> Existing forms of cooperation include mutual assistance, notification, consultation and exchange of information.
- 14.12 Article 14.2 also obliges the respective competition authorities to consider, where feasible and appropriate, requests from their counterparts in the other country to initiate or expand activities to enforce competition. Existing agreements do not include such provisions – sometimes known as 'positive comity' – which would allow either government to encourage the other to address particular business conduct that might affect the interests of the first country. The Committee understands that this provision may be included in discussions on strengthening bilateral cooperation that the US Department of Justice and the US FTC have offered, on behalf of the US, in an associated side letter.<sup>10</sup>
- 14.13 Also, Article 14.2 establishes a joint working group that will examine the scope for strengthening support for, and minimising legal impediments to, the effective enforcement of each country's competition laws and policies.<sup>11</sup>

## Monopolies and government enterprises

- 14.14 Articles 14.3, 14.4 and 14.5 contain obligations to ensure that the activities of monopolies (public or private), and state (government) enterprises do not create obstacles to trade and investment. The provisions only apply to

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9 DFAT, *Guide to the Agreement*, p. 78.

10 DFAT, *Guide to the Agreement*, p. 78.

11 DFAT, *Guide to the Agreement*, p. 78.

private monopolies created after the Agreement enters into force, and to government monopolies at the central government level.

- 14.15 As with SAFTA, Australia will be obliged to take reasonable measures to ensure that governments at all levels do not provide any competitive advantage to any government businesses simply because they are government owned.
- 14.16 This particular obligation is not subject to dispute settlement.<sup>12</sup>
- 14.17 Article 14.5 clarifies that charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with the obligations on monopolies and state enterprises.<sup>13</sup>

## **Cross border consumer protection**

- 14.18 Under Article 14.6, the Parties agree to strengthen their cooperation in areas covered by their consumer protection laws, in particular fraudulent and deceptive commercial practices against consumers.<sup>14</sup> The Committee understands that this builds on existing cooperation between the ACCC and the US FTC.
- 14.19 According to the *Guide to the Agreement*, the Parties will also be required to identify obstacles to effective cross-border cooperation in the enforcement of consumer protection laws, and to consider changing their domestic frameworks to enhance their ability to cooperate, share information and assist in the enforcement of their respective consumer protection laws, including, if appropriate, adopting or amending national legislation.

## **Recognition and enforcement of monetary judgements**

- 14.20 Article 14.7 seeks to facilitate the efforts of government agencies to undertake civil (non-criminal) legal proceedings for the purpose of obtaining monetary restitution to consumers, investors or customers who have suffered economic harm as a result of being deceived, defrauded or

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12 DFAT, *Guide to the Agreement*, p. 80.

13 DFAT, *Guide to the Agreement*, p. 80.

14 DFAT, *Guide to the Agreement*, p. 80.

misled. The agencies concerned are the ACCC, the Australian Securities and Investments Commission, the US Federal Trade Commission, US Securities and Exchange Commission and the US Commodity Futures Trading Commission.<sup>15</sup>

- 14.21 The *Guide to the Agreement* states that this provision applies in particular to civil proceedings where an offending party (company or individual) has assets in the other country, and the relevant agency (or parties) are seeking to have a judgement by a court in the first country and enforced by a court in the other country. This provision is not binding but seeks to provide courts with interpretive guidance on the purpose of such legal actions.
- 14.22 The Parties also agree to examine the scope for establishing greater bilateral recognition of foreign judgements of their respective judicial authorities obtained for the benefit of deceived or defrauded consumers, investors or customers.

## Transparency, cooperation and consultations

- 14.23 Under Articles 14.8, 14.9 and 14.10, the Parties will make available to each other, on request, public information concerning the enforcement of their measures proscribing anticompetitive business conduct, exemptions and immunities to their measures proscribing anticompetitive business conduct, and public information concerning monopolies and government enterprises.<sup>16</sup>
- 14.24 The Parties agree to enter into consultations on request of the other Party to address specific matters that arise under this Chapter.

## Dispute settlement

- 14.25 According to the *Guide to the Agreement*, most of the articles in this Chapter will not be subject to dispute settlement. The only obligations that will be subject to dispute settlement are those relating to
- monopolies

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15 DFAT, *Guide to the Agreement*, p. 81.

16 DFAT, *Guide to the Agreement*, pp. 81-2.

- the provisions on government enterprises relating to exercise of delegated authority and non-discriminatory treatment
- transparency, and
- the obligation to consult at the request of the other Party to address specific matters.<sup>17</sup>

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17 DFAT, *Guide to the Agreement*, p. 82.