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# Brief on Competition Law 2010

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Issue No 1010

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## Introduction

Competition Law 2010 (*issue no: 1010 dated 30 June 2010*) is in response to Article 11 of the constitution of Afghanistan. Article 11 reads [Trade] Affairs related to the domestic and external trade shall be regulated by law in accordance with the needs of the national economy and public interests.

Other relevant articles of the constitution impacting economy are:

**Article 6 [Purposes]** The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.

**Article 10 [Private Investments]** The State encourages and protects private capital investments and enterprises based on the market economy and guarantees their protection in accordance with the provisions of law

**Article 13 [Economy]** The state shall formulate and implement effective programs for development of industries, growth of production, increasing of public living standards, and support to craftsmanship.

## Aim or Purpose of the Law:

The law aims to meet **five obligations** as below:

1. Protect sound competition in the market.
2. Prevent unsound competition, unfair agreements, decisions as well as implementation of unfair contracts restricting, disrupting or preventing competition in the markets of goods, services and products.
3. To prevent monopoly in commercial activities.
4. Prevent influence of monopolist entrepreneurs in the market
5. To facilitate the environment for a fair competition and for relief of general economy.

## Enforcement of the law

The law is enforceable from the date of its presidential assent and its publication in the official gazette. Once it comes into force all contradictory provisions become null and void.

## “Competition” as defined under the Law

The Law defines the word “**Competition**” as

*“a situation wherein a number of independent producers, buyers and sellers for producing, buying or selling of similar commodities or services operate in such a manner that **none of them has the power of determining quantity and price in the market independently.** (This is perfect market definition in theory which is essentially a utopian concept and is difficult to ensure practically. What most can be done is to regulate barriers of entry and exit) Competition amongst entrepreneurs in markets of goods and services enables them to take economic decisions independently”*

As can be seen from the definition the obligation of the competition authority is to regulate barriers of entry and exit primarily. This law is applicable to national and international natural and legal persons who are engaged in activities pertaining goods, services or products in accordance with the law in Afghanistan.

## **The National Competition Board**

**A “National Competition Board” is to be constituted as provided in Article 14. The prime responsibility of the Board is “To Promote Fair Competition and prevent Monopoly”.**

The Board consists of ELEVEN members appointed for a term of 4 years. Their term is extendable for an additional term of 4 years.

### **Chair:**

Minister of Commerce and Industries.

