

Presentation on Competition Law: Lay Man's Draft (PART 2 OF 2)

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No straightforward or “cut and dried” business deals.

In Competition Law deals may be:

- *Unilaterally Imposed*
- *Imposed via Formal or Informal Arrangements*

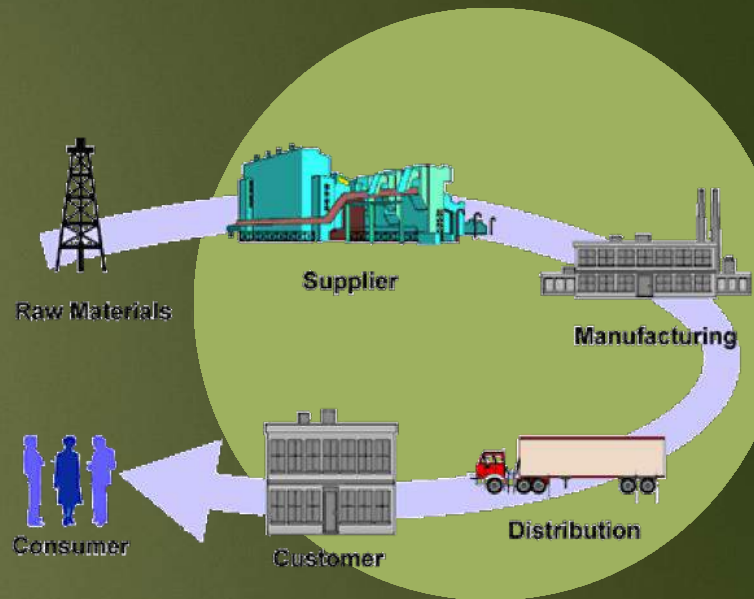
- **Formal and Informal Arrangements are Treated as Agreements and are subject to:**

- *Straightforward Agreement: Price-fixing cartel among rivals which is HORIZONTAL*

Straightforward Agreement: Imposition of a minimum resale price by manufacturer on his retailers which is VERTICAL.

- *Not so straightforward: when a powerful retailer imposes, via individual agreements, a minimum resale price on all other retailers via his supplier. Is it vertical or horizontal?*
- *Key Issue for Case Assessor: Which antitrust standard of assessment applies?*

- *Some Types of Horizontal and Vertical Relationships*
- *How They Are Analysed : Verticals versus Horizontal*
- *Analysing Mixed Deals*
- *Exemptions Created in Competition Law*



Rules of Competition

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- **Competition Policy and Law achieves their goals by Enacting Three Main Rules:**
 - ❑ A rule prohibiting abusive market conduct by a single dominant company or a single company with market power (Abuse of Dominance);
 - ❑ A rule prohibiting groups from formulating agreements that restrict trade in the market (Anticompetitive Agreements);
 - ❑ A rule requiring that mergers that can lead to a lessening of competition in the market be subject to review and resolution of anticompetitive issues by the competition agency (Anticompetitive Mergers).

Goal of Competition Law

Goal as set out in the legislation determines how cases are interpreted by the competition authority and the judiciary:

Section 3

- ✓ Promote... competition and enhance economic efficiency in production, trade and commerce;
- ✓ Prohibit anti-competitive business conduct...;
- ✓ Regulate mergers which could result in harm to competition ...;
- ✓ Facilitate an enabling business environmentfor economic development;
- ✓ Promote the welfare and interest of consumers.

3 Main Rules of Competition: Substantive Law

Regulate Anticompetitive Agreements, Abuse of Dominance, Anticompetitive Mergers

Part III: Sections 14-17

Prohibition of Anticompetitive Conduct: Agreements and Abuse

- ✓ s.14: Prohibition of Anticompetitive Agreements
- ✓ s.15: Defences Observed for Anticompetitive Agreements

- ✓ s.16: Prohibition of Abuse of Dominance
- ✓ s.17: Defences Observed for Abuse of Dominance

Focus of the Presentation: Abuse of Dominance and Vertical Agreements

Abuse of Monopoly Power

-Prohibits Use of Position of Economic Power on Market to Restrict or Distort Competition.