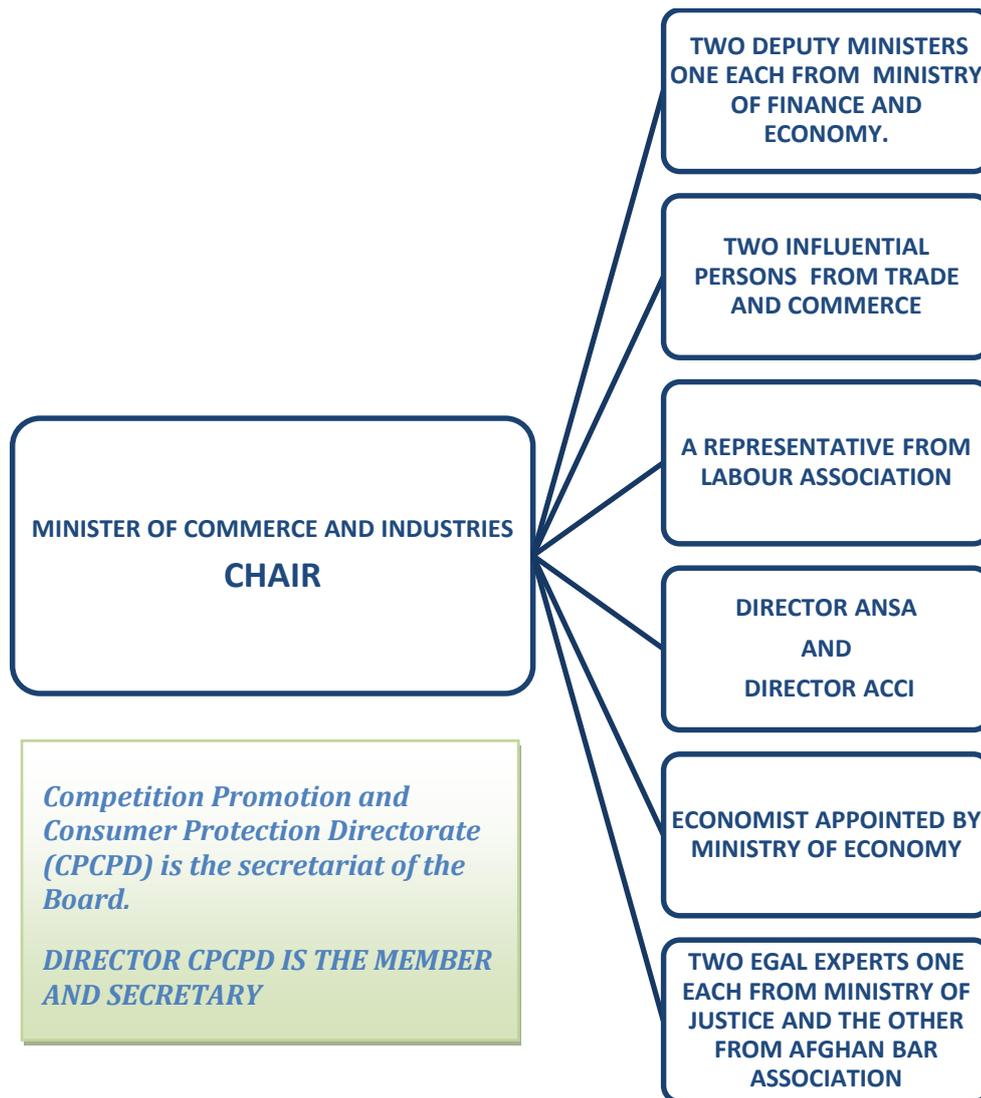
### **Members**

- Deputy Minister of Ministry of Finance.
- Deputy Minister of Economy.
- Director of ANSA.
- Director of ACCI.
- A legal expert appointed by the director of the Afghan Bar Association.
- An economist appointed by the Minister of Economy.
- A legal expert appointed by the Minister of Justice.
- Two influential persons in trade and industries appointed by the Minister of Commerce and Industries.
- One representative from the Labour Association.

**Director CPCPD is the Secretary and member. CPCPD acts as the secretariat of the Board.**

*The board members take oath in presence of the President of Islamic Republic of Afghanistan.*

## The National Competition Board



## Duties and Powers of the National Competition Board

**Article 17** provides for duties and powers of the Board. These are:

- 1- Examining of the entrepreneurs, traders, organisations and corporations for issues relating to anticompetitive practices.
- 2- Examining applications for the exemption under the law
- 3- Granting permission to enter premises, reservoirs, warehouses, transportation vehicles, and shops for examining economic activities, property and services, offices and documents.

- 4- Obtaining relevant information from corporations and commercial organisations.
- 5- Drafting of regulations, and applying rules and procedures for better implementation of provisions of this law.
- 6- Facilitating suitable environment for progress of domestic production and supporting the local industries against the dumping policy.

### Handling of Complaints

Handling of complaints is provided in Article 21.

This article provides the Board with powers to initiate an enquiry ***either its own motion or by taking cognizance of a complaint*** referred to it by any natural or legal persons. Board can assess a complaint within the maximum of 30 working days from the date of its receipt. The decision to proceed for an enquiry is limited to 7 working days. Thus the Board has a **total of 37 working days** to examine a complaint and take a decision regarding proceeding for an enquiry.

To facilitate conduct of inquiry the Board can take following measures:

- ✓ Summon any person as deemed necessary.
- ✓ Record evidences.
- ✓ Summon legal and natural persons for presenting their statements, evidence, documents, and background with regards to the anti-competitive practices either written or electronic.
- ✓ For assistance on assessment invite experts and influential persons or appoint experienced and technical persons.
- ✓ Make reference to appropriate stakeholders.

### Orders by the Board

Post enquiry if it is arrived that provisions of the Law have been violated, the Board may take one or more of the following decisions in accordance to Article 20:

1. Prevent repeat of anti competitive practices.

2. Prevent parties, from continuing anticompetitive practices.
3. Retracting investment or shares of an entrepreneur, trader, organization, or corporation, obtained in violation of Article 10 (“*A Natural or legal person cannot acquire capital or shares of other companies or organizations in a manner that causes disruption of competition in one or more markets*”) of this law.
4. Suspend, or nullify mergers, that contradict the Law.
5. Make suggestion to relevant authorities regarding apprehension and confiscation of goods, obtained through anti competitive practices.
6. Nullify understanding, agreements and contracts.
7. Issue instructions for amending articles of association
8. Publishing decisions and results of Board measures through the press

### Appeals and Compensation

Post inquiry, the decision taken by the Board to penalize any of the party is however appealable in relevant courts **within 7 working days** of the pronouncement by the Board.

Awarding any compensation to affected parties is not under the powers of the Board. It is to be decided by relevant courts.

### Fines:

**For violation of Article 7** following are the fines provided that the Board can order.

- 1- In case of breaching subsection (1) of Article 7 of this law the fine will be not less than 100,000 Afs and not more than 200,000 Afs.
- 2- In case of breaching subsection (2) of Article 8 of this law the fine will be not less than 2 millions Afs not more than 2.5 million Afs.
- 3- In case of breaching subsection (3 & 4) of Article 7 of this law, the fine will be not less than 250,000 Afs not more than 300,000 Afs.
- 4- In case of breaching subsection (5) of Article 7 of this law, the fine will be not less than 50,000 not more than 100,000 Afs.

- 5- In case of breaching subsection (6) of Article 7 of this law, the fine will be not less than 1 million Afs, not more than 1.5 million Afs.
- 6- In case of breaching subsection (7) of Article 7, of this law, the fine will be not less than 200,000 Afs and not more than 25,0000 Afs.
- 7- In case of breaching subsection (8) of Article 7 of this law, fine will be not less than 500,000 and not more than 1 million Afs.
- 8- In case of breaching subsection (9) of Article 7 of this law, the fine will be not less than 1 million Afs, not more than 1.5 million Afs.
- 9- In case breaching of subsection (10) of Article 7 of this law, the fine will be not less than 1 million Afs and not more than 1.5 million Afs.
- 10- In case breaching of subsection (11) of Article 7 of this law, the fine will be not less than 1 million Afs and not more than 1.5 million Afs.

**For violation of Article 8** following is the punishment:

- 1- In case of breaching subsection (1 and 4) of Article 8 of this law, the fine will be not less than 5 million Afs and not more than 5.5 million Afs.
- 2- In case of breaching subsection (2,3,5 and 10) of Article 8 of this law the fine will be not less than 1 million Afs and not more than 1.5 million Afs.
- 3- In case of breaching subsection (6) of Article 8 of this law, the fine will be not less than 400,000 Afs and not more than 500,000 Afs.
- 4- In case of breaching subsection (7) of Article 8 of this law, the fine will be not less than 300,000 Afs and not more than 500,000 Afs.
- 5- In case of breaching subsection (8) of Article 8 of this law, the fine will be not less than 200,000 Afs and not more than 300,000 Afs.
- 6- In case of breaching subsection (9) of Article 8 of this law, the fine will be not less than 2.5 millions and not more than 3 millions.
- 7- In case of breaching subsection (11) of Article 8 of this law, the fine will be not less than 1 million and not more than 3.5 millions Afs.
- 8- In case of breaching subsection (12) of Article 8 of this law, the fine will be not less than 500,000 Afs and not more than 2 millions Afs.
- 9- In case of breaching subsection (13) of Article 8 of this law, the fine will be not less than 2 million and not more than 2.5 millions Afs.

10- In case of breaching subsection (14) of Article 8 of this law, the fine will be not less than 500,000 not more than 600,000 Afs.