-Is the Company Dominant? Presumption: 50% or more market share?

-Is it Engaged in Abuse: E.g. Tied Selling, Refusal to Deal, Exclusive Dealing, Price Discrimination, etc.

- * Price-Based and Non-Price Based Abuse: Non-Exhaustive List of Abuses Possible

- * Exploitation of Consumers

- * Exclusion/Foreclosure of Rivals

- Defence: Objective Justification: Efficiency Argument?

Anticompetitive Agreements

-Prohibits Formal or Informal Agreements between 2 or more Enterprises to Restrict or Distort Competition.

-Is there an agreement?

- * Vertical or Horizontal

- * Agreements, decisions or concerted practices

-Is there Plurality of Parties (No Single Economic or Integrated Entities)

-Agreement has 'Object or Effect' which Restricts/Distorts Competition on the Market?

- * Foreclosure/Exclusion

- * Lowers Consumer Welfare

Defence/Exemption: Objective Justification?

Assessment of Abuse of Dominance

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- Abuse of dominance has three elements:
 - ❑ Is an undertaking dominant/in a monopoly situation?
 - ❑ Has there been an abuse of a dominant position/monopoly power?
 - ❑ Is there an objective justification for the abuse?

Step 2: Is there an Abuse of Dominance/Monopoly Power?

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- **Abuse** is described as “*practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertakings in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders’ performance, have the effect of hindering the maintenance or development of the level of competition still existing in the market*” (ECJ in *Michelin*)
- In the EU, focus is on two types of abusive behaviour: exploitative or exclusionary
 - ❑ **Exploitative abuses** harm consumers (i.e. unfair purchase prices, selling prices or trading conditions)
 - ❑ **Exclusionary abuses** harm competitors by foreclosing them from the market (i.e. exclusive dealing, refusal to supply, tying and bundling)

Agreements

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- There must be **agreement**, decision or concerted practice
 - Agreement must involve more than one **undertaking** (“enterprise” under the Act)
 - Agreement must have as its **object or effect** the restriction of competition
- **If any one element is missing, there is no restriction of competition**
- Agreement where restrictions on competition are **outweighed** by positive economic effects may be **exempt**
- ▶ Consequences of Violation:
- ▶ Anti-competitive agreement is legally **void and unenforceable**
 - ▶ It can **totally disrupt commercial relationships** – e.g., where agreement is basis of core business functions
 - ▶ It can also attract **substantial fines and lawsuits**

Horizontal and Vertical Agreements

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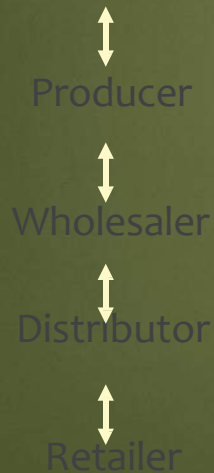
- ▶ Agreements may be unlawful whether they are reached between competitors at the **same level of the supply chain** (“horizontal agreements”) or between companies operating at **different levels of the supply chain** (“vertical agreements”):
 - In general terms, vertical agreements typically benefit from a more lenient assessment under competition laws. However, if they involve price fixing, or are used as a means of indirect coordination between competitors (known as “hub & spoke” arrangements) they will still be treated as serious infringements, and risk significant penalties.
- ▶ To evidence an agreement, you **may look not only to formal hard-copy documents, but also emails, electronic documents (on servers or PCs), meeting notes / diary entries, recordings of phone calls or witness / informant testimony.**