### **Fines for making False Statements**

Fine can be imposed of not less than 50,000 Afs and not more than 500,000 Afs.

- 1- In case of making false statements against the facts during the enquiries of anti-competitive practices which have influenced the decisions of the Board.
- 2- In case of refraining from making the factual statements which have affected the decisions of the Board.

(1) When an entrepreneur, trader, organisation, and corporation present false documents, and evidence to the Board or alter, tamper with or destroy the documents and evidence relating to anti-competitive practices in addition to the fine in line with subsection (1) of this Article they will be imprisoned by relevant court for not less than six months and not more than a year and six months.

(2) If subsection (1 and 2) of this Article results obtaining a certificate from the Board, the relevant court can in addition to the anticipated punishment in this Article issue to nullify or amend the decision of the Board.

### **Prosecution of False Witness**

(1) imprisonment of not less than 1 year and not more than 3 years or a fine not less than 200,000 Afs and not more than 1,000,000 Afs or both.

(2) Deliberate intention to harm commercial and professional credibility of traders, organizations, firms or Directors is punishable. In addition to conviction to compensate for loss , imprisonment of not less than 6 months and not more than 2 years or a fine of not less than 100,000 Afs and not more than 600,000 Afs or both is provided.

### **Key Provisions of the Law**

The law contains 35 articles governing the various provisions and their specific treatment. **The key provisions of the law relate to Articles 7, 8 and 11.**

- (a) Anticompetitive practices (prohibition of Limitation of Competition) Article 7,*
- (b) Unfair Commercial Practices which defines variety of unfair activities that are prohibited including abuse of dominant position (Article 8) and*
- (c) Limitation on merging of companies and organizations (Article 11)*

### **Anti-competitive Practices Prohibition and Limitation of Competition (Article 7)**

Any kind of understanding, agreement and contract (written, electronic or oral), including the following among the entrepreneurs, merchants, organisations and those corporations whose objectives are to prevent, limit or disrupt competition or harm the consumers are prohibited.

1. Determining purchase and sale prices or manner of their determination directly or indirectly at the market.
2. Limiting or controlling supply and demand of goods and services (production, purchase and sale) in the market or their determination out of the market.
3. Imposing different conditions in similar business transactions.
4. Forcing party to the transaction to conclude the contract with third parties or imposing conditions of contract on them.
5. Dividing market of goods and services among two or more persons or groups.
6. Restricting access of persons who are outside the contract, understanding or agreement at the market.
7. Separating markets of goods or services, dividing or controlling all kinds of resources or factors of market.
8. Limiting competitive activities of traders or entrepreneurs or confining activities of firms, organizations and factories at the market through imposing sanctions or other pressures and treatments or potential prevention of entry of new persons into the market.
9. Making the ratification of the contract conditional on acceptance of complementary undertakings by parties who are not relevant to the issue of contract.
10. Force to purchase other goods or services along with goods and services being purchased under the contradictory agreements of purchase, or commercial norms.

11. Exhibiting a commodity or service for purchasers who act as mediators, however, presenting goods and services, other than those being exhibited, to relevant buyers.

### **Unfair Commercial Practices (Article 8):**

Unfair commercial practices include the followings and should their exercise lead to interruption of competition, they shall be prohibited.

Refrain from the following transactions:

1. Collectively refraining from accomplishing a transaction or limiting quantity of goods or services, which are subject of transaction.
2. Forcing other persons to refrain from transaction and limiting their dealings with their competitors.
3. Supplying or demanding similar goods or services, with prices charged discriminately between two or more parties or difference of price between different areas, in spite of equal conditions of the transaction and its costs.
4. Discrimination in terms of the transactions, which includes imposing discriminatory conditions in transactions for different persons under the same circumstances.
5. Predatory prices which includes the following:
  - ✓ Supplying goods or services with lower price than their cost price in a manner causing serious harm to others or prevent entry of new persons into the market.
  - ✓ Granting award, gift, discount and so on which incur serious harm to others. Competition Board shall undertake responsibility of their identification.
6. Oral or written misleading statements or the following suspicious treatment committed by persons:
  - ✓ Falsely claims his/her goods and services with special quality, quantity, class, sample and standard or show goods or services of his/her competitors inferior to theirs.