Horizontal and Vertical Agreements

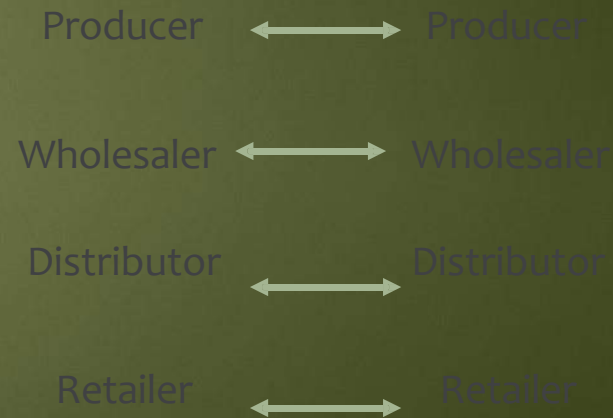
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- ▶ Horizontal agreement: between firms which, for the purpose of the agreement, operate at the same level of the production or distribution chain i.e. actual and potential competitors
- ▶ Vertical agreement: between firms which operate, for the purpose of the agreement, at a different level of the production or distribution chain

Vertical Agreement



Horizontal Agreements



Types of Anticompetitive Agreements

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- ▶ Anticompetitive agreements with competitors usually fall within one of the following categories:
 - price fixing;
 - fixing other trading conditions;
 - market/customer sharing;
 - collusive tendering / “bid rigging” (e.g. cover pricing);
 - limiting/controlling production or investment;
 - collective boycotts vis-à-vis customers/suppliers;
 - joint selling/purchasing (can be permissible subject to certain conditions); and
 - exchanges of commercially sensitive information.

3 Main Rules of Competition: Substantive Law Cont'd: Mergers

Regulate Anticompetitive Agreements, Abuse of Dominance, Anticompetitive Mergers

Part V: Sections 50-58 Review and Control of Mergers

Jurisdiction of BCA Re Mergers:

- ✓ s.50, 52, 53, 54, 55, 56: Filter Test/Jurisdictional Threshold for Review
- ✓ S.51: No Completion of Transaction That Satisfies Jurisdictional Test Unless Authorisation Granted – Suspension Rule

Merger Satisfies One or More of Filter Tests? Subject it To Full Substantive Assessment:

- ✓ Assessment Criteria: The Competition Assessment-Competitive Effects Test and Dominance Test
- ✓ Assessment Criterion: The Public Interest Assessment

Mergers: The Jurisdiction/Threshold Test

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- ▶ **Jurisdictional Threshold = Competition Authority has Power to Review/Control Merger if: Merger has a connection with the jurisdiction.**

- ▶ Question of what is a merger or which transactions are subject to review is:
 1. Used As a Filter Tool: No need to review competitively benign transactions.
 2. Filter Tests: Transaction satisfies legislation's definition of merger if.
 1. Objective Economic Criteria Tests:
 1. Local Nexus Criteria: Merger has an effect in or into The Bahamas, or on a market in The Bahamas
 2. Direct or Indirect Control Acquired or Material/Decisive Influence Acquired
 2. Numerical Threshold Tests:
 1. Sales/Turnover/Assets
 3. **Use of Both Economic and Numerical Values**

Merger Review Procedure and Timetable

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- ▶ Is filing mandatory or voluntary?
- ▶ What is the review period?
 - ▶ Must be pre-stated under regulation. **Review period: Number of working days, starting date of notification to date of grant of clearance certificate/authorisation. 150 working days Max.**
- ▶ Who is to file? One, both or one for both?
 - ▶ **Single Notification, Joint, Both parties File**
 - ▶ **Hostile Takeover: Contradictory Evidence?**
- ▶ When to file? If No Rule on Deadline for Filing, Compromises Failure to File Rules
 - ▶ **Suspensory Effect: Does the law require that the deal come to a standstill until decision granted? Yes**
 - ▶ **Penalty for Failure to Notify or Prior Implementation of the Merger? Yes**

Applicable Review Standard

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- ▶ Legal Assessment Criteria
 - ▶ A substantive legal test for reviewing whether merger is likely harm competition: competitive effects and dominance tests
 - ▶ The Bahamas Test: likely substantial lessening of competition

- ▶ Assessment Process/Primary features of a substantive merger analysis
 - ▶ (i) the assessment of the type of merger: horizontal, vertical, conglomerate
 - ▶ (ii) the competitive conditions that exist prior to merger; and
 - ▶ (iii) the likely competitive impact post-merger.

- ▶ Exemption Regime: “Economic Development” Based, “Efficiency” Based or Public Interest Based
 - ▶ Ensures mergers control does not contradict/conflict with government policy
 - ▶ **Important to distinguish “substantial lessening test” from “public interest” or economic development-type tests**
 - ▶ **Test/Outcome: Can allow anticompetitive mergers or disallow procompetitive mergers!!!!**

Applicable Review Standard

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- ▶ Substantial Lessening of Competition Test: Any Resultant Consumer and Competitive Harm?
 - ▶ Creation or enhancement of market power?
 - ▶ Negative competitive effects?
 - ▶ Any depression or lowered levels of consumer welfare?
- ▶ **Substantial Lessening of Competition Test: A View of Expected Outcome: The “Counterfactual” Analysis:**
 - ▶ **What is the state of consumer welfare and rivalry/competition with and without the merger?**
- ▶ Tools for Conducting Analysis:
 - Definition of the Relevant Market: Tells Market Share/Market Power, Market Concentration, Market Dynamics (Entry Barriers, Buyer Power etc.)
 - Unilateral Effects: Merger Leads to Acquisition of Market Power ⑦ Exploitation
 - Coordinated Effects: Merger Leads to Fewer Rivals on market ⑦ Coordination on Prices/Conditions Among Remaining Rivals
 - Vertical and Conglomerate Effects: Foreclosure of Upstream or Downstream Market/Also Foreclosure of rivals from accessing customers
 - Efficiencies: Allocative, Productive and Dynamic

Applicable Review Standard: Similar to South Africa Approach Section.12A(3) SACA

- ▶ Public Interest / Economic Development Exemption Tests: Sep⁴a¹ rate but Complementary Test
 - ▶ Conducted irrespective of outcome of the “substantial lessening” test outcome: Merger with no anticompetitive effects can be blocked if there is likely adverse effect on public interest
 - ▶ BUT: Typically conditional approvals are issued resulting from merger-specific public interest considerations.
 - ▶ BALANCING TEST: More than one public interest pleaded, look to net public interest and determine whether each in isolation is substantial
 - ▶ CASE: Distillers Corporation (SA) Ltd. v, Stellenbosch Farmers 08/LM/Feb02
- **Does the merger effect the public interest/economic development outcomes specified in the law:**
 - ▶ job-creation,
 - ▶ business-retention,
 - ▶ failing firm rescue,
 - ▶ critical infrastructure and industry development
 - ▶ creation/generation of small and medium-sized enterprise growth

Applicable Review Standard

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▶ KEY POINTS:

- Mergers blocked on public interest grounds may have different remedies. These must be listed in the law: ***What is the outcome of the assessment if there is a negative or positive impact on public interest?***
- **Public Interest Review:** Must be specifically pleaded and substantiated by evidence.
 - ▶ • **Step 1: determine the likely effect on the public interest;**
 - ▶ • **Step 2: determine whether the alleged effect is ‘merger-specific’ (i.e, that there is a sufficient causal nexus between the merger and the alleged effect);**
 - ▶ • **Step 3: determine whether the likely effect is substantial;**
 - ▶ • **Step 4: consider whether the merging parties can justify the likely effect (the onus being on the merger parties to do so); and**
 - ▶ • **Step 5: consider possible remedies to address any likely negative effect;**

- ❑ **Basic Principles for All Remedies: Structural and/or Behavioural**
 - ❑ Remove the competition concerns in their entirety
 - ❑ Viable and effective from all points of view: Parties should be allowed to propose remedies as they are in best position to do so
 - ❑ Proportionate: **Narrowly tailored to fix those anticompetitive effects likely to arise from the merger.**
 - ❑ Case by case approach

Competition Authority Structure

Competition Agency Structure Has Been Problematic in Developing Countries Because:

- ✓ Copy/paste of agency structure from Different/Unsuitable Legal System: E.g. Common Law country copies EU's Integrated Agency Model or Copies US' Bifurcated FTC Model
- ✓ Ignoring Common Law Legal Principles for Structuring a Statutory Body: Separation of Powers, Natural Justice, Proportionality, Legitimate Expectation, etc.
- ✓ Ignoring Indigenous Reality: Developing Countries have unique cultures, customs, limited budgets, lack of human resource at agency and judiciary level, high staff turnover, no/low institutional memory, poor institutional systems, processes and IT infrastructure to retain memory/work/regulatory practice

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High Court

*Issues Orders
Hears Appeals: Procedural and Substantive*

Board of Commissioners

*Takes Decisions on Anticompetitive Conduct:
Abuse of Dominance and Anticompetitive
Agreements*

Director

*Management/Executive/Administrative Functions
and Oversight of Directorate Investigations,
Conflict of Interest Checks for Board
Final Determination on Mergers*

Directorate for Investigation and Other Staff

*Complaints, investigations, case formulation
Reviews and Controls Mergers*



MINISTRY

BOARD OF COMMISSIONERS

*(Led by Chairman, supported by Commissioners, and
Legal/Economics Professional Support Personnel)*

THE OFFICE OF THE DIRECTOR

*(Led by Director, supported by Professional Service Support
Staff Accountant/Finance/Business Administration, Lawyer,
Administrative)*

THE DIRECTORATE FOR COMPETITION

1. LEGAL DEPARTMENT

*(Led by Senior Legal Counsel, supported by other legal,
paralegal and administrative staff)*

2. COMPETITION ECONOMICS DEPARTMENT

*(Led by Senior Economist, supported by other
economics, statistics, administrative staff)*

Procedural Law: Part IV and Part VI

- Courts ensure that **fundamental procedural rights**, including rights of privacy, the right to a fair and impartial hearing, and confidentiality of business information, are protected.
- **Procedural due process** makes certain that antitrust policy is implemented in an **objective** fashion and that the competition agency is **accountable**, thereby enhancing its **credibility** with the public.
- Procedural safeguards are a prerequisite for an effective competition policy: **Failure to observe procedure nullifies substantive law ruling.**
- **Natural Justice and Separation of Powers:** Written into the law itself via provisions. **NOT ENOUGH TO SAY LAW APPLIES NATURAL JUSTICE.**

Procedural Law: Part IV and Part VI

- Part IV: Procedural Rules for Ex-Post Enforcement/Anticompetitive Conduct
 - ✓ Initiation of investigation by complaint: s.18
 - ✓ Initiation of investigation *proprio motu* /*ex-officio*: s.19
 - ✓ Search, seizure, summons, information request: s.20-25
 - ✓ Formulating the Case Report: s.26
 - ✓ Granting the Right to be Heard (written) and Access to Evidence: s.26(2)
 - ✓ Case Transmitted to Board, Board Grants Right to be Heard (Oral), Evidence, Third Party, Withdrawal: s.27-41, 42-49
 - ✓ Board: Must seek Enforcement Order-s.41(2)

- Part VI: Procedural Rules for Ex-Ante Enforcement/Mergers
 - ✓ Jurisdiction: No need to file/no review if filter tests not satisfied/ Suspension: see above.
 - ✓ Informal Talks: Should be Encouraged S.60- Liked by Businesses/Pro-Business Perception of Agency
 - ✓ Application for Authorisation/Notification (Mandatory): s.59
 - ✓ Separate or Together Filing: s.61-separate (eg. Hostile takeover) and s.62 joint filing
 - ✓ Timing: s.59(b) 90 days plus max. extension f s.59(c) 60 days
 - ✓ Conduct of Investigation: s.65-68
 - ✓ Remedying Failure to File or Gun-Jumping/Prior Implementation: s.69, s.70
 - ✓ Remedies for Anticompetitive Mergers: s.71—parties propose solutions/remedies; commission discretion to say yes or no.
 - ✓ Board: Must seek Enforcement Order from Court-s.68

- Part IV/Section 21-24(market inquiry) : *Mutatis Mutandis*
 - ✓ Part VII: Unfair Trading Practices- s.78(2)
 - ✓ Part IX: Authorisation- s.88(8)
 - ✓ Part XII: Market Inquiry s.102—compelling of documentary evidence/summoning