- ✓ Present second hand, reconditioned or old goods as new.
  - ✓ Offering the commitment to change, maintain, repair of goods or parts of them, or repetition or permanency of services to create a specific conclusion, whereas such possibilities do not exist.
  - ✓ Deceives people in relation to prices of goods or services that are offered.
7. Joint sale of goods including the following:
- ✓ Tying in sale of goods or provision of services to the purchase or provision of other services.
  - ✓ Forcing the other party to a deal with a third party, in case it is related to supply and demand of other goods or services.
8. A deal under the following monopolistic conditions:
- ✓ Dealing with the other party provided that the said party refrains from dealing with its competitor.
  - ✓ Storing and destructing of goods or abstaining from their sale and also from providing services in a manner that storing, destruction or abstaining from sale of goods and services lead to artificial rise of prices in the market.
9. Offering substandard goods or services which do not conform to compulsory standards advertised by competent authorities with regard to their usage, composition, quality, ingredients, design, manufacture, completion or package.
10. Persuading, inciting or enforcing one or more shareholders, investor, director or employees of a competing organization or company by exerting suffrage, transferring shares, disclosing secrets or similar methods to exercise an action which is harmful to their competitor.
11. Interfering in dealings of competing traders, organizations or companies by preventing signing of contracts, persuasion of breaching the contract or other similar methods.
12. Abuse of the economic dominant position shall not be allowed in the following forms:
- ✓ Determining, maintaining or changing price of goods or services in an unusual manner.
  - ✓ Imposing unfair contract terms.

- ✓ Threatening the amount of supply or demand to increase or decrease market price.
  - ✓ Creating obstacles to prevent entry of new competitors or expel entrepreneurs, traders, organizations or competitor companies in a particular activity.
  - ✓ Subjecting contracts to acceptance of conditions, which do not have any relation with subject of such contracts from viewpoint of protection and commercial tradition.
  - ✓ Acquisition of capital and companies provided that such condition leads to disruption of competition.
13. Abuse of dominant position of collective act of entrepreneurs, traders, organisations and companies who are dominant in the goods and service market.
14. Limiting the price of resale including offering goods or services to the purchasers by accepting the following conditions:
- ✓ Enforcing purchaser to accept the determined sale price or preventing his free intention in determining sale price of goods or services in other ways.
  - ✓ Bounding purchaser that entrepreneurs, traders, organizations or companies have to buy goods or services from him with determined sale price of goods or services.
  - ✓ Enforcing purchaser to limit free intention of entrepreneur, traders, third organizations or companies with other means in determining sale price of goods or services
15. Illegal use of any internal information of competitors in commercial, financial, and technical affairs for their own interest or the interest of third parties shall be prohibited.

### **Limitation on merging of companies and organizations (Article 11)**

(1) A company or an organization cannot merge unilaterally, bilaterally or multilaterally in the following circumstances:

1. If as a result of merger or during the merger anticompetitive practices emerge in the market.
2. If as a result of merger prices of goods or services increase dramatically. .
3. If merger causes intense concentration in the market (Determination of intense concentration is undertaken by Competition Board).
4. Where merger causes the creation of a controlling organization or company in the market.

(2) Should the companies and organizations fail to operate due to non-mergence, they shall be exempted of section (1).

### **Exemptions**

Article 13, provides for grant of exemptions from the Law should the need so arise. However, the treatment of exemptions has to be reasoned and cannot be given discriminately. The Law also says that these exemptions have to be provided with care so as not to reach a situation that result into dominance of few players leading to defeating the very purpose of competition in markets.

### **Punishment for abuse of Position as Board Member or an employee of CPCPD**

According to **Article 30** Relevant Courts can fine between 1 million to 1.5 million Afghanis, any Board member including the Chairman and the employees of CPCPD if their action cause any harm to the public interest, or to the commercial reputation of firms. They can additionally be a sentenced for a period of not more than 3 years by the relevant court.