Third Party Action

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S. 86(1): Every enterprise which engages in conduct which constitutes –

- ✓ a contravention of any of the obligations or prohibitions imposed in Parts III, Part IV, Part V, Part VI or Part VII,
- ✓ aiding, abetting, counselling or procuring the contravention of any such provision,
- ✓ inducing by threats, promises or otherwise, the contravention of any such provision,
- ✓ being knowingly concerned in or party to any such contravention, or
- ✓ conspiring with any other person to contravene any such provision, **is liable in damages for any loss caused to any other person by such conduct.**

s.86(2): Statute of limitation: Within 3 years of when cause of action arose.

Search warrant: Anton Piller-s.79(1)(d)

Remedy: s.79(1)-cease and desist, compensation

Private Litigation in Competition Law

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- Public and Private Enforcement Complement Each Other
- Private enforcement: driven by the individual incentives: capacity issues are not a constraining force
- Other Jurisdictions E.g. US: Third party litigation funders finance competition and antitrust litigation.
 - In return for providing the investment, the funder will charge a success fee if the case succeeds. This success fee might be calculated as a percentage of the recovery or a multiple on the funder's investment e.g. a x2 return to the funder on the capital invested.

➤ Part X: Settlement of an Infringement-- The Leniency Framework

- ✓ Must be included in the legislation (not guidelines or policy; immunity requires Court sanctioning therefore must be established under the law)
- ✓ Culpable offender applies, partial or full immunity granted by Commission, approved by Court: s.92(1)
- ✓ Payment of Fixed Penalty: s.92(4)
- ✓ 92(11): Right to Have Case Against Them Set Out in Writing Still Exists under Leniency!
- ✓ 92(9): Application via prescribed Form. Form must be formulated to gain the necessary info re s.92(11) and 94(1)
- ✓ S.93: Board decides!

Subsidiary Regulation and Internal Administrative Regulations

- ✓ S.6(7) and s.6(9): Internal Administrative Rules: Conflict, Confidentiality, Qualifications, Employee Code of Conduct, etc.
- ✓ S.117: Regs for rules not provided for
- ✓ s.116: Transitional/Regs for Private International Law (Future Treaties or CARICOM, for example).

Powers of the Court

Enforcement Orders/As Applied for by Commission or Private Party/Private Damages Action:

- ✓ Order for compensation (expressed as max. 20% of annual turnover of business): s.79(1)(a)
- ✓ Order for divestiture of assets or shares (mergers): s.79(1)(b)
- ✓ Cease and desist order: s.79(1)(c)
- ✓ *Ex parte* order for seizing evidence and keeping it in court (preservation of records using “civil search warrant”): Commission or Private Party: s.79(1)(d) and s.80(2)
- ✓ Order for payment of fixed penalty: s.79(1)(e)
- ✓ Combination of above: s.79(1)(f)
- ✓ Appeal: s.84

Judiciary: Judicial Review of Competition Cases

- The role of the judiciary in competition cases varies considerably from country to country.
- 1. **ISSUE ORDERS IN Bifurcated Agency Model: Court Rubber-Stamps Board of Commissioner Decisions**
- **2. ON APPEAL:** In a few countries the **courts are active** in the implementation of competition policy, and judicial precedent is the principal source of competition law.
 - One advantage is that the system **provides flexibility**; courts can **adapt to changes in economic conditions** and in economic thinking. Also, the judiciary is a **moderating force over time**. It **dampens excessive swings in policy** that may affect the enforcement agency.

Judiciary: Judicial Review of Competition Cases

- **Appeal:** In some countries courts at the first level of appeal may review both issues of fact and law in competition cases. Different standards of review may apply to the two types of issues, however.
- **Questions of Law vs Facts:** It may be more difficult to overturn findings of fact by lower tribunals. In some countries, only questions of law may be appealed, and in most countries, courts at the highest level may review only questions of law.
- **DRAFT LAW: APPEAL ON FACTS AND LAW**

Thank You!

Questions/Comments:
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